MCLE FORM 1: Recordkeeping Form *(Do Not Return This Form to the Bar)*

Instructions:
Pursuant to MCLE Rule 7.2, every active member shall maintain records of participation in **accredited** CLE activities. You may wish to use this form to record your CLE activities, attaching it to a copy of the program brochure or other information regarding the CLE activity.

Do not return this form to the Oregon State Bar. This is to be retained in your own MCLE file.

Name:	Bar Number:
Sponsor of CLE Activity: OSB Professional Liability Fund (recording of OSB Oregon New Lawyer Division Super Saturday Program)	
Title of CLE Activity: Gender Identity and Inclusion/Ethics/Abuse Reporting	Program Number: 558*2250
Date: 6/22/2019	Location: OSB Center, Tigard, Oregon

❑ *Activity has been accredited by the Oregon State Bar for the following credit:*	❑ **Full Credit.** *I attended the entire program and the total of authorized credits are:*	❑ **Partial Credit.** *I attended _____ hours of the program and am entitled to the following credits*:*
____ **General**	____ **General**	____ **General**
1 **Prof Resp-Ethics**	____ **Prof Resp-Ethics**	____ **Prof Resp-Ethics**
1 **Access to Justice**	____ **Access to Justice**	____ **Access to Justice**
1 **Abuse Reporting**	____ **Abuse Reporting**	____ **Abuse Reporting**
____ **Practical Skills**	____ **Practical Skills**	____ **Practical Skills**
____ **Pers. Mgmt/Bus. Dev.***	____ **Pers. Mgmt/Bus. Dev.***	____ **Pers. Mgmt/Bus. Dev.***

***Credit Calculation:**
One (1) MCLE credit may be claimed for each sixty (60) minutes of actual participation. Do not include registration, introductions, business meetings and programs less than 30 minutes. MCLE credits may not be claimed for any activity that has not been accredited by the MCLE Administrator. If the program has not been accredited by the MCLE Administrator, you must submit a Group CLE Activity Accreditation application (See MCLE Form 2.)

Caveat:
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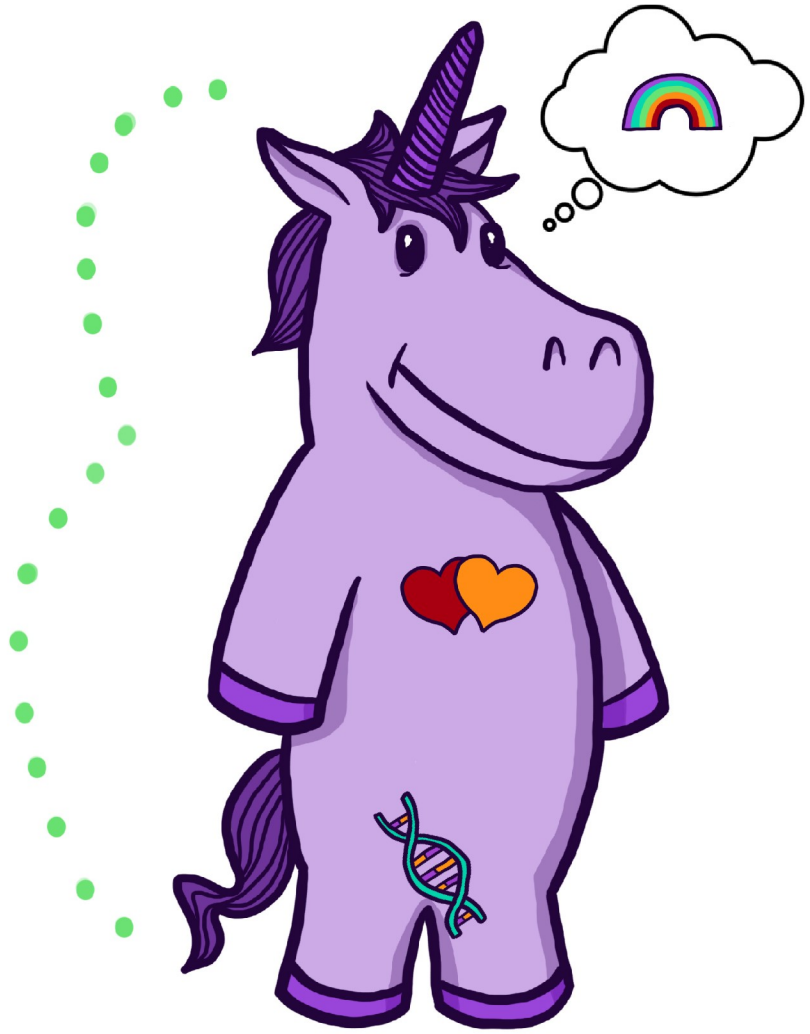
*Personal Management Assistance/Business Development. See MCLE Rule 5.12 and Regulation 5.300 for additional information regarding Category III activities. Maximum credit that may be claimed for Category III activities is 6.0 in a three-year reporting period and 3.0 in a short reporting period.

The Gender Unicorn

Graphic by:
TSER
Trans Student Educational Resources



Gender Identity

- Female/Woman/Girl
- Male/Man/Boy
- Other Gender(s)

Gender Expression

- Feminine
- Masculine
- Other

Sex Assigned at Birth

Female | Male | Other/Intersex

Physically Attracted to

- Women
- Men
- Other Gender(s)

Emotionally Attracted to

- Women
- Men
- Other Gender(s)

To learn more, go to:
www.transstudent.org/gender

Design by Landyn Pan and Anna Moore

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August 15, 2005

National Prison Rape Elimination Commission
810 Seventh Street, Northwest, Suite 3432
Washington, DC 20531

Re: Testimony before the Commission in San Francisco, CA

Dear Commissioners:

Thank you for taking the time today to hear testimony from a cross-section of people, including former prisoners, prison advocates, civil rights attorneys, sheriffs, and others, about the risks that many prisoners face for sexual violence in our local, state, and federal correctional facilities. As the Director of the Transgender Law Center, my testimony will focus on the experiences and needs of transgender inmates in county jails and state and federal prisons.

In testifying about transgender people, I mean those people whose internal understanding of their own gender is different from the sex they were assigned at birth and/or whose dress, mannerisms, and other expressions of their gender are non-stereotypical. This certainly includes prisoners who identify as transsexual, for instance, but also includes prisoners who appear to be effeminate men and masculine women. And, notably, some of the people who fit within this definition may not even use the term "transgender" to describe themselves.

To write that transgender prisoners are at a high risk of sexual violence in jails and prisons across the nation is to do a disservice to the issue. It has been my experience over the last four years of providing legal information and services to California's transgender communities, that sexual violence is an ever present fact of life for far too many transgender prisoners. In this context, I define sexual violence as rape, coercion, unnecessary strip searches and forced nudity, and harassment.

This violence does not exist, and can not be understood, in a vacuum. Therefore, my testimony will begin with an overview of the many areas in which individual and institutional bias against transgender people results in harassment, discrimination, violence, and alienation. Next, I will overview the many challenges that transgender prisoners face in any jail or prison because of societal bias against them. I will then specifically address the ways in which transgender prisoners experience sexual violence while incarcerated. Finally, I will conclude with common-sense recommendations that the Commission can adopt to diminish and eventually eliminate sexual violence against transgender prisoners.

Bias Against Transgender People

It is unfortunately not hyperbole to write that no institution in California is free of bias against transgender people. The Transgender Law Center, founded in 2002, provides legal information and services to approximately 750 transgender people and their families each year. We are contacted by people who are employees, students, parents, partners, youth, immigrants, renters, consumers, and/or prisoners. Too many of them are reaching out to us because they have been denied work, education, recognition of their family, respect, lawful status, health care, housing, or services because someone did not like the fact that they are, or someone in their family is, transgender.

In 2003, the Transgender Law Center and the National Center for Lesbian Rights published a report documenting the legal needs of transgender survey respondents from San Francisco. I have attached the report, *Trans Realities,* in its entirety at the end of this testimony. However, it is worthwhile to highlight some of the findings.

Over 150 survey respondents were asked to self-report on whether they had experienced discrimination in the following areas:

Area	**Percentage**	**Area**	**Percentage**
Employment	49%	Prison or Jail	14%
Public Accommodation	38%	Other	12%
Housing	32%	Ability to Marry	09%
Health Care	31%	Immigration	07%
Interactions with police officers	26%	Child custody	06%
Access to Social Services	20%	Not sure	01%

As this chart demonstrates, discrimination against transgender people is widespread. One of the most alarming statistics to me was the 14% of survey respondents who reported experiencing discrimination in jail or prison. This was not 14% of the respondents who reported going to jail or prison but *14% of the entire survey pool*. Even if we were to assume that this 14% were the only survey respondents to go to jail or prison, that percentage is still twice the number of people in the general population who are incarcerated at some point in their lives. And this assumption would mean that 100% of the transgender survey respondents who went to jail or prison faced discrimination there because they are transgender.

Follow-up survey questions attempted to garner some sense of the economic impact that results from such discrimination and that may lead to this over-representation.

Respondents were asked to list their income range:

Response	Percentage
$0-$25,000	64%
$25,000 - $50,000	15%

Response	Percentage
$50,001 - $100,000	06%
Over $100,000	04%

And whether they have health insurance:

Response	Percentage
Yes	50%

Response	Percentage
No	43%

Clearly, the economic consequences of discrimination are stark. Almost two-thirds of survey respondents have incomes that would be defined by the US Department of Housing and Urban Development as "very-low income" for San Francisco in 2000. The percentage of people lacking health insurance is more than two times the rate for California as a whole in 2000. These two statistics can, anecdotally, help to put in context the over-representation of transgender people, particularly transgender women (people identified at male at birth, but whose internal understanding of their gender is that of a woman), in jails and prisons around the country.

Survey respondents were not asked whether they were involved in the street economies of prostitution and unregulated medical care, but anecdotally, we know that many community members turn to these institutions for survival. For instance, a former Transgender Law Center client who settled a discrimination complaint against her employer has spent nearly a year looking for a new job. During that time, her years of professional experience and a strong job market did her no good in securing a new position. After nine months of looking, as the funds in her savings account dwindled down to almost nothing, she turned to on-line prostitution as a means to keep her afloat. Similarly, a young woman born outside of the US and here on a student Visa became involved in prostitution when her parents stopped providing her with support when she revealed to them that she was transitioning from male-to-female. Finally, a number of transgender people who are limited to working in low-wage jobs earn additional income through selling street hormones to the pool of transgender people who are unable or unwilling to access health care in a more traditional setting.

These statistics and anecdotes along with the attached copy of *Trans Realities*, help to outline only the barest sketch of the conditions that have lead to what almost everyone who has looked at the issue would define as an over-representation of transgender people in jails and prisons. They also help to set the stage for a deeper understanding of why this population is so vulnerable once incarcerated.

Overview of Jail and Prison Conditions for Transgender Prisoners

Before covering issues of jail and prison sexual violence against transgender people, it is helpful to lay out the array of issues that transgender prisoners face in general. It is of course worth noting that jails and prisons are places in which we as a society routinely allow people to experience degrees of neglect, humiliation, and abuse that would not be tolerated outside of these institutions. However, my testimony in this setting will be limited specifically to those issues that are created by bias against, or at least ignorance about, transgender people.

At the outset it is important to acknowledge the gender segregation that goes on in nearly every penal institution in the country. This segregation itself certainly plays a role in the discrimination that transgender people face. However, just as culpable, and possibly more so, are the gendered expectations that this segregation creates. The existence of a "men's" institution and a "women's" institution, for instance, not only raises expectations about the gender of the people housed there, but also the stereotypes associated with that gender. These expectations and stereotypes are then played out in the way in which prisoners are recognized and treated.

Respecting a person's identity and expression – nearly every transgender prisoner and ex-prisoner to whom I've spoken in the last four years can recount at least one instance (and too often an endless stream of them) when they believe or know that they were intentionally referred to by the wrong pronoun or name. Most surprising to me early in my career was that the balance of these references was made by sheriff's deputies, prison guards, and correctional officers. It is one thing to house someone who is female-to-male *with* women, but another entirely to house him *as* a woman.

I have personally witnessed these kinds of references.. For instance, when I am visiting a transgender prisoner and I refer to that person by the correct pronoun, I am regularly corrected by the facility employee and told to use the pronoun that is "appropriate" for the facility (i.e. that I should refer to a male-to-female prisoner as "he" simply because it was a male facility). This is true despite the fact that the deputy or officer often-times knows that I am a civil rights attorney who works on behalf of transgender people.

This form of harassment is not one that has the immediate negative consequences that physical violence does, but it is one that I believe facilitates the more egregious abuse and violence to which some transgender prisoners are subjected. One of the women to whom I spoke was able to speak directly about how this treatment provoked her to come into conflict with particular deputies and allowed them to take punitive action against her. While she knew intellectually that she would come out worse for the wear in these encounters, her sense of self was important enough to her that she had to stand up to deputies who were using male pronouns or her old male name in referring to her.

Ability to dress appropriately – based again on gendered expectations, too many jails and prisons limit the ability of prisoners to dress or groom in a way that is comfortable for them. With some notable exceptions, including the San Francisco County Jail, many transgender women housed in men's facilities are denied access to bras and are forced to keep their hair at a stereotypically male length. Transgender men in women's facilities often find that they have to keep their face

shaven despite the fact that they are not provided with proper grooming supplies. I have also heard stories of some women's institutions requiring male inmates to wear garb that is similar to a dress.

Again, this form of harassment is the kind of on-going indignity that can lead to more significant issues down the line. In this case, though, some health problems can result from women being denied bras or men being forced to shave without the proper tools. And the lack of bras has facilitated, in a number of cases, sexual harassment.

Access to programs, jobs, and recreational opportunities – many transgender people are denied basic conditions of confinement afforded to other prisoners. Most institutions will deny transgender prisoners opportunities to attend drug treatment, educational, or other programs because these opportunities are offered only in a gender segregated setting. The same is true of job assignments and recreational activities. Sometimes, the stated reason for the denial is the safety of the transgender prisoner. Other times the reason is stated as a policy change necessitated because a different transgender prisoner used the opportunity to participate in a prohibited activity (oftentimes sexual in nature).

Sometimes, an alternative activity or educational opportunity will be provided, but such alternatives rarely compare to the lost opportunity. Also, some facilities will credit transgender prisoners for time they would have had taken off their sentence had they worked. However, the actual opportunity to keep busy is lost to transgender prisoners. Finally, transgender prisoners are rarely, if ever, provided with alternative drug and alcohol treatment programs.

Lack of competent medical care – as is currently being made clear in a Northern California Federal District Court, health care in jails and prisons can oftentimes be wholly inadequate. Couple with that the general lack of knowledge about transgender health care among providers and it is not hard to imagine how difficult it can be for a transgender person to receive appropriate care while incarcerated.

In an institution that provides some level of care, transgender prisoners can face issues ranging from the proper issuance of hormones, to the ability to monitor drug interactions and typical hormone side effects, to the reluctance to start a prisoner on hormone therapy, to improper questions or genital inspections to satisfy a provider's curiosity. However, in other institutions where care is completely denied, the outcomes can be even worse.

For one of our female-to-male clients who was denied testosterone for six weeks while incarcerated in the Orange County Jail, the consequences ranged from genital bleeding, to heart trouble, to a spike in his blood pressure. This denial was in the face of advocacy by his physician, family, attorney, and outside advocates. I have also heard stories of women who can't get prescription hormones sometimes resorting to buying them from other inmates. In order to get the "money" to buy these hormones, some women will participate in commercial sex work within the facility and once they get the "hormones" can never be sure what they are injecting or what side effects it may be having on them.

A*busive Use of Detention Against Immigrants* – a number of transgender people in jails and federal prisons around the U.S. are there not because they have been convicted of a crime, but because they have no recognized legal basis for being in the U.S. Many of these people are in the United States due to horrible abuse and persecution in their home country and a number of them have submitted applications for asylum and are awaiting a ruling from a judge.

In the face of this, our Department of Homeland Security confines these people to conditions that are too often as bad or worse than those they will experience in their home country. In one recent case, a woman agreed to return to her country, where anecdotal accounts exist of federal personnel murdering transgender women, because the conditions in the jail where she was awaiting a decision on her asylum application were so deplorable.

Reliance on Administrative Segregation to "Protect" Transgender Prisoners – abdicating their responsibility to create confinement conditions in which individual prisoners are safe from violence, some sheriffs and wardens will allow transgender prisoners to be confined to administrative segregation or its equivalent. This restrictive housing classification allows a prisoner minimal interaction with other people, no access to jobs or treatment programs, and greatly restricted privileges (including phone and commissary). The stated purpose of administrative segregation is that people being confined within it are a proven danger to themselves, staff, or other inmates. By using this classification for transgender prisoners, the message is being sent that a person's gender identity itself is threatening to the institution and that person must be locked away in a prison within the prison.

Retaliation for complaints – whether the complaint is for any of the above issues or for the issues of sexual violence detailed below, retaliation is a common occurrence for many transgender prisoners. And due to the vulnerability of this population, the retaliation can take many forms. For instance, a deputy who previously referred to someone in the proper manner may begin to use the incorrect pronoun for them. Or someone who was regularly getting medical treatment may find that treatment cut-off. For this reason, I believe that incidents of harassment and discrimination go dramatically under-reported among transgender prisoners.

Sexual Violence Against Transgender Prisoners

Rape – while I have not seen verifiable data on this issue, I have met enough transgender women who have been raped in jails or prisons to believe that it is a widespread practice. Rape comes in many forms. It can be perpetrated by a lone fellow prisoner; a group of fellow prisoners; deputies, guards, or officers; or an inmate assisted by a deputy, guard, or officer.

For instance, a woman being held in Sacramento County Jail has told me about her experience where she believes she was set-up by a Sheriff's Deputy. She was in her own cell in administrative segregation when a bigger, male prisoner was allowed to enter and the door locked behind him. Despite her protests, this prisoner forced himself on her and raped her. Once he was done, this woman reports hearing him say to someone on the outside that he was done. Her cell was unlocked and the man exited. When this woman saw the man later, she says that he apologized to her and said he was told to rape her by a Deputy.

Another Sacramento County Jail prisoner, who was being held pending a decision by a federal attorney on whether to appeal a judge's grant of her asylum petition, was raped by a prisoner. She too was in administrative segregations when she was pulled into a cell close to hers. Once inside, she was held down and raped. An attorney who visited her three days later commented that bite marks were still visible at the top of her breast, just below her collarbone. One week later, she was released from the jail as an asylee when the government attorney decided not to appeal her case.

Coercion – even more common, but no less scaring is the coercive sex to which many transgender women are subjected. Such coercion comes from fellow prisoners and deputies, guards, and officers. It is oftentimes exchanged for protection or special privileges and is too often seen by officials as consensual.

One young Latina who has been in touch with the Transgender, Gender Variant, Intersex Justice Project reported that she had to join a gang in prison for safety. Her membership in the gang required her to provide frequent sexual services to her fellow gang members. An inmate in San Francisco County Jail sued the county in 2002 because a Sheriff's Deputy coerced her into performing sex shows for her. When the coercion became known, the Deputy threatened that he would get her once she was released.

Unnecessary strip searches and forced nudity – a frequent substitute for, or precursor to, sexual violence or coercion is the use of strip searches or forced nudity by deputies, guards, officers, or medical personnel. Because of the severe reduction in privacy that occurs in jails and prisons, transgender people have very little control over who sees their bodies. Bodies that often times do not conform to the identity they know to be true or at least society's expectations about that identity. Therefore, strip searches and public nudity can be especially humiliating to transgender prisoners.

Transgender men in particular report being subjected to unnecessary strip searches. Two men who have been held in San Francisco County jail have told me about frequent strip searches conducted by deputies and medical personnel for no reason other than to seemingly satisfy curiosity. These searches were not related to visits or interactions in which these guys could have been passed contraband. Instead, they seemed to come randomly from many quarters and occasionally involve two or more people doing the search.

Back in Sacramento County Jail, one of the two women described above and two of her fellow transgender prisoners related stories of being forced to walk topless through a gauntlet of male cells in order to get new clothes each week. Along the way, the women were subjected to taunts and catcalls. The very act of walking the line made them objects of both harassment and ridicule.

Harassment – in fact, the most common form of sexual violence to which transgender prisoners are subjected seems to be verbal harassment. The harassment can include comments that exhibit this mixture of ridicule and objectification or can be a running stream of sexual propositions. Without a doubt, the comments can as often be threats as anything else and can rob a transgender prisoner, especially a woman, of any sense of security.

Again, many transgender men complain of almost non-stop verbal sexual harassment from women prisoners. Much of the harassment is in the form of overt sexual offers or aggressive flirting. However, for the men, it can become a challenge to their masculinity and a source of friction with women prisoners who resent the attention these men are getting.

Recommendations

In recognition of the charge of the Commission, the following common sense recommendations are organized into three sections. The first are recommendations on which the Commission can act. The second are recommendations that the Commission can offer to Congress. The third are recommendations that the Commission can offer to local, state, and federal agencies.

Commission Recommendations

1. **Create Best Practice Resources on Alternative Sentencing for Transgender Prisoners** – recognizing that only radically altered jails and prisons will be safe for transgender inmates, the Commission could create resources for use by criminal justice professionals looking for alternatives to incarceration for this population. Looking perhaps to the expertise that the Transgender, Gender Variant, and Intersex Justice Project is developing, the Commission could provide a powerful and needed voice to the effort to move more transgender people from jails and prisons to community based alternatives.

2. **Conduct Research on Classification Issues for Transgender Prisoners –** many questions remain about the best way to house those transgender prisoners for whom alternative programs would not be appropriate. This Commission is well suited to investigate those issues and call together experts on the subject to explore different model recommendations.

3. **Support the Promulgation of Model Policies for Transgender Prisoners –** identifying a set of model policies that could be implemented by jails and prisons around the country that comprehensively deal with the issues raised in this and other testimony would go a long way towards educating criminal justice professionals about the needs of transgender prisoners and the interconnected nature of the issues that they face in places of incarceration. One such model, created by the San Francisco Human Rights Commission and the National Lawyers Guild, is included for your reference.

4. **Identify or Create Model Training Curriculum for Deputies, Guards, and Officers** – many of the issues raised in this and other testimony could be addressed through comprehensive and on-going training with deputies, guards, and officers. Having the Commission issue or approve model curriculum would facilitate the use of such curriculum in in-service trainings.

5. **Issue a Statement on Over-Incarceration** – Recognizing that the Commission's primary charge is to eliminate prison rape, it is indisputable that overcrowding in our jails and prisons facilitates sexual violence. A statement from the Commission urging local, state, and federal jurisdictions to find ways to reduce jail and prison populations by focusing on incarcerating violent criminals and finding alternative programs for other offenders would go a long way

towards highlighting the connection between over-incarceration and sexual violence in prisons.

6. **Request that Federal Officials Offer Testimony to the Commission** – Request that representatives from the Federal Bureau of Prisons appear before the Commission to explain what their current written policies are in regards to transgender prisoners and the issues outlined in this testimony. Also, request that an appropriate representative from the Department of Homeland Security appear before the Commission to explain the Department's use of detention for transgender asylum seekers and the tools that the Department uses to ensure that such detainees are safe in the facilities in which they have been placed.

Congressional Recommendations

1. **Create Meaningful Administrative and Civil Remedies for Prisoners Sexually Abused in Jails and Prisons –** federal regulations and statutes have a strong role in providing meaningful civil remedies to victims of prison rape. A strong recommendation to Congress to create and pass civil rights reform that facilitates the positive resolution of such claims will create a stronger incentive for local, state, and federal facilities to address problems when they arise and prevent them from occurring in the first place.

2. **Increase Funding to Jails and Prisons and Advocacy Organizations Who are Working to Solve Prison Rape** – much of the expertise needed to eliminate prison rape exists. The experts simply need the resources to do their job and the incentive to work together to bring about substantive change.

3. **Recommend Modifications to the Immigration and Naturalization Act to Limit the Use of Detention by Federal Attorneys** – In recent years, federal courts have limited the federal government's ability to indefinitely detain immigrants. The Commission would be well served to recommend that Congress go one step further and limit the ability of federal attorneys to use this tool to house transgender asylum seekers in unsafe facilities where they are at increased risk of the same kind of sexual violence that they are often fleeing in their home countries.

Recommendations for Local, State, and Federal Agencies

1. **Recommend that Local and State Governments Hold Their Own Hearings on Prison Rape** – The Commission's hearings are a vital step towards ending prison rape. However, state and local governments will likely need to go through their own process in order to fully buy into the idea of that prison rape can be eliminated. Recommend that appropriate local and state agencies hold similar hearings in their own jurisdiction to inform their own communities about this important issue.

2. **Recommend that all Deputies, Guards, and Officers Receive a Minimum of Eight Hours of Transgender Cultural Competency Training –** correctional professionals can learn to manage the expectations about gender and gender stereotypes that underlie much of the

discrimination against transgender prisoners. Recommending that all deputies, guards, and officers undergo intense training on these issues within their first three years of service (or within their next three years of service for veteran professionals) is a meaningful way to increase protection for transgender prisoners.

3. **Recommend that all Jail and Prison Health Care Professionals and Staff Receive a Minimum of Eight Hours of Transgender Cultural Competency and Health Care Training –** health care professionals are a vital link in creating safe environments for transgender prisoners. Basic training in how to interact with transgender patients and provide appropriate and competent care will greatly improve the doctor/patient relationship, improve the health of transgender prisoners, and lead to a safer environment.

4. **Recommend that Ex-Offender Treatment and Training Programs Take Steps to Create Non-Discriminatory Environments –** it is important to ensure that transgender former prisoners are able to break the cycle of incarceration. One key to doing that is having a strong support system upon release. Many of the existing programs serving ex-offenders are ill-equipped to provide services to transgender people. A strong recommendation that these programs take steps to create non-discriminatory environments will facilitate change within the programs and reduce the number of transgender people returning to prison.

Conclusion

This testimony and these recommendations are respectfully submitted to the Commission along with my deep gratitude for the opportunity to work with you. I am very hopeful that the inclusion of transgender prisoners, their experiences, and their needs in this hearing will lead to additional exposure of the issues raised through the Commission's work. As many of you know all too well, the challenges of reforming jails and prisons in the U.S. can sometimes be daunting. However, the efforts of this Commission and the hundreds of prisoners, ex-prisoners, correctional professionals, advocates, and concerned participants who are helping you to fulfill your charge are inspiring. I expect that this is simply the beginning of a long, and hopefully fruitful, endeavor and offer whatever assistance I can provide to you along the way.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 15th day of August, 2005.

_____

Christopher Daley
Director

BASIC TERMINOLOGY (most common)

Queer: A term for people of marginalized gender identities and sexual orientations who are not cisgender and/or heterosexual. This term has a complicated history as a reclaimed slur.

Cis(gender): Adjective that means "identifies as their sex assigned at birth" derived from the Latin word meaning "on the same side." A cisgender/cis person is not transgender. "Cisgender" does not indicate biology, gender expression, or sexuality/sexual orientation. In discussions regarding trans issues, one would differentiate between women who are trans and women who aren't by saying trans women and cis women. Cis is not a "fake" word and is not a slur. Note that cisgender does not have an "ed" at the end.

Gender Expression/Presentation: The physical manifestation of one's gender identity through clothing, hairstyle, voice, body shape, etc. (typically referred to as masculine or feminine). Many transgender people seek to make their gender expression (how they look) match their gender identity (who they are), rather than their sex assigned at birth. Someone with a gender nonconforming gender expression may or may not be transgender.

Gender Identity: One's internal sense of being male, female, neither of these, both, or other gender(s). Everyone has a gender identity, including you. For transgender people, their sex assigned at birth and their gender identity are not necessarily the same.

Sex Assigned at Birth: The assignment and classification of people as male, female, intersex, or another sex assigned at birth often based on physical anatomy at birth and/or karyotyping. AFAB – assigned female at birth; AMAB – assigned male at birth.

Sexual Orientation: A person's physical, romantic, emotional, aesthetic, and/or other form of attraction to others. In Western cultures, gender identity and sexual orientation are not the same. Trans people can be straight, bisexual, lesbian, gay, asexual, pansexual, queer, etc. just like anyone else. For example, a trans woman who is exclusively attracted to other women would often identify as lesbian.

Transgender/Trans: An umbrella term for people whose gender identity differs from the sex they were assigned at birth. The term transgender is not indicative of gender expression, sexual orientation, hormonal makeup, physical anatomy, or how one is perceived in daily life. Note that transgender does not have an "ed" at the end.

Transition: A person's process of developing and assuming a gender expression to match their gender identity. Transition can include: coming out to one's family, friends, and/or co-workers; changing one's name and/or sex on legal documents; hormone therapy; and possibly (though not always) some form of surgery. It's best not to assume how one transitions as it is different for everyone.

Transsexual: A deprecated term that is often considered pejorative similar to transgender in that it indicates a difference between one's gender identity and sex assigned at birth. Transsexual often – though not always – implicates hormonal/surgical transition from one binary gender (male or female) to the other. Unlike transgender/trans, transsexual is not an umbrella term, as many transgender people do not identify as transsexual. When speaking/writing about trans people, please avoid the word transsexual unless asked to use it by a transsexual person.

More Terminology

Agender: An umbrella term encompassing many different genders of people who commonly do not have a gender and/or have a gender that they describe as neutral. Many agender people are trans. As a new and quickly-evolving term, it is best you ask how someone defines agender for themselves.

Aggressive (AG or Ag): A term used to describe a female-bodied and identified person who prefers presenting as masculine. This term is most commonly used in urban communities of color.

AFAB and AMAB: Acronyms meaning "assigned female/male at birth" (also designated female/male at birth or female/male assigned at birth). No one, whether cis or trans, gets to choose what sex they're assigned at birth. This term is preferred to "biological male/female", "male/female bodied", "natal male/female", and "born male/female", which are defamatory and inaccurate.

Ally: Someone who advocates and supports a community other than their own. Allies are not part of the communities they help. A person should not self-identify as an ally but show that they are one through action.

Aromantic: The lack of romantic attraction, and one identifying with this orientation. This may be used as an umbrella term for other emotional attractions such as demiromantic.

Asexual: The lack of a sexual attraction, and one identifying with this orientation. This may be used as an umbrella term for other emotional attractions such as demisexual.

Bigender: Refers to those who identify as two genders. Can also identify as multigender (identifying as two or more genders). Do not confuse this term with Two-Spirit, which is specifically associated with Native American and First Nations cultures.

Binary: Used as an adjective to describe the genders female/male or woman/man. Since the binary genders are the only ones recognized by general society as being legitimate, they enjoy an (unfairly) privileged status.

Bisexuality: An umbrella term for people who experience sexual and/or emotional attraction to more than one gender (pansexual, fluid, omnisexual, queer, etc).

Boi: A term used within the queer communities of color to refer to sexual orientation, gender, and/or aesthetic among people assigned female at birth. Boi often designates queer women who present with masculinity (although, this depends on location and usage). This term originated in women of color communities.

Bottom Surgery: Genital surgeries such as vaginoplasty, phalloplasty, or metoidioplasty.

Butch: An identity or presentation that leans towards masculinity. Butch can be an adjective (she's a butch woman), a verb (he went home to "butch up"), or a noun (they identify as a butch). Although commonly associated with masculine queer/lesbian women, it's used by many to describe a distinct gender identity and/or expression, and does not necessarily imply that one also identifies as a woman or not.

Cross-dressing (also crossdressing): The act of dressing and presenting as a different gender. One who considers this an integral part of their identity may identify as a cross-dresser. "Transvestite" is often considered a pejorative term with the same meaning. Drag performers are cross-dressing performers who take on stylized, exaggerated gender presentations (although not all drag performers identify as cross-dressers). Cross-dressing and drag are forms of gender expression and are not necessarily tied to erotic activity, nor are they indicative of one's sexual orientation or gender identity. Do NOT use these terms to describe someone who has transitioned or intends to do so in the future.

Cissexism: Systemic prejudice in the favor of cisgender people.

Cissimilation: The expectation and act of trans people, especially trans women, assimilating to cisgender (and often heteronormative) standards of appearance and performance.

Drag: Exaggerated, theatrical, and/or performative gender presentation. Although most commonly used to refer to cross-dressing performers (drag queens and drag kings), anyone of any gender can do any form of drag. Doing drag does not necessarily have anything to do with one's sex assigned at birth, gender identity, or sexual orientation.

Dyadic: Not Intersex.

Equality: A state in which everyone is equal. This ignores difference in identity/community and history.

Equity/Liberation/Justice: A state in which all marginalized communities are free. This differs greatly from equality.

Femme: An identity or presentation that leans towards femininity. Femme can be an adjective (he's a femme boy), a verb (she feels better when she "femmes up"), or a noun (they're a femme). Although commonly associated with feminine lesbian/queer women, it's used by many to describe a distinct gender identity and/or expression, and does not necessarily imply that one also identifies as a woman or not.

Gender Affirming Surgery; Genital Reassignment/Reconstruction Surgery; Vaginoplasty; Phalloplasty; Metoidioplasty: Refers to surgical alteration, and is only one part of some trans people's transition (see "Transition" above). Only the minority of transgender people choose to and can afford to have genital surgery. The following terms are inaccurate, offensive, or outdated: sex change operation, gender reassignment/realignment surgery (gender is not changed due to surgery), gender confirmation/confirming surgery (genitalia do not confirm gender), and sex reassignment/realignment surgery (as it insinuates a single surgery is required to transition along with sex being an ambiguous term).

The Gender Binary: A system of viewing gender as consisting solely of two, opposite categories, termed "male and female", in which no other possibilities for gender or anatomy are believed to exist. This system is oppressive to anyone who defies their sex assigned at birth, but particularly those who are gender-variant or do not fit neatly into one of the two standard categories.

Gender Dysphoria: Anxiety and/or discomfort regarding one's sex assigned at birth.

Gender Fluid: A changing or "fluid" gender identity.

Gender Identity Disorder/GID: A controversial DSM-III and DSM-IV diagnosis given to transgender and other gender-nonconforming people. Because it labels people as "disordered," Gender Identity Disorder is often considered offensive. The diagnosis is frequently given to children who don't conform to expected gender norms in terms of dress, play or behavior. Such children are often subjected to intense psychotherapy, behavior modification and/or institutionalization. This term was replaced by the term "gender dysphoria" in the DSM-5.

Genderqueer: An identity commonly used by people who do not identify or express their gender within the gender binary. Those who identify as genderqueer may identify as neither male nor female, may see themselves as outside of or in between the binary gender boxes, or may simply feel restricted by gender labels. Many genderqueer people are cisgender and identify with it as an aesthetic. Not everyone who identifies as genderqueer identifies as trans or nonbinary.

Heteronormative/Heteronormativity: These terms refer to the assumption that heterosexuality is the norm, which plays out in interpersonal interactions and society and furthers the marginalization of queer people.

Intersex: Describing a person with a less common combination of hormones, chromosomes, and anatomy that are used to assign sex at birth. There are many examples such as Klinefelter Syndrome, Androgen Insensitivity Syndrome, and Congenital Adrenal Hyperplasia. Parents and medical professionals usually coercively assign intersex infants a sex and have, in the past, been medically permitted to perform surgical operations to conform the infant's genitalia to that assignment. This practice has become increasingly controversial as intersex adults speak out against the practice. The term intersex is not interchangeable with or a synonym for transgender (although some intersex people do identify as transgender).

LGBTQQIAPP+: A collection of identities short for lesbian, gay, bisexual, trans, queer, questioning, intersex, asexual, aromantic, pansexual, polysexual (sometimes abbreviated to LGBT or LGBTQ+). Sometimes this acronym is replaced with "queer." Note that "ally" is not included in this acronym.

Monosexual / Multisexual / Non-monosexual: Umbrella terms for orientations directed towards one gender (monosexual) or multiple genders (multisexual/non-monosexual).

Nonbinary (Also Non-Binary): Preferred umbrella term for all genders other than female/male or woman/man, used as an adjective (e.g. Jesse is a nonbinary person). Not all nonbinary people identify as trans and not all trans people identify as nonbinary. Sometimes (and increasingly), nonbinary can be used to describe the aesthetic/presentation/expression of a cisgender or transgender person.

Packing: Wearing a penile prosthesis.

Pansexual: Capable of being attracted to many/any gender(s). Sometimes the term omnisexual is used in the same manner. "Pansexual" is being used more and more frequently as more people acknowledge that gender is not binary. Sometimes, the identity fails to recognize that one cannot know individuals with every existing gender identity.

Passing/blending/assimilating: Being perceived by others as a particular identity/gender or cisgender regardless how the individual in question identifies, e.g. passing as straight, passing as a cis woman, passing as a youth. This term has become controversial as "passing" can imply that one is not genuinely what they are passing as.

Polysexual: Capable of being attracted to multiple gender(s).

Queer: General term for gender and sexual minorities who are not cisgender and/or heterosexual. There is a lot of overlap between queer and trans identities, but not all queer people are trans and not all trans people are queer. The word queer is still sometimes used as a hateful slur, so be careful with its use.

Stealth: To not be openly transgender in all or almost all social situations.

T: Short for testosterone.

Top Surgery: Chest surgery such as double mastectomy, breast augmentation, or periareolar (keyhole) surgeries.

Trans: Prefix or adjective used as an abbreviation of transgender, derived from the Latin word meaning "across from" or "on the other side of."

Trans*: An outdated term popularized in the early 2010's that was used to signify an array of identities under the trans umbrella. However, it became problematized online due to improper usage because it eventually created a divide (transmen and transwomen v. all other trans* folks) rather than the more intended inclusivity. Therefore, trans (without asterisk) is the most-preferred term these days.

Transmisogyny: Originally coined by the author Julia Serano, this term designates the intersectionality of transphobia and misogyny and how they are often experienced as a form of oppression by trans women.

Transphobia: Systemic violence against trans people, associated with attitudes such as fear, discomfort, distrust, or disdain. This word is used similarly to homophobia, xenophobia, misogyny, etc.

Trans Woman/Trans Man: Trans woman generally describes someone assigned male at birth who identifies as a woman. This individual may or may not actively identify as trans. It is grammatically and definitionally correct to include a space between trans and woman. The same concept applies to trans men. Often it is good just to use woman or man.
Sometimes trans women identify as male-to-female (also MTF, M2F, or trans feminine) and sometimes trans men identify as female-to-male (also FTM, F2M, or trans masculine). Please ask before identifying someone. Use the term and pronouns preferred by the individual.

Two Spirit: An umbrella term indexing various indigenous gender identities in North America.

http://www.transstudent.org/definitions

The singular, gender-neutral ‘they’ added to the Associated Press Stylebook

By Travis M. Andrews, March 28, 2017

The Associated Press Stylebook, arguably the foremost arbiter of grammar and word choice in journalism, has added an entry for “they” as a singular, gender-neutral pronoun in its latest edition.

“We stress that it’s usually possible to write around that,” Paula Froke, lead editor for the Associated Press Stylebook, said in a blog post on the American Copy Editors Society’s website. “But we offer new advice for two reasons: recognition that the spoken language uses they as singular and we also recognize the need for a pronoun for people who don’t identify as a he or a she.”

Some journalists “write around” it by simply using the person’s name with each reference to avoid a jarring construction such as, “They is going home.”

The decision, announced Thursday at the American Copy Editors Society conference in St. Petersburg, Fla., now appears in the online stylebook and will appear in the 2017 print edition on May 31.

Via Poynter, the new entry reads in part:

They, them, their In most cases, a plural pronoun should agree in number with the antecedent: The children love the books their uncle gave them. They/them/their is acceptable in limited cases as a singular and-or gender-neutral pronoun, when alternative wording is overly awkward or clumsy. However, rewording usually is possible and always is preferable. Clarity is a top priority; gender-neutral use of a singular they is unfamiliar to many readers. We do not use other gender-neutral pronouns such as xe or ze ...

In stories about people who identify as neither male nor female or ask not to be referred to as he/she/him/her: Use the person’s name in place of a pronoun, or otherwise reword the sentence, whenever possible. If they/them/their use is essential, explain in the text that the person prefers a gender-neutral pronoun. Be sure that the phrasing does not imply more than one person.

The new stylebook also includes an updated section on gender, which reads, “Gender refers to a person’s social identity while sex refers to biological characteristics. Not all people fall under one of two categories for sex or gender, according to leading medical organizations, so avoid references to both, either or opposite sexes or genders as a way to encompass all people.”

Additionally, it added its first entry for “homophobia, homophobic,” which it stated are “acceptable in broad references or in quotations to the concept of fear or hatred of gays, lesbians and bisexuals.”

“It’s about time,” Ben Zimmer, language columnist for the Wall Street Journal, told Poynter. “Style guides sometimes move in baby steps. This seems to be a step in a good direction, even if it’s not a full-throated endorsement of singular they.”

“Because of this change, transgender and gender-nonconforming people will gain greater respect and dignity in the media,” writer Jacob Tobia, whose preferred pronouns are gender-neutral, toldNBC News. “It’s great to know that I won’t have to fight so hard to have my pronouns respected by journalists.”

The Washington Post, which uses its own style guide, officially embraced the usage of the singular “they” in 2015.

“For many years, I’ve been rooting for — but stopping short of employing — what is known as the singular they as the only sensible solution to English’s lack of a gender-neutral third-person singular personal pronoun,” wrote the late Bill Walsh, a longtime Washington Post copy editor.

“The only thing standing in the way of they has been the appearance of incorrectness — the lack of acceptance among educated readers,” he continued. “What finally pushed me from acceptance to action on gender-neutral pronouns was the increasing visibility of gender-neutral people. The Post has run at least one profile of a person who identifies as neither male nor female and specifically requests *they* and the like instead of *he* or *she*.”

The singular “they” made further gains in January 2016, when it beat out popular phrases “on fleek” and “thanks, Obama” as the American Dialect Society’s Word of the Year.

Zimmer, who presided over the vote, told The Post the selection both acknowledged something commonly used in the English language while “also playing into emerging ideas about gender identity.”

“It encapsulates different trends that are going on in the language,” Zimmer said. “It’s a way of identifying something that’s going on in the language which ties to issues of gender identity and speaks to other ways that people are using language to express themselves and present their identity.”

The usage of nontraditional pronouns has become more common in daily life, particularly in universities, during the past few years. Students attending orientation at American University, for example, offer their preferred gender pronouns alongside their names and home towns when introducing themselves.

“We ask everyone at orientation to state their pronouns,” Sara Bendoraitis, the university’s director of programming, outreach and advocacy, told the BBC, “so that we are learning more about each other rather than assuming.”

Critics of allowing students to choose preferred pronouns have mocked the practice. After the University of Michigan announced a “designated pronoun” policy, one student chose the “pronoun” “His Majesty” in protest.

“The more and more we go down this road of political correctness at these universities,” Grant Strobl, the student in question, told Fox News, “the question is: When will that end? How much is the university willing to sacrifice its pursuit of truth and its mission for this fantasyland of political correctness?”

ETHICS AND BEST PRACTICES FOR OREGON LAWYERS

ONLD Super Saturday CLE

June 22, 2019

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Introduction

The Oregon Rules of Professional Conduct (ORPC or Oregon RPCs) govern the ethical duties of all Oregon lawyers. These rules are the same for lawyers in solo practice, at a firm of any size, at a government office, in a court-appointed or public defense capacity, at an in-house position, or anywhere else you are practicing law as an Oregon lawyer.

The Oregon Formal Ethics Opinions and relevant case law help clarify and interpret the ORPC. You can find the Formal Ethics Opinions, the Disciplinary Board Reporter, and other resources as the Oregon State Bar Website. The ABA commentaries to the Model Rules of Professional Conduct give significant guidance and clarification, although they are not binding in Oregon. There are many other resources to help you understand and perform your duties to clients, your colleagues, opposing parties, the court, the profession, the public, and others.

The materials that follow give basic overviews, citations to particular provisions of the Oregon Rules of Professional Conduct, selected citations to cases, and best practices to help you stay within the bounds of your ethical duties and help you be a better lawyer. Of course, no written materials can cover all subjects. This presentation is a starting point. You will need to do further thinking and seek out specific resources to know how to fully understand your ethical duties and conduct yourself professionally in the situations you face in your practice.

These written materials and the related CLE presentation are <u>not</u> legal advice, generally or specifically, and should not be considered as such. No lawyer-client relationship is established during any discussion of hypotheticals, issues, topics, or real-life scenarios. The materials and presentation do not necessarily reflect the views and policies of the Oregon Department of Justice or the Attorney General.

I. Duty of loyalty to your client and lawyer competence.

A. Loyalty to your client

1. Loyalty to your client is at the core of your ethical duties and effective lawyering. Keeping your focus on your duty of loyalty to clients will help you avoid most ethical quandaries. It will also help you understand how best to work with your client and others to achieve your client's goals.

B. Competence

1. **ORPC 1.1.** A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

2. You have a duty to provide competent representation for your client. This means you must have the knowledge and skill to effectively advance your client's legal interests and counsel your client about options and consequences of decisions in their matter. This requires you to have an accurate and current understanding of the area(s) of law relevant to your client's matter, and then to act accordingly.

3. For new lawyers, competence can be a tricky thing. It can be easy to underestimate or overestimate your knowledge and skill to handle a particular legal matter. This is especially true when you're trying to bring in work and earning the trust of clients. You can become competent by learning the skills and knowledge you need to be an effective advocate and adviser – without falling prey to unwarranted self-assurance.

   You may need to associate with a lawyer who has more experience and skill. You may need to set aside time to study CLE materials and other resources (without billing the client for the time you're spending to become competent). One good option is to do research or work for a lawyer (on contract, for reduced pay, or for no pay) who has experience in the area of law in which you're seeking to become competent. Failure to recognize a lack of knowledge and experience is an all-too-common pitfall — but also one you can avoid. During your legal career, you will need to turn away some cases and refer people to other lawyers who have the right skill set. Don't let your short-term hunger ruin your long-term career or your reputation.

II. Who is your client?

A. The lawyer-client relationship does *not* depend solely upon a written agreement or the payment of fees. The lawyer-client relationship is governed by contract law, agency principles, and other substantive law. A lawyer also owes certain duties to *prospective* clients under **ORPC 1.18**.

B. Having a clear understanding of whom you represent and the other parties related to a legal matter is essential to analyzing conflicts of interest, which you must do before engaging a client.

C. **Reasonable Expectations Test**:
Oregon, like most jurisdictions, applies the "reasonable expectations" test to determine both the existence of a lawyer-client relationship and the identity of the client. Put another way, if a lawyer understood or should have understood that a lawyer-client relationship existed, or acted as though the lawyer was providing professional assistance or advice on behalf of the putative client, a lawyer-client relationship was formed. See *In re Weidner*, 310 Or 757 (1990).

Analysis:

1. Does the putative client *subjectively* believe that the lawyer is representing the client?
2. Is the client's subjective belief *objectively* reasonable under the circumstances?
3. A client's expectations can be managed through the use of disclaimers and clearly written engagement or "non-engagement" letters shortly after the first consultation.

D. Simultaneous representation of an entity and one or more of its individual constituents is permitted, provided there is a *waivable* conflict between the interests of the clients ***and*** you obtain written informed consent signed from all affected current and former clients as to any waivable conflicts.

E. The Oregon Evidence Code defines "client," for purposes of the lawyer-client privilege. This definition of client includes, among others, a person "who consults a lawyer with a view to obtaining professional legal services from the lawyer." OEC 503(1)(a).

F. *Prospective Clients: Effective Use of RPC 1.18*, OSB Bulletin, Feb/March 2010.

G. *Avoiding Bad News: Risk Management in Law Firm Marketing*, Mark J. Fucile, OSB Bulletin, Jan 2009.

H. ***In re Spencer*, 335 Or 71, 84, 58 P3d 228 (2002)**
When a person delivers "funds, securities or other properties" to a lawyer who is considering whether to represent that person, the person has entrusted those materials to the lawyer as a lawyer and, as such, is as much entitled to be considered a "client" for that limited purpose as if the person had made a confidential, verbal communication to the lawyer.

III. Duty to act with reasonable diligence and promptness in representing a client.

A. Diligence

1. **ORPC 1.3.** A lawyer must not neglect a legal matter entrusted to the lawyer.

2. A lawyer has a duty to pursue a client's case. *In re Bourcier II*, 325 Or 429, 939 P2d 604 (1997); *In re McKee*, 316 Or 114, 849 P2d 509 (1993). A lawyer who fails to pursue a client's case engages in neglect. The analysis of neglect usually focuses on a pattern of acts or failures to act during a particular timeframe. See *In re Magar*, 335 Or 306, 666 P3d 1014 (2003).

   At its most basic level, neglect means a pattern of utter lack of diligence to a client's legal matter. Although *In re Gygi*, 273 Or 443, 541 P.2d 1392 (1975), holds that an isolated instance of ordinary negligence is not a basis for professional discipline, a single instance may be deemed so prejudicial to a client that it may amount to neglect.

   Although neglect as an ethics issue is distinct from negligence as a malpractice issue, they are often related and can arise from the same failures to be diligent and attentive to client matters.

3. *Examples*:

   a. ***In re Steves,* 26 DB Rptr 283 (2012)**
   In three separate domestic relations matters, the court instructed lawyer to prepare and submit proposed orders or judgments, but lawyer failed to do so or take other action to advance her clients' interests.

b. ***In re Jordan,* 26 DB Rptr 191 (2012)**
In an immigration matter, lawyer failed to attend court appearances for the client. Lawyer also failed to tell client that lawyer was about to be (and ultimately was) suspended from the practice of law.

c. ***In re Soto,* 26 DB Rptr 81 (2012)**
Lawyer took on legal matters, some beyond her usual practice area, did not handle them competently, neglected a number of the matters and failed to respond to client inquiries.

d. ***In re Sushida*, 24 DB Rptr 58 (2010)** [3-year suspension]
Attorney failed to file a petition for dissolution within the time requested by the client and then misrepresented the filing date to the client. Attorney also failed to file a proof of service on the adverse party and failed to take other substantive action in the dissolution thereafter. Regarding a second client, attorney was retained but failed to take any substantive action in a support modification matter.

e. ***In re Redden,* 342 Or 393, 153 P3d 113 (2007)**
Parties resolved a child support arrearage matter and case was taken off court docket. Lawyer drafted stipulation, but failed to pursue it for almost two years.

f. ***In re Meyer II*, 328 Or 211, 970 P2d 652 (1999)**
Former DR 6-101(B) (identical to current ORPC 1.3) violation even where the lawyer rendered some service during a two-month period because the lawyer took no constructive action to advance or protect the client's position and client sustained actual and substantial injury. *See also In re Purvis*, 306 Or 522, 760 P2d 254 (1988).

Recommendations:

Use a good calendaring and reminder system to keep track of key events in a matter (filing deadlines, court dates, response deadlines, statutes of limitations, etc.) Have a system in place for reviewing each file at a regular interval based on specific needs ("tickling" the file). If you keep good notes, a review of the client file will be more effective. Use wisdom in deciding whether to bill for a short file review.

Establish and maintain clear case management procedures. Use them consistently. Good file setup and office systems will help you respond to client needs, speed preparation of documents, track events, and stay ahead of deadlines. This will make you more efficient and more effective. Prepare discovery requests in advance. Don't wait for a request from the other side.

B. Communication

1. **ORPC 1.4(a)**. A lawyer must keep a client *reasonably* informed about the status of a matter and promptly comply with *reasonable* requests for information (emphasis added).

2. **ORPC 1.4(b)**. A lawyer must explain a matter to the extent *reasonably necessary* to permit the client to make informed decisions regarding the representation (emphasis added).

3. *Examples*:

   a. ***In re Midfeldt,* 24 DB Rptr 25 (2010)**
   Lawyer failed to communicate with elderly client during representation, believing third-party reports and court documents that client was incompetent.

   b. ***In re Hughes*, 21 DB Rptr 1 (2007)**
   Lawyer represented insurance companies in subrogation matters. Over a significant period of time, the lawyer failed to keep client updated and failed to respond to numerous inquiries from client.

   c. ***In re Groom,* 20 DB Rptr 199 (2006)**
   Lawyer represented several clients in appeals/post-conviction relief cases. While attorney filed opening briefs for the clients, he did not notify the clients when state motions for summary affirmation of convictions were granted, did not timely file petitions for review and did not keep the clients reasonably informed about the status of their appeals/PCR petitions.

   d. ***In re Bourcier*, 325 Or 429, 939 P2d 604 (1997)**
   Lawyer appointed to represent client in an appeal of a criminal conviction. Lawyer *never* communicated with client and failed to advise client about requests for extensions of time to file the brief, failed to review or discuss brief, failed to inform client that briefs had been filed. Lawyer also failed to provide client with copy of briefs, failed to inform client of scheduled argument, and filed to advise client of court's decision.

   e. ***In re McKee*, 316 Or 114, 849 P2d 509 (1993)**
   Lawyer made a conscious decision to keep his client *uninformed* about the progress of the client's legal matter because lawyer did not wish to upset client.

Recommendations:

Maintain clear and consistent communication with clients. Be sure you and your client are clear about how you will communicate with each other. Maintain a good bank of form letters related to issues that commonly arise.

In the initial conference with your client, establish how you will communicate and how often. Confirm these (along with the scope of your representation) in your initial letter or engagement letter to a client. Set reasonable and clearly stated limits, but make sure that all necessary people understand and agree such limits. Be aware of the traps of e-mail, texting and cloud computing. Consider using software that allows clients to securely log in to access messages and file materials.

Be candid with clients about the prospects of their case. Don't sugar coat or minimize challenges and barriers. Know the state of the law and the details of your client's matter to avoid overstating prospects or understating challenges. Discuss the strengths and weaknesses of all aspects of the case in clear, common sense terms. When you need to use legal jargon, explain terms to clients without talking down to them. Encouraging questions opens doors to effective lawyer-client communication.

If you don't know the answer to a client's question, say so. Then let the client know that you'll do the research to get the answer. If a client's question isn't relevant to your work as their lawyer, but it's an issue of importance to the client, try to refer the client to helpful resources when possible.

When dealing with a difficult client, or a client whose legal matter involves a high degree of stress, anxiety and/or crisis, consider the following:

1. **Listen, acknowledge, and validate as much as possible.**

2. **Defuse tense conversations with a client by using a calm tone and patience. As needed, take breaks and/or table discussion about certain issues to allow for cooling off and further thought.**

3. **Be direct, clear, and complete in your advice to your client and in your explanations about process. Avoid getting defensive.**

4. **Whenever possible, prepare a client for bad news so it doesn't come as a shock. Manage expectations with clear, direct discussion.**

5. **When preparing a client for a deposition, court hearing, or other event outside a client's usual experience, do a walk through to give the client context and clear understand of what to expect.**

6. **Keep focused on the most important aspects of the case and redirect minutiae. Set reasonable boundaries and limits on the duration of phone calls and meetings, and the length of emails/correspondence.**

7. **Document as much as you can and write follow up letters or emails to your client as needed. Written follow up isn't always possible, but use it as much as circumstances allow.**

8. **Work with your staff on approaches and strategies for dealing with difficult clients. Your staff is likely to encounter difficulties with clients before you do. Difficult clients are likely to be more difficult with your staff than with you. Make it clear to clients that you won't tolerate them mistreating your staff. Trust your staff and deal with problem clients right away.**

9. **There are many ways to resolve problems with difficult clients. A "clear the air" meeting with a client can be helpful. Keep such a meeting short and focus on reassessing your client's goals and your approach to achieving those goals. If it's clear there's an impasse, see if you can understand what's causing it.**

10. **Reach out to colleagues who have dealt with difficult clients, and adapt their strategies to your situation.**

IV. Duty to determine and abide by client's wishes, except under certain circumstances.

A. Duty to determine and abide by client's wishes.

1. **ORPC 1.2(a)**. 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 a jury trial and wither the client will testify.

   The client decides the objectives of the representation. The *lawyer*, with client input, decides the *means* by which to pursue the matter.

   The distinction between objectives and *means* can be understood as the difference between decisions that directly affect the ultimate resolution

of the case or the substantive rights of the client and decisions that are procedural, strategic or tactical in nature.

2. *Examples*:

a. ***In re Ingram*, 26 DB Rptr 65 (2012)**
Without consulting the client, lawyer concluded that the client's lawsuit had no merit. Lawyer then informed opposing counsel that he would not oppose a defense motion for summary judgment. Lawyer did not convey to client a defense proposal to stipulate to a dismissal without costs, did not notify client that the case had been dismissed, and waived any objection to a form of judgment that included costs.

b. ***In re Bailey,* 25 DB Rptr 19 (2011)**
Lawyer accepted a settlement offer from opposing party without consulting with, or obtaining authority from, the client.

c. ***In re Billman,* 27 DB Rptr 126 (2013)**
Lawyer agreed to settlement of a domestic relations matter and recited terms into the record without confirming in advance with client whether client was agreeable to the terms and conditions, and allowed a judgment to be entered with those terms and conditions.

B. Limiting the Scope of Representation and Counseling Your Client.

1. **ORPC 1.2(b)**. A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

2. **ORPC 1.2(c)**. A lawyer may not counsel a client to engage, or assist a client, in conduct that the lawyer know is illegal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

3. **ORPC 1.2(d)** is a relatively new provision. This rule allows a lawyer to "counsel and assist a client regarding Oregon's marijuana-related laws." The rule goes on to require a lawyer to advise a client on federal and tribal law and policy where Oregon law conflicts with federal or trial law regarding marijuana. This is an emerging area of law, so be sure to tread carefully and speak competently to these issues (or refer a client a lawyer who can do so).

4. *Examples*:

a. ***In re Spencer*, 335 Or 71, 58 P3d 228 (2002)**
Out-of-state resident purchased a motor vehicle in Oregon. To avoid payment of taxes in California, attorney assisted out-of-state resident in registering vehicle in Oregon by using attorney's home address as out-of-state resident's address. No violation of Rule 1.2 because bar could not prove that the accused was acting as a lawyer. However, other ethics violations found.

b. ***In re Albrecht*, 333 Or 520, 42 P3d 887 (2002)**
Attorney participated in money-laundering scheme to disguise fact that client's funds were the proceeds of unlawful drug activity.

c. ***In re Dinerman*, 314 Or 308, 840 P2d 50 (1992)**
Attorney participated in scheme to avoid bank's lending limits for his client and represented in writing that he owned property offered as security, when he did not.

d. *Unbundling Legal Services: Limiting the Scope of Representation,* Amber Hollister*, OSB Bulletin,* July 2011.

Recommendations:

Understand your client's objectives clearly and early. Ask good questions, listen carefully and take good notes. Revisit those objectives as the matter progresses.

Make sure your client understands that you are not merely a "hired gun." Consult with your client about strategy and tactics. But, when you disagree with your client about how to proceed make sure they understand that you plan to proceed in a different way and explain your decision. Be a zealous advocate, but don't trade your reputation for a short-term victory.

Remember, you must not substitute your judgment for the client's on issues solely within the client's judgment to decide. If you and the client continue to disagree on fundamental matters, it's time to withdraw. ORPC 1.16 governs the termination of the attorney-client relationship.

V. Duties regarding fees, funds and property.

A. Fees.

1. **ORPC 1.5(a)**. A lawyer may not enter into an agreement for, charge or collect an illegal or clearly excessive fee or a clearly excessive amount for expenses.

2. **ORPC 1.5(b)**. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:
   (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
   (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
   (3) the fee customarily charged in the locality for similar legal services;
   (4) the amount involved and the results obtained;
   (5) the time limitations imposed by the client or by the circumstances;
   (6) the nature and length of the professional relationship with the client;
   (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
   (8) whether the fee is fixed or contingent.

3. *Examples*:

   a. ***In re Rose*, 20 DB Rptr 237 (2006)**
   Lawyer received payment for legal services in advance. Then, when lawyer failed to complete the client's legal matter, lawyer failed to return unearned funds after lawyer was terminated.

   b. ***In re Leutjen*, 18 DB Rptr 41 (2004)**
   Lawyer borrowed money from a client and later agreed to perform legal services for the client in the future in lieu of paying interest on the loan. Lawyer charged a clearly excessive fee in that the value of the legal services performed was less than the amount of interest waived by the client.

   c. ***In re Campbell*, 17 DB Rptr 179 (2003)**
   Lawyer's fee agreement required client to pay a rate one-and-a-half times the lawyer's standard hourly rate if the client dropped the claim or did not accept the lawyer's settlement recommendation. Lawyer' later attempt to enforce the agreement was found to be an excessive fee.

   d. ***In re Wyllie*, 331 Or 606, 19 P3d 338 (2001)**
   Lawyer billed and collected an amount in excess of his hourly rate.

e. ***In re Hammond,* 24 DB Rptr 187 (2010)**
Lawyer collected an illegal fee because client paid him his fee in a federal workers' compensation case without obtaining prior approval from the workers' compensation board, as required by statute.

f. ***In re Sunderland,* 23 DB Rptr 61 (2009)**
Lawyer collected fee in a probate proceeding and related conservatorship without court approval.

Recommendations:

Fee agreements need to be clear and understandable to clients. They should show how you charge for and earn funds. It is usually best to have the client agree that they will maintain a certain amount in trust at all times, and that if they fail to do so, you can withdraw from your representation. Make expectations clear and fair. (Remember, you must not prejudice a client's matter upon withdraw.) A good engagement letter always helps.

Even if charging a flat fee, track your time. If your client terminates you before all necessary work on the matter is complete, you will want to be able to clearly show the fees you have earned.

B. Handling Client Funds.

1. *Depositing Funds*

a. **ORPC 1.15-1(a)**. Funds, including advances for costs and expenses shall be kept in a lawyer trust account.

b. **ORPC 1.15-1(c)**. A lawyer shall deposit into a lawyer trust account fees and expenses that have been paid in advance.

c. ***In re Kent,* 20 DB Rptr 136 (2006)**
Lawyer accepted flat fee to represent client in a bankruptcy proceeding. No written fee agreement. Lawyer did not deposit fee into lawyer trust account.

d. **ORPC 1.15-1(c)**. A lawyer shall withdraw fees and expenses from the lawyer trust account only as fees are earned or expenses incurred.

e. *Examples*:

1) ***In re Rose,* 20 DB Rptr 237 (2006)**
Client's mother paid to the lawyer the fee for a post-conviction appeal. The lawyer initially deposited the funds into lawyer trust

account. A week later the lawyer withdrew the funds from that account even though lawyer had not yet earned them.

2) ***In re Doss,* 21 DB Rptr 94 (2007)**
Lawyer prematurely withdrew funds from the lawyer trust account.

3. *Accounting*

a. **ORPC 1.15-1(a)**. Complete records of the lawyer trust account shall be kept and preserved for a period of five year after termination of the representation.

b. **ORPC 1.15-1(d)**. Upon request by a client, a lawyer shall promptly render a full accounting.

c. ***In re Kent,* 20 DB Rptr 136 (2006)**

4. *Refunding*

a. **ORPC 1.16(d)**. Upon termination of representation, a lawyer must make a refund of any advance payment of fees or expenses that have not been earned or incurred.

b. *Examples*:

1) **In re Fadeley, 342 Or 403 (decided March 23, 2007)**

2) ***In re Rose,* 20 DB Rptr 237 (2006)**

3) ***In re Doss*, 21 DB Rptr 94 (2007)**

5. "Earned on Receipt" and "Nonrefundable" Fees

a. **ORPC 1.5(c)(3)** governs these types of fees

b. Use caution when using this type of fee structure. Remember that if you withdraw from representing the client before you complete the work you agreed to do, the client may be entitled to a refund of all or part of the fee. **(ORPC 1.5(c)(3)(ii))**.

Recommendations:

Keep clear, individual accounting records for each client. Find and use software that fits your practice area and personal style (or that can bridge any gaps in your practice management and accounting skills). Set a regular time to review accounts and

determine what fee, if any, you have earned. Consider hiring a bookkeeper or accountant who can keep you on track regularly, or who can handle the books for you.

Clients should not have to guess about your billing practices, and should understand them clearly from the outset. Describe your billing practices in writing for your client. Consistently send easy-to-read billing statements to clients. Ensure that clients know you are available to answer questions and address concerns about fees and billing issues (and that they won't be charged for such questions).

The *Fee Agreement Compendium* is a useful reference (available for download from Bar Books at the OSB website). You may also find good form agreements from other lawyers in your practice area. Always advise a client that they have a right to consult with an independent legal advisor before signing a fee agreement with you.

If a client doesn't pay their bill, the first thing to do is contact them to see if it was an oversight. People forget things. Give your client the benefit of the doubt. If you don't get a response, or it becomes clear your client is avoiding payment, remind the client of their obligation to pay as stated in the fee agreement and/or engagement letter. Remind the client you may have to withdraw if they don't pay as agreed (keeping in mind that you may have to stay on for a period of time to avoid prejudicing a client's interests).

Suing a client is fraught with problems. Yes, you should be paid for the work you've done. However, consider whether it is a better use of time and effort to simply let it go and learn a lesson from the client's non-payment. If you do take legal action to collect unpaid fees, be sure you have ample documentation to back up your position. The Fair Debt Collection Practice Act and other relevant federal, state and local law apply to you as a creditor regarding a client's unpaid fees. Seek feedback and advice from a lawyer you trust and who understands their ethical duties before you start down the road of suing a client.

The bar has a *voluntary* Fee Arbitration Program that can help resolve fee disputes. The bar discipline process has no jurisdiction over fee disputes, only matters involving clearly excessive fees which implicate the rules of professional conduct.

C. Handling Client Property

1. *Safekeeping*

   a. **ORPC 1.15-1(a)**. A lawyer shall hold client property separate from the lawyer's own property.

   b. **ORPC 1.15-1(a)**. Client property, other than funds, shall be identified as such and appropriately safeguarded.

c. *Examples*:

1) ***In re Bertoni,* 26 DB Rptr 25 (2012)**
Over an extended period, lawyer negligently withdrew client funds from his law firm's trust account before the fees were earned. Lawyer also failed to maintain complete trust account records for five years, as required by the rule. In addition, lawyer periodically deposited his own funds into the firm trust account in amounts that exceeded bank service charges and minimum balance requirements.

2) ***In re Eckrem,* 23 DB Rptr 84 (2009)**
Lawyer collected a flat fee as payment in advance for an adoption and a retainer in another client matter, and did not deposit either amount of client's funds into the trust account.

2. *Surrendering client property*

a. **ORPC 1.15-1(d)**. Upon receiving property in which a client has an interest, a lawyer shall promptly notify the client and promptly deliver to the client property that they client is entitled to receive.

b. **ORPC 1.16(d)**. Upon termination of representation, a lawyer must surrender papers and property to which a client is entitled.

c. *Examples*:

1) ***In re Britt II,* 20 DB Rptr 185 (2006)**
5 months is too long to wait to return client property.

2) ***In re Doss*, 21 DB Rptr 94 (2007)**

Recommendations:

If you provide copies of documents to clients as the case progresses, send them with cover/transmittal letters, with a copy of the letter to the file. If the client contacts the bar, an issue might be resolved by providing copies of such letters to the bar. A lawyer has no ethical obligation to send multiple free copies of a client's file. But if you can't document that you've previously sent the materials, you may have to send them again at your cost.

When a client terminates you, your closing letter should remind the client how you will handle their file, even if you have already addressed that issue with the client previously. Restate what is in your retainer agreement regarding disposition of the client's file. This should be addressed clearly and in writing.

A standard practice is to retain client files for ten years following completion of the matter. This is a typical recommendation from the Professional Liability Fund. The Rules do not give a specific timeframe for keeping client files. Retention of client files is an issue where the rules of professional conduct and malpractice liability intersect.

Find the best method and facility for storing closed files, keeping in mind security, accessibility and cost – in that order. If you scan closed files to store them electronically and then destroy the paper file, be aware of data degradation issues in whatever electronic storage method you are using. Ask other lawyers (and their staff) in your practice area how they deal with closed files to find the best solution for you and your clients. Speak with the PLF Practice Management Advisors for additional information, feedback and recommendations.

You *may* assert a possessory lien on a client file if the client owes you money, but *carefully* weigh the benefits and drawbacks of doing so. Holding physical items of client property for lengthy periods of time is generally not a good idea.

VI. Conflicts of Interest

A. We analyze conflicts in terms of whether they are **"directly adverse"** or **"materially limiting"** rather than using terminology such as "potential," "current," "likely" or "actual" conflicts. While it is wise to look ahead to any potential issues that may arise, and to discuss them in a reasonable way with a client, the focus should remain on whether a conflict exists in the *present*.

B. ***Conflicts Between Current Clients—Directly Adverse***

ORPC 1.7(a)(1) provides that a lawyer may not represent a client if the representation will be "directly adverse" to another client of the lawyer or the lawyer's firm. Representation is directly adverse if the lawyer will be advocating for one client in a matter against a person the lawyer represents in another matter, even if the other matter is wholly unrelated. Thus, a lawyer cannot represent the plaintiff in a claim against a defendant that the lawyer represents in an unrelated matter.

1. Any time a lawyer considers whether to seek client consent to a simultaneous representation, the lawyer must *first* determine honestly whether he can satisfy his obligations to both clients.

2. The test is whether the lawyer is obligated to take directly conflicting positions for the clients simultaneously. An example of a non-waivable conflict is where a lawyer would need to argue for one position for one client while simultaneously arguing the opposite for another client.

It is not a conflict to simultaneously represent multiple clients in *unrelated* matters where the interests are only "economically adverse."

3. Where consent is required for a simultaneous representation of clients with conflicting interests, and the conflict can be waived, the client must give "informed consent" as defined by the Rules to be valid. (ORPC 1.0)

ORPC 1.7(b) *allows* a directly adverse representation if:

- The lawyer reasonably believes she can provide competent and diligent representation to each client,
- The representation will not obligate the lawyer to contend for something for one client that the lawyer must oppose for the other,

  AND

- The affected clients give their informed consent, confirmed in writing.

4. *Examples*:

   a. ***In re Clark*, 25 DB Rptr 207 (2011)**
   Lawyer represented co-defendants in a criminal case when there was both the potential for disagreement between them AND an actual dispute between them whether plea negotiations should include the forfeiture of property. Informed consent would not have cured the conflict.

   b. ***In re Dole*, 25 DB Rptr 56 (2011)**
   Lawyer represented both father and mother in estate planning and family business matters, and continued to represent father after mother died. Lawyer also began to represent the adult children regarding their concerns over the valuation, liquidation, and distribution of assets from mother's estate to father, as well as fathers' spending habits and control over the family business entities. Lawyer failed to obtain informed consent confirmed in writing from his multiple clients.

C. *Conflicts Between Current Clients—Material Limitation*

ORPC 1.7(a)(2). A lawyer also may not represent a client if there is "a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to another client, a former client, a third person, or by the lawyer's own interests," unless the client gives informed consent, confirmed in writing.

This rule applies where the interests of the other client, former client or third person are not "directly adverse," but where there is a risk that the

lawyer's ability to consider, recommend or carry out a course of action for the client will be limited by the lawyer's other responsibilities or interests.

D. ***Former Client Conflicts***

ORPC 1.9 governs former client conflicts. Lawyers sometimes face the problem of whether they have authority to disclose information about a former client — especially when the former client's consent cannot be obtained, usually due to the death of the client. It is well settled that the death of a client does not end a lawyer's duty of confidentiality; a lawyer cannot decide unilaterally to disclose client information covered by the rules.

Unless specifically permitted by ORPC 1.6, disclosure of information relating to the representation of a client is prohibited. A "closed-file conflict" should be treated as a former client conflict, whether the file was closed one hour ago or 50 years ago.

E. ***Disclosure and Consent***

In dealing with a waivable conflict, a lawyer must disclose the conflict and obtain the client's informed consent. You should discuss this with your client in the initial meeting so there is no surprise if withdrawal becomes necessary. Clearly spell out the risks and the reasonable alternatives, advise your client to seek independent legal counsel, and obtain the informed consent in writing.

Recommendations:

As a new lawyer, conflicts may not seem that important because you're only beginning to build your client base. But early in your career is the best time to develop habits and clear understanding of how to identify and analyze conflict issues. Find the best conflict checking system that will fit and grow with your practice.

When analyzing a conflict, it can be very helpful to take pen and paper and sketch out a visual of the parties, subject matter, witnesses, other necessary people and entities, and the connections between them.

When in doubt, reach out to trusted colleagues and call the Oregon State Bar to talk through conflicts issues. If you make a mistake, or unforeseen circumstances result in a conflict, take a breath and seek help to deal with the issue. Then find the best way to speak with your client about any conflict that may require informed consent or your withdraw. Speak forthrightly with clients about conflicts that may arise if certain events occur.

VII. Communication with Represented Parties

A. **ORPC 4.2**. In representing a client or the lawyer's own interests, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject ***unless:***

1. Prior consent of the party's lawyer
2. Authorized by law or court order
3. Written agreement requires that a written notice/demand be sent to the party (copy of notice/demand must also be sent to other party's lawyer)

B. Relevant cases regarding communicating with represented parties:

1. ***In re Paulson*, 341 Or 542 (2006)**.
   Lawyer met with client's boyfriend in a sex abuse case when lawyer knew the boyfriend had counsel.

2. ***In re Koessler*, 18 DB Rptr 105 (2004)**.
   Lawyer called opposing party to advise a check was ready instead of opposing lawyer because the lawyers had a poor relationship.

3. ***In re McNeff*, 17 DB Rptr 143 (2003)**.
   Lawyer had opposing party personally served with notice of deposition even though knew that party had a lawyer.

C. **Formal Ethics Opinions** regarding communicating with represented parties:

1. **No. 2005-161**. AAG may advise agency regarding investigations that contemplate agency contact with a represented party as long as the agency investigator is not an employee or subject to the supervision, direction or control of the AG's office and the AAG does not cause the communication. The AAG is also not obligated to advise the agency not to make contact.

2. **No. 2005-152**. Plaintiff's attorney in suit against former employer state agency may not communicate directly with current agency employee without consent of AG's office, if the conduct of the current employee is at issue or the current employee is in a management position. Plaintiff's attorney does not need consent to speak with former agency employee or current employee of a separate agency, but *does* need consent if that employee has their own attorney on that subject matter.

3. **No. 2005-144**. Attorney may contact county employee to obtain public records; but if the contact strays into asking the employee about the meaning of the records, this could be a violation.

4. **No. 2005-147**. Communications between represented parties is not per se prohibited. Cannot induce a client to communicate with opposing party.

VIII. Communication with Unrepresented Persons

A. **ORPC 4.3**. A Lawyer may not communicate or cause another to communicate on the subject matter of the representation if the lawyer knows that a party is represented.

In acting on behalf of a client or the lawyer's own interests with a person/agency not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person/agency misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client or the lawyer's own interests.

You are allowed to communicate (advocate your client's position) as long as you make clear what your role is and don't give legal advice other than to consult a lawyer. Of course, ORPC 4.2 prohibits you from communicating with someone you know is represented.

1. ***In re Lawrence,* 337 OR 450, 98 P3d 366 (2004)**.
Attorney's firm represented defendant in domestic violence case. Attorney violated RPC 4.2 when he gave legal advice to the victim and assisted the victim in filling out an affidavit used in attempt to have charged dismissed.

2. ***In re Richardson,* 19 DB Rptr 239 (2005)**.
Attorney who represented defendant in domestic violence case advised the victim she was not required to appear at grand jury unless service was valid.

3. ***In re Jeffery*, 321 Or 360 (1995)**.
Attorney disciplined for giving legal advice to unrepresented party with interests adverse to those of his client. Attorney represented defendant in a drug case

and gave "free legal advice" to his client's live-in girlfriend who had already made statements to police that were not in the client's best interests.

B. Pro Se parties

More and more people are handling their own legal matters. Two of the main reasons for this are: 1) the availability of self-help forms, especially in domestic relations cases), and 2) the perceived (and actual) cost of hiring a lawyer. If the opposing party in a case is pro se (the term "self-represented party" is also used), keep the following in mind:

1. Treat a pro se party with the same respect you should give to opposing counsel. Don't assume a pro se party is unsophisticated. At the same time, don't throw around legalese or try to hoodwink pro se parties.

2. No matter what a pro se party does (intentionally or unintentionally), maintain your commitment to your ethical duties and professionalism. Don't use hardball tactics with pro se parties.

3. Maintain formality and decorum, both in court and in any communication outside court. If a pro se party makes a substantive or procedural error, gently point it out to the court. When making your own presentation to the court, be careful about taking shortcuts that you might when there is another lawyer on the other side.

4. Pro se parties are most often not familiar with court procedure and rules. Don't take unfair advantage of this or appear to do so in the eyes of the court. When you need to point out a deficiency in a pleading or a violation of a court rule, be respectful and avoid posturing.

5. Don't fall into the trap of giving legal advice when negotiating with a pro se party. This can be very difficult. Clearly tell the pro se party that you can't advise them or interpret the law for them. When you tell a pro se party what your client's position is and the law that supports that position, keep it brief and clear-cut. It's best to do state these things in writing. And remember that long explanations can get you into trouble.

6. Set clear boundaries when dealing with pro se parties. Be as polite as possible, but not overly friendly. Otherwise you can wind up confusing both the pro se party and your client.

7. Advise your client to limit their interactions with the pro se party as much as possible. Clients can unintentionally tell the pro se party things such as "my lawyer said you should do X and Y." This opens the door to the pro

se party believing that you're advising them through your client, even if that wasn't your intent. Clients will talk to each other no matter what you do. But your client needs to know that discussing the case with an unrepresented opposing party can cause big problems for their case and your ability to be an effective advocate for them.

IX. Confidentiality and Client Secrets.

Your duty of confidentiality is one of the pillars of the lawyer-client relationship. Trust is the hallmark of an effective relationship between lawyer and client. A client must be able to communicate frankly and fully with his or her lawyer, especially when it comes to embarrassing and legally damaging or detrimental information.

Lawyer-client confidentiality involves related principles and bodies of law, including: the attorney-client privilege, the work product doctrine and the rules of professional conduct related to confidentiality of client information.

Remember that your duty of confidentiality continues after the lawyer-client relationship ends. Just because you no longer represent a client or you're finished with the legal matter, you cannot decide on your own to disclose a client's confidential information, even if you think it's a good idea, or helpful in a good cause.

Helpful Bar Counsel articles:

- *Top 10 Myths: The Duty of Confidentiality*, Helen Hierschbiel, OSB Bulletin, June 2009.
- *Disclosing Client Confidences: When Doing the "Right" Thing May be the Wrong Thing to Do*, Helen Hierschbiel, OSB Bulletin, Aug/Sept 2011.

A. ORPC 1.6.

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

2. **ORPC 1.6(b)**. A lawyer ***may*** reveal information relating to the representation of a client **to the extent the lawyer reasonably believes necessary**:

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

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

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

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

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

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

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

3. Be mindful of your duties of confidentiality under **ORPC 1.18** (prospective clients) and **ORPC 1.9(c)(2)** (former clients), as well as your duties under **ORPC 1.8(b)** and **1.9(c)(1)** regarding the use of information to the disadvantage of clients and former clients.

B. ORS 9.460 & ORS 40.225.

1. **ORS 9.460 Duties of attorneys.**
An attorney shall:
(3) Maintain the confidences and secrets of the attorney's clients consistent with the rules of professional conduct [.]

2. **ORS 40.225 (Oregon Evidence Code Rule 503). Lawyer-client privilege.**
   (1) As used in this section, unless the context requires otherwise:
      (b) "Confidential communication" means a communication not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the

communication.

(2) A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:
   (a) Between the client or the client's representative and the client's lawyer or a representative of the lawyer;
   (b) Between the client's lawyer and the lawyer's representative;
   (c) By the client or the client's lawyer to a lawyer representing another in a matter of common interest;
   (d) Between representatives of the client or between the client and a representative of the client; or
   (e) Between lawyers representing the client.

Recommendations:

Acting with caution is vital when it comes to client information. Even unintentional slips can destroy trust and can result in violations of your ethical duties to your client. New lawyers, especially in an age when the social definition of privacy is in such flux, must clearly understand and abide this fundamental duty.

Maintain safeguards in your office and your routines that prevent inadvertent and unauthorized disclosure of client information – by you, your staff, and any professionals you employ to work on a client's matter. This includes taking reasonable precautions to prevent a client's information from falling into the hands of unintended recipients. The reasonable expectation of privacy is a governing principle here.

Beware of email and other online communications. Consider using software that allows your client to securely log in with a password to access confidential and sensitive materials related to their case. Properly secure and clearly label printed materials you send to your client. If sending confidential documents, ask your client whether there's a risk of anyone at their address intercepting their mail. Before sending, triple-check the address, use a privacy envelope, and label the envelope "Confidential" in a clear manner. If sending mail to a client at a jail or any type of correctional institution, mental health facility or other such secure environment, be sure to label the envelope "Confidential Legal Mail" and include the client's SID, SWISS or other identifying number, as such institutions usually require this for delivery. Most correctional institutions do not allow staples and binder clips and have limits on the number of pages that can be included in mailings. Check with the institution.

If your client wants you to hold information confidential while they are alive but to disclose it to certain parties after their death, you must obtain written informed consent from the client to authorize the disclosure. Keep a copy of the consent signed by the client in your file, and include specific written instructions that your client has

approved so you know what to do with the information following a client's death. This situation may not come up often, but you may be prevented from fulfilling a deceased client's wishes if you don't get their written informed consent while they are living and competent to give that consent.

X. Withdrawing from Representation

ORPC 1.16. Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
  (1) the representation will result in violation of the Rules of Professional Conduct or other law;
  (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
  (3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
  (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
  (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
  (3) the client has used the lawyer's services to perpetrate a crime or fraud;
  (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
  (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
  (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
  (7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

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

Eventually, your representation of a client will come to an end. Sometimes this is a happy ending. Sometimes it's a nightmare. The following is a list of some of the things to keep in mind as you approach and arrive at the end point.

1. Regardless of how the representation ended, send a closing letter. If the matter isn't concluded but your client needs further legal help, advise your client of the need for a new lawyer, approaching deadlines and court dates, and any time limitations. Send copies of court orders and file materials. Advising a former client to contact the OSB Lawyer Referral Service is a very good idea. (In a criminal case, tell the former client to contact the court to see if they qualify for a court-appointed attorney.)

2. Avoiding prejudice (material adverse effect) to a client's matter is paramount. This impacts the timing of your withdrawal, what you say in your motion to withdraw, and may limit you from withdrawing at a critical point in the case.

3. Explain clearly, in writing, to your client why your withdrawal is necessary, especially if the lawyer-client relationship is strained. If you are withdrawing due to a conflict, give the client enough information so they can understand the reasons while also keeping confidences.

4. If you're fired, file your motion and take other required action immediately. Explain to clients in court-appointed cases that it's up to the court to grant or deny the request for a new lawyer.

5. File the appropriate motion to withdraw with the court, and send copies to opposing counsel. Make sure you are following relevant court rules. If you are court-appointed, be sure to keep a signed copy of the order allowing your withdrawal and send it to the client.

6. If you're court-appointed, the court's order allowing your withdrawal and/or appointing new counsel may mention the name of the lawyer newly appointed to your former client. Send a copy of this order to your former client and opposing counsel.

7. Use bland language in your motion to withdraw (such as "there has been an irremediable breakdown in the attorney-client relationship requiring my immediate withdrawal" or other such language). There are pitfalls to a "noisy" withdrawal. For instance, if you are withdrawing because your client wants your help to do something illegal, announce that to the court is perilous. Keep the language regarding your withdrawal as plain and limited as possible.

8. Make preparations for a request for the client file, either from the former client or the new lawyer. Ensure that the file contains only materials related to that client. You don't want to inadvertently send something related to another client that was mistakenly placed in the wrong file.

   Scanning and sending an electronic version on a CD or thumb drive is often a very effective way to deliver a client file nowadays. Document when you have delivered the file and to whom. Urge the client in writing to safeguard their file materials, and that electronic data degrades.

   While you may be permitted to put a possessory lien on a file due to unpaid fees, it may not be worth the fight. You don't want to risk prejudicing a client's case by not handing over the file, and then finding yourself having to respond to a bar complaint and/or facing discipline.

9. Promptly refund any unused retainer. If you have to do additional work on a client's case prior to withdrawal to avoid prejudice to the client's matter, do so as quickly and carefully as possible, and document the time spent with precision and extra clarity.

10. Sometimes, judges will ask why a client fired you. Your first response should be to repeat the bland language of your motion to withdraw. If the court presses the issue, it may help to diplomatically tell the court that your duty is to protect your client and that revealing the reasons to the court will not remedy the need for your withdrawal. If the court continues to press, one approach can be to submit an affidavit under seal in order to protect the client's interests. However, this may not be appropriate in all cases, and you may need to set the matter for a hearing to buy a bit of time to thoroughly explore the best options for the client. Call the bar or seek legal advice if you need.

11. Once you have withdrawn, remember you must still keep client confidences. If the client hires a new lawyer, get written confirmation from the new lawyer before speaking about any aspect of the case or providing any client file information.

12. Do your best to end the attorney-client relationship with good rapport intact. Most cases will end this way. In those that don't, try to avoid vendettas. Even the most volatile clients will usually move on from being upset with you so long as you don't stir up a hornet's nest by your words and actions in withdrawing.

XI. Additional Areas of Possible Lawyer Misconduct

Rule 8.4(a)

A. **ORPC 8.4(a)(2)**. A lawyer commits misconduct if he or she commits a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law. Note that this does not necessarily require a criminal conviction resulting in a particular sentence, but the commission of a criminal act bearing on honesty, trustworthiness or fitness.

B. **ORPC 8.4(a)(3)**. A lawyer commits misconduct if he or she engages in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law. Generally misrepresentation must be as to a material fact. However, this rule (and other provisions) involving lawyer honesty is not a trifling issue. Fly high above the tree line and avoid dipping down into "gray areas" when it comes to your honesty and trustworthiness.

C. **ORPC 8.4(a)(4)**. A lawyer commits misconduct if he or she engages in conduct that is prejudicial to the administration of justice. This rule is not a catch-all, but is rarely used on its own in disciplinary cases against lawyers. Rather, it undergirds a number of other provisions of the rules that seek to ensure lawyers are abiding their duties to properly advance a client's cause and maintain fundamental fairness of the judicial process and practice of law.

D. **ORPC 8.4(a)(7)** is similar to those adopted by other jurisdictions in the U.S. This provision makes it misconduct for a lawyer to, in the course of representing a client, knowingly intimidate or harass a person due to that person's race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation, marital status, or disability. This rule makes more specific prohibitions against harassment and intimidation in other provisions of the Oregon Rules of Professional Conduct. A lawyer may engage in "legitimate advocacy" on the bases cited in Rule 8.4(a)(7). However, "legitimate advocacy" has yet to be defined as applied to this rule. The case law in Oregon related to this provision will develop over time.

XI. Written Advisory Opinions

ORPC 8.6

A. The Oregon State Bar Board of Governors (BOG) issues the Formal Ethics Opinions. These give official guidance on the application of the provisions of the Oregon Rules of Professional Conduct.

B. The Oregon State Bar Legal Ethics Committee and General Counsel's Office may also issue information written advisory opinions on questions a lawyer may face regarding the Rules. These give informal guidance on particular circumstances involving provisions of the Oregon Rules of Professional Conduct, but are not binding on any disciplinary proceeding that may arise from a lawyer's misconduct related to those circumstances.

To obtain an informal advisory opinion letter from General Counsel's Office, a lawyer should contact General Counsel's Office by phone or email to make an initial inquiry, and then provide a clear, detailed written description of the circumstances. General Counsel's Office typically can respond in a reasonably short period of time. These letters may be requested even after a discussion with a lawyer in General Counsel's Office or the Client Assistance Office regarding an ethical issue.

C. The Disciplinary Board and the Oregon Supreme Court can consider a lawyer's good faith effort to comply with one of these opinions to show the lawyer made a good faith effort to comply with the Rules, and as a basis for mitigation of a sanction imposed on the lawyer if a violation is found.

XIII. Final Considerations

If someone files a bar complaint against you, it will most likely be filed by a client. Most bar complaints are about lack of communication, lack of diligence and issues related to fees, files or funds.

It takes time to document your work, your communication with clients and your handling of client property and funds. But it is important to do so to avoid or minimize complaints and save time over the long-term (both in terms of the underlying matter and the off-chance you have to respond to an inquiry by the bar due a client complaint). Even summaries written days after conversations with a client are helpful. If, despite these efforts, a complaint is filed against you, you can sleep at night knowing you have the documentation to back up your response. This isn't just about covering yourself against bar complaints. It's about being an effective advocate and a professional who others can trust.

If you have questions or concerns about ethics issues and the complaint process, contact the bar. The Client Assistance Office handles the initial review of all complaints and other inquiries about lawyer conduct. Complaints can be dismissed or referred to Disciplinary Counsel's Office for further action. If a complaint is referred, it is assigned to a lawyer in Disciplinary Counsel's Office for handling. At that stage of review, the complaint may be dismissed or authorized for prosecution before a disciplinary trial panel. The decision to prosecute a complaint is made by the State Professional

Responsibility Board (SPRB). Recommendations from Disciplinary Counsel's Office are considered but are not determinative.

The public can call to inquire about a lawyer's disciplinary history. Lawyers can call to inquire about the complaint history of a particular individual. The Client Assistance Office tries to resolve issues informally, if possible. Even where there is formal involvement by the Client Assistance Office, there may be a chance to resolve the dispute. You may want to hire your own lawyer to help you through the complaint process, especially if you think the bar may seek action against you.

The filing of a complaint by a client does not automatically create a conflict requiring the lawyer's withdrawal. However, a lawyer may choose to withdraw under these circumstances, so long as the withdrawal is done properly. If you reasonably believe dealing with a bar complaint causes you to focus more on your own interests than advancing your client's case, you should withdraw.

Resources

Oregon State Bar Legal Ethics Assistance Page
http://www.osbar.org/ethics

- Oregon Rules of Professional Conduct (PDF)
- Contact Info for General Counsel's Office
- Bar Counsel Article Archive (from OSB Bulletin, 2000 – present)
- Formal Ethics Opinions
- Basic search engine
- Rules, Regulations, and Policies of the Oregon State Bar

Professional Liability Fund
http://www.osbplf.org

- Practice Management Advisors
- Publications (most are included as part of PLF coverage)
- CD and DVD programs

Oregon Attorney Assistance Program (OAAP)
http://www.oaap.org

The Oregon Ethical Lawyer (OSB CLE, rev. 2015)

Oregon Rules of Professional Conduct Annotated
Jarvis, Moore, Sapiro & Tellam, Oregon Law Institute of Lewis & Clark Law School (2016, with 2017 and 2018 supplements).

Disciplinary Board Reporter (1984-present)
http://www.osbar.org/publications/dbreporter/dbreport.html

American Bar Association Center for Professional Responsibility
http://www.americanbar.org/groups/professional_responsibility.html

- Model Rules of Professional Conduct
- Publications and other resources

Don't forget that BarBooks has a wide array of publications and CLE presentations available to members of the Oregon State Bar. This is covered by your annual bar dues, so don't let this resource go to waste.

Some Additional Practical Tips

Communicate, Communicate, Communicate.

A large number of bar complaints result from poor communication between lawyer and client. As mentioned above, lawyers are ethically obligated to communicate basic information to a client and respond to their reasonable requests for information.

- Lawyers are often poor listeners. We are busy people, but listening carefully to a client helps us clearly understand what the client's concerns are and how we can address them. Good listening helps a lawyer find ways to focus a client's attention on what is most important to their legal matter and saves time and frustration in the long run for both lawyer and client.
- Remember that the client has only one legal matter and it is likely of great importance to the client. Manage your client's expectations. Don't say anything that could be interpreted as a guarantee of a particular result or within a particular time frame.
- When the client says it isn't about money, but principle, it's about the money! Give your client a realistic cost estimate (or explain that you can't predict the cost). Have clear, candid discussions with your client about fees if they begin to escalate.
- Do your best to avoid legal jargon when talking with your client. Explain substance and procedure fully and clearly using plain language. What may be second nature to you is often foreign to the client. When using a legal term is unavoidable or necessary, explain it to the client as best you can without getting bogged down in minutiae.
- Clients are generally more concerned about whether you care about their case than whether you achieve their objectives. Most clients experience more anxiety and stress about their case than they let on. Do your best to read body language, tone of voice and other non-verbal cues. Be patient with your clients.

Use Engagement Letters

It's impossible to overemphasize the value of clear written communication. Engagement letters are key components. While Oregon requires written fee agreements only in limited types of cases (e.g., contingent fee personal injury cases), they are *always* the better practice.

A good engagement letter should address the following:

1. The identity of the client, and others involved in the matter.
2. The nature and scope of work to be performed by the lawyer or firm.
3. A brief statement about what the client can reasonably expect (short term and long term) and the major events likely in their matter.

4. A clear explanation of the lawyer-client relationship, how the lawyer and client will communicate, and any office practices and processes relevant to the client.
5. A clear explanation of the fees and how they will be calculated, including any interest that will be charged on unpaid amounts.
6. An explanation of costs that will be charged in addition to fees.
7. Who will be responsible for fees and costs.
8. Whether a retainer (advance deposit) is required and whether it will need to be replenished when gone.
9. How often you will bill the client.
10. Other obligations of the client (address change information, alternate contact information, location and production of documents, etc.).
11. Circumstances under which the lawyer or firm will withdraw from the representation (or seek court permission to do so).
12. How disputes about fees will be resolved (arbitration, jurisdiction, venue, awards to prevailing parties).

Be a Professional

In your client's eyes, you are the embodiment of the legal profession and the legal system. The examples most people (even sophisticated clients) have of lawyers are television and film portrayals, which don't always show lawyers as people of honor or decency.

The *Statement of Professionalism* approved by the Oregon Supreme Court in 2006 is a thorough overview of the standards of professionalism to which all lawyers should aspire. While not binding, as are the Oregon Rules of Professional Conduct, these standards are a vital part of being an effective and ethical advocate. Specific areas of law may also have written performance standards and aspirational standards to consider.

Oregon has a small legal community. Like elephants, lawyers never forget. Neither do judges. And we love to gossip! Your reputation is hard won and easily lost if you engage in discourteous or rude behavior or sharp practices. Your professional life will be much easier and more satisfying if you are seen as a person who can be trusted and who treats others fairly.

At the same time, don't confuse professionalism with lack of zeal for your client's cause. Avoid personalizing the client's dispute and strive to strike the right balance between concern for your client's cause and your own appropriate professional distance and objectivity.

You can be a vigorous advocate for your client without being extreme, uncompromising or discourteous. As the saying goes, "It is easier to catch flies with honey than with vinegar."

(These additional practical tips are adapted from materials prepared by Sylvia Stevens, former OSB General Counsel and former Executive Director)

You have options for help with legal ethics matters:

1) Contact the Oregon State Bar: 503-620-0222.

The lawyers in General Counsel's Office and the Client Assistance Office at the Oregon State Bar are usually available to discuss legal ethics questions over the telephone. This is a free service to OSB members. There is no attorney-client relationship formed between bar lawyers and a bar member who contacts the bar, and calls are *not* confidential. General Counsel can provide an informal written ethics opinion letter on request. Visit www.osbar.org/ethics for more information.

Keep in mind that the information and feedback you get from a phone call with the bar will be limited in scope, and based on the time available and the details you are able to provide. The lawyers at the bar are experienced and do their best to help you walk through ethics issues. But the help you receive may or may not be enough for your particular situation.

2) Contact a lawyer with experience in legal ethics matters.

Like any other legal matter or concern, you may want to consult (and ultimately hire) a lawyer with experience in legal ethics and professional responsibility matters. Whether you are dealing with a bar complaint, possible discipline, or simply want to troubleshoot an issue, an experienced lawyer can help.

There are a few lawyers in Oregon with a depth of experience in this niche area of the law. Some of the lawyers in this practice area also advise lawyers in developing office systems and strategies to help avoid ethics and malpractice problems. You may be able to get the name of a lawyer to consult about an ethics issue from Member Services at the Oregon State Bar office.

3) Talk to a colleague who has dealt with the issue you're facing.

Few ethics concerns and problems are issues of first impression. There may be someone in your professional circle who has faced the issue you are facing.

4) Review the text of the ORPC, Oregon Ethics Opinions, and case law.

5) Contact the Oregon Attorney Assistance Program (OAAP) for support.

The Attorney Counselors at the OAAP provide a wide range of support to Oregon lawyers. If you're facing a difficult issue with a client, a bar complaint, or virtually any kind of personal issue, they are there to help you. The OAAP regularly has groups of various types for an array of support. This is a *confidential* service.

6) Breathe, face the issue head on, and avoid isolation.

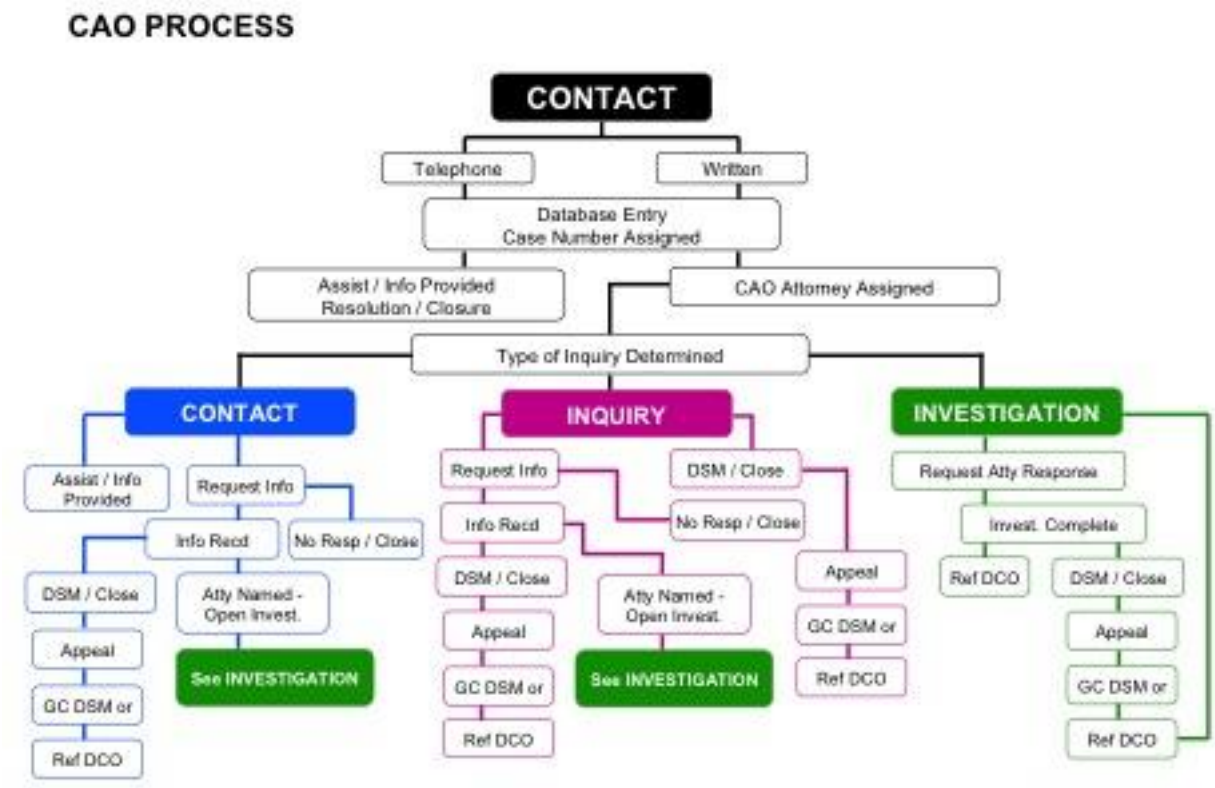
Statement of Professionalism

Adopted by the Oregon State Bar House of Delegates and
Approved by the Supreme Court of Oregon effective December 12, 2011

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 the courage to care about and act for the benefit of our clients, our peers, our careers, and the public good. Because we are committed to professionalism, we will conduct ourselves in a way consistent with the following principles in dealing with our clients, opposing parties, opposing counsel, the courts, and the public.

- 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 unlawful or unethical discrimination.
- I will protect and improve the image of the legal profession in the eyes of the public.
- I will promote respect for the courts.
- I will support a diverse bench and bar.
- 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.

Appendix A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MANDATORY REPORTING FOR OREGON ATTORNEYS

SEAN M. PANK & JOSHUA M. GUMS
MORRIS & SULLIVAN P.C.
HOOD RIVER
THE DALLES

WHO IS REQUIRED TO REPORT

- **Medical Professionals**
- **Audiologists and Therapists**
- **Police Officers, Firefighters, EMTs**
- **School and College Employees**
- **Health and Human Services Workers**
- **Care Providers and Legal Custodians**
- **Clergy and Mental Health Professionals**
- **Physical, Speech and Occupational Therapists**
- **Members of the Legislative Assembly**
- Attorneys

WHY IS REPORTING ABUSE IMPORTANT

As an example, the elder abuse statute is reproduced below:

"The Legislative Assembly finds that for the purpose of preventing abuse, safeguarding and enhancing the welfare of elderly persons, it is necessary and in the public interest to require mandatory reports and investigations of allegedly abused elderly persons."

ORS 124.055

WHAT NEEDS TO BE REPORTED

- ELDER ABUSE: Duty to report ORS 124.060
- CHILD ABUSE Duty to report ORS 419B.010

Not covered in this presentation:

- Long-Term Care Resident—ORS 441.640 applies to a lawyer only if they represent "a resident or guardian or family member of the resident."
- Mental Illness/Developmental Disability—ORS 430.765 operates very similarly to elder & child abuse reporting.

THE DUTY TO REPORT

- You **must** report abuse if you have:
  - **Contact** with an abuser or a victim, and
  - **Reasonable cause** to believe that
  - A **protected person**
  - Has Been **abused,**
- UNLESS an exception applies.

HOW TO REPORT

- Immediately = without delay
- **To DHS or law enforcement**
- Oral report required
- Give as much as information as possible
- Explain allegation of abuse

Reporting Hotline:
1-855-503-SAFE
or call DHS Branch Offices

WHAT TO INCLUDE IN THE REPORT

- Names and addresses
- Nature and extent of the abuse
- Explanation given for the abuse
- Cause of abuse and identity of perpetrator.

WHEN IS REPORTING REQUIRED

- BOTTOM LINE: WHEN YOU HAVE REASONABLE CAUSE

- ORS 124.060 requires attorneys to report abuse when they have reasonable cause "to believe that any person 65 years of age or older with whom the official comes in contact has suffered abuse, or that any person with whom the official comes in contact has abused a person 65 years of age or older . . ."
- ORS 419B.010 requires attorneys to report abuse when they have reasonable cause "to believe that any child with whom the official comes in contact has suffered abuse or that any person with whom the official comes in contact has abused a child . . ."

WHEN DO YOU HAVE REASONABLE CAUSE

- Reasonable cause is undefined in the abuse reporting statutes.
- The Oregon Court of Appeals held that reasonable cause is equivalent to reasonable suspicion, a 'very low evidentiary threshold for deciding that a complaint is founded.' " *Meier v. Salem-Keizer School District*, 284 Or App 497, 505-06 (2017); s*ee also Berger v. SOSCF*, 195 Or App 587, 590 (2004) (equating reasonable cause with reasonable suspicion in a child abuse reporting context).
- Reasonable suspicion is more than a hunch, it requires an ability to point to articulable facts based on the totality of the circumstances.
- Reasonable suspicion has a subjective and objective component, in that a suspicion of [abuse] must be objectively reasonable.

YOU DON'T HAVE TO DETERMINE THAT ABUSE OCCURRED

- **Your job is not to determine whether abuse occurred.**
- You do not need to investigate
- Do you have a reasonable suspicion of abuse?
- Okay to comment on injury or situation and observe
- If the explanation does not suit the injury, make a report.
- "There is a role for the exercise of judgment in determining whether a report gives rise to a reasonable suspicion of abuse" *Meier*, 284 Or App at 507.
- The experts will take it from there.

WHAT IS CONTACT?

- The statute requires a lawyer to report based upon any person "with whom the lawyer comes in contact." The term "contact" is not defined in the statute.
- Although it might seem to suggest some kind of physical contact, telephone or e-mail contact may suffice.
- A direct contact between the person being abused or doing the abusing and the lawyer.
- The contact doesn't have to be before the abuse or even connected to the abuse in any way.

WHAT IS ELDER ABUSE

- Physical Injury
- Neglect
- Abandonment
- Willful infliction of physical pain or injury
- Crimes under Chapter 163
- Verbal Abuse
- Financial Exploitation
- Sexual Abuse
- Involuntary Seclusion
- Wrongful use of Physical or Chemical Restraint

NEGLECT

- ORS 124.050 and OAR 411-020-0002(1)(b):
- Failure to provide the care, supervision or services necessary to maintain the physical health, mental health and safety of an elderly person
- May be active or passive
- The failure creates a risk of serious harm or results in physical harm, significant emotional harm, unreasonable discomfort or serious loss of personal dignity.
- The expectation of care may arise from assumed responsibility or a legal or contractual agreement

RELIGIOUS EXEMPTION

- ORS 124.095 and OAR 411-020-0002(1)(b)(B):
- An Elderly person who in good faith is voluntarily under treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination, for this reason alone, will not be considered subjected abuse by reason of neglect.

SIGNS OF NEGLECT

- Dirt, fecal/urine smell or other health and safety hazards in the elder's residence
- An elder left in an unsafe or isolated place
- Rashes, sores or lice on the elder
- Malnourishment, dehydration or sudden weight loss
- Untreated medical condition
- Soiled clothing or bed linens
- Poor skin condition
- Poor hygiene
- Lack of food
- Lack of medical aids (e.g., glasses, hearing aid, medications, walker, dentures)
- Home in disrepair
- Confined to bed
- Home lacks adequate facilities or utilities

ABANDONMENT

- ORS 124.050(1)(c) and OAR 411-020-0002(1)(c):
- Includes desertion or willful forsaking of an elderly person or the withdrawal or neglect of duties and obligations owed an elderly person by a caretaker or other person.
- By a person who assumed responsibility for providing care
- Results in harm or places the adult at risk of serious harm

VERBAL ABUSE

- To threaten significant physical or emotional harm to an elder through use of:
- Derogatory or inappropriate names, insults, verbal assaults, profanity or ridicule; or
- Harassment, coercion, threats, intimidation, humiliation, mental cruelty or inappropriate sexual comments.
- Includes oral, written or gestured communication that is directed to an elder or within their hearing distance, regardless of their ability to comprehend.
- Emotional harm that may result includes anguish, distress, fear, unreasonable emotional discomfort, loss of personal dignity or loss of autonomy.
- ORS 124.050(13) and OAR 411-020-0002(1)(d).

FINANCIAL ABUSE

- Wrongfully taking the assets, funds or property belonging to or intended for the use of an elder.
- Alarming an elder by conveying a threat to wrongfully take or appropriate money or property of the elder if the elder would reasonably believe that the threat would be carried out.
- Misappropriating, misusing or transferring without authorization any money from any account held jointly or singly by an elder.
- Failing to use the income or assets of an elder effectively for the support and maintenance of the person
- ORS 124.050(4)

INVOLUNTARY SECLUSION

- Involuntary seclusion for either the convenience of the caregiver or discipline of the elder constitutes abuse.

It includes:

- Confinement or restriction of an elder to his or her room or a specific area; or
- Placing restrictions on an adult's ability to associate, interact, or communicate with other individuals.
- In a facility, monitored separation from other residents may be permitted if used for a limited time when:
  - Used as part of a care plan after other interventions have been tried
  - Used as a de-escalating intervention until the facility monitors the behavior and develops care plan
  - The resident needs to be secluded from certain areas of the facility when their presence in that specified area poses a risk to health or safety.
  - OAR 411-020-0002(1)(g)

WRONGFUL RESTRAINT

- ORS 124.050(j) defines this type of abuse as a wrongful use of a physical or chemical restraint not prescribed by a licensed physician, consistent with an approved treatment plan or in connection with a court order.
- Includes situations where a restraint is used for convenience or discipline, less restrictive alternatives have not been evaluated, or a licensed health professional has not conducted a thorough assessment before implementing a prescription for restraint. OAR 411-020-0002(1)(h).
- Physical restraints may be permitted if used when a resident's actions present an imminent danger to self or others and only until immediate action is taken by medical, emergency or police personnel. *Id.*

WHAT IS CHILD ABUSE

- Any assault; any injury not caused by accident; any injury at variance with the explanation given for it.
- Any mental injury caused by cruelty
- Rape, sexual abuse, or sexual exploitation
- Neglect
- Child selling
- Presence where methamphetamines are manufactured
- Unlawful exposure to controlled substance w/risk of harm
- Threat of harm
- Abuse does not include reasonable discipline unless it results in the above

ORS 419B.005(1)

UNPACKING CHILD ABUSE

- **"Any injury at variance with the explanation given for it." - Most common way abuse is discovered.**
- **Mental injury:**
  - **Cruel punishments**
  - **Exposure to domestic violence**
  - **Shutting a child out of the family**
- **Neglect:**
  - **Not meeting basic needs: food, clothing, shelter, supervision, medical care**
  - **Parent's drug use—must impair parenting skills to be abuse**
  - **DHS says 12-year-old child can be left alone to care for other kids.**
- **Threat of Harm:**
  - **Substantial risk of harm to a child's health or welfare.**
  - **Examples:**
    - **DV with child present**
    - **DUII with child in car**
    - **No skills to care for newborn**
    - **Parent caused severe harm to another child.**

WARNING SIGNS OF CHILD ABUSE

- Unexplained injury or one that doesn't fit the explanation given for it
- Injuries in various stages of healing
- Multiple bruises or bruises on soft tissue; any bruise on a baby
- Child wary of parents or adults generally.
- Fatigue, listlessness, constant hunger
- Unusual sexual knowledge
- Inappropriately adult or infantile

WHAT ABOUT THE RPCS

- Both abuse reporting statutes discussed today contain exceptions for information that cannot be disclosed under the Oregon Rules of Professional Conduct.

Attorneys are not required to report information that is:

- **Attorney-Client Privileged** under ORS 40.225 (OEC 503)
- **Information communicated during representation that is *detrimental* to client** if disclosed (reconciles RPC 1.6 duty)

RPC 1.6

- General prohibition that prevents lawyers from revealing information "relating to the representation of a client."
- Information relating to representation includes: attorney client privileged information, information that will be likely detrimental to the client, information that is embarrassing to the client, or information that is a secret.
- Only detrimental information or privileged information is exempt from disclosure.
- "If the information about the abuse is subject to the lawyer-client privilege, or if it was gained during the course of representing a client and would be detrimental to the client if disclosed, then the lawyer is exempt from reporting. Therefore, lawyers generally are not required and not permitted to report child abuse if it would mean revealing confidential client information."

Source: https://www.osbar.org/publications/bulletin/09jun/barcounsel.html

ATTORNEY CLIENT PRIVILEGE

- The communication must be confidential (I.E., not communicated to a third party unless the third party was working for the lawyer).
- The communication must be made by a client, a former client, or a prospective client, or a representative of a client. For example, in a corporation, a representative is someone with authority to hire the lawyer to act on behalf of the corporation.

WHEN CAN YOU REPORT PROTECTED INFORMATION

- If there is implied authorization in order to carry out the representation
- If the client has expressed an intention to commit a crime
- If disclosure is necessary to prevent reasonably certain death or substantial bodily injury
- If the client gives informed consent
- Example: *In re Hasche,* 20 DB Rptr 96 (2006). A represented both H&W in immigration proceedings. H already under a deportation order and a warrant issued. A becomes aware of severe domestic abuse taking place in the relationship. Believing that H would commit further crimes and that injury might result, he told ICE where to pick up H. Held: No violation of RPC 1.6. Panel: "We are not going to second-guess his decision."

EXCEPTIONS TO REPORTING REQUIREMENT

If you have reasonable cause to believe that any of the preceding abuse has occurred and you have had contact with the suspected victim or abuser you must report unless:

- The information is protected under the Attorney-Client privilege or
- The information was received through communication during representation and is detrimental to the client if disclosed.

DUPLICATIVE REPORTS (CHILD ABUSE ONLY)

- A report has already been made.
- A proceeding to investigate the abuse is already pending.
- The attorney has a reasonable belief the information is already known.

Remember

- There is a statutory duty to report abuse to following protected persons:
  - The Elderly ORS 124.060
  - Children ORS 419B.010
  - People with Mental Illness/Developmental Disability—ORS 430.765
  - Long-Term Care Resident—ORS 441.640
- When in doubt, consult the law!

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