

Zoom Webinar:

Examining Potential Malpractice Risks of Practicing in the COVID-19 Era

May 20, 2020
10:00 AM – 11:00 AM

Presented by Hong Dao & Holli Houston
OSB Professional Liability Fund

Materials:

- PowerPoint slides
- Sample client/case screening checklist
- Sample client engagement letter checklist
- The following written materials and more can be found at the PLF's website:
<https://www.osbplf.org>.
 - Malpractice Risk Factors and How to Avoid Them – Part I:
https://www.osbplf.org/assets/in_briefs_issues/Malpractice%20Risk%20Factors%20and%20How%20to%20Avoid%20Them.pdf
 - Malpractice Risk Factors and How to Avoid Them – Part II:
https://www.osbplf.org/assets/in_briefs_issues/Malpractice%20Risk%20Factors%20and%20How%20to%20Avoid%20Them%20Part%20II.pdf
 - Disaster Response and Recovery Checklist:
<https://www.osbplf.org/assets/forms/pdfs//Disaster%20Response%20and%20Recovery%20Checklist.pdf>
 - Protecting Yourself & Your Firm from Data Breach Checklist:
<https://www.osbplf.org/assets/forms/pdfs//Protecting%20Yourself%20and%20Your%20Law%20Firm%20from%20Data%20Breach%20Checklist.pdf>
 - Resources for Working Remotely in the Age of COVID-19:
https://www.osbplf.org/assets/forms/practice_forms/Resources%20for%20Working%20Remotely%20in%20the%20Age%20of%20COVID-19.pdf



Speakers



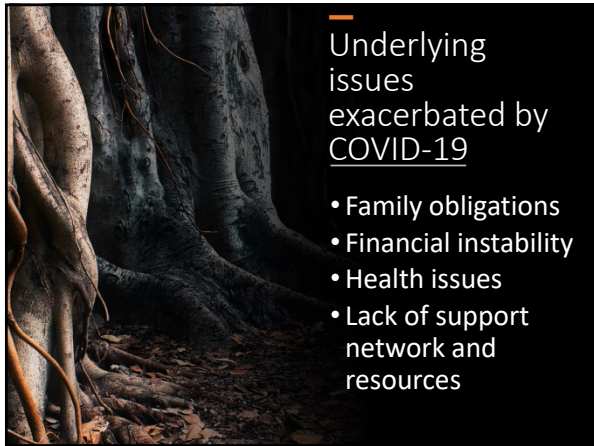
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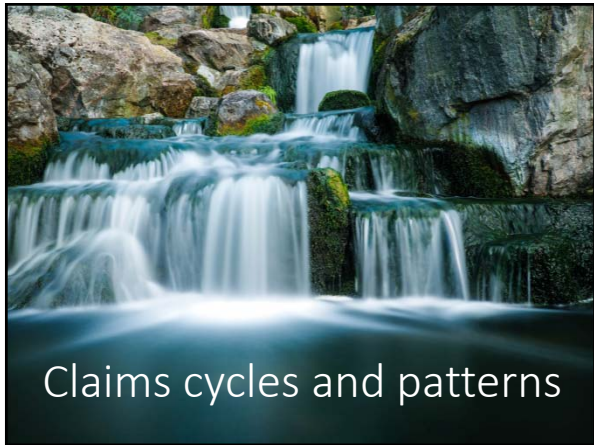
A slide with a background image of several black pens and a red pen drawing a circle on a white surface. The text "Practicing a little differently..." is in white on a dark grey background. Below the title is a list of three bullet points in white.

- Thinking about contingencies
- Moving services online
- Advocating remotely

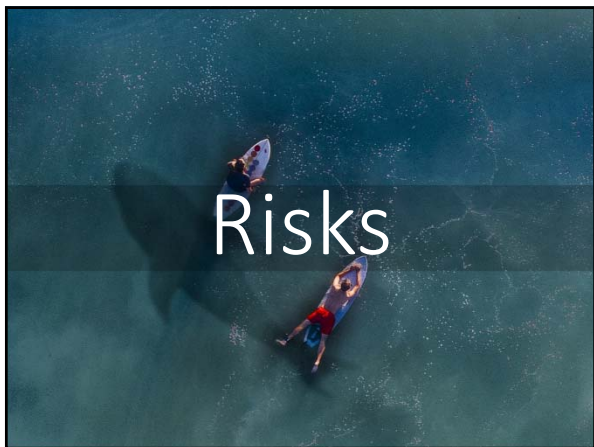


Underlying issues exacerbated by COVID-19

- Family obligations
- Financial instability
- Health issues
- Lack of support network and resources



Claims cycles and patterns



Risks



Working from home

Security risks

Access issues

The slide features a background image of a home office with a desk, chair, and window. On the right side, there are three icons: a hexagonal molecular structure, a padlock, and a document with a checkmark. The text 'Working from home' is overlaid on the left, 'Security risks' is next to the padlock icon, and 'Access issues' is next to the document icon.



Cyberattacks and scams

Exposed data

Breach of confidentiality

Loss and expense

The slide has a dark blue background with a circuit board pattern. It features three orange icons: a folder, a padlock, and a stack of money. The text 'Exposed data' is below the folder icon, 'Breach of confidentiality' is below the padlock icon, and 'Loss and expense' is below the money icon. The title 'Cyberattacks and scams' is at the top.



Lack of contingency planning

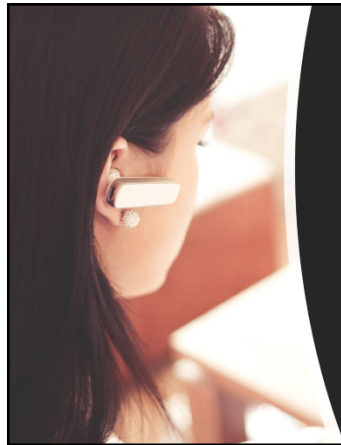
- Hasty or delayed response
- Business disruption
- Harms to clients

The slide features a background image of a red umbrella in the rain. The title 'Lack of contingency planning' is on the right, and a bulleted list of three items is below it.



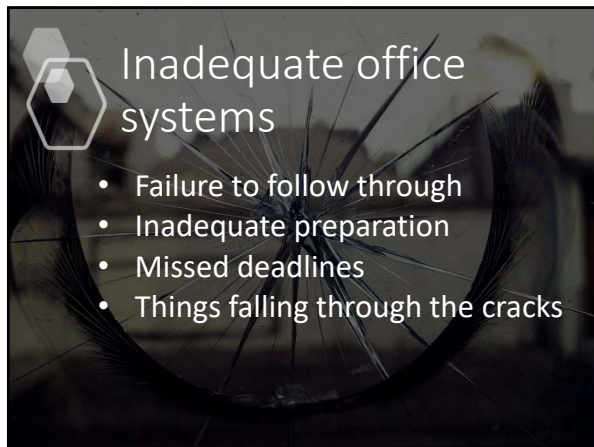
Dabbling

- Inadequate client/case screening
- Risky clients



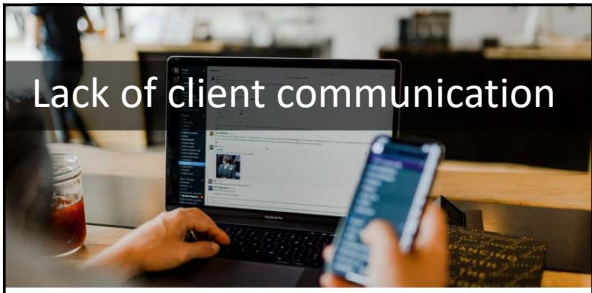
Lack of / insufficient supervision

- Unauthorized practice of law
- Errors & mistakes



Inadequate office systems

- Failure to follow through
- Inadequate preparation
- Missed deadlines
- Things falling through the cracks



Lack of client communication

- Client abandonment
- Poor client relations
- Ineffective representation



Conflict of interests

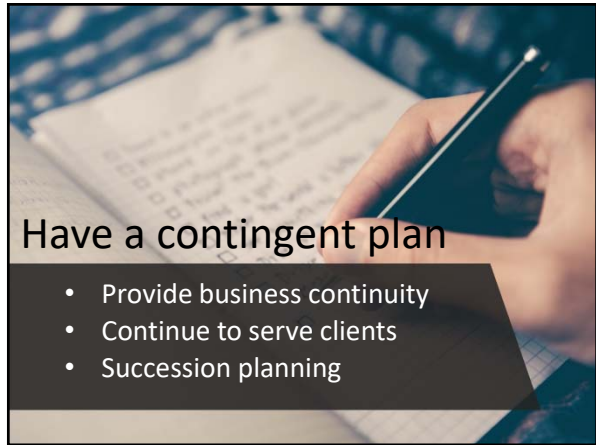
Client conflicts | Self interests



Other Issues

- Confusion over changing rules
- Timelines are unpredictable
- Client circumstances changed
- General overwhelm



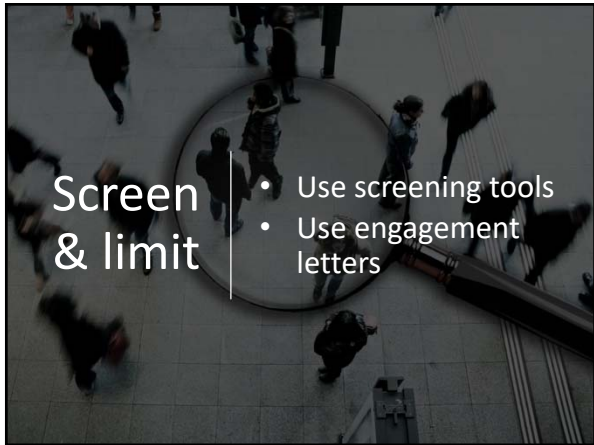






Invest in the right tools

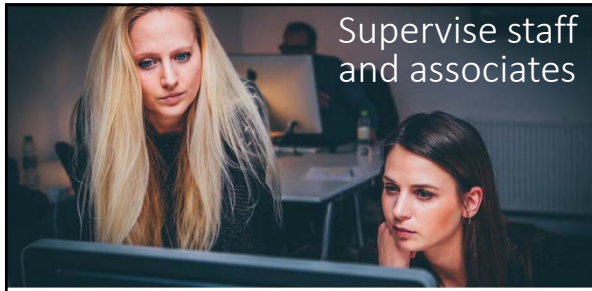
- Streamline office systems
- Upgrade technology and security



Screen & limit

- Use screening tools
- Use engagement letters

Checklist for Drafting Engagement Letters	Client Screening Checklist
<p>We recommend that all engagement letters address the following issues:</p> <ul style="list-style-type: none"> Acceptance of engagement: Clearly state that the client has agreed to hire you and you have agreed to represent the client. Identification of the client: Identify who the client is and who the client is not. Clarify whether the client is an individual or corporation, partnership, etc. If there are other parties closely affiliated with the client, identify the relationship of those parties. Identification of the matter: Describe the work to be done in lay terms. "You have engaged me to represent you in a matter involving _____ with the goal of _____ through writing and _____." Scope of the engagement: Define the scope of representation by specifying what you will and will not do for the client. See Item 10.01, 10.02, 10.03, 10.04, 10.05, 10.06, 10.07, 10.08, 10.09, 10.10, 10.11, 10.12, 10.13, 10.14, 10.15, 10.16, 10.17, 10.18, 10.19, 10.20, 10.21, 10.22, 10.23, 10.24, 10.25, 10.26, 10.27, 10.28, 10.29, 10.30, 10.31, 10.32, 10.33, 10.34, 10.35, 10.36, 10.37, 10.38, 10.39, 10.40, 10.41, 10.42, 10.43, 10.44, 10.45, 10.46, 10.47, 10.48, 10.49, 10.50, 10.51, 10.52, 10.53, 10.54, 10.55, 10.56, 10.57, 10.58, 10.59, 10.60, 10.61, 10.62, 10.63, 10.64, 10.65, 10.66, 10.67, 10.68, 10.69, 10.70, 10.71, 10.72, 10.73, 10.74, 10.75, 10.76, 10.77, 10.78, 10.79, 10.80, 10.81, 10.82, 10.83, 10.84, 10.85, 10.86, 10.87, 10.88, 10.89, 10.90, 10.91, 10.92, 10.93, 10.94, 10.95, 10.96, 10.97, 10.98, 10.99, 10.100. Fee and billing: This includes the following fee and billing information in the engagement letter or via a separate fee agreement. Be aware that there are special requirements for contingent fee agreements and "hour-or-nothing" fee agreements. See CIPM 13.01(1)(1), 13.01(2), 13.01(3), 13.01(4), and 13.01(5), respectively. <ul style="list-style-type: none"> • Agree to identify which is responsible for paying your attorney fees. Is a third party responsible, along with 13.01(1) to make proper disclosure and get the client's informed consent. Request a written statement if you want the third party to be responsible for the fees. See CIPM 13.01(1), 13.01(2), 13.01(3), 13.01(4), 13.01(5), 13.01(6), 13.01(7), 13.01(8), 13.01(9), 13.01(10), 13.01(11), 13.01(12), 13.01(13), 13.01(14), 13.01(15), 13.01(16), 13.01(17), 13.01(18), 13.01(19), 13.01(20), 13.01(21), 13.01(22), 13.01(23), 13.01(24), 13.01(25), 13.01(26), 13.01(27), 13.01(28), 13.01(29), 13.01(30), 13.01(31), 13.01(32), 13.01(33), 13.01(34), 13.01(35), 13.01(36), 13.01(37), 13.01(38), 13.01(39), 13.01(40), 13.01(41), 13.01(42), 13.01(43), 13.01(44), 13.01(45), 13.01(46), 13.01(47), 13.01(48), 13.01(49), 13.01(50), 13.01(51), 13.01(52), 13.01(53), 13.01(54), 13.01(55), 13.01(56), 13.01(57), 13.01(58), 13.01(59), 13.01(60), 13.01(61), 13.01(62), 13.01(63), 13.01(64), 13.01(65), 13.01(66), 13.01(67), 13.01(68), 13.01(69), 13.01(70), 13.01(71), 13.01(72), 13.01(73), 13.01(74), 13.01(75), 13.01(76), 13.01(77), 13.01(78), 13.01(79), 13.01(80), 13.01(81), 13.01(82), 13.01(83), 13.01(84), 13.01(85), 13.01(86), 13.01(87), 13.01(88), 13.01(89), 13.01(90), 13.01(91), 13.01(92), 13.01(93), 13.01(94), 13.01(95), 13.01(96), 13.01(97), 13.01(98), 13.01(99), 13.01(100). • Agree to identify which is responsible for paying your attorney fees. Is a third party responsible, along with 13.01(1) to make proper disclosure and get the client's informed consent. Request a written statement if you want the third party to be responsible for the fees. See CIPM 13.01(1), 13.01(2), 13.01(3), 13.01(4), 13.01(5), 13.01(6), 13.01(7), 13.01(8), 13.01(9), 13.01(10), 13.01(11), 13.01(12), 13.01(13), 13.01(14), 13.01(15), 13.01(16), 13.01(17), 13.01(18), 13.01(19), 13.01(20), 13.01(21), 13.01(22), 13.01(23), 13.01(24), 13.01(25), 13.01(26), 13.01(27), 13.01(28), 13.01(29), 13.01(30), 13.01(31), 13.01(32), 13.01(33), 13.01(34), 13.01(35), 13.01(36), 13.01(37), 13.01(38), 13.01(39), 13.01(40), 13.01(41), 13.01(42), 13.01(43), 13.01(44), 13.01(45), 13.01(46), 13.01(47), 13.01(48), 13.01(49), 13.01(50), 13.01(51), 13.01(52), 13.01(53), 13.01(54), 13.01(55), 13.01(56), 13.01(57), 13.01(58), 13.01(59), 13.01(60), 13.01(61), 13.01(62), 13.01(63), 13.01(64), 13.01(65), 13.01(66), 13.01(67), 13.01(68), 13.01(69), 13.01(70), 13.01(71), 13.01(72), 13.01(73), 13.01(74), 13.01(75), 13.01(76), 13.01(77), 13.01(78), 13.01(79), 13.01(80), 13.01(81), 13.01(82), 13.01(83), 13.01(84), 13.01(85), 13.01(86), 13.01(87), 13.01(88), 13.01(89), 13.01(90), 13.01(91), 13.01(92), 13.01(93), 13.01(94), 13.01(95), 13.01(96), 13.01(97), 13.01(98), 13.01(99), 13.01(100). 	<ul style="list-style-type: none"> • What are the client's expectations (with both the outcome and time involved)? • Are they reasonable? (Answer "yes" or red flag.) • If expectations are not reasonable, is the client able to adjust his/her expectations to make them reasonable? (Answer "yes" or red flag.) • Has the client shown interest/commitment to be diligent or to lack integrity? (Answer "yes" or red flag.) • Has the client indicated that s/he will be difficult to control as a witness? (Answer "yes" or red flag.) • Does the client indicate difficulty or unwillingness to pay or express financial hardship? (Answer "yes" or red flag.) • Has the client retained prior attorneys in the same matter? (Answer "yes" or red flag.) • If so, why did the previous attorney-client relationship end? • Has the client made claims or grievances against any prior attorneys? (Answer "yes" or red flag.) <p>Case Screening Checklist</p> <ul style="list-style-type: none"> • Does this case fall outside of the types of cases you normally accept? (Answer "yes" or red flag.) • Do you have or can you acquire the requisite skill and knowledge to take on the case? (Answer "yes" or red flag.) • Do you have the time and resources necessary to be thorough and prepared for this case? (Answer "yes" or red flag.) • Do you have a matter or an experienced lawyer whom you can seek advice and guidance on this case? (Answer "yes" or red flag.) <p>What to do if Red Flags are Raised</p> <ul style="list-style-type: none"> • If red flag to initial and one other case involving the client for pending before or completed. • If any red flag are going off, decline that client, and send that person a nonengagement letter.



Supervise staff and associates

- Properly delegate
- Review work product
- Regularly check-ins



Be Proactive

- Keep apprised of changing rules
- Manage client expectations
- Do not wait until the last minute
- Be flexible



Training and education

- Written policies: security & remote work
- Offer cybersecurity & fraud/scam training
- Make security tools available

Online Security Awareness Training Courses

- BrightWise (<https://www.brightwise.com>)
- Inspired eLearning (<https://inspiredelearning.com>)
- KnowBe4 (<https://www.knowbe4.com>)
- Proofpoint (<https://www.wombatsecurity.com>)
- Webroot (<https://www.webroot.com/us/en/business/security-awareness>)



DOJ Free Fraud Prevention Training

Request Free Fraud Prevention Training

Community Outreach by the Oregon DOJ

Community education is a fundamental part of the Oregon DOJ's comprehensive approach to fighting fraud and protecting Oregonians. In a state as diverse and large as Oregon, community outreach takes many different forms, ranging from presentations to the community, to appearances on local radio or television.

Ellen Klem, Director of Consumer Outreach & Education, facilitates and coordinates the Oregon Department of Justice's community outreach efforts.

To request a presentation or appearance by Ellen Klem, please download and fill out the following form:

PRESENTATION REQUEST FORM

You can email, fax or mail the form, and Ellen Klem will be in touch to confirm.

Email the form to: ellen.klem@doj.state.or.us

Fax the form to: (503) 378-4017

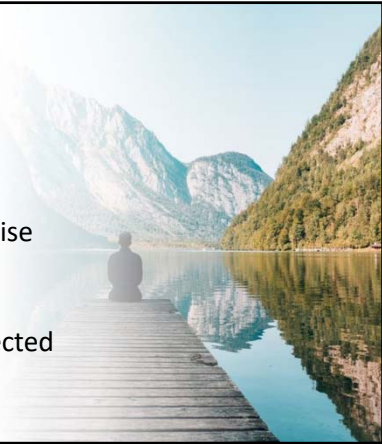
Mail the form to:

Ellen Klem, Director of Consumer Outreach & Education
Oregon Department of Justice, Office of the Attorney General
1152 Court St. NE
Salem, OR 97301

<https://www.doj.state.or.us/consumer-protection/sales-scams-fraud/request-free-fraud-prevention-training/>

Self-Care

- Nutrition
- Physical exercise
- Meditation
- Counseling
- Staying connected





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Client Screening Checklist

Proper client screening is one of the most effective ways to reduce the risk of malpractice claims. The purpose of screening is to filter out high-risk clients, who are more likely to bring an unmerited malpractice claim against lawyers or otherwise make your practice unenjoyable. Use the following questions to help you identify red flags.

- What are the client's expectations (with both the outcome and time involved)?
- Are they reasonable? (Answer "no" is red flag.)
- If expectations are not reasonable, is this client able to adjust his/her expectations to make them reasonable? (Answer "no" is red flag.)
- Has the client show himself/herself to be dishonest or to lack integrity? (Answer "yes" is red flag.)
- Has the client indicated that s/he will be difficult to control as a witness? (Answer "yes" is red flag.)
- Does the client indicate difficulty or unwillingness to pay or express financial hardship? (Answer "yes" is red flag.)
- Has the client retained prior attorneys in the same matter? (Answer "yes" is red flag.)
- If so, why did the previous attorney-client relationship end? (PC's unwilling to explain is red flag.)
- Has the client made claims or grievance complaints against any prior attorneys? (Answer "yes" is red flag.)

Case Screening Checklist

Besides screening clients, it's also important to assess the case to ensure you can provide competent representation. Use these questions to help you screen cases.

- Does this case fall outside of the type of cases you normally accept? (Answer "yes" is red flag.)
- Do you have or can you acquire the requisite skill and knowledge to take on the case? (Answer "no" is red flag.)
- Do you have the time and resources necessary to be thorough and prepared for this case? (Answer "no" is red flag.)
- Do you have a mentor or an experienced lawyer whom you can seek advice and guidance on this case? (Answer "no" is red flag.)

What to do if Red Flags are Raised

- If a red flag is raised, put extra effort into evaluating the client by asking follow-up questions.
- If many red flags are going off, decline that client and send that person a nonengagement letter.

Checklist for Drafting Engagement Letters

Your engagement letter should address the following issues:

- Acceptance of Engagement** – Clearly state that the client has agreed to hire you and you have agreed to represent the client.
- Identification of the client** – Identify who the client is and who the client is not. Clarify whether the client is an individual, a corporation, a partnership, etc. If there are other parties closely affiliated with the client, explicitly disclaim representation of those parties.
- Identification of the matter** – Describe the work to be done (e.g., “You have engaged our firm to represent you in a matter involving _____ with the goal of recovering damages arising out of _____”).
- Scope of the Engagement** – Define the scope of representation by specifying what you will and will not do for the client (e.g. “We have agreed to do A, B, and C, but not X, Y, and Z”). If the client has additional or future legal needs not covered by this engagement letter, state whether that additional work will need a separate engagement letter or whether an addendum to this engagement letter is sufficient.
- Fees and Billing** – You may include the following fee and billing information in the engagement letter or use a separate fee agreement. Be aware that there are special requirements for contingency fee agreements and “earned up receipt” fee agreements. See ORPC 1.5(c)(1)-(2), ORS 20.340, and ORPC 1.5(c)(3), respectively.
 - *Payor* – Specify who is responsible for paying your attorney fees. If a third party is responsible, comply with ORPC 1.8(f) to make proper disclosure and get the client’s informed consent. Redact your billing statement if it’s sent to the third party to protect client information. See OSB Formal Ethics Op. No. 2005-157. Specify who should get any prepaid but unearned fees when the representation concludes.
 - *Rates and basis* – Explain the hourly rates for the lawyers and staff working on the matter and how they are calculated. Explain the types of tasks or activities for which the client will be billed.
 - *Retainer (deposit) or advance flat fee* – If you’re requesting a retainer or charging a flat fee paid in advance, specify the amount and explain that the money will be deposited in the lawyer trust account to be withdrawn only after work is completed and a statement is sent to the client.
 - *Expenses and costs* – Explain who is responsible for costs and expenses incurred in the matter. Specify which expenses may be advanced by you and which are paid directly by the client. If you plan to advance expenses, clearly state the client’s obligation to pay you back.
 - *Non-cash payment* – If you’re going to be paid by means other than cash or check, such as security or interest in property or cryptocurrency, you want a clear statement of the rights and obligations with regard to those types of payments.
 - *Consequence of non-payment* – State what will happen if the client fails to make timely payment or keep current on the retainer balance.
 - *Billing procedures* – State how often the client will be billed (e.g., monthly), when the client will be billed (e.g., end or beginning of the month), how the client will receive the billing statement (e.g., by mail or email), when payment is due or when funds are withdrawn from the trust account, and the procedures for withdrawing funds.

Checklist for Drafting Engagement Letters

- ❑ **Client’s obligations** – Describe the client’s responsibilities, which should include: (1) providing complete and accurate information to the best of the client’s knowledge; (2) notifying the lawyer of changes to personal and residence information; (3) cooperating with the lawyer in the representation of the case. Outline other responsibilities or tasks that the client needs to fulfill, decisions to be made, or documents or information to produce.
- ❑ **Conflicts of Interest** – Disclose all personal conflicts, imputed conflicts, and conflicts with current and past clients in the engagement letter or in a separate “disclosure and waiver of conflict” letter signed by the client.
 - **Joint representation** – Disclose issues related to the representation of two or more clients on the same matter, including, but not limited to:
 - *Confidences* – State whether you can or cannot keep confidences or secrets of one client from the others in the group. (The common law default position is that lawyers cannot keep secrets or confidences from other clients.)
 - *Diverging interest* – State what happens if the interests of any clients in the group diverge or if conflict arises during the course of representation.
 - *Disqualification* – If any client wants to hire a separate lawyer later on for reasons other than a conflict, state whether the firm is free to continue representing the remaining clients. An agreement by the departing client not to disqualify you from the continued representation must be in writing and signed by that client.
 - *Aggregate settlement* – State what happens if there is an aggregate settlement offer. Follow ORPC 1.8(g) to make the proper disclosure and get all clients’ informed consent.
- ❑ **Communication guidelines** – Specify the best date/time and method (email, text, phone, client portal, etc.) for the client to reach you. Explicitly state when you’re not available. Also specify how the client should contact you in an emergency and explain what an emergency means. Include the client’s preferred modes of contact, availability, and emergency contact. Provide guidance on whether the client can or should use a work computer or email to communicate with you.
- ❑ **File storage/retention/destruction** – Specify whether it’s your practice to store the client’s file in digital format or on the cloud and what happens to the paper file. State how long you will retain a copy of the file and what will happen to it after the retention period. The PLF recommends that lawyers store a copy of the client file for 10 years from the date the matter is closed unless there is a legal requirement to maintain it longer, and then to securely destroy the files after that.
- ❑ **Commencement of legal work** – State that work on the matter will not begin unless the client signs and returns the engagement letter and pays the agreed-upon advance deposit.
- ❑ **Client’s understanding of and agreement to the terms** – Have a statement that the client will let you know promptly if the client disagrees with or doesn’t understand any of the terms of engagement, and by signing the engagement letter, the client understands and agrees to the terms.
- ❑ **Termination of Engagement** – Inform the client of the right to terminate the attorney-client relationship at any time. State that the client’s decision to terminate will not generally excuse the client’s obligation to pay for work already performed on behalf of the client. Also consider reserving your right to terminate the representation if the client fails to fulfill the obligations outlined in the engagement letter, falls unreasonably behind on payments, or other circumstances—to the extent permitted by the Oregon Rules of Professional Conduct.