ISSUE 140 | MAY 2020

Malpractice Prevention Education for Oregon Lawyers

PLF UPDATES

PLF Resources

Due to COVID-19, the PLF office is temporarily closed to visitors and operating with reduced staff onsite. Other staff are working from home.

However, our PLF staff is available to help you in many ways. We have three practice management attorneys (PMAs) available to assist you by phone, email, or video conference. For contact information and more background about our PMAs, view our website at www.osbplf.org > Practice Management > <a href="https://www.osbpl

If you are concerned that you have made an error on one of your cases, you can also reach a PLF claims attorney by calling 503.639.6911. For more about our staff, view our staff directory at *www.osbplf.org* > *About PLF* > *Staff Directory*.

If you would like help through the Oregon Attorney Assistance Program, you can reach an attorney counselor at 503.226.1057. Additional information about the attorney counselors and the OAAP is listed at: https://oaap.org.

We also have hundreds of free CLEs in electronic format, forms, practice aids, and other resources, including our *in*Practice blog, posted on our webpage at *www.osbplf.org*. Use the navigation bar and select CLEs, Practice Management, or Blog.

If you have other questions or need assistance, please call us at 503.639.6911. We will direct your call to the staff member who can best help you.

We are all here to help you. Please reach out so we can be of assistance during this challenging time.

Thank you, Barbara Fishleder!

Thank you, Barbara, for 34 years of service to the Oregon legal profession!

Barbara Fishleder began work at the PLF as a claims attorney in 1986. In 1989, she became the director of the Fund's loss prevention programs. Under her leadership, the PLF's Practice Management Assistance (PMA) Program and the Oregon Attorney Assistance Program (OAAP) came to set the standard nationally for



quality and scope of malpractice claim prevention services. Her efforts made the PLF's services readily available to all Oregon lawyers, law students, and judges. Through the PLF's PMA program, she made law practice assistance affordable and accessible, with free office visits, CLEs, practice aids, and publications, including *in*Brief, which she edited since its inception. In addition, in 2014 she created the Oregon Lawyers' Conference



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THANK YOU, BARBARA FISHLEDER! (CONTINUED FROM PAGE 1)

Room (OLCR), a free conference room in downtown Portland, which allows Oregon lawyers to meet their clients in a confidential space, even if they don't have an office in the Portland area.

As head of the OAAP, Barbara expanded OAAP services to include mental health issues, career satisfaction, and retirement, in addition to recovery

support. Barbara also created the Oregon Lawyer Assistance Foundation (OLAF), which provides grants and loans to Oregon lawyers who are unable to pay for the mental health and addiction treatment they need. Her caring, dedication, and hard work have resulted in the PLF's programs improving the lives and careers of many thousands of Oregon lawyers.

Extension of April 10 PLF Assessment Deadline

During this difficult and uncertain time, the PLF has reviewed a number of its policies to determine how it might mitigate the financial burdens of the assessment deadline. As a result of this review, we have decided to allow Oregon lawyers up to 60 days beyond the April 10 quarterly installment deadline to make the April installment payment without license suspension ("Extension Period"). During the Extension Period, lawyers deferring payment will continue to be covered under the 2020 PLF Primary Coverage Plan. If the PLF receives payment on or before June 10, 2020, we will also waive all late fees incurred during the Extension Period and allow the lawyer to continue participation in the installment plan under PLF Policy 3.300. This

policy change does not impact the next installment payment, which is due on July 10, 2020. As a reminder, because the Oregon State Bar Center has moved its operations offsite, we cannot accept payment in person. To pay your assessment online, go to www.osbplf.org > **Assessments & **Exemptions > **Pay Assessment*, or send your check to PO Box 231600, Tigard, OR 97281-1600 Attn: Accounting Department.

We hope this 60-day extension and waiver of late fees assist our lawyers in navigating the financial challenges presented by this COVID-19 pandemic. Please let the PLF know if you have any questions. Please stay safe and healthy.

LAW PRACTICE

Maintain Control by Narrowing Down Your COVID-19 Resources

By Rachel Edwards, PLF Practice Management Attorney

At times like these, the amount of information available on the topic of COVID-19 can be overwhelming. It is important to sift through the information to be sure you are receiving it only from reliable sources. With the vast number of unknowns

and quickly changing landscapes, it can be difficult if not impossible to feel any sense of control. I've compiled various resources for you to reference, organized by topic, to provide you with a sense of where to look when you have questions.

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- **1. Court updates.** Updates from the courts about changing policies in response to COVID-19 are often happening daily, if not more frequently. The Oregon State Bar (https://www.osbar.org) has a very helpful compilation of updates from various courts available on its homepage. But be sure to also go directly to the source to verify that you have the most updated information:
 - a. Oregon courts The Oregon Judicial Department has updated information at the top of its homepage (https://www.courts.oregon.gov/Pages/default.aspx) about statewide policy changes to the court system in response to COVID-19. These policies apply to the Oregon Supreme Court, Oregon Court of Appeals, Oregon Tax Court, and the circuit courts in every Oregon county. Also visit the particular county circuit court's website, as counties may have more specific policies and requests in addition to those set forth by Chief Justice Martha Walters. You can find each county's official website on the homepage of the OJD website (see above).
 - **b. Oregon Supreme Court and Appellate Courts** Go to the Oregon Appellate Courts website (https://www.courts.oregon.gov/courts/appellate/Pages/default.aspx) where you will find additional updates at the top of the homepage.
 - **c. Oregon Tax Court** Go to the Oregon Tax Court website (https://www.courts.oregon.gov/courts/tax/Pages/default.aspx) where you will find additional updates at the top of the homepage.
 - **d.** U.S. District Court for the District of Oregon Go to its website (https://www.ord. uscourts.gov/) where you will find updates at the top of the homepage.
 - **e.** United States Bankruptcy Court for the District of Oregon Go to its website (https://www.orb.uscourts.gov/) where you will find updates at the top of the homepage.

- **f. Other courts** Again, go to each court's website for updated information. Below is a list of websites for various courts:
 - i. Oregon County, Justice, Municipal, and Tribal courts - https://www.courts. oregon.gov/courts/Pages/other-courts.aspx
 - ii. Oregon Workers' Compensation
 Board https://www.oregon.gov/wcb/
 Pages/index.aspx
 - iii. State of Oregon Office of Administrative Hearings - https://www. oregon.gov/OAH/Pages/index.aspx
 - iv. Oregon Psychiatric Security Review
 Board https://www.oregon.gov/prb/Pages/
 index.aspx
- 2. General COVID-19 information. If you are seeking general information about the pandemic, such as recent governors' orders and health officials' recommendations, it is important to go to the source. Certain national and local news outlets can also be helpful, but they may only provide summaries and very specific pieces of information depending on the scope of the story. Below is a list of resources that can help you to narrow down your list of sources:
 - **a. Oregon governor.** The governor now has a dedicated page (https://govstatus.egov.com/or-covid-19) on the website containing COVID-19 information and updates. The page contains a section (https://govstatus.egov.com/or-covid-19#executiveorders) listing each of the governor's executive orders.
 - b. Centers for Disease Control and Prevention (CDC). The CDC is a federal agency, part of the Department of Health and Human Services. The CDC homepage (https://www.cdc.gov/) has helpful information and resources, such as recommendations regarding recognizing symptoms and how best to protect yourself and your family.

- c. World Health Organization (WHO) The WHO is an agency of the United Nations,
 part of the UN Sustainable Development Group.
 Its website now has a dedicated page (https://www.who.int/emergencies/diseases/novelcoronavirus-2019) with various information
 about COVID-19. It also contains a helpful
 "mythbusters" page (https://www.who.int/
 emergencies/diseases/novel-coronavirus-2019/
 advice-for-public/myth-busters) to help
 differentiate fact from fiction.
- **d. National and local news outlets** Also check national and local news outlets for additional information. Local news outlets can be particularly resourceful for providing information specific to your community.
- 3. Professional Liability Fund (PLF). The Professional Liability Fund website has a running header on our homepage (https://www.osbplf.org/) with regular updates in response to COVID-19. Also keep in mind that despite closure of our building to the public and limited staff onsite, PLF staff are working remotely and available to assist in any way that we can via email, phone, and video conference. Call the main number at 503.639.6911 with any questions and you will be routed to the appropriate department. The practice management attorneys are available as well, and can be reached either through the main PLF number or by contacting us directly (https://www.osbplf.org/ practice-management/practice-managementattorneys.html). We will continue to regularly post to our inPractice blog (https://www.osbplf.org/ *inpractice/*) and will be offering free webinars related to topics such as maintaining contact with clients and setting up your home office. Also remember to take advantage of our vast array of practice aids (https://www.osbplf.org/practicemanagement/forms.html) available on our website.
- **4. Oregon State Bar.** Go to the bar's homepage (https://www.osbar.org/index.html) for helpful information and links. If you are a member of any bar sections (https://www.osbar.org/sections), some

- of those sections have websites that may provide updates. And certainly take advantage of information being exchanged through section listservs.
- **5. Ethics.** If you have ethics questions and concerns relating to COVID-19, the General Counsel's office at the bar has put together a helpful ethics FAQ (https://www.osbar.org/_docs/resources/CoronavirusEthicsFAQ.pdf). Also consider calling the ethics helpline at 503.431.6475.
- **6. County bar associations.** Various county bar associations likely have information available on their websites or listservs, as well as offering helpful CLEs.

7. Well-being.

- **a. Oregon Attorney Assistance Program (OAAP).** The OAAP website (*https://oaap.org/*) has information about scheduling changes to groups, CLEs, and events. Attorney counselors are available as well. Contact the main line at 503.226.1057 and you will be routed to the appropriate person, or contact an attorney counselor directly (*https://oaap.org/all-staff/*).
- **b. Stay connected with friends and loved ones.** Isolation in our homes can be difficult. Remember to take advantage of technology to stay connected. This includes things like video conferencing through Skype or Zoom, and other social media platforms such as Facebook, Instagram, and Twitter.

Rachel Edwards is a PLF Practice Management Attorney

PLF CLE Resources

During this time of sheltering in place, we want to reach out and remind you that the PLF has over 85 free electronic CLEs on our website, *www.osbplf.org*. The CLE topics include lawyer well-being, practice management, ethics, access to justice, and practical

skills. To order recorded CLE programs, log in at the PLF website, *www.osbplf.org* > *CLE* > *Past CLE*. If you have questions, call Julie Weber, PLF CLE Resources, at 503.639.6911 or 1.800.452.1639.

PLF Board of Directors Positions

The Board of Directors of the Professional Liability Fund (the "BOD") is looking for two board members, one lawyer member and one public member, each to serve a five-year term on the BOD beginning January 1, 2021. Directors attend five board meetings per year, plus occasional committee meetings. Directors are also required to spend time reading board materials and participating in occasional telephone conferences between meetings. They are not required to engage in fundraising. PLF policies prohibit Directors and their firms from prosecuting or defending claims against lawyers. The PLF

Board recognizes that Bar members are diverse in perspective and background and highly encourages individuals from diverse backgrounds to apply.

Interested persons should send a brief resume and letter of interest by August 3, 2020, to:

Nena Cook nenac@osbplf.org Chief Executive Officer OSB Professional Liability Fund PO Box 231600 Tigard, OR 97281-1600

New Website Feature: Search All Resources

The PLF is pleased to introduce a new search feature on its website, Search All Resources, which will search all of the PLF's resources, including books, CLEs, *in*Practice blog posts, *in*Brief articles, and

forms. You can search by keyword and by resource type. To search for PLF resources, go to *www.osbplf.org*, and select Search All Resources under the Practice Management tab.

New Website Feature: Reporting a Claim to the PLF

The PLF website now has a way for lawyers to self-report potential claims. This feature had been contemplated for a while, and with the sudden shift to working from home, the time seemed right to move forward. To self-report a claim to the PLF, go to www.osbplf.org > Claims > Reporting Claims. If you are an attorney contacting the PLF to report a claim against yourself or another attorney in your

firm, please click the link marked "I Am An Attorney Self-Reporting a Claim." If you are an attorney contacting the PLF to report a claim against a lawyer other than yourself or another lawyer in your firm, please click the link marked "How to Report a Claim."

After you report a claim, you will be contacted by a claims attorney.



Estate Planning and Administration: Protect Yourself and Your Client

By Holly N. Mitchell, Duffy Kekel LLP

Oregon malpractice statistics show that the number of claims filed against estate planning and administration lawyers is consistently high, as compared with other areas of law. Similarly, the amount of money paid by the PLF on these claims is also high.

In the last two years, the PLF has seen a marked increase in the number of malpractice claims in this area of law. The good news is that following the suggestions listed below will help you reduce your chances of a malpractice claim.

Failure to Include a Beneficiary. Ask questions about the client's family. It might be helpful to have the client draw a family tree. This is especially helpful if the client does not have children. In general, it is safer to leave bequests to a class of beneficiaries, rather than to specifically named beneficiaries. For example, a bequest to "my children" or "my grandchildren" is less prone to errors than naming the children or grandchildren individually.

Intentionally Omitting a Beneficiary. Be very careful when a beneficiary is being omitted from an estate plan. Ask your client specifically why a

particular beneficiary is being omitted, and retain those notes in your file. It might also be a good idea to specifically state in the will or trust that a particular beneficiary has been omitted, to show intention and not oversight.

Capacity. If capacity might be an issue, have a long conversation with the client to document your client's intent, and to document lack of undue influence. Ask the four questions we learned in law school: 1) who are the natural objects of the client's bounty; 2) what is the nature and extent of the client's property; 3) does the client understand the nature of the act being performed; and 4) does the client know the scope and contents of the will or trust. (For a further discussion see: "Protecting an Estate Plan Against Contests," *Oregon State Bar Estate Planning and Administration Section Newsletter*, October 2001, by Philip N. Jones and James R. Cartwright.)

Avoid a Claim of Undue Influence. Be very careful to avoid a claim of undue influence, especially if the client is making an unnatural disposition or is omitting a child or grandchild.

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Carefully review the seven factors that the Oregon Supreme Court has held are present in a case of undue influence: 1) procurement; 2) lack of independent advice; 3) secrecy and haste; 4) change in attitude following close association with a new beneficiary; 5) change in dispositive plan; 6) unnatural or unjust bequest; and 7) susceptibility to influence. (For a further discussion of the seven factors see: "Protecting an Estate Plan Against Contests," *Oregon State Bar Estate Planning and Administration Section Newsletter*, October 2001, by Philip N. Jones and James R. Cartwright.)

Retirement Accounts. Ask about your client's retirement accounts, and be sure to coordinate the beneficiary designations with the estate plan. Be very careful before you name the estate as the beneficiary of a retirement account, because that might have detrimental income tax consequences. Similarly, be careful when you name a trust as a beneficiary of a retirement account to make sure that the required technical provisions are contained in the trust. Also, be very careful when making taxable withdrawals from retirement accounts during the administration of an estate or trust. You should familiarize yourself with the provisions of the SECURE Act, which significantly changed the distribution of inherited retirement accounts beginning in 2020. If you are not sure about how to best coordinate a retirement plan with an estate plan, associate with an ERISA attorney.

Transferring Assets to a Client's Trust.

When you are drafting trusts, make clear to your client, preferably in writing, which assets you will help transfer to the client's trust and which assets the client is responsible for transferring to the trust. If you are asked to prepare a deed for a trust you have not drafted, do not prepare the deed until you have received a copy of the trust and have reviewed its terms.

Joint Trusts. Joint trusts are very popular with married couples because the couple can manage their trust assets jointly, in a manner very similar to joint ownership. However, a problem may lurk in the administration of a joint trust after the first death. Many joint trusts provide that the trust

assets will be divided into two equal shares at the first death. This division is crucial to implement any estate tax planning contained in the trust. It might also be important for family reasons, especially in a second marriage. When you are administering a joint trust following a death:

- Carefully follow the provisions of the trust.
- If the trust provides that the assets be divided, divide the assets and change the title to the assets to reflect which half of the formerly joint trust now owns each of the assets.
- If the trust provides for a further division of the deceased spouse's half into subtrusts for estate tax planning purposes, make the required divisions and change the title to the assets to reflect which subtrust owns which assets.

When you are drafting a joint trust, impress upon your clients the need to seek legal advice to get help in dividing the joint trust after the first death.

Administering Wills or Trusts. When administering a will or trust, read the entire will or trust, including any codicils or amendments to it, very carefully. Pay particular attention to the boilerplate, especially no-contest provisions. It is a good idea to keep notes and review the trust and your notes from time to time during the process of administration.

Amending Wills or Trusts. Be very careful when amending only a portion of a will or trust. Read the entire will or trust, including any codicils or amendments to it, very carefully. Think of it as a game of pick-up sticks. If you change one provision, be aware of what other provisions might be affected.

Document Your Client's Intent. Keep careful notes and write letters to your client outlining what the estate plan does and doesn't do. If there is something that might be controversial, or if your client does not accept something that you recommended, document it in a letter to your client. Careful file notes are helpful, but a letter to the client gives the client the opportunity to let you know if the client does not understand or objects to

any of the provisions of the estate plan. The client will not be available as a witness when the estate or trust is administered. Your letter to the client is evidence that the client understood and agreed to the plan.

Consider Unexpected Order of Death. Ask your client questions about what they would like to do if people die in an unexpected order. The client naturally thinks their children and grandchildren will survive them. Ask your client what should happen with their assets if a child or grandchild dies before the client, and then incorporate those wishes into the estate plan.

Specific Bequests and Residue. Make sure to review the residue language of every will and trust you draft. It can be easy to overlook the residue, especially when a client is making many specific bequests. As a general rule, encourage your client to think in terms of percentages for bequests, rather than specific assets that they might not still own when they die.

If Your File is Subpoenaed. If your file is subpoenaed (for example, in a will contest), call the PLF before responding to the subpoena for advice on how to proceed.

Payments from a Probate Estate. Carefully review with the personal representative the rules about what can and cannot be paid from a probate estate. In general, ask your client to call you before payments are made to ensure that the payments do not require court approval. In particular, frequently remind your client that no distributions can be made to a beneficiary, to the personal representative, or to attorneys without prior court approval.

Claims in Probate. Educate your personal representatives that they should call you immediately if they receive an invoice, or if they learn of a debt of the decedent, that they might consider contesting. Remind them that claims that are not disallowed within 60 days must be paid and cannot be disputed after the 60 days have expired.

Small Estate Affidavits. Small estate affidavits can be used for estates of limited size, but they generally cannot be used for adversarial proceedings, such as a will contest. If you have an adversarial issue, you need to convert the small estate into a full probate. Otherwise, after the fourmonth notice period in the small estate affidavit has expired, the small estate proceeding is final and you cannot later challenge or change the outcome.

Special Needs Trusts. Drafting a special needs trust is prone to errors because such trusts have very technical requirements. When in doubt, consult with a special needs trust specialist.

Attorney Acting as Fiduciary. As a general rule, it is best if an attorney does not act as a personal representative, trustee, or trust protector. However, it is appropriate in some circumstances. If you act as a fiduciary, keep a very close eye on conflicts of interest.

Emails. As a general rule, be discreet in your emails, even intra-office emails. Keep in mind the old adage – imagine the email being read in court or printed on the front page of your local newspaper.

Free Advice. Take advantage of the free advice in the Oregon State Bar's BarBooks publications *Administering Oregon Estates* and *Administering Trusts in Oregon*. The Estate Planning Section listserv can also be a good source for advice; just be sure to verify the advice with your own research before you act upon it, and be certain you do not reveal any client confidences.

As you can see, many of these suggestions have a common theme: document, document, document.

Holly Mitchell is an attorney with Duffy Kekel LLP and a PLF Board Member

Upcoming PLF CLE Webinar: "Examining Potential Malpractice Risks of Practicing in the COVID-19 Era"

Wednesday, May 20, 2020, 10 - 11 a.m.

Please join PLF Practice Management Attorney Hong Dao and PLF Claims Attorney Holli Houston in a free webinar to discuss some potential malpractice risks for lawyers practicing law during the COVID-19 pandemic. We will discuss how the pandemic is changing the way lawyers are running their practice, underlying issues that are exacerbated by COVID-19, and our claims department's perspectives on coverage issues and emerging liabilities. The risk of working from home,

dabbling as a result of dwindling business, inadequate law office systems, changes in court rules, and other circumstances can result in exposure to lawyers. We will explore the consequences of those risks and provide tips to manage them.

Registration information will be posted on the PLF website, *www.osbplf.org* > *CLE* > *Upcoming*. A broadcast email will also be sent with registration information.

LAW PRACTICE

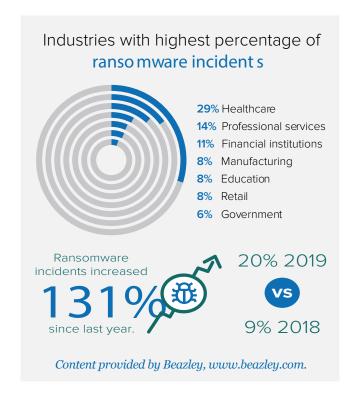
Excess Corner: COVID-19 & Cyber Risk

By Emilee Preble, Staff Attorney / Excess Program Administrator

The dramatic shift to work-from-home setups in recent weeks has opened up the potential for increased cyber crime. Criminals may seek to exploit vulnerable home networks by deploying targeted social engineering or spear-phishing scams.

One potential cyber risk to be aware of as you work remotely are pandemic-related email scams. Be sure to regard COVID-19 related emails, particularly those with attachments and links, with extra scrutiny. It is important to confirm that these emails are coming from a known sender before opening. Cyber criminals can use our concern about the pandemic to infect home networks or computers with malicious malware or ransomware.

While claims related to the types of cyber liability described above are excluded under the PLF Primary Plan (Exclusion 20), there is coverage for these claims under a special endorsement to the PLF Excess Coverage Plan. If your firm does not have PLF Excess Coverage, you may want to review other insurance policies to see if you have coverage for cyber liability.



Firms with PLF Excess Coverage benefit from a Cyber Liability & Breach Response endorsement serviced by Beazley.* Beazley just released its 2020 Breach Briefing in which the focus was on ransomware. From 2018 to 2019, claims Beazley serviced saw a 131% increase in ransomware attacks. Included here are some excerpts from that 2020 Breach Briefing that shine a light specifically on ransomware.

If your firm is interested in Excess Coverage, please visit *www.osbplf.org* > *Excess Coverage* to learn more about how to apply.

*Claims handling and breach response services are provided by Beazley USA Services, a member of Beazley Group. Beazley USA Services does not underwrite coverage for the PLF Excess Program. Excess coverage purchased through the PLF is subject to the PLF Excess Program's underwriting processes.



WHO IS THE TARGET?

Ransomware can be devastating to an individual or an organization. Traditionally, these attacks were designed to deny access and interrupt business operations. However, the recent shift towards ransomware paired with banking trojans, and towards threats to expose data, changes the landscape. Anyone with important data stored on their computer or network is a target – from municipalities or hospitals through to law firms. Important data at risk was traditionally thought to be personally identifiable information (PII) and protected health information (PHI), but it could also include intellectual property, litigation strategies, unpublished financials, and project bids. It is a myth that attackers are not interested in small companies. As our data shows, small and medium-sized businesses are often easier to exploit, and therefore, very attractive targets.

WHAT IS THE ATTACK?

One common form of attack used to deploy ransomware are phishing emails. Here we explain this attack vector and ways to mitigate the associated risks.

PHISHING

Today, direct email of malware and links to credential-stealing sites lead to a large number of incidents. There are a lot of protections available, in the forms of email filters and added layers of authentication; however, few of these solutions are broadly implemented. People have access to the information and technology that the attackers want, and attackers will continue to find new ways to reach people and exploit them. It would be incorrect to view phishing as the vulnerability; phishing just happens to be the most effective way of getting to the real vulnerability – people.

MITIGATING PHISHING RISK

- Enable multi-factor authentication (MFA)
- Force regularly scheduled password resets, preventing recycled passwords
- Train employees to recognize and report suspicious email traffic

Content provided by Beazley, www.beazley.com.

Emilee Preble is a Staff Attorney / Excess Program Administrator at the PLF



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PLF UPDATES

Upcoming PLF CLE Webinar: "Harnessing Technology to Improve Your Practice"

You won't want to miss "Harnessing Technology to Improve Your Practice," presented by the PLF practice management attorneys. You'll hear new advice and ideas to help you to use technology to improve your clients' experience, as well as your own efficiency and productivity. Learn how you can automate some of your office systems and processes, protect your clients' data, avoid cyberattacks and scams, and learn some practice and technology tips to use right away.

This CLE was originally intended to be presented live around the state this spring as part of the PLF's Roadshow Series. Due to COVID-19, the CLE will now be presented only once, via Zoom. The webinar will be recorded and posted on the PLF website, *www.osbplf.org*.

Date: Thursday May 28, 2020 Time: 10:00 to 11:30 a.m.

1.5 Practical Skills MCLE credits approved

PLF Recorded Webinars on Working Remotely

The COVID-19 pandemic has forced many attorneys and their staff to quickly transition from working in an office to working from home. Yet the move doesn't need to add stress to an already trying experience.

PLF practice management attorneys have hosted two 30-minute webinars discussing the basics.

- Staff Supervision While Working Remotely: Practical Tips and Resources
- Working From Home: Basic Setup Tools & Resources

To order these streaming videos, go to www.osbplf.org > CLE > Past.