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A GUIDE TO SETTING UP AND RUNNING YOUR LAW OFFICE

Avoiding Malpractice Through Efficient Office Systems

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Oregon State Bar Professional Liability Fund

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IMPORTANT NOTICES

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Dear Oregon Lawyer:

This edition of *A Guide to Setting Up and Running Your Law Office: Avoiding Malpractice Through Efficient Office Systems* replaces the purple-covered handbook of the same name previously published by the Professional Liability Fund in June 2014.

This handbook is a reference guide that answers questions about everything from starting your own law office to maintaining a system for closed files. The suggestions in the handbook are those that are likely to help most practitioners. The systems suggested are not the only effective systems; they are some of the systems that we find easy to understand and implement.

A copy of this handbook is free to any Oregon lawyer who requests it. Out-of-state lawyers may download copies of *A Guide to Setting Up and Running Your Law Office: Avoiding Malpractice Through Efficient Office Systems* on the Professional Liability Fund Web site, www.osbplf.org.

This handbook is offered as a starting point for lawyers in private practice. The Professional Liability Fund also offers free practice management consultations on an individual basis, through our Practice Management Advisor program. In addition, the Professional Liability Fund has many free practice aids that are available to attorneys online at www.osbplf.org.

We hope this handbook will be of assistance to you and that you will utilize our practice management advisors and practice aids.

Sincerely yours,

Barbara S. Fishleder

Barbara S. Fishleder
Director of Personal and Practice Management Assistance
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GETTING STARTED

The decision to open your own law office should include consideration of the following:

1. What type of entity do you want? Should you practice solo, form a partnership, or set up a professional corporation or a single member limited liability company?
2. Where should you locate your office?
3. Do you want to purchase someone else's practice?
4. What type of furniture and equipment do you need?
5. What is a realistic budget?
6. What type of professional support and resource network do you need?

Deciding the Form of Entity

If you are self-reliant and can handle administrative details, you may want to be a sole practitioner. You can be your own boss, set your hours, and run the office any way you choose. You make all the decisions – good and bad – and take all the credit. You must also take all the responsibility and be able to market yourself to potential clients. Most of all, you must be willing to take risks. On the other hand, if you have trouble making decisions and the thought of shouldering the responsibility alone scares you, going solo may not be the road for you. Administration of a solo practice takes time away from the practice of law and requires some knowledge of how to run a business. If you enjoy practicing law and despise administrative matters, you may not be happy as a sole practitioner.

You may choose to form a partnership with other lawyers.[1] This allows you to share responsibilities and expenses with other lawyers. The partners can choose a managing partner to handle administrative affairs and make day-to-day decisions, with all of the partners voting on important matters and setting policy. It is essential that you draft a written partnership agreement with provisions that clearly state the terms under which the firm will operate: how expenses will be paid, profits and losses shared, capital contributions made, retirement earned and withdrawn, and capital and income paid. Other items that may be included are expected billable hours, sharing of administrative duties, employee supervision, and responsibilities of the respective partners on dissolution of the partnership. Even when a partnership is formed to share only office space and expenses, it is important to have some type of agreement in writing.

An Oregon lawyer can practice alone as a sole proprietor, a professional corporation, or a single member limited liability company. Two or more Oregon lawyers can practice as a general partnership, a professional corporation, a limited liability partnership, or a limited liability corporation.

Deciding what entity your practice should take is a business and tax decision. The choice you make will affect the business side of your practice. Therefore, whatever form you choose, consult an accountant and an insurance broker. An experienced accountant will be able to advise you on federal, state, and local taxes; employment requirements; and business licenses. An insurance broker can provide quotes on valuable papers coverage; business interruption coverage; premises liability; personal liability (to protect your assets from liability other than professional malpractice); theft, disappearance, and destruction coverage; fidelity insurance; and fidelity bonds for employees.

Choosing a Location and Situation

Cost is probably the most important consideration in determining where your office should be located. It is also the most restrictive. Keeping fixed costs at a minimum will prevent financial disaster during the start-up period. One option to consider is sharing an office with another lawyer or law firm. Some

[1] An attorney cannot form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law. Oregon Rule of Professional Conduct (ORPC) 5.4(b).

agreements provide for the tenant to do legal work (such as research) in exchange for rent or a portion of the rent. Office sharing guidelines are available on the Professional Liability Fund's (PLF's) Web site, www.osbplf.org.

Executive suites are another option that many new sole practitioners choose. This arrangement provides the lawyer with a virtual office (sometimes furnished and paid for on an hourly basis), a waiting room with a receptionist (who will greet clients and take messages), a conference room, and secretarial services. Some sole practitioners work at home, have phone calls forwarded to their home number when they are there, and use the executive suite facilities to meet with clients or other lawyers. For more information about these arrangements, *see* "Virtual Law Office," available on the PLF Web site, www.osbplf.org.

Another consideration in determining your office location is your type of practice and the image you wish to project. If your practice does not require frequent court appearances, you may want to locate outside the downtown business district where rent is cheaper and parking is free. If litigation is your specialty, locating close to the courthouse may be a necessity.

No matter which location you choose, be careful not to enter into a long-term lease. A one-to three-year lease will provide flexibility to relocate your office as the nature of your practice changes. After a short period, you may find that additional space is required for staff or associates and that your current location does not allow for growth. Or you may find it advantageous to form a partnership with another sole practitioner, and a long-term obligation may keep you from doing so.

When choosing an office, consider conveniences to clients: parking availability and cost, proximity to bus lines, accessibility for aging or disabled clients (stairs, elevators), and ease of location (can your office be found easily by out-of-town clients?).

Buying a Law Practice

If you are thinking of buying a law practice, consider consulting with a broker experienced in the sale of professional businesses and carefully review ORPC 1.17. A checklist and resource sheet written with the selling lawyer in mind is available on the PLF Web site, www.osbplf.org. These are a valuable reference for the lawyer interested in buying a practice as well.

Furnishing Your Office

When furnishing your office, keep in mind the image you wish to project to your clients. If money is limited, think about buying used office furniture. Keep it simple and hold costs down. The reception area should contain several chairs, a coffee or end table, a coat rack, and some magazines. If some of your clients bring children with them, provide a few toys or children's books. If your staff person will be located in the reception area, make sure papers and files are not left where they can be seen by waiting clients. If there is a computer on the staff person's desk, use a screen shade or position the monitor so waiting clients cannot view information on the screen. (A screen saver is not enough unless it is password protected, since a curious client can hit any key to reactivate the screen if the reception area is temporarily unattended.) Do not keep unlocked file cabinets in the reception area.

In your own office, you will need a desk, comfortable chair, and at least two client chairs. Furnish your library/conference room with an adequate size conference table and chairs, bookcases, and a telephone with a speaker device. Other standard equipment and furnishings include a calculator (if your computer does not have one), file cabinet(s), digital dictation equipment or voice recognition software, telephone headset, copier, scanner, laser printer, and paper shredder. In addition, you should arrange for voice mail services or purchase an answering machine. Basic office supplies include paper, envelopes, file folders, pens, pencils, stapler, hole punch, date stamper, rubber bands, and tape.

When purchasing computer equipment, keep in mind your future needs so the equipment does not quickly become obsolete. Make sure your equipment can be upgraded. Using a laser printer or digital copier, you can print your own letterhead, envelopes, and pleading paper. Purchase licensed software programs to ensure that support and upgrades will be readily available. In addition to using your computer for word processing, consider purchasing programs for calendaring, docketing, conflicts, office accounting, time and billing, and case management.

Budgeting

As with any new business, the first year of operation will entail many large purchases. Be aware that operating expenses will usually exceed revenues until your practice matures. Make sure you have sufficient reserves to last through the early growth stages.

You can calculate your reserves through a budget or cash flow projection – an estimate of income to be received and expenses to be paid for a certain period. To prepare a budget, you need to establish a business plan that answers some basic questions about services to be offered and reserves required. Ask yourself these questions: Will I be charging on a contingent fee, hourly rate, or other basis? If hourly, what will my rate be? What types of clients will I be trying to attract? What type of law will I be concentrating on? Should I require retainers? How much will I need for start-up costs? What will my monthly expenses be? How much do I need to live on? Once these areas have been addressed, you are ready to project your monthly cash flow.

If you are basing your income on hourly fees, determine your projected number of billable hours per month and multiply it by your hourly rate, keeping in mind that there will be few billable hours in the beginning with a gradual increase in each succeeding month. It is much more difficult to project income if you operate on a contingent fee basis; there is no easy formula to predict revenues. Keep in mind that income does not always equal immediate cash intake. Hourly and flat fee billing can take 30 to 90 days to collect. This makes retainers very attractive. At the very least, require retainers for costs; this not only keeps down your expenses, it gives clients a financial interest in their cases.

After establishing your start-up costs, determine monthly expenses by listing all expected costs, such as rent, utilities, telephone, Internet access, supplies, insurance, postage, and taxes. Two important items to include are personal living expenses, including student loan payments, and unexpected expenses. Personal expenses can be estimated by reviewing your personal checking account, cash withdrawals, and credit card activity for the past 12 months. It is wise to have two or three months of expenses in reserve at all times.

Don't stop there. At the end of each month, analyze income and expenses and update your projected budget using the actual figures as each month goes by. This will focus your attention on keeping expenses down and will immediately inform you of any underestimated or missing items. It will also let you know whether income is keeping up with your projections and will alert you to the need for increased marketing to bring in new clients.

Professional Support and Resource Networks

Many lawyers maintain a network of other lawyers to whom they refer cases that are outside their own area of expertise. Letting other lawyers know your area of expertise is a great way to help get your practice started. The lawyer accepting the referral becomes the attorney for the client on that matter. The lawyer receiving the referral may split the fee with the referring lawyer.

Fee splitting is governed by ORPC 1.5(d), which provides that a division of fees can be made only if the client gives informed consent and the total fee of the lawyers for all legal services is not clearly

excessive. Always disclose the fee splitting arrangement in full, and inform the client that the total fee will not be any greater because of the fee split. To avoid a misunderstanding later, always confirm the client's consent in writing.

Another alternative is to associate more experienced counsel. This also requires consent of the client. In this arrangement, both lawyers are counsel on the case and payment arrangements are determined between the attorneys.

Checklist for Opening a Law Office

- ❑ Decide what form of entity your business will be. (For solos: sole practitioner, professional corporation, single-member LLC. For multi-member firms: professional corporation, partnership, LLC, LLP.)

- ❑ Disclose your form of entity (PC, LLC, or LLP) in the name of your firm and use it on your business cards, letterhead, billing statements, Web site, etc. *See* OSB Formal Ethics Opinion No. 2005-49.

- ❑ Name your business. The name of your business must not be misleading as to the identity of the lawyers practicing under the name. ORPC 7.5(c)(1).

  Use of "and Associates" violates ORPC 7.5(c)(1) if there are no associates or no relationship exists among lawyers in an office share attempting to use this designation. "Group" violates the rule if the practice consists of a sole proprietor and no other lawyers. (The common meaning of "group" implies two or more individuals.)

  Use of trade names and historical names of deceased or retired lawyers is permitted under ORPC 7.5(c)(2) and (3). For more information, review Sylvia E. Stevens, "What's In a Name: Things to consider before hanging that shingle," *Oregon State Bar Bulletin* (November 2006), available online at http://www.osbar.org/publications/bulletin/06nov/barcounsel.html.

- ❑ Choose a location (downtown, suburbs, virtual, or home office).

- ❑ Choose space option (rent office space, share office space, executive suite, virtual office, and/or home office).

- ❑ Determine office needs:

  1. Furniture:
     a. Lawyer's office (desk, chair, guest chairs, file cabinet, chair mat, wastebasket)
     b. Reception area (chairs, coffee table, lamp, pictures, magazine rack)
     c. Staff (desk, chair, chair mat, wastebasket, file cabinet)
     d. Conference (table, chairs)

  2. Equipment:
     a. Dedicated business telephone – landline, VoIP, or cell/Smartphone
     b. Voicemail or virtual receptionist
     c. Secure Internet connection
     d. Desktop computer or laptop (tablet if desired)
     e. Laser printer (consider wireless printer if using a tablet)
     f. Digital copier/scanner
     g. Paper shredder
     h. eFax service (www.faxcompare.com, www.comparethatfax.com)
     i. Appropriate software, including office productivity; security (firewall, anti-malware); practice management/accounting (calendaring, docketing, file tickling, conflicts, document management, billing, trust, and general accounting); voice recognition if desired (Dragon NaturallySpeaking Legal Edition – www.nuance.com)

3. Supplies (stationery, business cards, paper, envelopes, ball-point pens, highlighter pens, pencils, stapler, staple remover, post-it notes and flags, two and three hole punch, copy stamp, date stamp, file folders, rubber bands, tape and tape dispenser, paper clips, phone message pads, legal pads, coffee pot and cups).

4. Personnel (secretary/administrative assistant, paralegal, receptionist, bookkeeper).

5. Law library (resources in addition to those available free online, which include: BarBooks™, Oregon Revised Statutes, case law, the Oregon Rules of Appellate Procedure, Oregon Rules of Civil Procedure, Uniform Trial Court Rules, and Supplementary Local Rules.) Use Fastcase, the OSB's free online legal research service, Google Legal Scholar, or follow the links to other online resources from the bar's web site at www.osbar.org. Download PLF practice aids at www.osbplf.org.

- ❑ Develop business plan, start-up budget, and monthly budget. Identify potential client markets and capital needed to carry business through first three months.

- ❑ Open appropriate bank accounts (general office, IOLTA). See Notice to Financial Institutions at www.oregonlawfoundation.org for instructions on opening an IOLTA account. program.

- ❑ Obtain necessary insurance (professional liability, excess professional liability, premises liability, property, casualty, disability, life, health, cyber liability, valuable papers).

- ❑ Obtain a business license (if required)

- ❑ Consult with a CPA or accountant concerning your tax liabilities (business personal property tax, business income tax, excise tax, withholding or estimated tax payments).

- ❑ Determine what type of marketing and advertising you will use (Web site, lawyer referral listing, brochures, business cards, sign for office, announcements). Review applicable ORPCs and OSB Formal Ethics Opinion No. 2007-180. Download the PLF marketing materials at www.osbplf.org.

- ❑ Establish necessary office systems:

    1. Docket/calendar
    2. Tickler
    3. Accounting (general office and trust)
    4. Time and billing
    5. Filing (open files, closed files, organization of electronic documents)
    6. Conflict

- ❑ If you plan to use cloud-based solutions to store confidential client information or wish to have a paperless law office, see the file management and technology practice aids available on the PLF Web site, www.osbplf.org. Obtain client consent to store files digitally or in the cloud by customizing your engagement letter or fee agreement. Use free encryption software to encrypt or encode sensitive data and client file materials so that only an authorized person with the encryption key (you) can decrypt or decode the information.

- ❑ Take advantage of Web resources, including:

    1. Oregon Corporation Division Home page and Business Registration Services.
    2. Answers to Frequently Asked Questions from the Oregon Corporation Division.
    3. Oregon Business Wizard (provides customized information to help you start and operate an Oregon-based business.)
    4. Oregon Business Guides – How to Start a Business in Oregon and Employer's Guide for Doing Business in Oregon.
    5. Small Business Administration – tools and resources to start and manage your business, including how to write a business plan, marketing your business, preparing your finances, and more. (Live links to these resources are available when you access the "Opening a Law Office Checklist" practice aid on the PLF Web site, www.osbplf.org.

- ❑ Call the PLF's practice management advisors at 503-639-6911 or 1-800-452-1639 for assistance or answers to any questions.

Start-Up Budget

Start-Up Capital or Line of Credit $_____

Equipment

Computer/Server and Backup System	$_____
Software	$_____
Printer	$_____
Fax (or use an eFax service)	$_____
Scanner	$_____
Shredder	$_____
Copier	$_____
Telephone (Cell/landline/mobile devices)	$_____
Calculator	$_____

Total Equipment $(_____)

Furnishings and Decor

Lawyer's desk	$_____
Lawyer's chair	$_____
Lawyer's chair mat	$_____
Client chairs (at least 2)	$_____
Lawyer's file cabinet	$_____
Credenza/computer table	$_____
Waste baskets (2)	$_____
Pictures and other decor	$_____
Reception area chairs	$_____
Coffee table	$_____
Conference Table	$_____
Conference Chairs (4-6)	$_____
Staff desk	$_____
Staff chair	$_____
Staff chair mat	$_____
Staff file cabinet	$_____

Total Furnishings and Decor $(_____)

Supplies

Paper, envelopes, ball-point pens, highlighter pens, pencils, stapler, staple remover, post-it notes and flags, two and three hole punch, copy stamp, date stamp, file folders, rubber bands, tape and tape dispenser, paper clips, phone message pads, legal pads	$_____

Start-Up Budget

Total Supplies		$(_____)
Library		
Fastcase legal research online through OSB	FREE	
Supplemental online legal research	$_____	
BarBooks™ online through OSB	FREE	
Other CLE publications	$_____	
Total Library		$(_____)
Marketing and Printing		
Stationery/Business cards	$_____	
Announcements	$_____	
Print Advertising	$_____	
Radio or TV Advertising	$_____	
Internet Advertising (Web site, blog, social media)	$_____	
Other	$_____	
Total Marketing and Printing		$(_____)
Miscellaneous		
Business entity formation fees	$_____	
Business sign(s)	$_____	
Business license	$_____	
Bar dues	$_____	
Mandatory professional liability coverage	$_____	
Excess professional liability coverage	$_____	
Bond (for staff)	$_____	
Business insurance (including liability, fire/casualty, disability/overhead/business interruption, premises liability, and valuable papers)	$_____	
Total Miscellaneous		$(_____)
Balance		$_____

Notes:

Monthly Budget

Monthly Expenses

Monthly Rent (should include water and garbage)	$_____
Utilities/Internet Access (if not included in rent)	$_____
Communications (cell, landline, mobile devices)	$_____
Recycling/Shredding Services	$_____
Parking	$_____
Supplies	$_____
Salaries	$_____
Tax withholding	$_____
Payments on furniture and equipment	$_____
Insurance premiums (pro-rated monthly)	$_____
Dues for professional organizations (pro-rated monthly)	$_____
Subscriptions (pro-rated monthly)	$_____
CLE and Legal Research	$_____
Miscellaneous (business lunches, travel, marketing)	$_____
Other	$_____
TOTAL MONTHLY BILLS	$_____

Fees and Income

Fees needed to pay monthly bills	$_____
Fees needed to pay self (including student loan payments)	$_____
REQUIRED INCOME	$_____
Required income divided by number of billable hours = hourly rate	$_____

NEW CLIENTS

Case and Client Screening

Careful case and client screening can eliminate the threat of a legal malpractice suit and greatly reduce the stress in your life. Evaluate potential cases and clients with these factors in mind:

1. Do you have a good "gut reaction" to the client and the course of action he or she proposes? If your first impression is unfavorable, you may want to reject the case. Lawyers who are sued for malpractice almost always knew at the outset that they should have rejected the case.
2. Be cognizant of the client's relationship and experience with previous lawyers. Beware of the client who constantly changes lawyers. Look out for the case that has already been rejected by one or more lawyers.
3. Be cognizant of the client's attitude toward other professionals such as doctors, accountants, bankers, or lenders.
4. What is the client's attitude toward the case? If he or she wishes to proceed because of principle and regardless of cost, you may find yourself pressed to pursue a case that you do not believe in or, worse, find offensive.
5. Do you have the skill, expertise, and time needed to pursue the case?
6. Are you taking the case simply because the potential client is a relative, a friend, related to a friend, or knows a friend? These cases should be avoided unless you have confidence in your ability to handle the case and have a good feeling about the potential client. Ask yourself whether you would take the case if the client walked in off the street. If not, you should reject the case.
7. Are you and the client able to agree on fee arrangements? If not, you may be dealing with someone who will have difficulty making other decisions or compromises.
8. Consider the client's attitude and method of operation. If he or she has come to you with a "done deal," researched the case extensively, or failed to attend to the matter until it became an emergency, the case may require special handling.
9. Consider the client's ability to pay for your services. A client's financial situation may warrant declining the case unless you are willing, at the beginning, to provide pro bono services.

Creating Realistic Expectations

Even some of the best cases are lost when presented to the jury. After obtaining the necessary information from the client regarding the problem, start by laying out the adverse facts about his or case. If you begin by advising the client that he or she has a good case, the client will not hear anything else. It is also important to explain to the client the economics of settling the case.

If a lawsuit is or may be involved, don't give the client the impression it will take only a few months to resolve. Lawsuits are rarely resolved in a couple of months. Explain fully to the client the time limits involved. In an effort to be brief and simple, lawyers often misguide their clients by simplifying the process. ("Once the complaint is filed, the other side has 30 days to respond. When the case is at issue, we can request a trial date.") As a result, clients get the mistaken impression that their cases will be over in a month or two. It is far better to explain the possibilities of problems with service, requests for extensions of time, or motions that may require filing an amended complaint. The client should be told that discovery will take additional time, and that you then have to wait for the court to set a trial date. Be familiar with the court's time line for setting cases. Explain trial setovers, and get the client's consent. Clients who are aware of these time frames will not be calling the office constantly wanting to know why something isn't happening.

When the matter does not involve litigation, explain the various steps involved and the time required for each. If there is a delay, advise the client immediately and provide a new estimate of when the matter will be completed.

Using Intake Sheets

Have every new client complete an information sheet listing the client's address, telephone number, Social Security number, place(s) of employment, emergency contacts, spouse's or partner's information, and referral sources. While new clients are waiting to see you, you can also give them additional information sheets relating to the specific case, such as an intake sheet for a personal injury case, a domestic relations case, probate of an estate, or preparation of a will. If desired, add a disclaimer clarifying that you are not obligated to provide services to the client until you and the client mutually agree in writing to the terms of representation. (*See* "New Client Information Sheet with Disclaimer," available on the PLF Web site, www.osbplf.org.) Information sheets save you from having to ask routine questions during the initial interview.

The PLF's sample New Client Information Sheet provides spaces for docket control and conflict information. It also has a line to be initialed when the file is opened, conflicts are checked, and docket information is entered on the calendar. You can use the back side of this form to take notes during the initial interview, including supplementary conflict information. You can then use the sheet to open the client's file and enter the necessary information into the office docket and conflict systems. Once you have opened the file and entered information into both the docket and conflict systems, place the sheet in the client's file for reference. If your office is paperless, the sheet can be scanned and saved to the client's electronic file. This is a good time to send a thank-you letter to any referral sources.

New Client Information Sheet

TODAY'S DATE *June 3, 2014*

Client's Full Name *John Smith* SS# *222-33-8354*

Client's Former Name/Other Names Used *None*

Spouse's/Partner's Full Name *None* SS#

Spouse's/Partner's Former Name/Other Names Used *None*

Street Address *123 Main Street, Apartment 5*

City/State *Portland, Oregon* Zip *97202* E-mail Address *smithjohn@ispprovider.com*

Telephone (Home) *(503)222-3000* Client Work *(503) 555-1111* Spouse/Partner Work

Client's Employer *Hong Dao Industries* Spouse's/Partner's Employer

Emergency Contacts:

Name *Howard Smith* Relationship *Father* Telephone *(503) 555-1234*

Name *Mary Jones* Relationship *Sister* Telephone *(503) 555-4567*

Why You Chose Our Office *Referred by Jennifer L. Meisberger*

Conference with Attorney Regarding:

Lease of commercial property for business.

FOR OFFICE USE ONLY

Fee arrangement: *$225.00 per hour. $2,500 retainer.*
Billing arrangement: *Send client monthly itemized statement.*

DOCKET CONTROL	
Statute of Limitations Deadline	
Tort Claims Act Notice Due	
First Appearance Due	
Other Deadlines	
File Review Frequency	*30 days*
INSTRUCTIONS:	

CONFLICT CONTROL	
NAME	RELATIONSHIP
John Smith	*Client*
LB Properties, Inc.	*Lessor*
Clifford Rhodes	*President, LB Prop.*
Margaret Ellis	*Real Estate Agent*
555 SE Downs, No. 115, Portland, OR	*Property Address*

File opened by *BLL* Conflicts checked by *BLL* Deadlines docketed by *CW*
Engagement letter sent by *MLS* Date: *June 4, 2014*

Fees

The client has the right to know what your legal services are going to cost. Some clients ask about fees right away, but others are quite timid about discussing money. Nevertheless, you need to fully discuss fees with the client before proceeding with the case. Clients who don't understand their responsibilities to pay are likely to be unhappy with the amount charged and may end up not paying their bill.

We strongly recommend that you have each client sign a fee agreement. Go over the fee agreement in detail with the client before the client signs it. This advice applies to all kinds of fee agreements – hourly, fixed, contingent, hybrid, and value-based. Either have the client take the fee agreement home to read again, sign, and send back or prepare a fee agreement after the initial interview and send it to the client with the same instructions. Also, advise the client in writing that you will not do any work on the case until the fee agreement is signed and returned. If your agreement requires your client to provide you with funds for deposit in your trust account (funds you will earn as you do the work), be sure to explain that your representation cannot proceed until the money has been provided. If you take the case on a contingency basis, you may want to ask that a specific amount be paid to cover the initial costs of commencing the litigation (i.e., filing and service fees) and any charges for reports necessary to determine the value of the case (i.e., doctor or police reports). You should not finance your clients' litigation.

Generally, clients cooperate more fully with their cases when they are financially invested. If they are not sufficiently interested in the case to be willing to invest some money, the matter quickly becomes your problem rather than theirs. A surprising number of malpractice claims are brought against lawyers who spent enormous amounts of time on cases without collecting a cent in fees.

Many legal malpractice suits result from counterclaims in response to a lawyer's action to recover fees. The risk of being countersued for malpractice is greatly reduced if you take the time to explain your fees to clients early on, document your agreement, and provide frequent fee bills. Your explanation should include how you bill (i.e., units of time) and whether you have a minimum billing unit (e.g., .10 hour, which is six minutes). These fee bills should be detailed and should identify the specific services rendered for the fee charged. Listen carefully to your client's need for services before you provide a quote for fees. Then follow these practice tips to promote good client relations:

1. Enter into a written fee agreement early in the course of representation. Be sure it is specific and complete.

    a. **Identify the Scope of Services**. The fee agreement should specify the services to be rendered and provide the client with clarity and written proof of what he or she has agreed to do.

    b. **Specify the Timing of Services**. A fee agreement that clearly states that you will commence representation after the client performs a future act (e.g., paying a retainer fee, providing money for filing fees, or providing crucial background information) can avoid a misunderstanding.

    c. **Explain the Type of Fee**. Clients are generally not familiar with legal terms such as contingent fee, costs, retainer fee, flat fee, fixed fee, or value-based billing. Be certain to explain these terms carefully. For example, if you charge a contingency fee, explain what the percentage fee will mean in terms of dollars. Be certain the client understands that he or she will be responsible for costs regardless of the outcome. If you charge an hourly fee, estimate the number of hours the case may take and periodically update the client. Provide revised estimates if the case takes more time than originally planned. If the fee arrangement is for an uncontested case,

define the term uncontested for the client. For example, if the fee applies only if you do not have to negotiate support or property division, let the client know this.

It may be difficult for clients to understand fees that are earned upon receipt. This type of fee arrangement can increase your risk of a legal malpractice or ethics claim. Be sure to fully advise the client of the nature of the fee and always put your fee agreement in writing. Avoid calling fees earned upon receipt "nonrefundable." Such a designation may be misleading, if not false, in violation of ORPC 8.4(a)(3), which prohibits conduct involving "dishonesty, fraud, deceit, or misrepresentation that reflects adversely on the lawyer's fitness to practice law." Remember: clients always have the right to challenge a fee as excessive, even if the agreement is in writing, and all fees are subject to refund if the work is not performed. OSB Formal Ethics Opinion No. 2005-151.

d. **Stick to the Payment Terms**. The fee agreement should specifically state when the client is expected to pay for services, even if the arrangement is for a contingent fee. Many contingent fee cases involve the expenditure of large amounts of money for costs. Outlining the terms of payment in the fee agreement enables you to recover these costs on a monthly or other basis.

   Once the fee agreement is signed, treat it as the contract it is. Follow through on the legal work to be performed, and require the client to pay in accordance with the agreement. Do not change your method of compensation in the middle of the case.

e. **Choose the Appropriate Form of Agreement**. The fee agreement can be a separate letter or memorandum, or it can be incorporated into an initial acknowledgment letter to the client. Whichever method you use, the agreement should (1) specify the scope and timing of the representation; (2) delineate what the client is expected to pay for and when; (3) explain billing practices and when the client can expect to receive bills; (4) identify what will occur if payment is not made; and (5) be signed and dated by the client. It is important to personally review the agreement with the client. You should also provide a copy to the client, encourage the client to review the agreement in the client's own home or office, and encourage the client to ask questions before signing the agreement. The agreement should be stated in terms the client can understand. Note: If you are representing a client on a contingent fee basis, use a written fee agreement and comply with ORS 20.340 by having the client sign an OSB-Approved Explanation of Contingent Fee Agreement **before** the fee agreement itself is signed. (Sample agreements and a bar-approved model explanation form are available on the PLF Web site, www.osbplf.org.)

2. Prepare itemized bills so the client can determine what is being done, and send bills on a regular basis (preferably monthly). Inconsistent billing practices disrupt firm cash flow, infuriate clients, and make collection more difficult.

3. Maintain detailed and complete time records, even on contingency fee or flat/fixed fee cases. This procedure will enable you to analyze the amount of time you spent on the case. It will also help you determine how much to charge for similar cases in the future. These time records will also serve as evidence in the event of a fee dispute.

4. Do not allow outstanding fees to accumulate during the course of your representation. If you are not paid as agreed, call the client as soon as possible and discuss the situation. You may find that the client has new financial circumstances and that you are willing to renegotiate the terms of the client's account. Or you may find that you need to address issues related to

your attorney-client relationship. For example, perhaps the client is dissatisfied with an aspect of your representation. Speaking with the client helps you to decipher and address the applicable issues. Once you understand the situation, you can decide whether you want to continue or withdraw from the representation. If you withdraw, comply with all provisions of ORPC 1.16, as well as applicable court or agency rules. Do not discontinue providing essential legal services due to non-payment unless you have properly withdrawn.

5. As a general rule, avoid suing clients for fees. Make an effort to determine the cause of the client's dissatisfaction. Really listen to the client's side of the dispute. If appropriate, offer to arbitrate the fee dispute through the OSB Arbitration Program or consider other alternative dispute resolution methods.

   If you decide to sue a client for fees, consider the following:

   a. Do you stand to gain or lose a substantial amount of money?

   b. Was a good result obtained in the underlying case?

   c. Has an uninvolved, experienced lawyer reviewed the file for possible malpractice?

   d. Are there any grounds on which the client can credibly dispute the debt or any part of it?

   e. Have you offered to arbitrate or compromise?

   f. Will a judgment be collectible if obtained?

   g. Will a lawsuit result in bad publicity reflecting negatively on you or your law firm?

Exercise extreme caution in deciding to sue to collect a fee. Many legal malpractice suits result from counterclaims in response to a lawyer's action to recover fees. Frequently, your effort to sue for fees is rewarded only with further aggravation, wasted time, wasted money, and poor client relations. A straightforward discussion of fees, financial arrangements, and billing procedures at the beginning of the attorney-client relationship will reassure clients, reduce the possibility of fee disputes, and eliminate the need for collection litigation.

The OSB publishes a collection of fee agreements in a handbook entitled the *Fee Agreement Compendium*. The handbook is available through the Order Department of the OSB, 503-620-0222 or 1-800-452-8260 (ext. 413) and is included in BarBooks™.

Engagement, Nonengagement, and Disengagement Letters

Engagement, nonengagement, and disengagement letters are crucial to effective malpractice avoidance. Engagement, nonengagement, and disengagement letters set the stage for the relationship and the responsibilities between the parties. They protect you and the client by providing a clear written description of the client's relationship with counsel. Many legal malpractice claims are successfully defended because the lawyer can produce a letter that establishes that he or she did not have responsibilities to the client. Generally, an attorney-client relationship may be formed whenever it is reasonable under the circumstances for the potential client to look to the lawyer for advice. *See In re Weidner*, 310 Or 757, 801 P2d 828 (1990). Documenting your relationship with current, former, and declined clients avoids these misunderstandings.

Using engagement, nonengagement, and disengagement letters does not have to be time-consuming, difficult, or offensive to the client. On the contrary, most clients welcome (and expect) a clear written description of their association with their lawyer. Providing these letters to potential clients will clarify and formalize your own relationship to the client or potential client. This practice will also increase the likelihood that the legal matter is entered into your conflict of interest and calendaring systems.

Sample engagement, nonengagement, and disengagement letters are available on the PLF Web site, www.osbplf.org.

Engagement Letters

Always follow the initial client interview with a letter that establishes the limits of representation. The letter should set out which legal problems will be handled and which ones will not, which steps will be taken (or have already been taken), and which responsibilities are the client's. This type of letter is equally important for an ongoing client with a new matter.

Engagement letters are crucial because clients generally come to you expecting you to fix everything related to a particular legal problem. If you are a personal injury lawyer and a client who has been hurt comes to you for help, you will probably assume that you will be representing the client only on the personal injury claim and possibly on a property damage claim. Yet the accident may have given rise to more than a personal injury or property damage claim; it may also involve a workers' compensation claim, a product liability claim, a social security disability claim, or an employment discrimination claim. Unless you specifically limit the scope of your representation, the client will assume you will resolve all of these problems.

Here is a vivid example of the importance of using an engagement letter:

> The mother of a child who had been involved in a serious automobile accident called a lawyer. The lawyer advised the mother over the telephone that he would obtain a copy of the police report and would get back to her. There was no further communication between the lawyer and the mother. The lawyer forgot to obtain a copy of the police report, forgot to write back to the client, and forgot that he had made promises to her. After the statute of limitations ran, the lawyer was sued for legal malpractice. If the lawyer had sent an engagement letter to the client, a file would have been opened and the case would have been entered into the lawyer's calendaring system.

You can incorporate your fee agreement in the engagement letter rather than using a separate fee agreement. If you choose this method, the *entire* fee agreement needs to be set out in the letter. Include two originals of the engagement/fee agreement letter to the client with instructions to sign and return one of the originals to the office before representation begins.

Nonengagement Letters

When you do not wish to accept the case, sending a nonengagement letter is equally important. In many instances lawyers are sued by non-clients or by those who are considered by the lawyer to be non-clients. An example of this occurrence is as follows:

> A woman who had extensive health problems consulted with her "family" lawyer about a potential medical malpractice case. The lawyer listened empathetically to the woman's story, commented that he felt she had a good case, and advised her that he did not handle medical malpractice cases. The woman left the office believing that she had established a rapport with the lawyer and expecting that the lawyer would be handling her medical malpractice case. When the woman later sued the lawyer for missing the statute of limitations, he could only offer his verbal testimony that he had not accepted the case. He failed to send the client a nonengagement letter, and could not offer any additional proof. The jury entered a verdict in favor of the woman.

In the above example, the lawyer could have avoided the legal malpractice claim by writing a simple, three-line nonengagement letter. The letter could have protected him and also served as a reminder

to the client that she needed to obtain another lawyer for that matter. There may be times when you cannot send a nonengagement letter to your prospective client, as in a family law matter where the consulting client continues to live at home with his or her spouse. In these cases, use a New Client Information Sheet that contains a disclaimer clarifying that you are not obligated to provide services to the client until you and the client mutually agree in writing to the terms of representation. *See* New Clients, *supra.*

If you remain unconvinced that nonengagement letters are an important part of malpractice avoidance, consider for a moment how the jury will view the situation. If you decline a case and do ***not*** send a follow-up letter, your verbal testimony will be pitted against the client's. The plaintiff's lawyer in the legal malpractice case against you will probably point out that you interview over two hundred clients or potential clients a year. The jury is likely to believe that the client's recollection is better than yours since the client probably only has the one case.

Consider these guidelines when drafting a nonengagement letter:

1. Specifically state in the letter that you are not able to accept the case. It is not necessary to give a reason for declining the case, but you may do so if you wish.
2. Avoid commenting on the merits of the case. If you are not taking the time to research and investigate it, you should not offer an opinion as to its worth. This is particularly true if you are not skilled in the area of law in question.
3. If time limits apply to the case, generally advise the client that time limitations apply. Do not specifically state your calculations for the time limitations. Instead, emphasize that it is imperative to consult with another lawyer immediately.
4. Use the nonengagement letter as an opportunity to return any original documents the client may have given you during the interview.

Keep a file copy of all nonengagement letters in a miscellaneous file, and be sure to enter information concerning the declined client in your conflict system.

Disengagement Letters

When your legal services are complete:

1. Send a disengagement letter letting the client know that your representation in the matter has ended.
2. Thank the client for allowing you to be of service and return all original documents.
3. Set out any tasks the client needs to perform to *finalize* the matter, such as sending a certified copy of the General Judgment to a life insurance company if the adverse spouse is to keep life insurance in effect for your client or their minor children.
4. Set out any tasks the client needs to perform in the *future*, such as renewing a UCC filing, exercising an option to renew a lease, and so on.
5. If you are going to undertake any follow-up responsibilities, they should also be set out in the closing letter.
6. If you have chosen a destruction date for the file, let the client know that the file will be destroyed and when it will happen.

If you wish to terminate the attorney-client relationship before the case is concluded, be sure to comply with all ethics rules, including ORPC 1.16, and take the following steps:

1. Advise the client of the reason for termination in writing. Avoid commenting on the merits of the case. Since you are terminating representation before conclusion of the case, advise the client generally of any time limitations and stress the need to obtain another lawyer immediately. Be certain to properly withdraw as attorney of record.
2. Provide the client with a copy of your file and retain a copy for your records. Return any original documents or papers belonging to the client.
3. Refund any unearned fees.
4. Cooperate fully with the client's new legal counsel, if any. Provide that person with a complete copy of the file, and make sure the appropriate substitution of counsel is timely filed with the court.

CONFLICT OF INTEREST SYSTEMS

Conflicts of interest can lead to serious malpractice and ethical problems. To detect conflicts, a good conflicts checking system is essential. No lawyer can remember every person connected with every case. Eventually a new client will appear with interests opposed to a present or past client. If undetected, such a conflict will cause much wasted effort if you are eventually forced to resign from the case and can result in malpractice claims and disciplinary proceedings.

One type of conflict problem lawyers run into is representation of multiple parties. Representing husband and wife, buyer and seller, insured and insurer, estate and administrator, directors and officers, guardian and ward, or trustee and beneficiary can be dangerous because the parties' interests may diverge. Any time multiple parties are represented or the lawyer has a personal interest in the matter, conflicts can arise.

Conflict problems also arise when lawyers fail to document that they are *not* representing someone. For example, assume a husband and wife want an amicable dissolution. They come to you and ask you to represent both of them.

In this type of situation, documentation is critical. Assuming that you are permitted to represent one of the parties, confirm representation of the client with an engagement letter and send the other party a nonengagement letter. The nonengagement letter should state that you are not representing the nonclient's interests and that the nonclient should seek independent counsel.

A good conflict checking system will detect possible conflicts of interest before representation. Nevertheless, some conflicts may arise during representation. Every lawyer should develop policies for handling conflict situations as they arise. Follow ORPCs 1.7, 1.8, and 1.9, and be sure to carefully document your actions.

A poor conflict system is as bad as having no conflict system at all. There are different approaches to setting up conflict systems, depending on the size and type of office. All effective systems have certain things in common. A good conflict system has these characteristics:

1. The system is integrated with other office systems;

2. The system provides for easy access to conflict data for everyone in the office;

3. Checks are conducted at the three key junctures: before the initial interview, before a new file is opened, and when a new party enters the case;

4. Searches check for spelling variations of names;

5. Conflict entries show the party's relationship with the client;

6. All parties connected with a case are entered into the system; and

7. Conflict searches are documented in the file.

Creating a Conflict Checking System

Transitioning from Traditional Conflict Systems

The traditional conflict system used index cards to keep track of conflict names. This system was slow to maintain and check. Now a simple computer database allows for fast and immediate conflict checking. Databases are inexpensive and are often included in the software bundle that comes with new computers.

A database stores information on records in fields. When you set up a database, you select the particular fields that will appear on each record. When you create a new record, the fields will automatically appear to prompt the user to enter the correct information.

The big advantage of a database is that you can search the records using a particular name. Once you give the command, the database scans all the records in the database to see whether the designated name is present. If the name appears in any record, the computer pulls that record up onto the screen.

When shopping for a database, look for one that is easily searchable and will hold enough records. Many databases hold an unlimited number of records while others are limited. We recommend a minimum of 5000 records for the new sole practitioner.

Setting Up the Conflict Database

When you set up a database for your practice, include the following fields in each record:

Date Opened:	(the date when the file or matter was opened)
Matter Name:	(the name of the file or matter)
Matter Number:	(the number assigned when the file or matter was opened, if applicable)
Client Name:	(the name of the client) [1]
Attorney:	(initials of the responsible lawyer, if applicable)
Description of Matter:	(a description of the matter detailed enough to allow the user to determine whether a conflict exists without having to pull the file)
Conflict Names:	(names of all related and adverse parties and their relationships to the client) [2]
Date Closed:	(the date when the file or matter was closed)
Closed File Number:	(the number assigned when the file or matter was closed)
Date Destroyed:	(the date when the file or matter was destroyed, if applicable)

[1] This field could be further divided to separately track the client by last name, first name, and middle name.
[2] Conflicts can also be tracked in two separate fields, one for adverse parties and one for related parties.

Other fields that could be added to a conflict database include the client's federal taxpayer identification or Social Security number and the name of the opposing counsel. At a minimum, always include each party's relationship with the client or role in the case. This information makes it much easier to quickly assess the seriousness of a potential conflict.

Case Management Software

A case management program can be an alternative to setting up your own database. This type of software usually allows you to electronically save or print a "conflict" report for the file and integrates various office systems (conflicts, client database, matter database, calendar, tickler system, etc.) into one product.

This "all in one" software has become very popular. The PLF practice management advisors monitor new developments and can provide information about this type of software.

Using a Conflict System

A Checking Routine

Set up a procedure for checking conflicts. Conflicts should be checked three times. First, check for conflicts when a potential client first contacts you but before the initial interview. (A preliminary check of the potential client's name allows you to decline further discussion, preventing a crucial divulgence of confidences.) Second, do a more thorough check before you open a new file for that client. After talking with the potential client, you will have the names of others connected with the case. Third, check the conflict system whenever a new party enters the case.

Office Sharing

Lawyers sharing offices *may* need to provide each other with the names of their clients so that a conflict of interest check can be completed. However, before revealing a client's name to other lawyers in your office share, obtain the client's informed consent in writing. OSB Formal Ethics Opinion No. 2005-50 cautions lawyers sharing offices to avoid conflicts of interest by (1) not holding themselves out to the public as members of the same firm through joint advertising, joint letterhead, or otherwise; (2) respecting confidentiality of information relating to the representation of their respective clients and insuring the same from their employees; and (3) keeping their respective files separate. If these steps are not taken, then lawyers in an office share cannot represent adverse parties. If a common telephone system is used, office sharers must not represent adverse parties unless they have taken steps to assure that telephone messages containing client information or legal advice are not given to or transmitted by shared employees. Mail must not be opened by shared employees. If the lawyers share a secretary or other employee who is in possession of the confidences or secrets of both lawyers, then the simultaneous representation of adverse parties would be prohibited.

Document Conflict Checks

Assign responsibility for conflict checking at each of the three stages mentioned above, and establish a method for recording that a check was completed. A client intake sheet or a specific conflict check request form are possible ways for keeping track of this. Always show the names that were checked and who performed the check. When a new file is opened, make sure that the conflict check was actually done.

Input New Conflict Information

The person checking for conflicts should also input the new conflict information from the client intake sheets or conflict check requests. Be sure to include everyone connected with the case. Lawyers in your own firm, staff members, and close relatives of lawyers and staff should be listed in the conflict system. This insures that cases will not be taken against people connected with the firm.

In addition to all clients, enter the names of all prospective clients and declined clients into the conflict system. A failure to enter prospective or declined clients in the conflict system can be embarrassing and costly and may result in ethical or malpractice claims against the lawyer. For example, assume a husband comes in for a consultation because he is contemplating divorce. During the consultation, the husband discloses confidential information. The husband then decides not to proceed with the divorce, or the lawyer declines the husband as a client. Two years later, the wife comes to the lawyer seeking a divorce. If the lawyer accepts the wife as a client, the lawyer will have a conflict of interest. This could easily happen if the lawyer forgot about the consultation with the husband and did not maintain a record of consultations in the conflict system. A similar situation can occur when two lawyers in the same firm interview prospective clients who have adverse interests.

When a Name Is Found

If a name is found in the conflict system, notify the responsible lawyer immediately. The faster the lawyer is aware of the potential client's relationship to a current or past case, the better position the lawyer is in to make a decision to decline representation or make proper disclosure. If a name comes up during a conflict check, it does not necessarily mean there is a conflict. The lawyer responsible for the client or matter must make the final decision. However, if there is no way to check for conflicts, or if a check is not done, the lawyer will not know until it is too late.

If the lawyer decides to decline representation, notify the declined client immediately. To protect client confidentiality, state only that a potential conflict exists. Do not provide any further details to the declined client. Always document notice and declination of representation with a nonengagement letter.

New Lawyers and Staff

Conflicts can arise when a new lawyer or staff member joins the firm. The new lawyer or staff member may have worked on cases at another firm that present a conflict with your firm's clients. Every lawyer and staff member should maintain a personal list of former clients. Have the new person review a list of the firm's clients and compare it with his or her personal list. When the comparison is complete, incorporate the new person's former clients into the firm's conflict system. This step ensures that all lawyers in the firm will be aware of any potential conflicts the new person might have. (The new person's conflicts are now the firm's conflicts unless the screening rule in ORPC 1.10 applies.)

When a Lawyer or Staff Member Leaves the Firm

When leaving a firm, a lawyer or staff member should take a list of the clients to whom he or she provided legal services. The list will let the lawyer or staff member screen for conflicts in his or her new office. If the lawyer or staff member did not maintain a list of the clients he or she served, the old firm may be able to provide the list from the firm's conflict system. (This option may not be available for staff members.)

If the firm's conflict system accurately reflects all the matters the lawyer worked on while at the firm, the firm can print a report for the lawyer or provide the information electronically, if available. If the firm's conflict system tracks only the primary lawyer on client matters and does not reflect all the lawyers who may have worked on a given file, the firm may want to create the necessary conflict information from billing records or provide the departing lawyer with a list of all the matters that were opened during the time the departing lawyer was employed at the firm.

New Client List

Regularly circulate a list of new clients and cases to all lawyers and staff in the office. Ask that everyone review the list for possible conflicts that may not be in the conflict system. Someone in the office may recognize a conflict from the list that would not be detected otherwise.

Request for Conflict Search and System Entry

FILE NAME *John Smith – Business Lease*

CLIENT/COMPANY NAME *John Smith*

CLIENT MATTER *Business Lease* RESPONSIBLE ATTORNEY *MLS*

RELATED PARTIES

NAME	RELATIONSHIP
LB Properties, Inc.	*Lessor*
Dee Crocker	*President of LB Properties*
Carol Wilson	*Real Estate Agent for Lessee*
Sheila Blackford	*Real Estate Agent for Lessor*
Bev Michaelis	*Property Manager*
555 SE Downs, No. 115, Portland, Oregon	*Property Address*

☑ NEW MATTER (to open new file)

☐ ADDITIONAL INFORMATION (to update file)

☐ SEARCH ONLY (do not add information)

Requested by *MLS* Request Date *June 2, 2014*

☑ NO CONFLICTS FOUND

☐ NAMES FOUND AS FOLLOWS:

Searched by *BLL* Search Date *June 2, 2014*

Types of Names to be Added to Conflict List

(This is not a complete list.)

Litigation Insured Plaintiff(s) Guardian ad Litem Expert Witness(es) Insurer Defendant(s) Spouse/Partner Lay Witness(es)	**Corporate/Business/Real Estate** Owner (Spouse/Partner) Buyer(s) Partner(s) Shareholder(s) Key Employees Subsidiaries/Affiliates Seller(s) Officer(s) Director(s) Property Address Taxlot ID Number Any opposing party in a transaction
Probate Deceased Personal Representative Spouse or Partner/Children/Heirs/Devisees Trustee/Guardian/Conservator	**Estate Planning** Testator Personal Representative Spouse or Partner/Children/Heirs/Devisees Trustee/Guardian
Domestic Relations Client Children Spouse/Partner Grandparents	**Criminal** Client Witness(es) Co-Defendant(s) Victim(s)
Workers' Compensation Injured Worker Employer Insurer	**Bankruptcy** Client Creditors Spouse/Partner
Your Firm All Lawyers Spouses or Partners/Parents/Siblings/ In-laws/Children Employees	**Other** Declined clients and adverse parties, if known Prospective clients Agencies or individuals for whom you provide investigation work, such as OSB Professional Responsibility Board

Include all clients in your conflict system, including pro bono clients and individuals advised through volunteer work at pro bono agencies such as Legal Aid Services of Oregon.

When listing an individual, be sure to include all known names (i.e., former or maiden names). When listing lawyers and employees of the firm, consider including contract attorneys, temporary workers, and freelancers. You can also include the firm's key vendors or service providers in the conflict system.

ORGANIZING AND KEEPING CLIENT FILES

Following the initial interview, once you have checked for conflicts and obtained the client's signature on a fee agreement or engagement letter, it is time to open the file. Some lawyers use a paper filing system, others are paperless, and many combine the two.

Opening Files – Paper-Based System

If you are paper-based, file folders can be legal or letter size. Letter-size file folders are cheaper, but what size file folder you use will also depend on the size of the file cabinet you choose. File cabinets come in a variety of forms: vertical (which store files front to back), horizontal (which store files side to side), or open shelving. Files stored in open shelving usually require end tabs on the folders. This works if you are also going to store your closed files on open shelves. However, if you are going to transfer your closed files to banker boxes, these side tabs get folded into the side of the banker boxes, making it very difficult to read the file names.

Although more expensive, another option is the pressboard partition file folder. These folders usually have at least two partitions in the middle of the file. This allows for six or more different filing surfaces. Some law offices use a file pocket or expandable file with colored subfiles in the pocket file. Using subfiles is a very easy way to keep pleadings separate from correspondence and correspondence separate from discovery, and so on. Each of the subfiles can be a different color. (Green for correspondence, blue for legal research, red for discovery, etc.) When you are filing correspondence, it is easy to locate the green correspondence subfile.

Another way of organizing files is to color code them by area of law. For example, all criminal files could be green, domestic relations red, and so forth. Again, it makes it much easier when looking for files to look for a specific color only.

Numbering Files – Paper-Based System

Decide whether to give files a number when they are opened. If you are not using a file number for a specific purpose, such as filing numerically or using open file numbers in the billing system, then don't spend the time to number open files. (*See* Closing Files, *infra.*) Many smaller offices file all open files alphabetically so there is no need for an open file number.

File numbers can be strictly sequential or may show how many files were opened in a given year, for example, 2009-10 (tenth file opened in 2009). Some offices give each client a number, and then each matter is an extension of that main client number.

Another challenge is to decide how to label succeeding matters when representing public entities and corporations. You should have a main file for everyday items and separate files for distinct topics such as an employee problem or a road project.

Client Copies

Unless you have arranged to provide documents electronically, give every client his or her own file folder. Put the name of the matter on the file tab. Use folders that come with fasteners already attached or two-hole punch the top of the folder and insert an Acco fastener. Tell clients they will receive copies of everything that is pertinent to their case and that it is their responsibility to maintain their own files. Tell clients that you will keep their files for 10 years after the representation is concluded and then destroy them, but clients may keep their files as long as they wish. (*See* Engagement, Nonengagement, and Disengagement Letters in the New Clients section, *supra*.)

Some jurisdictions state that the file belongs to the client and cannot be destroyed without the client's permission. By following the above guidelines, the client receives a duplicate of the lawyer's file. The lawyer's file then remains the sole property of the lawyer and can be destroyed when it is appropriate, without having to obtain the client's permission.

Paperless Files

Keep paperless client files orderly for easy retrieval by anyone needing access. Create a folder on your system for each client. If a client has multiple case matters, use subfolders. Each matter may have a subfolder for correspondence, pleadings, and other documents as needed. Incoming paper can be scanned and saved in portable document format (PDF). You can use document management or case management software to track and organize client documents. The PLF practice management advisors monitor new developments and can provide information about this software. An excellent resource for going paperless is Donna S.M. Neff and Sheila M. Blackford, *Paperless in One Hour for Lawyers*, published by the American Bar Association (ABA) Law Practice Division (2014). Additional resources are available on the PLF Web site, www.osbplf.org.

If you use e-mail to communicate with clients, have a system in place to capture and document your messages in the client's file. For detailed instructions on how to save client-email, see the PLF practice aid "Documenting E-mail as Part of the Client's File," available on the PLF Web site, www.osbplf.org.

Once a matter is concluded, archive the client's computer folder or subfolder (including e-mail messages). One approach is to move or copy the client's information to appropriate computer media and delete it from the hard drive. Label and save the media. If you need to reopen the client's file, you can easily reload all the documents onto the computer. One added benefit to this system is that you can remove all office-generated forms and letters from the case file when it is closed because they have been stored on media. This saves file storage space. For more information, *see* Closing Files, *infra.*

CALENDARING AND FILE TICKLING SYSTEMS

Failing to respond to deadlines is a leading cause of malpractice claims. In a study by the ABA's Standing Committee on Lawyers' Professional Liability, more than twenty-five percent of *all* malpractice claims could be traced to calendaring errors—failure to account for a deadline, failure to properly calendar, failure to react to the calendar, or procrastination in performance or follow-up.

To avoid malpractice and manage your practice effectively, you must have a good calendaring system to keep track of court dates, statutes of limitations, client appointments, file review dates, and other dates and deadlines.

Historically, lawyers have used several systems to track important dates: an appointment calendar for client appointments, a docket for court dates and legal deadlines, and a diary or tickling system for files. However, the terms calendar, docket, and tickler are often used interchangeably because all refer to the same principle of keeping track of important dates.

The three parts of a calendaring system – docket, calendar, and tickler – are often combined or subdivided further, depending on the size and type of practice. No matter what system you use, it must capture all deadlines and provide significant reminders to allow you to complete all work orderly and timely.

When setting up a calendaring system for your practice, look at the different elements of traditional calendaring methods and adapt them to your particular style. Whatever combination you use, be sure that your system provides for:

1. immediate and automatic entry of dates;
2. double checking of all entries;
3. sufficient lead time to complete tasks;
4. follow-up checking; and
5. backup or duplication of the main calendaring system.

A good calendaring system has two components: (1) a tickling function to prompt you to pull paper files or access electronic files in anticipation of work; and (2) a docketing function to remind you of impending dates and deadlines. This section explains how to set up a calendaring system to accomplish these two functions and prevent errors in maintaining the system. The first part gives an overview of tickling systems and how to use them, and the second does the same for docketing systems.

Types of File Tickling Systems

Systems for reminding you to work on files are called file tickling or diary systems. They are used to retrieve files in anticipation of future deadlines, to plan work, and to prevent files from being neglected. They also keep you aware of self-imposed work management deadlines and critical deadlines such as court appearances and statutes of limitations. In this way, the file tickling system ensures a steady work flow and backs up your regular calendar.

You can choose from several effective file tickling systems. No matter which type you use, you must take certain precautions to prevent error.

Transitioning from Traditional Tickling Systems

Prior to the widespread adoption of computerized calendaring programs, attorneys used index cards to tickle files. With an index card system, each open file is listed on a separate 3x5 card kept in a file box with daily and monthly dividers. When the client file is tickled, the 3x5 card is placed behind the corresponding date in the card box. When the file is pulled for review, the card is then moved to the front of the file box. Upon completion of the file review, a new tickle date is noted on the card and the card is refiled under the new tickle date. Maintaining a tickle system using index cards is labor-intensive and can lead to errors. It is easy for cards to be inadvertently misfiled or lost. There are better alternatives to the index card system.

Main Calendar and a Case List

One option to the index card system is to note the names of files to be tickled on the bottom of each day's section on the main calendar. At the beginning of each day, you or a staff person pull or bring up the files listed for that day. After you complete the task for a particular file, but before it is placed back in the cabinet or closed in the computer system, note the next tickle date on the calendar.

To prevent files from falling through the cracks, you or a staff person must maintain a list of all active cases and print the list at the beginning of each month. As the month progresses, place a line through the name of each file that you work on. At the end of the month, review any file not yet worked on. When a file is closed, remove its name from the list. This simple system prevents files from being forgotten.

Stand-Alone Calendaring Programs

Computer calendaring programs work very well for file tickling, because you can enter recurring dates for reviewing a file. These review dates can be self-imposed deadlines or deadlines for statutes of limitation, court dates, or other critical times. When you open a file, you choose the review intervals. You then enter these intervals into the calendar program, which automatically brings up the file name according to the specified intervals.

Calendaring programs also allow for tickling events years in advance. For instance, corporation files can be tickled yearly for annual meetings, will files can be tickled yearly for review, and judgments can be tickled for a 10-year renewal.

Case Management Programs

Case management software is an alternative to a stand-alone calendaring program. This type of software integrates various office systems (calendar, tickler system, conflicts, client database, matter database, etc.) into one product. One of the most helpful features of a case management program is the ability to chain events. Chained events allow related deadlines or tasks to be linked together. For example, a trial date can be chained to all the events that must be accomplished prior to trial – filing a motion for summary judgment, issuing subpoenas, preparing witnesses, etc. If the trial is reset, any event chained (linked) to the trial date will be moved automatically. Without chained events, each task would need to be re-calendared manually.

Date Calculation Programs

For most lawyers and their staff, calculating deadlines involves the tedious process of verifying the occurrence date, identifying the applicable deadline, calculating its expiration, and properly entering it into the calendar. A common problem is failure to account for weekends and legal holidays. One solution is to use a deadline calculation service (available online) or rules-based software. Both allow deadlines to be imported into existing calendaring or case management programs, and ensure greater accuracy of date calculations.

Calendaring, case management, and date calculation programs offer distinct advantages over desk calendar and card systems. The PLF practice management advisors monitor new developments in technology, including cloud-computing options, and can provide information about this type of software.

Using a File Tickling System

Establishing a Routine

No matter which tickling system you use, pull all tickled files for a particular day each morning. If your office is paperless, access the files on your computer system. If nothing needs to be done on a file that day, you can tickle the file for a future date. The best routine is for you and a staff member to review the files together. You can also use this meeting to review the day's mail. This system allows you to plan your work for the day and assign staff specific tasks. Any files that do not need immediate attention you can retickle and remove from your office.

If a routine tickle date comes up and there is no work to be done on the case, consider calling the client or sending a short e-mail or letter. Some clients want to hear from their lawyer, even if no action is necessary. It is important to let the client know the status of the matter, even if the status is "waiting."

Setting Tickle Dates

File tickling dates fall into several categories: (1) a date that cannot be missed, such as a time limitation; (2) a date that should not be missed, such as a follow-up on a 10-day notice; (3) an informational date, such as a date when medical reports are expected; and (4) a periodic review date. Dates vary in their significance and should be protected with extra tickle dates accordingly.

When you are finished working on a file, mark a new tickle date on the file jacket or log sheet inside the file. Then send the file back for filing. Be sure that the new tickle date is also entered in the tickling system. If your office is paperless, consider keeping an electronic tickle log for each file/matter or track tickle dates using calendaring or case management software. **Never place a file back in the filing cabinet without inserting a tickle date in the tickler system.** Make this your file tickling rule. Also, instruct everyone you work with that no files are to be taken out of your office without a tickle date, and no files are to be put back in the cabinet without a new date in the system. This same practice should be followed for electronic or paperless filing systems.

Conducting Periodic Reviews

In addition to specific tickle dates, set each file for periodic review. A 30-day file review interval is ideal for most cases, and most files should not be tickled for more than 60 days out. Some law firms find it helpful to use a dual system: one reminder every 30 days to refresh the lawyer's memory about the client matter followed by a second reminder every 60 days to review the file. A dual system is easy to set up in a calendaring or case management program by creating a recurring appointment or task.

The maximum review frequency should be established at the outset of the matter and written in the file, either on the client intake sheet or on a file opening memo. If you are paperless, note the maximum review frequency in your calendaring or case management system. Consider using fillable Intake Sheets, as described below. If the case has been concluded, close the file. If you represent a client in multiple matters, open separate paper or electronic files for each matter. Avoid keeping concluded matters in your open files.

Tickling Specific Deadlines

You should also tickle specific deadlines. For example, a file for a case in which you have given someone 10 days to respond should be tickled for 11 or 12 days. If you receive no response, you are reminded to take the next step immediately. If the deadline is not tickled, the file remains dormant in the cabinet or in your computer system and you are not reminded to take action. Your reminder may be the angry client calling to find out what is going on.

Tickle final deadlines, such as statutes of limitations or appeal deadlines, with ample reminder dates. Also, mark these dates directly on the file or prominently in your computer system where you can easily see them.

Setting Reminder Dates

Develop a general time line of tickle dates for each type of matter you handle. Include not only deadlines, meetings, and court appearances but also backup reminder dates. Give yourself adequate time to prepare for each upcoming event. For example, you should always tickle a file with a trial date for at least two months before trial, and again one month before trial, in addition to adding tickle dates for specific events. This method will give you plenty of lead time to make all final preparations before the trial date.

Following Up

Set tickle dates to follow up after an event. This is critical for time-sensitive deadlines but is easily overlooked when the next move depends on someone else. For example, always tickle follow-up dates to check whether service of process was accomplished timely. Also, remember to tickle the file for follow-up shortly after a self-imposed deadline, in case something still needs to be done before the real deadline.

Managing the Caseload

Use your tickling system to manage your work and help meet client expectations. Look at your calendar and find blocks of time when you can complete the next piece of work on a matter. When giving a client a date for completion of work, be realistic. Build in an extra cushion of time before the ultimate deadline given to the client. If you complete the work early, you will have a happier client and one less "to-do" task on your plate.

If you have a good tickling system and to-do list, you don't need to keep all active client files stacked in your office. A good system should also reduce the fear that a file will disappear or never return if it is allowed off your desk. File hoarding makes it difficult for others who may need the file. You can neglect a file just as easily under a pile of other files as in the filing cabinet. Getting the files off your desk can reduce a major source of stress and help you organize your work more effectively. If your office is paperless, a good tickling system and to-do list will keep you on track.

Types of Docketing Calendars

In every law firm, the central docketing calendar should hold all the important dates for each lawyer. If you maintain this calendar in addition to a file tickling system, the two will serve as backups to each other. You will be reminded of a particular event both by its presence on the calendar and by the file's reappearance because of a tickle date.

Central Docket Calendar

Traditionally, the docket calendar was a large, desktop calendar kept in a central location in the office and maintained by one staff member. Lawyers and staff members informed this person of important dates with written calendar slips.

For the sole practitioner, the central docket calendar may simply be the calendar that you or a staff person maintains. Docket dates and file tickle dates are maintained on one or both calendars. The essential element of a docketing system is to have ample reminder dates.

Docket List

A variation of the central calendar is a true docket system. In this type of system, you maintain a running list of all the important dates. Many offices maintain specialized docket systems in addition to the central calendar. This is most common in firms with a heavy litigation practice because of the many court appearances and deadlines.

Usually, someone in the office enters the dates into a word processing document, spreadsheet, or computerized docketing or case management program. The docket list is updated daily or weekly and distributed to all staff and lawyers. In addition, each lawyer and staff person maintains a calendar for all his or her important dates and appointments. This system is more common in larger firms, where a central desk calendar is impractical because of the number of events to be docketed.

Computer Calendar

Many small firms and sole practitioners have abandoned central calendars in favor of computerized calendars, case management software, or a combination of computerized and manual calendars. Calendaring or case management programs have many advantages over desktop calendars and are ideal for the sole practitioner or firm with networked computers. You can print or access up-to-date calendars at any time and set up recurring events as described above. This feature is ideal for matters that require periodic review, such as wills or corporations.

You can maintain different calendars in the same system, allowing each lawyer and staff member to have a personal calendar. If you need a firm-wide calendar, most programs can combine the individual calendars into one main calendar. Also, you can move or modify entries easily. The more sophisticated programs allow for entry of predetermined reminders for cases.

Some law firms choose to create a separate central docket calendar that is shared on the server. Lawyers and staff members can update this central docket with important dates. Maintaining a shared central docket can be very helpful when a lawyer or key staff member is unexpectedly out of the office.

Individual Calendars

Most lawyers prefer to carry a calendar with them when they are out of the office. You can easily synchronize a mobile device to the calendar on your computer or use your mobile device to access your calendar in the cloud. These devices can also store client contacts, documents, e-mail, and other information.

Mobile devices allow the lawyer-on-the-go to stay in touch with the office. The key to making the system work is to synchronize all new or changed events from your mobile device to the main calendaring system. If an event appears only on your personal calendar and you are ill, on vacation, or lose your mobile device, you may miss the deadline. When all events are synchronized to the main calendaring system, everyone in the office can monitor and respond to deadlines. With cloud-based calendars, synchronization is automatic – users are accessing a single calendar stored online.

Using a Docket Calendar System

Setting Reminder and Follow-Up Dates

No matter what type of calendaring system you use, certain procedures are necessary to prevent error. It is essential that you enter all deadlines as soon as you are notified of them and that you create sufficient reminder entries. The number of reminder dates depends on the particular calendared item, but

every item should have at least one reminder date. Three reminders are ideal: a month, a week, and a few days before the event date or deadline.

Follow-up reminders are also important, but they are often overlooked. If you are relying on someone else to do something, a follow-up entry date will remind you to verify that the action was taken. For example, if you sent the complaint to a process server, enter a follow-up date to verify that the process server effected timely service. If necessary, create a follow-up log for a particular matter. Include each important action, when it was accomplished, and by whom.

Without a follow-up system, you may not discover that a critical action was *not* taken until it is too late. Establish a policy stating what action should be taken if final reminders and follow-ups are ignored or you are unavailable.

Take the following steps to ensure that all important events are properly calendared:

1 . Set spam or junk e-mail filters to allow receipt of eNotices from the courts in which you practice. Otherwise, an important deadline or notice may be missed. You may need to make this change at the Internet Service Provider (ISP) level *and* in the settings of your specific e-mail program.

2. Create a rule in your e-mail program to automatically forward copies of eNotices to staff if they are not receiving them directly from the court.

3. Enter the final deadline in your calendaring/docket system.

4. Determine a reasonable time line for completing the various tasks before the deadline and ensure that those dates are entered.

5. Have a staff person enter reminder and follow-up dates for each task and the final deadline. For example, if the event is sending a complaint out for service, create a follow-up entry to verify that the process server actually served the complaint. If the event is to mail notice by certified mail, create a follow-up entry to verify that the certified card was returned. Indicate final reminders in red or boldface, or use the attention-getting features of your calendaring or case management program.

6. As the case proceeds, have the staff person bring the reminders and follow-ups to your attention. Mark off tasks when they are completed.

Without reminder and follow-up dates, you can miss a critical date. Failing to respond to a critical date is a common type of malpractice. Use reminder and follow-up dates.

Calendaring All New Dates Immediately

Immediate calendaring of new dates is critical for an effective calendaring system. The following are some techniques to shorten the time between the receipt of a new date and its placement on the main calendar.

1. **Intake Sheets**. Give each new client an intake sheet at the first appointment. The client completes the top half while waiting, and you complete the bottom half during the interview. The portion you fill out should include entries for important legal deadlines such as statute of limitations, file review frequency, and the first tickle date. If you maintain a paper-based filing system, place the client information sheet in the new file folder. If you have a paperless filing system, you may wish to convert your intake form to a fillable PDF in Adobe Acrobat® and e-mail it to clients for completion. The remainder of the form can be completed by you after the client interview. Otherwise, the paper form can be scanned

and added to the new client's electronic file. In either case, enter the dates on the calendar immediately.

Client information sheets provide a permanent record of every client interview. If no file is opened, scan and save the intake sheet or keep a hard copy in a miscellaneous prospective client file. Be sure to enter the prospective client information into your conflict of interest checking system.

2. **Mail Handling**. In a small firm, have the person opening the mail enter all new dates as the mail is opened. Besides date stamping, that person should indicate on each item that the date has been docketed, either by highlighting the docket date or placing a checkmark next to it. If your office is paperless, consult the mail handling recommendations for paperless filing systems available on the PLF Web site, www.osbplf.org.

3. **Synchronizing Calendars**. If you have a manual calendaring system, keep a supply of brightly colored calendar slips and carry these with you when outside the office. This allows you or a staff member to make note of new dates immediately and to give the note to the person in charge of the main calendar.

CALENDAR NOTE

NAME_____

☐ APPOINTMENT ☐ COURT APPEARANCE

DATE_____

☐ AT OFFICE ☐ AT OTHER LOCATION

TIME REQUIRED_____

COMMENTS:_____

If you use a mobile device, get into the habit of synchronizing it to your main calendar on your office computer at the start of each day.

4. **Access to the Calendar**. Keep the docketing calendar in a central location so everyone in the office has access to it. If the main calendar is manual, color code entries. Use different colors for each lawyer or type of entry (e.g., red for trials, orange for depositions, green for motions, purple for filing deadlines, etc.). Color coding is also a feature of most computerized calendaring or case management programs.

5. **Daily Conferences with Staff**. Meet with staff daily to confirm new calendar items and discuss tickled cases. This is an excellent time to review new mail, report on the progress of work, and assign tasks to staff. Good communication can prevent calendaring errors.

TIME MANAGEMENT

Do you manage your time effectively or does time manage you? Many lawyers allow time to manage them, letting interruptions deter them from their intended tasks. Some lawyers even look forward to these interruptions as a way of avoiding the work they should be doing. Lawyers who say, "My best client called and I had to drop everything," have an excuse for falling behind in their work. They justify it as unavoidable – but is it?

It is easy to rationalize that the drop-in client *must* be seen, or that all phone calls must be taken. Many lawyers believe that if they do not take their calls, voicemails will stack up and they will not have time to return calls. However, those same lawyers may avoid phone calls from angry clients who call to find out why their work has not been completed.

People who habitually procrastinate need to ask themselves why. Is it because they are unsure how to proceed? Is there a personality conflict with the client? Is it a feeling of power, that is, making everyone run around at the last minute to help get the project completed? Some people feel that they do their best work under pressure, but procrastination causes a great deal of stress for procrastinating lawyers and those who must work with them.

The OSB's Lawyer to Lawyer program is an excellent resource when you are unsure how to proceed in a case. Lawyers registered with the Lawyer to Lawyer program have agreed to volunteer their time to help other lawyers decide what steps to take in a matter.

The Oregon Attorney Assistance Program (OAAP) is another source of help for the procrastinating lawyer. The OAAP facilitates a group of lawyers who have agreed to work on their procrastination issues. These lawyers want to discover why they procrastinate and how to overcome the problem. Participation in the group requires a commitment to attend the weekly workshops and work through the program. Visit the OAAP Web site, www.oaap.org for more information.

Schedule Work

One way to avoid being managed by time is to take control of your calendar. Use your calendar as it is meant to be used – to schedule your day. No one has any trouble putting appointments with other people on the calendar, but very few think of making appointments with client files. If the "Jones contract" must be completed, schedule an appointment with yourself to do it. For example, put a two-hour appointment on the calendar with the "Jones contract." Block out this time the same as you would for any client who comes in to the office.

You most likely hold calls and refrain from reading text messages when you are meeting with a client. The same should hold true if the client is not there but the client's file is. Even one short phone call or text can be a significant interruption. A two-minute telephone call may cut into the time you need to work on a project by 10 to 20 minutes. By the time you make notes on the phone call and regain your lost train of thought, a great deal of time may have passed.

All of us have situations arise that require immediate attention. When this occurs, the best efforts to follow through with carefully scheduled time will fail. However, these emergencies should be rare and not routine. If an emergency does arise, do not let the whole system fall apart. Rearrange your schedule and keep going. Carefully scheduling work allows projects to be completed on time. The office where everything is a last-minute rush creates stress for everyone involved – you and your staff. Scheduling your work and your day will allow everyone to take a deep breath occasionally. It will also make you, your staff, and your loved ones happier.

Schedule Time to Return Phone Calls, Respond to Texts, and Answer E-Mails

Block out time to make or receive telephone calls. Staff can tell callers when you are available. If callers know approximately when to expect a return call, they can attend to other matters. Clients often expect you to call back within a few minutes, and may become anxious and irritated if you cannot return their calls as expected. When a phone call *is* returned, the client may not be available. So the same routine starts over. This is a waste of everyone's time.

Figure out what time of day is most productive for you. Are you a morning person who runs out of steam later in the day? If so, do legal work in the morning and use the afternoon for appointments and returning phone calls. If you are a slow starter and do not reach your peak until later in the day, see clients and return calls in the morning. Follow the same procedure with text messages and e-mail – block out time to respond.

Inform clients when you take on a new case what time of day you take calls, respond to texts, and answer e-mails. Doing legal work during your peak thinking hours allows you to spend less time spinning your wheels. You are able to concentrate better on the matter at hand.

Deadline Dates

All deadline dates must be calendared. You also must calendar reminders of these upcoming deadlines. For example, a statute of limitations deadline should have a reminder on the calendar every month for the six months before the limitation date, weekly for the last month, and daily for the last week. However, never wait until the last minute on a statute of limitations. Too many things can prevent you from meeting a fatal deadline date.

In addition, calendar all self-imposed deadlines. If you have promised a document to a client by a certain time, that is a deadline that should be calendared. If you find you cannot keep that deadline, let the client know and give the client a new date. Clients generally accept revised deadlines graciously if they are told directly. Waiting for the client to call to find out what is going on does not improve, and may even harm, your attorney-client relations.

Better yet, plan ahead. Before you make a promise to the client to complete a task by a certain date, take a moment to *realistically* assess your schedule. Think about the task. How long will it take? Who will be involved? When can you find a block of time to work on the task without interruption? If you form the habit of planning ahead, you can avoid breaking a promise to a client or setting an unrealistic self-imposed deadline. For more information on calendaring, *see* Calendaring and File Tickling Systems, *supra*.

Enlist Staff Help

Instruct staff to take detailed messages from callers. This information allows you to be prepared to answer the callers' questions when you return their calls. When you return a call without knowing what the caller wants, you may find that you don't have what you need in front of you. You may have to call the client back yet again.

Sometimes the client just needs specific information that your staff person can provide. When you are given a detailed message, you can determine who should return the call. Most clients are not concerned about who returns the call, as long as they get the answers they need.

Checklists

A good checklist will take you step by step through a case. It ensures that you do not forget to get pertinent information from the client. It should include not only the necessary procedures but also the time lines involved in those procedures. A checklist will allow staff to become familiar with the procedures of a

particular type of case and to know what steps need to be taken next. Without a good checklist, much time is wasted going through a file to find out what was done last and what must be done next.

Keep a checklist in each file and record all actions as soon as they are taken. (It is important that the person completing the action have the file. Otherwise, it is easy to forget to make the entries.) If your office is paperless, create a checklist by chaining together related deadlines and events using case management software. *See* Calendaring and File Tickling Systems, *supra.*

Another good way of keeping on top of each case is to set up a tracking sheet for each area of the law in which you practice. You can do this by listing, for instance, each probate case you have in the first column of the tracking sheet. Set up columns across the page and head them by each sequential step you need to take. (*See* sample Master Probate form at the end of this chapter.) As you complete the steps, check or date the columns and add new cases as you take them on. As an alternative to the tracking sheet, some lawyers use a dry-erase board so they can erase the completed cases and insert new ones. Offices using case management software can track cases by creating matter reports sorted by practice area. All three methods – tracking sheet, dry erase board, and case management reporting – allow you to look at all the cases you have in an area of law and see where you are on each case at a glance.

A good checklist will ensure that nothing is overlooked. Each area of the law lends itself to its own distinctive checklist. The PLF has many checklists you can use as is or adapt to fit your particular practice. For more information about checklists and practice aids available from the PLF, *see* Resources, *infra*.

Mail Handling

Set aside a specific time each day to review your mail – usually shortly after it arrives in the office. If you are a sole practitioner with no staff, turn on the answering machine or activate your voice mail and devote your entire attention to opening the mail, date-stamping it, and deciding what to do with each item. If you allow interruptions during this time, deadlines may be overlooked or papers may be placed into the wrong files.

Put educational materials and magazines in a stack to be read later. Glance at junk mail and throw it away, unless it is something you are interested in. Make an immediate decision on all other mail. Pull the file for each piece of mail. Promptly docket/calendar all items that need to be calendared. File all items and tickle the files that do not need immediate action. Attach mail to the files that need immediate attention. When the action is taken, file the documents in the appropriate file. This eliminates loose documents laying around your office that may be lost or misplaced.

If you have staff, use this time to meet with them to go over the mail and the calendar and to review files tickled for that day. Many items can be delegated to staff for handling. If mail is scanned and distributed electronically, review mail handling procedures for paperless offices available on the PLF Web site, www.osbplf.org.

Meeting with staff daily not only ensures good communication, but it also allows each of you to review upcoming deadlines and work schedules. It is also a convenient time to review the status of current cases. This enables staff to talk intelligently to clients when they call and cuts down on unnecessary interruptions in your workday.

To-Do List

Using some type of "to-do" list works well for most people. You can prepare this list each morning or at the end of each workday for the next day. You can keep it on your desk or carry it with you so you can add items to it as they come to mind. As you complete items, check them off the list. Items you do not complete should be rewritten on a new list.

Many computerized calendaring programs include a "to-do" or "task" list. Most of these programs roll uncompleted items over to the next day's list and will even show how many days an item has been on the list. You can print computerized "to-do" lists to carry with you, synch them to your mobile device, or manage your "to-do" list using a mobile app designed for this purpose.

Most of us put more items on a "to-do" list than we can ever hope to accomplish in a single day. Do not let this be self-defeating. Give yourself permission not to do everything on the list. Otherwise, you may feel guilty and stop using a "to-do" list.

A "to-do" list can become overwhelming, so limit it to the items that need doing in the near future. Keep items that you may want to do sometime in the future on a list for future projects and not on the "to-do" list.

Technology

Technology can be a great time-saver, if used to the fullest. However, many people use their computers only as a typewriter, which is not much of a time-saver. Learning some rudimentary computer skills beyond word processing is beneficial to any office.

Start by developing forms instead of reinventing the wheel each time you prepare a legal document. Use templates, macros, and merge documents. Specialized document assembly software can speed up the process.

As you develop forms, organize how you store them on your computer. Start by setting up two directories or folders – one labeled "Forms" and another labeled "Letters." Within these directories, create subdirectories or subfolders for each area of law in your practice, such as probate forms/letters, workers' compensation forms/letters, domestic relations forms/letters, will forms/letters, and so on. Whenever you prepare a document or letter that is likely to be used again, save it to that particular "forms" or "letters" directory. Go through the document, delete confidential client information, scrub the metadata, and set it up as a merge document for future use.

Directories and subdirectories will keep you and your staff organized and allow for easy retrieval of forms and documents. Set up a subdirectory for each client's case. As you work on a case, import forms and letters from the various directories and subdirectories to that client's directory. Make changes to the forms and letters to fit the client's circumstances and then save them in that client's directory or folder. Give the changed form or letter a new name, so the original document is not changed and remains in its original directory or subdirectory to be used again.

When you close the client's file, archive the client's electronic information (e-mails, correspondence, pleadings, etc.) One approach is to move or copy the client's directory or folder to appropriate computer media and delete it from the hard drive. Label and save the media. If you need to reopen the client's file, you can easily reload all the documents onto the computer. One added benefit to this system is that you can remove all office-generated forms and letters from the case file when it is closed because they have been stored on media. This saves file storage space. For more information, *see* Closing Files, *infra.*

Besides generating your own forms, many forms are available from the OSB's CLE Publications department, other independent developers of forms, and the PLF (www.osbplf.org).

Learning how to use technology will allow you to operate your practice more efficiently. This saves you time and saves your client money. It also gives you more time to take on more clients and make more

money. If you have questions about how to maximize your efficiency by getting the most out of technology, contact the PLF practice management advisors.

Build in Flexibility

One thing to keep in mind with any form of time management is that some people function better with rigid controls and schedules. However, most of us need flexibility. Build some flexibility into your schedule as an option. If you need the extra time – great. If not, you can use the time to work on other projects without feeling guilty.

Master Probate Checklist

(SAMPLE ONLY—THIS IS NOT A COMPLETE CHECKLIST)

(USE THIS SAMPLE AS A GUIDELINE TO CREATE YOUR OWN)

Name of Estate Personal Representative SS# of Decedent/ ID# of Estate Probate Number	Date of Death	PR Appt.	1st Pub. Date	Notice to Heirs	Inven. Filed	Indiv. Inc. Tax Ret.	Req. for Audit	Four Mos. Exp.	File Final Acct.	Not. Final Acct.	Req. for Release	Estate Closed

CLIENT RELATIONS

Establishing and maintaining a good working relationship with your clients is one of your best protections against a malpractice claim. A client with whom you have maintained good communication will be less likely to sue you than one who harbors frustrations about having been ignored or mistreated. This is true even if an administrative error occurs that might be grounds for a potential claim. Also, good client relations often allow a claim to be handled without the necessity – and cost – of litigation.

Common courtesy and good communication are the key factors in good client relations. Here are some suggestions to follow.

Clarify Fees at Initial Meeting

Clients have a right to know what your legal services are going to cost. Some clients ask this question right away, but others are quite timid about discussing money. In fact, many lawyers are uncomfortable discussing fees, but you need to fully discuss this topic with the client before you proceed with a case. Clients who do not understand their responsibility to pay are the ones who will be unhappy with the amount charged. (For more specific guidance in clarifying fees, *see* New Clients, *supra*.)

Keep Your Client Informed

The most important thing you can do is to keep the client informed. Transmit almost everything you do or receive to your client with a simple cover letter or e-mail explaining what is enclosed or by use of a stamp "For Your Information Only – No Response Required." Make it a standard office policy to send copies of everything to your client unless you instruct staff otherwise.

Keeping your client constantly advised will dramatically cut the number of telephone calls the client makes to your office wanting to know what is going on. In turn, both you and your staff will spend less time on the phone. This frees all of you for other work.

If there is no activity on a file for a time and the file comes up on a routine tickler review, send a short status letter or e-mail to your client. The client will be glad to know that you have not forgotten the case and will be less likely to keep calling the office wanting to know what is happening.

Unless you have arranged to provide documents electronically, give clients their own file folders that are labeled with the name of the matter on the file tab. Each case file should include the initial fee agreement and an outline of what the client can expect as the case progresses, including a discussion of procedures and time lines. Whether you provide documents by mail or e-mail, tell the client to keep copies of everything you send. If the client is keeping a file, instruct the client to bring the file to your meetings. Provide clients with copies of everything as their cases proceed so that they can build their own record of the case. (*See* Organizing and Keeping Client Files, *supra*.)

Follow Up in Writing

Follow up most office and telephone conferences and discovery procedures with a letter or e-mail to the client setting out the relevant information including the items discussed, any action taken or to be taken, and advice given. This letter provides the client with communication and you with proof that you reviewed the matter with him or her. It takes no longer to compose a letter or e-mail than to write a memo to the file, and a letter or e-mail will be far greater protection than a memo in case of a malpractice claim.

Although documenting the file does require some additional time and effort, it is time and effort that improves your relationship with your client. Isn't it better to spend a little extra time documenting the file than to lose billable time defending a legal malpractice claim?

Providing a written summary of what transpired in a conference provides clients with an opportunity to review and think over the information. Most clients are upset when they visit their lawyer and may focus only on the positive or the negative said to them. They may not hear or understand everything, or they may misinterpret what is said. When given the opportunity to review a letter in their own homes or offices, clients can digest the information and ask for further clarification if needed.

The average client is not knowledgeable about the law or legal terminology, so word your communications in a way that a lay person can readily understand.

Create Realistic Expectations

Many legal malpractice cases are filed because clients had unrealistic expectations. Carefully evaluate the pros and cons of new cases or courses of action and explain them to the client. (For specific guidance on creating realistic expectations, *see* New Clients, *supra*.)

Return Telephone Calls

Nothing is more irritating to clients than to call you, not be able to reach you, and then not have their call returned. They feel ignored or avoided. Clients who are told that you will return their calls will wait impatiently. To avoid the problem, give clients a time frame in which they might expect your return call. Then they can go about their business and be available when the call *is* returned. Instruct staff to tell the client that a message will be given to you. Staff should *not* state, "I will have the lawyer return your call." You may not be able to keep that promise.

Voicemail messages are easy to change. If you are using voicemail, record a new message each morning and give callers some idea of what to expect. If you are in trial, your voicemail message may state as much and indicate that you will not return calls until evening. If staff members, associates, or partners are available to assist clients in your absence, include this information in your message. The caller can then contact someone else in the firm or leave a message for you with alternate times to call, if the caller will be unavailable in the evening. Recording a new greeting each day sends the message that you are diligent and monitor your voicemail daily. Used properly, voicemail can be a valuable communication tool for you and your clients. *See* "Using Voicemail in the Office," available on the PLF Web site, www.osbplf.org.

Advise the client at the outset of your representation that you do not take telephone calls at certain times of the day because of:

1. court appearances;
2. time blocked out to concentrate on legal work; or
3. conferences with other clients.

Assure clients you will return their calls at your earliest opportunity. If you have staff, introduce the client to staff and encourage the client to talk to staff if you are not available. Clients who know in advance that you are not always accessible by phone will not be upset. They will assume it is a perfectly normal way to conduct business.

You may have nothing to tell the client and feel it unnecessary to return the call. Or you may be extremely busy and not have the opportunity to return the call. A good staff person, at your direction, can return the call and advise the client of the status of the case. If the client needs something that requires your assistance, staff can transmit an accurate message. This enables you to be prepared with the information before returning the call, eliminating the need to call the client back again.

If clients are expecting a return call and you are detained, instruct staff to call back and inform them of the delay. This extra effort really doesn't take much time and gets great results. Clients will appreciate the update, and staff may be able to take a more detailed message for you.

Communicating By E-mail

Adapt the telephone protocols described above to e-mail communications. Give clients a time frame in which they might expect your response. If appropriate, use automatic out-of-office replies to inform clients when you will be away from the office for long periods of time. Consider the benefits of giving staff access to your e-mail. A good staff person, at your direction, can respond to client e-mails or at least inform the client your response will be delayed. With access to your e-mail, staff can also monitor messages from the court, including notification of hearing dates, trial dates, or other timelines.

Keep a record of all e-mail messages sent and received. Make it a habit to save all messages and attachments electronically. (*See* Organizing and Keeping Client Files, *supra.)* Keep in mind that e-mail may be discoverable. Exercise care in what you say (or don't say). Include a confidentiality disclaimer at the *beginning* of your e-mail message. If the message is misdirected, the recipient will immediately know it is a confidential communication that should not be read.

For a sample confidentiality disclaimer and detailed instructions on how to save client e-mail, visit the PLF Web site at www.osbplf.org. For tips on improving e-mail communications, *See* "Using E-mail in the Office," also available on the PLF Web site, www.osbplf.org.

Show Respect for Clients

Remember that clients are paying for your services. Treat them with the same respect you demand and expect from your service providers. Strive to make each client feel important. Clients feel communication from you is important. You may not think a client needs to know something, but he or she may *want* to know it. Think how you feel about being uninformed, put on hold, or forced to wait. Always:

1. return phone calls the same day, or have a staff person return them;
2. respond as promptly as possible to e-mail messages and other client requests;
3. be on time for appointments;
4. avoid taking phone calls during office conferences;
5. give clients your full attention – do not interrupt their phone calls by speaking to other people in the room;
6. send clients copies of your work product;
7. show an interest in each client as a person; and
8. bill on a regular, preferably monthly, basis.

Most areas of law require a lot of client contact. Generally, people consult lawyers because they have experienced a traumatic event and need help. They are usually unfamiliar with the legal process and are relying on you to protect them. Usually, they want to be informed of all developments.

Let Clients Make the Decisions

Your responsibility to clients involves outlining alternatives, explaining consequences, and providing enough information so they can make decisions. However, it is *not* your responsibility to make those decisions for them. Clients need to be involved throughout your handling of their cases. Make sure you are communicating clear and concise information, but do not be pressured into making decisions for clients. Never proceed without a client's permission, and always obtain express permission for:

1. granting extensions of time to the adverse party;
2. stipulating to evidence or testimony;
3. suggesting settlement figures to the other side;
4. rejecting settlement offers;
5. settling cases;
6. agreeing to continuances; and
7. concluding testimony in litigation matters.

If a client decides to proceed against your advice or in a manner you feel has important ramifications, document the file with a letter or e-mail to the client confirming the implications of that decision.

Lack of informed consent is one of the major causes for legal malpractice claims. Often a lawyer provides adequate information to the client but is unable to prove it later. Carefully analyze the client's capacity and determine the best way to document your advice. It may be necessary to send a letter by certified mail, return receipt requested, or have the client reply to an e-mail or sign a copy of a letter acknowledging that the advising letter was read and understood. Or it may be necessary to have a settlement agreement reported by a court reporter to verify the client's consent.

Settlement Negotiations

Keep your client informed in writing of all settlement offers, no matter how unfavorable. Do not make any offers or agree to any settlements without thoroughly discussing the pros and cons with your client. Failure to communicate a settlement offer is a frequent source of malpractice and ethics claims.

When a client does decide to accept or reject a settlement offer, be sure to document your file with a letter or e-mail to the client setting out the terms of the proposed settlement, the advice you gave, and the client's decision. Whether to accept or reject a settlement offer is the client's decision. Your role is to provide the information he or she needs to make an *informed* decision. Beware of putting pressure on a client to accept a settlement. It may be better to resign from a case or suggest that the client get a second opinion than to be too persuasive.

Clients who are informed of all aspects of a case and are encouraged to remain involved feel better able to make a decision on settlement. The client who dumps the matter on your desk and makes it your problem will never be happy with the result. These clients will distance themselves from the matter and never understand what is going on.

Reject Certain Cases

Careful client and case screening is an effective way to avoid poor client relations. Most lawyers can spot a difficult client after a relatively short time in practice, so follow your instincts. If you do not feel you can or want to devote the necessary time to a client, do not take the case or arrange to withdraw from representation if you have already taken it. Avoiding a difficult client after you have already taken a case almost inevitably results in a malpractice claim. (For more specific information on case and client screening or withdrawing from representation, *see* New Clients, *supra*.)

Staff Responsibilities

Have you ever walked through your front door and viewed your office as your clients see it? Your receptionist is the first person clients see, and his or her voice is the first one they hear when calling. Does your receptionist give the impression of being competent and congenial or irritated and disinterested?

Instruct all staff to make the client feel comfortable and important. After all, without clients there would be no payday. Even the most difficult client can usually be tempered with a smile and a friendly greeting.

Your staff is a very important part of client relations, so take the time to train your staff on how to deal with clients. Explain their limits in discussing cases with the clients. Also, explain the need for confidentiality. Staff often do not realize they are bound by the same legal ethics as lawyers. Make this point an essential part of employee orientation for every new staff member.

Although being treated rudely by staff may not create a malpractice claim, it is certainly not conducive to good client relations. A rudely treated client will not recommend you to others and may advise others not to use your services.

Marketing

Happy clients are your best marketing tool. In fact, ABA studies indicate that 54 percent of a lawyer's business is from referrals by satisfied clients.

Using a good tickler system (*see* Calendaring and File Tickling Systems, *supra*) will allow you to follow up in future years to remind clients of actions they may need to take. Clients appreciate such reminders, which can be a source of additional business for your firm. Be mindful, however, that notifying a former client of the possible need for further action on a completed matter may convert that former client into a current client for conflict purposes. *See* OSB Formal Ethics Opinion No. 2005-146. To avoid this result, *always* send a closing or disengagement letter at the conclusion of the case and include a disclaimer in your follow-up letter that states that your letter is being sent as a reminder only and not for the purpose of offering legal advice.

Remember, you are selling a service. Clients are your business. *Clients hire you* – not the other way around. Find out your clients' expectations. Usually, clients are more concerned with service and value than with results. One way to find out whether you are meeting your clients' needs is to send a simple survey (*see* the Client Service Questionnaire at the end of this chapter) to each client at the close of the case. A good survey will give you insight about what you are doing right and what you need to improve.

Client Service Questionnaire

How were you referred to our firm?

- ☐ Know lawyer or staff member personally. Name _____
- ☐ Referred by someone. Name _____
- ☐ Saw firm advertisement or brochure. Where? _____
- ☐ Saw firm Web site _____
- ☐ Other (please explain) _____

Why did you select our firm? Mark all that apply.

- ☐ Convenient location
- ☐ Firm/lawyer reputation
- ☐ Personal relationship with lawyer/staff member
- ☐ Business relationship with lawyer/staff member
- ☐ Cost of legal services
- ☐ Recommendation (please explain) _____
- ☐ Other (please explain) _____

What is your opinion about the following?	Very Satisfied	Somewhat Satisfied	Somewhat Dissatisfied	Very Dissatisfied
Convenience of the office location	☐	☐	☐	☐
Comfort and appearance of reception area	☐	☐	☐	☐
Staff helpfulness	☐	☐	☐	☐
Courteousness	☐	☐	☐	☐
Ease of reaching your lawyer on the telephone	☐	☐	☐	☐
Promptness in returning telephone calls	☐	☐	☐	☐
Promptness in responding to e-mail, if applicable	☐	☐	☐	☐
Clarity of lawyer's explanations	☐	☐	☐	☐
Amount of information I got about my case	☐	☐	☐	☐
Settlement amount, if applicable	☐	☐	☐	☐
Charge for attorney fees	☐	☐	☐	☐
Lawyer's responsiveness when I wanted to meet	☐	☐	☐	☐
Lawyer's skills as a listener	☐	☐	☐	☐
Lawyer's concern about me as a person	☐	☐	☐	☐
Lawyer's belief in my case	☐	☐	☐	☐
Overall, what is your level of satisfaction with our service?	☐	☐	☐	☐

Did we meet your expectations? ☐ Yes ☐ No

Do you feel you could have handled your case as well without a lawyer? ☐ Yes ☐ No

Would you ask our firm to handle another case for you? ☐ Yes ☐ No

Would you refer a friend to our firm? ☐ Yes ☐ No

Do you have any suggestions for how we can improve our services? (Continue on separate sheet if necessary.)

_____

_____

Thank you for taking the time to complete our questionnaire. We will review your answers and strive to make appropriate changes to serve you and other clients better.

If you want to give us your name and phone number, we may call you to discuss your feedback. We will also discuss any action we are taking to improve our service to clients. We thank you again for selecting us as your lawyers and helping us improve our client service.

OPTIONAL: _____ (Name) _____ (Date)

_____ (Phone) _____ (E-mail)

_____ (Case/Matter)

OFFICE AND TRUST ACCOUNTING

Generally, lawyers are not very familiar with bookkeeping or accounting principles. Courses in accounting and professional responsibility are optional, so experience must be obtained from other sources. If you lack skills in these areas, hire a bookkeeper or accountant. However, keep in mind that you are ultimately responsible for client funds held in trust. (*See* Trust Accounts, *infra.*)

You should have two office bank accounts: one for general office expenses and the other for funds held in trust for clients (lawyer trust account). This two-account system is required by the ORPCs.

General Office Accounting

Chart of Accounts

A chart of accounts is a list of categories for payables and receivables. (*See* sample at the end of this chapter.) Categorizing payments and receivables allows you to figure out how much money you are spending in each area – for example, library, office supplies, rent, photocopying, telephone, insurance, education, and costs advanced.

General Ledger

If you are setting up your accounts manually, use some type of ledger book or pad with columns across the page. Some ledger books already have account categories listed at the tops of the columns, while others are blank, allowing you to write your own. As you write checks, enter the payee in the payee column and enter the amount of the check in both the amount column and the column under the proper category. If the check applies to more than one category, split these items and enter each amount in the column for its category. For instance, the telephone bill may contain charges for your Internet access, Web hosting, and telephone service (landline and cell). Enter the total amount of the check in the amount column and deduct it from the running balance – then enter the proper amounts in the columns for the various expense categories. This method makes it easy to track all your categories individually. This book is called a "General Ledger." (*See* the sample at the end of this chapter.)

If you are using a computerized accounting system, such as Quicken® or QuickBooks®, the program will come with a set of predetermined account categories. Modify the predetermined categories to suit your needs. Most accounting software allows you to do this *and* to split amounts among various categories.

You should total all categories monthly and transfer the totals to a monthly tracking sheet for each category. Manual bookkeeping ledgers may already provide the format in the general ledger book, while computer programs sort and print out these reports.

Most of your accounts receivable will come from fees. However, you will also need categories for other receivables, such as capital outlay, refunds, and costs advanced, so that these amounts are not reflected as income. If you overpay an insurance premium and the overpayment is refunded, enter it as a deposit and deduct it from the insurance category. If a client reimburses costs advanced paid out of the general or office accounts, enter them as a deposit and subtract them from the costs advanced expense category.

Financial Record Keeping and Account Balancing

Each time you make a deposit, list its source in an income and reimbursement category (refer to the sample general ledger at the end of this chapter, columns 1-3) *and* list the deposit in the "total received" column (refer to column 4 in the sample). You must also add the deposit amount to the general account balance (refer to column 5 in the sample).

Each time you pay an expense, list the source of the expense in an expense category (refer to columns 7-11 in the sample) and list the expense in the "total paid" column (refer to column 6 in the sample). You must also subtract the expense amount from the general account balance (refer to column 5 in the sample).

To balance your ledger, follow these steps:

STEP 1. Total each item in the income and reimbursement categories (refer to columns 1-3 in the sample) each month. This gives you a total income and reimbursement amount for the month. For the purpose of this illustration, we will refer to that total as the "income and reimbursement total." This amount should be the same as the total of all the entries in the "total received" category (refer to column 4 in the sample). If you do not come up with the same total, you must backtrack to find your error. If you get the same total for these two (the total of the individual categories and the total of all entries in sample column 4), you can move on to the next step. Using the sample general ledger at the end of this chapter, the total of all the entries in the income and reimbursement categories is $11,200.

STEP 2. Total each item in the expense categories (refer to columns 7-11 in the sample) each month. This gives you a total expense amount for the month. For the purpose of this illustration, we will refer to that total as the "expense total." This amount should be the same as the total of all the entries in the "total paid" category (refer to column 6 in the sample). If you do not come up with the same total, you must backtrack to find your error. If you get the same total for these two (the total of the individual categories and the total of all entries in sample column 6), you can move on to the next step. Using the sample general ledger at the end of this chapter, the expense total for the month is $2,200.

STEP 3. Take the income and reimbursement total for the month (*see* STEP 1) and add it to the beginning balance for the month (refer to the beginning figure in column 5 in the sample). For the purpose of this illustration, we will refer to this new figure as beginning balance plus monthly income and reimbursement (BBPMI&R). Take the "expense total" for the month and subtract it from the BBPMI&R. This new figure (the beginning balance plus the money received during the month minus the money paid out during the month) should equal the ending balance for the general account (refer to the last entry made in column 5 of the sample). If it does not, you must backtrack and find your error. If it does match, and you have done all three steps, you have completed the first part of balancing your accounts. Using the sample general ledger at the end of this chapter as an example, the BBPMI&R is $11,200 (income and reimbursements of $11,200 plus a beginning balance of $0). When the expense total for the month ($2,200) is subtracted from the BBPMI&R of $11,200, a net of $9,000 remains. This equals the ending balance for the general account (the last entry made in column 5 on 1/12/09).

When you receive the bank statement each month, check off the cleared checks against those written for the month. Most bank statements have a simple chart and formula on the back of the statement that makes it easy to reconcile the statement. If you use a computerized accounting program, it should come with a reconciliation function to assist in this process. Problems arise when accounts are not reconciled monthly. Allowing a staff person to have sole responsibility for this procedure without overseeing the accounts provides unsupervised access to your funds and greatly increases the likelihood of employee theft. Always have staff deliver your bank records to you unopened, or have them sent directly to your home. Direct electronic bank records to your personal e-mail address. Review NSF notices immediately. Review statements and cancelled checks (including signatures) monthly. Many lawyers have found out too late that a staff person took funds. If your staff person takes funds from the lawyer trust account, you may be disciplined even though you were not involved in the theft.

Be careful about who you permit to be a signer on the office accounts. Even if you have indicated that two signatures are required on checks over a certain amount or that staff can only sign checks up to $500, banks are not responsible for monitoring the signatures on checks. You must take special care to fulfill this responsibility. Some jurisdictions (Washington) prohibit non-lawyers from signing on the lawyer trust account. It is advisable to bond employees who have access to accounts or firm credit cards and to obtain appropriate insurance. Contact your insurance broker for more information. Always be aware of what checks are written and what bills are paid. Review both carefully.

Budgeting

Even a new lawyer starting a sole practice needs a budget. (For a sample budget, *see* the Getting Started section of this handbook.) Without one, it is easy to overspend and hard to plan for future purchases. Knowing the amount of your overhead will help you decide how much money you need to make and how much you need to charge to make that amount. Failure to budget can cause financial problems. Lawyers with financial problems may take on new clients who have money in hand, leaving the work for existing clients unfinished. This soon turns into a vicious cycle and leads to disciplinary complaints from clients whose work is not completed. Financial problems also increase the temptation to borrow from the lawyer trust account.

Start-up Costs

Start-up costs are usually one-time expenses such as equipment and furnishings. To meet your start-up costs, set aside money to cover living expenses and overhead for at least the first six months of practice. It normally takes that long to establish any kind of cash flow.

Fixed Expenses

Fixed expenses are those items that you need to pay every month, for example, rent, salaries, payments on equipment, and supplies. The amounts of these fixed expenses change very little on a month-to-month basis. When you add these fixed expenses, you have the amount you need to make each month to pay basic expenses. Remember, hours worked and billed one month may not actually generate revenue until the next month or the month after that.

Some fixed expenses are only paid quarterly or yearly. These include insurance, malpractice coverage, and dues. If you divide these expenses into monthly amounts and set them aside each month, you do not have to come up with a large lump sum when these payments become due. It may be hard to discipline yourself to do this; however, by not doing so, you may put your law practice in jeopardy.

One large fixed expense that you should set aside money for is estimated quarterly taxes. Do not mistakenly assume you will show no profit, especially in the first year, and then be shocked to find out how much you owe the IRS.

Once you have determined all your fixed expenses, you know how much is left over for you or available to pay extra expenses.

Extra Expenses

Extra expenses may consist of items like hard-bound volumes of CLE publications from the OSB or a software program you feel will enhance your practice. Without a budget, buying extras can drain sums that should be reserved to pay fixed expenses.

Using a budget will allow you to set aside money for future purchases. You can then use cash to buy new equipment or furniture without having to take out a loan or draw on a line of credit.

Using a Budget to Plan

Having a budget enables you to decide when you can hire additional staff, move to better office space, or increase other benefits. It also provides you with a way to determine where you can cut expenses. Working with a budget and a full understanding of the office cash flow allows you to make adjustments that are compatible with your priorities. (For more information on these topics, *see* Billing and Collections, *infra*.)

Trust Accounts

The ethical obligations for those who set up lawyer trust accounts are rooted in the principle that a lawyer who holds funds of a client or third person in trust, even for a brief time or intermittently, has the duty as a fiduciary to safeguard and segregate those assets from the lawyer's personal and business assets. ORPC 1.15 sets forth the ethical duties and obligations of a lawyer who is holding client or third person funds. The duties set forth in ORPC 1.15 are intended to eliminate not only the *actual* loss of client funds but also their *risk* of loss while in the lawyer's possession.

Lawyers must account for every penny of client funds as long as the funds remain in their possession. ***This responsibility cannot be delegated, transferred, or excused by the ignorance, inattention, incompetence, or dishonesty of the lawyer or the lawyer's employees or associates***. A lawyer may employ others to help carry out this duty but must provide adequate training and supervision to ensure that all ethical and legal obligations to account for those monies are being met. *In re Mannis*, 295 Or 594, 668 P2d 1224 (1983) (lawyer reprimanded although he was unaware employee was commingling funds).

The need to handle a client's funds with extreme care should be self-evident. Even so, cases continue to arise in which practicing lawyers, whether inadvertently or intentionally, mishandle their clients' money, thus subjecting those clients to the risk of economic hardship and seriously undermining public confidence in the legal profession. Mishandling client funds can also subject the lawyer to disciplinary action, which may result in the lawyer losing his or her license to practice law.

For more information on lawyer trust accounts, see the PLF publication, *A Guide to Setting Up and Using Your Lawyer Trust Account (2014)*, available on the PLF Web site, www.osbplf.org; the OSB CLE publication, *The Ethical Oregon Lawyer*; contact the administrator of the Oregon Law Foundation (OLF) at 503-620-0222 or 1-800-452-8260, ext. 373; or visit the OLF web site at www.oregonlawfoundation.org.

Chart of Accounts

(This is not a complete list, but merely an example.)

RECEIVABLES (Income and Reimbursements)

Fees	Fees received
Referral Fees	Fees received (from other lawyers)

PAYABLES (Expenses)

Advanced Costs	Costs advanced on behalf of clients
Draw	Draw on profits
Dues	Membership dues
Education	CLE expenses
Equipment	Equipment purchases
Insurance:	
Liability	Fire and liability insurance
Life	Life insurance
Malpractice	Malpractice insurance
Medical	Medical insurance
Janitorial	Janitorial costs
Library	Books and subscriptions
Marketing	Marketing and promotional
Operating Expenses:	
Photocopies	Photocopy expenses
Postage	Postage
Supplies	Office supplies
Telephone/Internet	Landline, cell, and Internet expenses
Rent	Office rental
Repairs	Repair work
Travel	Travel expenses
Utilities	Gas, electric, water, garbage

General Ledger

INCOME (Income and Reimbursements)				BANK ACCOUNT			EXPENSES (Payments)						
1 Fees	2 Advanced Costs	3 Other	4 Total Received	5 Bank Balance	Date	Name or Memo	Chk No.	6 Total Paid	7 Total Deductions From Employee Earnings	8 Employee Gross Earnings	9 Advanced Costs	10 Supplies	11 Other Expenses (Describe)
				0.00	*1/5/14*	*Beginning Balance*							
		10,000.00	*10,000.00*	*10,000.00*	*1/6/14*	*Capital Investment*							
				8,000.00	*1/6/14*	*Costco*	*101*	*2,000.00*				*500.00*	*Equipment 1,500.00*
				7,800.00	*1/6/14*	*Clackamas County Circuit Court*	*102*	*200.00*			*200.00*		
1,000.00	*200.00*		*1,200.00*	*9,000.00*	*1/12/14*	*Thomas Jones*							

BILLING AND COLLECTIONS

Turning legal work into income is an important aspect of managing a law practice. Instituting and following procedures for timekeeping, billing, and collections reduces stress and makes financial success possible. Billing procedures must include accurate timekeeping, immediate entry of time, preparation of statements, and monthly billing.

Timekeeping

Billing begins with accurate timekeeping. Your daily time records should account for every tenth of an hour. Enter the time spent after each activity in your time and billing program or record it on a daily time sheet. (*See* samples at the end of this chapter.) If you have trouble keeping current with your time entries or maintaining time sheets by hand, dictate the time after each activity. Procrastination in timekeeping causes a loss of billable time, because lawyers generally underestimate time when they reconstruct it later.

When starting out, keep track of every block of time throughout the workday. Account for billable time and also for time spent on administrative chores, breaks, and so on, to give you a picture of your total productivity. You can use the information to decide how much time you should be working and how efficiently you are working. It also gives you an idea of how much a particular legal procedure costs you. You can then use this knowledge to set flat or fixed fees and give clients accurate fee estimates. A total productivity breakdown also allows you to know when time spent on administrative chores can be shifted to a staff person.

Preparing Billing Statements

Your bills should provide the client with specific information about what you did to earn the fee. Many fee disputes are caused by misunderstandings about billing statements. The bill should show fees charged, costs incurred, and trust account activity, as applicable. (*See* the sample bills at the end of this chapter.) Always include a due date. Many clients prioritize bills according to due dates and will place a bill without a due date at the bottom of the bills-to-pay pile.

Remember that you should not transfer client funds out of the lawyer trust account until you have given notice to the client. (*See* the PLF publication, *A Guide to Setting Up and Using Your Lawyer Trust Account.*) Be sure to show the trust account transfer and balance on your monthly statements so that you can make all the trust transfers at once after you have sent out the statements.

When describing your work, be sensitive to the client's perceptions. For example, many clients do not want to be charged for conferences between lawyers. Some clients do not think their lawyer should charge for research because they are supposed to know the law. Some clients do not know that 0.5 on the bill means a half-hour rather than 5 minutes.

Follow the "golden rules" of billing:

1. Proofread statements carefully. Clients view billing statements as a reflection of your work. If names are misspelled or statements are incorrect, they may believe that you are not paying adequate attention to their cases. Clients immediately notice billing mistakes and are likely to be upset.

2. If you make an error on a client bill, apologize and correct it quickly and accurately the *first time*. The client shouldn't have to remind you a second time.

3. Offer a "carrot" instead of a "stick." In lieu of late fees or interest, which may pose problems, give clients a discount if payment is made within 10 days of the billing date. This will improve

your cash flow by giving clients an incentive to pay early. If you employ this technique, calculate the discount for the client and include it on the billing statement. (For information on ethical dilemmas related to billing and collections, refer to the OSB publication, *The Ethical Oregon Lawyer*. For a thorough discussion of truth-in-lending concerns, consult the OSB publication, *Fee Agreement Compendium*. *See* Resources, *infra*.)

You can avoid many misunderstandings about billing by thoroughly briefing clients at the outset of each case. Explain how you bill and what work is required on the case. Then when the bill arrives, the descriptions and charges on it will match the client's expectations.

If you are not using a computerized billing program, create a document in your word processing program for all current bills. Make each bill a separate page in that document and keep the bills in alphabetical order by client name. When you open a new file, insert your billing letterhead into the appropriate place in the billing document, and add the client's name and address. Time and expenses can be entered as ordinary text or in a table. When the table feature is used, formulas can be inserted to aid with computing time spent or expenses incurred. Here is an example of three time entries created in a word processing document with the table and formula visible:

Professional Services Rendered	Hours
Review medical records obtained from Dr. Jones	1.5
Office conference with Dr. Jones regarding client's prognosis	1.0
Phone conference with client regarding defendant's settlement offer	.50
	{=SUM(ABOVE)}

Here are the same time entries in a final bill, ready for the client. The table is not visible. The formula field now shows the total hours spent working on the client's case:

Professional Services Rendered	Hours
Review medical records obtained from Dr. Jones	1.5
Office conference with Dr. Jones regarding client's prognosis	1.0
Phone conference with client regarding defendant's settlement offer	.50
	3.0

Spreadsheet and database programs may also be used to create client bills. These programs have advanced features to assist with calculating time and expenses.

If your spreadsheet or word processing document becomes cumbersome to work with due to the number of client bills it contains, it is probably time to invest in a computerized billing program. You will likely recover the cost of your investment in such software very quickly because you can use the time previously spent generating bills manually to produce billable hours. If purchasing a program is not feasible and your billing document has become too long, break it up. Organize client bills into separate documents in alphabetical segments, such as Bills A-E, Bills F-J, Bills K-O, Bills P-T, and Bills U-Z. Set up and save each client's statement in the proper document, for example, the statement for Sam Jones is saved alphabetically in the document "Bills F-J."

If you are tracking your time manually, take your time sheets and enter the time into the current bills daily. Scroll down through the bills or find each client's bill using the search function and the client's name. If you diligently enter your time on a daily basis, you will need to spend very little time finalizing the bills. At the end of the month, all you will have to do is make any corrections, total each bill, fill in any trust account activity, and print or e-mail the final copy.

The Monthly Billing Cycle

You should send bills monthly and at the immediate conclusion of a case. Send bills at the same time each month, preferably before the last day of the month. Most people and businesses are prepared to pay bills at the first of the month. Late-arriving bills are often put off until the next month. The longer the gap between completing legal work and billing, the less likely it is that the client will pay.

If cash flow is an issue, consider two billing cycles. Divide the client list in half. Mail or e-mail A-M bills by the 15th and N-Z bills by the 30th. This simple step can improve your firm's financial health by leveling the natural peaks and valleys of accounts receivable and payable. Improved cash flow is important if you need to spread out the age of your accounts receivable. (The number of accounts that are 30 days, 45 days, or 60 days past due.) Dividing the billing cycle also increases your average daily bank balance because you are collecting more accounts throughout the month. If you apply for financing, the age of your accounts receivable and your average daily bank balance will be key factors in the loan evaluation process.

Remember, clients must consent to *all* billing practices. Be sure to include billing information in your fee agreement with the client or enclose a billing brochure.

Maintain Billing Flexibility

In addition to generating monthly statements, be prepared to give clients their bills on short notice – for example, when they show up unannounced with checkbook in hand. Also, have your bill ready when a client picks up final documents for a particular matter. If you maintain up-to-date records, you will be ready to tell each client what is owed at any time. And if you keep up on daily entry of time into your billing system, you can print out a statement on the spot.

Keeping billing records current also allows you to hand clients a finished work product with the bill attached. This method works well for matters that end with the production of a document (wills, contracts, etc.).

Record Keeping

Retain a copy of each client's bills in the client file and in a file of all bills sent out that month. Any records related to trust accounting must be held for five years after termination of the representation. ORPC 1.15-1(a).

Collections

You can usually foresee the likelihood of collecting a particular fee at the outset of a case. A client who is obviously unreliable or unable to give you money before work commences is even less likely to pay after the work is finished.

Attempting to collect delinquent amounts generally produces nothing but more headaches. Sometimes you can recover some of the debt, but clients often respond to collection efforts by filing a malpractice claim or disciplinary complaint. If a client objects to the amount of a bill, offer to use the Bar's fee arbitration program. If you do take action to collect on debts, remember that you must abide by the debt collection laws. Any debt collection letters must contain the correct statutorily mandated language.

Time spent on collections would be better devoted to establishing a system to secure more fees up front and end representation of clients before past due amounts have accumulated. Keep the rules governing withdrawal (ORPC 1.16) in mind when dealing with a client who is reluctant to pay. Depending on the type of proceeding and the particular court, it may be impossible for you to withdraw from representation after a certain point.

Review your accounts receivable regularly. If a client appears to be unable to pay, call and determine his or her financial situation. Then decide whether you want to withdraw from the case or continue with the understanding that you might not be paid. It is very difficult to competently represent a client when you are preoccupied with the client's unpaid bill.

Continuing to represent a client who refuses to pay, however, can get you into ethics and malpractice trouble. As the client continues to withhold payment, your resentment builds, you tend to delay working on the file, and you may be reluctant to communicate. In this hostile environment, you are very vulnerable to a malpractice claim or ethics complaint. Usually, the non-paying client finds fault with you as a way of rationalizing nonpayment, and you may end up with an ethics or malpractice claim. (For more information on collection-related issues, *see* the discussion on Fees, *supra*.)

Daily Time Sheet

Date_____

CLIENT	TIME	Phone conf.	Office conf.	Letter	Draft Document	Attend Court	Research	Travel	Review File	EXPLANATION
	08:00									
	08:15									
	08:30									
	08:45									
	09:00									
	09:15									
	09:30									
	09:45									
	10:00									
	10:15									
	10:30									
	10:45									
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	04:15									
	04:30									
	04:45									
	05:00									
	05:15									
	05:30									
	05:45									
	06:00									

Daily Time Sheet

Date_____

CLIENT	EXPLANATION	Phone conf.	Office conf.	Letter	Draft Document	Attend Court	Research	Travel	Review File	TIME

Sample Billing Statement

LETTERHEAD

Date

Name
Address
City and State

RE:

STATEMENT

PROFESSIONAL SERVICES RENDERED

		Hours
7/2/14	Conference with client re case	1.0
7/16/14	Research re facts	1.0
		2.0

2.0 hrs x $200 per hour $ 400.00

COSTS

7/31/14	Recording fees	$ 50.50	
	Document scanning	$ 3.56	
			$ 54.06

TOTAL $ 454.06

TRUST ACCOUNT BALANCE:

Retainer Paid	$ 500.00
Legal Services and Costs	$ 454.06

BALANCE REMAINING IN TRUST $ 45.94

ALL ACCOUNTS ARE DUE BY THE 10TH OF THE NEXT MONTH

Sample Billing Statement

LETTERHEAD

Date

Name
Address
City and State

RE:

STATEMENT

BALANCE IN TRUST ACCOUNT				$ 500.00
PROFESSIONAL SERVICES RENDERED				
			Hours	
7/2/14	Initial conference with client re acceptance of case		1.0	
7/16/14	Research re facts		2.5	
7/31/14	Draft Answer in response to Complaint		0.5	
			4.0	
	4.0 hrs x $100 per hour			$ (400.00)
COSTS				
7/31/14	Filing fee	$ 50.50		
	Document scanning	3.56		
				$ (54.06)
BALANCE REMAINING IN TRUST				$ 45.94
AMOUNT NEEDED TO BRING TRUST ACCOUNT TO $500.00				$ 454.06

ALL ACCOUNTS ARE DUE BY THE 10TH OF THE NEXT MONTH
KINDLY REMIT $454.06 TO REPLENISH
YOUR TRUST ACCOUNT

Sample Billing Statement

LETTERHEAD

Date

Name
Address
City and State

RE:

STATEMENT

PROFESSIONAL SERVICES RENDERED

		Hours	
7/2/14	Initial conference with client re acceptance of case	1.0	
7/16/14	Research re facts	2.5	
7/31/14	Draft Answer in response to Complaint	0.5	
		4.0	
	4.0 hrs x $200 per hour		$ 800.00

COSTS

7/31/14	Filing fee	$ 50.50	
	Document scanning	$ 3.56	
			$ 54.06
	TOTAL		$ 854.06

10% DISCOUNT ON ALL ACCOUNTS
PAID IN FULL WITHIN 10 DAYS OF STATEMENT DATE
($768.66 DUE IF PAID BY [Date])

CLOSING FILES

Using a System

The first step in a system for closing files is to determine whether a file can be closed. Next, send a closing letter to the client, indicating that representation has ended and the file is being closed. This letter should explain any remaining duties and obligations of the lawyer and the client. Along with the letter, send a final bill, return original documents, and tell the client how long you will keep the file before destroying it. This is also a good time to send a survey asking the client's opinion on the service received. For example, was our staff courteous and helpful? Were your questions answered? Would you ask us to handle another case for you? (*See* Client Relations, *supra*.)

Regardless of your filing system for open files, give closed files a closed file number so you can file them in numerical order. Even if you are using a numerical system for your active files, remember that files are not closed in the same order they are opened. Assigning a closed file number will simplify the filing of closed files in the order they are closed (using their new number). You won't have to move files closed earlier to insert newly closed files. Using the year as the first or last two digits of the closed file number will quickly identify how old the file is. You can then place files on shelves or in boxes in numerical order.

Enter the client name, matter name, assigned closed file number, date closed, and location of file (on site or off-site) in your case management program. If you don't have a case management program, set up a closed file inventory using a spreadsheet or word processing table. The columns of spreadsheets and tables are easily sorted, allowing you to produce a list organized by client name, date closed, location of file, or other criteria.

Before scanning or placing a closed file in storage, check the entire file for the following:

1. Have all original documents been filed or recorded and original papers and documents returned to the client?
2. Do any documents need to be added to office form files? Have all duplicate documents been removed? Has all filing been placed in the file and have all loose papers been secured?
3. Have the firm's electronic files been reviewed for client-related material, such as e-mail messages, electronic faxes, digitized evidence, or other documents? This data may exist on network servers, Web servers, Extranets, Intranets, the Internet, local hard drives of firm PCs, laptops, home computers, zip drives, disks, portable memory sticks and flash drives, mobile devices, or other media.
4. Has the final bill and a closing (disengagement) letter been sent to the client?
5. Have all future docket dates (UCC renewals, judgment renewals) been placed on the calendar?
6. Has a file destruction date been assigned and placed on the calendar?

For specific steps to take when closing files, *See* the sample "File Closing Checklist," available on the PLF Web site, www.osbplf.org and at the end of this chapter. If you intend to scan client files and dispose of the original documents, review the PLF practice aid, "A Checklist for Imaging Client Files and Disposing of Original Documents," available on the PLF Web site, www.osbplf.org.

File Retention

Most client files (whether paper or electronic) should be kept for a minimum of 10 years to ensure the file will be available to defend you against malpractice claims. Files that should be kept for *more* than 10 years include:

1. Cases involving a minor who is still a minor at the end of 10 years;[1]
2. Estate plans for a client who is still alive 10 years after the work is performed;
3. Contracts or other agreements that are still being paid off at the end of 10 years;
4. Cases in which a judgment should be renewed;
5. Files establishing a tax basis in property;
6. Criminal law – keep for two years after the client is released or exonerated [2]
7. Support and custody files in which the children are minors or the support obligation continues;
8. Corporate books and records;
9. Adoption files;
10. Intellectual property files; and
11. Files of problem clients.

Whenever possible, do not keep original papers (including estate plans or wills) of clients. If you keep original wills, 40 years must elapse before the will can be disposed of. ORS 112.815 provides: "An attorney who has custody of a will may dispose of the will in accordance with ORS 112.820 if: (1) The attorney is licensed to practice law in the state of Oregon; (2) At least 40 years has elapsed since execution of the will; (3) The attorney does not know and after diligent inquiry cannot ascertain the address of the testator; and (4) The will is not subject to a contract to make a will or devise or not to revoke a will or devise."

When closing your file, return original documents to clients or transfer them to their new attorneys. Be sure to get a receipt for the property and keep the receipt in your paper or electronic file.

The first step in the file retention process begins ***when you are retained by the client***. Your ***fee agreement*** should notify the client that you will be destroying the file and should specify when that will occur. The client's signature on the fee agreement will provide consent to destroy the file. In addition, your ***engagement letter*** should remind clients that you will be destroying the file after certain conditions are met.

The second step in the file retention process is ***when the file is closed***. When closing the file, establish a destruction date and calendar that date. If you have not already obtained the client's permission to destroy the file (in the fee agreement and engagement letter), you can get written permission when you close the file or you can make sure that the client has a complete copy of the file. This includes all pleadings, correspondence, and other papers and documents necessary for the client to construct a file for personal use. If you choose the latter alternative, be sure to document that the client has a complete file. This means that the paper or electronic file you have in your office is *yours* (and can be destroyed without permission) and the file the client has is the *client's* copy. File closing is also a good time to advise clients of your firm's policy on retrieving and providing file material once a matter is closed.

The final step in the file retention process involves reviewing the firm's electronic records for client-related material. Electronic data may reside on network servers, Web servers, Extranets, Intranets, the Internet, local hard drives of firm PCs, laptops, home computers, zip drives, disks, portable memory sticks and flash drives, mobile devices, or other media. Examples include e-mail communications, instant messages, electronic faxes, digitized evidence, word processing, or other documents generated during the course of the case. Review these sources to ensure that the client file is complete. If these documents exist only in electronic form, you may choose to store them electronically or print them out and place them in the appropriate location in the client's file.

Paperless practitioners should take note of statutes or rules that require retention of **original paper documents**. Examples include:

- Settlement Agreements on behalf of Minors – "The attorney representing the person entering into the settlement agreement on behalf of the minor, if any, shall maintain the affidavit or verified statement completed under subsection (1)(d) of this section in the attorney's file for two years after the minor attains the age of 21 years." ORS 126.725(2). See footnote 1 below.

- U.S. Bankruptcy Court documents – "An electronically filed document described in FRBP 1008 [petitions, lists, schedules, statements, or amendments] or a properly completed, signed, and filed LBF #5005 [electronic filing declaration] with respect to the document and a scanned electronic replica of the signed document must be maintained by the filing ECF Participant or the firm representing the party on whose behalf the document was filed in its original paper form until the later of the closing of the case or the fifth anniversary of the filing of the document, except as otherwise provided for trustees by the U.S. Department of Justice. The filing ECF Participant or firm retaining the original document or LBF #5005 and scanned electronic replica of the document must produce it for review upon receipt of a written request." Oregon LBR 5005-4(e) - Retention of Original Document.

- Oregon eCourt documents – "Retention of Documents by Filers: (1) Unless the court orders otherwise, if a filer electronically files an image of a document that contains the original signature of a person other than the filer, the filer must retain the document in its original paper form for 30 days. UTCR 21.120 amended September 29, 2014 pursuant to Chief Justice Order 14-049. "Filer means a person registered with the electronic filing system who submits a document for filing with the court." UTCR 21.010(6).

This is not an exhaustive list. Conduct your own appropriate legal research to identify other instances where original paper documents must (or should) be retained. One example of a document that should be retained is the original signed fee agreement, particularly when your fee is in dispute or the client has an outstanding balance at the time of file closing.

If you possess electronic data containing "consumer personal information" within the meaning of the Oregon Consumer Identity Theft Protection Act (ORS 646A.600 to 646A.628) you are required to develop, implement, and maintain safeguards to protect the security and disposal of the data. Failure to do so can result in civil penalties. For more information, *See* "2007 Legislation Alerts - Business Law/Consumer Protection (Identity Theft)," *In Brief* (November 2007) and Kimi Nam, "Protect Client Information from Identity Theft," *In Brief* (August 2008), available on PLF Web site, www.osbplf.org.

If you possess personal health information of clients or others within the meaning of the Health Insurance Portability and Accountability Act (HIPAA), you are obligated to conduct a risk analysis and take proper steps to secure your records. Failure to do so can result in civil penalties. For more information, *See*

Kelly T. Hagan, "Business Associate, Esq.: HIPAA's New Normal," In *Brief* (September 2013), available on the PLF Web site, www.osbplf.org.

The retention policy for electronic data should be consistent with the retention policy for paper files. Regardless of how files are retained, the PLF recommends that all client files be kept a minimum of 10 years. If you intend to scan client files and dispose of the original documents, review the PLF practice aid, "A Checklist for Imaging Files and Disposing of Original Documents," available on the PLF Web site, www.osbplf.org.

Organization and Destruction of Closed Files

Closed paper files should be organized by years or organized into two groups: files that are 10 years and older and files that are less than 10 years old. If possible, however, separate closed client files into groups according to the year the work was completed so that each year you know which files to review for destruction. Electronically retained files should be organized in a similar fashion, or identified in a manner that allows you to determine easily when the file was closed. If you possess files that must be retained on a permanent or long-term basis, clearly mark the file and the file box to prevent inadvertent destruction.

Keep a permanent inventory of files you destroy and the destruction dates. Before destroying any client file, review it carefully. Some files need to be kept longer than 10 years, as noted above. Others may contain conflict information that needs to be added to your conflict database or original documents of the client, which should never be destroyed. Always retain proof of the client's consent to destroy the file. This is easily done by including the client's consent in your fee agreement or engagement letter and retaining the letters with your inventory of destroyed files. Follow the same guidelines when evaluating whether to destroy electronic records. For additional guidance on closing client files, *See* the PLF practice aid "File Closing Checklist," available on the PLF Web site, www.osbplf.org, and at the end of this chapter.

Since June 1, 2005, the Fair and Accurate Credit Transaction Act (FACTA) Disposal Rule (the Rule or FACTA) requires any person who maintains or possesses "consumer information" for a business purpose to properly dispose of such information by taking "reasonable measures" to protect against unauthorized access to or use of the information in connection with its disposal. The Rule defines "consumer information" as any information about an individual that is in or derived from a consumer report. Although the Rule doesn't specifically refer to lawyers, it may be interpreted to apply to lawyers, and the practices specified in the Rule would safeguard clients' confidential information.

"Reasonable measures" for disposal under the Rule are (1) burning, pulverizing, or shredding physical documents; (2) erasing or physically destroying electronic media; and (3) entering into a contract with a document disposal service. *See* OSB Formal Ethics Opinion No. 2005-141. Permanent destruction of electronic data requires special expertise.[3]

When choosing a document disposal service, select a company certified by the National Association for Information Destruction (NAID). NAID members securely destroy materials in compliance with FACTA, HIPAA, and the Gramm-Leach-Bliley Acts. Casually discarded information is a risk and a liability.

[1] ORS 126.725(2) requires that the attorney representing a minor's legal guardian in a tort claim keep the Affidavit of Custodian for two years after the minor reaches the age of 21. Retaining the Affidavit of Custodian is mandatory. You may wish to keep your entire file. *See* Brooks F. Cooper, "Settlements for Minors – 2009 Legislative Changes," *In Brief* (November 2010). There may be other instances where it is advisable to keep files involving a minor who is still a minor at the end of 10 years. Examples include ongoing conservatorships or guardianships and family law matters involving custody of a minor who is still a minor at the end of 10 years.

[2] In criminal law cases, an action for legal malpractice may not accrue, for statute of limitation purposes, until the date on which the client is exonerated through reversal on direct appeal, through post-conviction relief proceedings, or otherwise. *See Stevens v. Bispham*, 316 Or 221 (1993), *Abbott v. DeKalb*, 346 Or 306 (2009), and *Drollinger v. Mallon et al*., SC S0588839 (2011).

[3] With proper technique, deleted documents can be retrieved and restored. Consult with an information technology expert to determine what steps must be taken to ensure that client documents have been *completely* purged from your system, including backups, if applicable. For recommendations on how to store data for long-term archival needs, contact the Association for Records Management Professionals at http://www.arma.org.

File Closing Checklist

Client_____ File/Matter No._____

Matter:_____ Date:_____ Atty:_____

DATE	INITIALS	ACTION FOR ALL FILES – PAPER AND ELECTRONIC
		1. Make sure notices of *lis pendens* or lien abstracts have been discharged.
		2. Make sure all original judgments, orders, decrees, cost bills, deeds, contracts, *etc.* are filed or recorded.
		3. If an unsatisfied judgment is involved, diary the file for 3, 6, and 9 years. Review for assets and file certificate of extension before expiration of 10 years.
		4. Make sure any UCC or security interest has been perfected and filed. Track appropriate renewal dates in your own system to prevent security interests from lapsing. (The Oregon Secretary of State's office no longer issues individual renewal notices.) Renewals can also be verified online against the UCC Renewal Report at http://www.filinginoregon.com/ucc/renewal.htm. Individual renewals are easily identified by the lien number.
		5. If the file involves a lease or option to buy, diary the file for 6 months prior to expiration.
		6. In criminal cases, check to see if expungement is possible and diary the file for 3 years.
		7. If the file involves a settlement agreement on behalf of a minor, the attorney representing the person entering into the settlement agreement on behalf of the minor must maintain the original signed affidavit or verified statement completed under ORS 126.725(1)(d) in the attorney's file for two years after the minor attains the age of 21 years. ORS 126.725(2).
		8. Bankruptcy petitions, lists, schedules, statements, amendments, and electronic filing declarations must be retained by the filing ECF Participant or the firm representing the party on whose behalf the document was filed in original paper form until the later of the closing of the case or the fifth anniversary of the filing of the document, except as otherwise provided for trustees by the U.S. Department of Justice. Oregon LBR 5005-4(e).
		9. Documents that contain the original signature of a person other than the "filer" in Oregon eCourt must be retained in original paper form for 30 days. UTCR 21.120 amended September 29, 2014 pursuant to Chief Justice Order 14-049.
		10. If you possess personal health information of clients or others within the meaning of the Health Insurance Portability and Accountability Act (HIPAA), you are obligated to conduct a risk analysis and take proper steps to secure your records. Failure to do so can result in civil penalties. For more information, See Kelly T. Hagan, "Business Associate, Esq.: HIPAA's New Normal," In Brief (September 2013), available on the PLF Web site, www.osbplf.org.
		11. Check for unbilled activities or balance remaining in trust and send final bill or accounting to client.
		12. Review the file for any further work to be done.
		13. Review file for additional names to be included in conflict system.
		14. Review file for documents to be included in the firm's form or template directory.
		15. If litigation or tribunal matter, withdraw as attorney of record.

File Closing Checklist

Client_____ File/Matter No._____

Matter:_____ Date:_____ Atty:_____

DATE	INITIALS	ACTION FOR ALL FILES – PAPER AND ELECTRONIC, CONT'D
		16. Assign destruction date. Regardless of how files are kept, the PLF recommends that all files be kept for a minimum of 10 years. *See* the PLF practice aid, "File Retention and Destruction," available on the PLF Web site, www.osbplf.org.
		17. Send closing letter to client. Advise client of file destruction date and firm policy on retrieval and provision of closed file materials. Return client's original documents and include client questionnaire, if appropriate.
		18. Remove file from active status and enter destruction date into calendar, case management system, or closed file inventory.
		19. For information on proper disposal of file material (paper and electronic), refer to the PLF practice aid, "File Retention and Destruction," available on the PLF Web site, www.osbplf.org.
DATE	**INITIALS**	**ACTION FOR PAPER FILES ONLY**
		20. Assign closed file number.
		21. Mark the file closed and enter closed file number in case management system or closed file inventory.
		22. Remove duplicate documents, unused note pads, and other unneeded items from file. (DO NOT remove draft work product, memos, phone messages, research, or attorney notes relating to the merits of the case.)
		23. Check for loose, unfiled documents and place in the file.
		24. Check network servers, local hard drives, laptops, zip drives, disks, flash drives, PDAs, etc. for electronic material not in file. Print hard copies, file, and purge electronic data or move electronic data onto appropriate storage media according to the firm's policy for retention of electronic records. Also see step 29 below.
		25. Move file to storage.
DATE	**INITIALS**	**ACTION FOR ELECTRONIC FILES ONLY**
		26. Review the PLF practice aid, "Checklist for Imaging Client Files and Disposing of Original Documents," available on the PLF Web site, www.osbplf.org.
		27. Does the matter involve original documents whose authenticity could be disputed? Or documents that have particular legal importance, such as an original Will? These documents cannot be discarded after scanning. Provide them to the client or make other arrangements to protect and store valuable originals. Note: The PLF recommends against storing original wills. *See* "Why Did We EVER Want to Keep Original Wills?" *In Brief* (March 2007). Available on the PLF Web site, www.osbplf.org.
		28. Does the firm possess original documents or property belonging to the client? Documents, photographs, receipts, cancelled checks, or other materials provided by the client are generally considered *property* of the client and cannot be destroyed. Keep scanned copies of these items for your records. Return the client's original property to the client.

File Closing Checklist

Client_____ File/Matter No._____

Matter:_____ Date:_____ Atty:_____

DATE	INITIALS	ACTION FOR ELECTRONIC FILES ONLY
		29. Verify completeness of client's electronic file. Check for loose, unscanned documents, e-mails, or other records. Scan, save, or move items to client's electronic file as needed. If you are scanning a paper file in its entirety, consider providing the client with the paper version once you are assured the file has been accurately scanned. This will save destruction fees and give the client a complete copy of their file.
		30. If you possess electronic data containing "consumer personal information" within the meaning of the Oregon Consumer Identity Theft Protection Act (ORS 646A.600 to 646A.628) you are required to develop, implement, and maintain safeguards to protect the security and disposal of the data. Failure to do so can result in civil penalties. *See* "2007 Legislation Alerts - Business Law/Consumer Protection (Identity Theft)," *In Brief* (November 2007) and Kimi Nam, "Protect Client Information from Identity Theft," *In Brief* (August 2008). Both articles are available on the PLF Web site, www.osbplf.org.
		31. Be prepared to meet future requests for file material. Clients are entitled to file information in a format they can access. This may mean printing all or part of a file. Inform clients of the firm's policy on retrieval and provision of closed files at the time of file closing.
		32. Statutes or rules may require that certain documents be retained in original paper form. Refer to 7, 8, and 9 above. This is not an exhaustive list. Conduct your own appropriate legal research to identify other instances where original paper documents must (or should) be retained.
		33. Enter closed file information into case management system or closed file inventory.
		34. Properly archive electronic file for duration of firm's retention period. Establish access rights to ensure that documents cannot be inadvertently modified, destroyed, or altered. Retain file material for 10 or more years.
		35. Establish, test, secure, and maintain on and off-site backups. *See* the PLF practice aid, "How to Back Up Your Computer," available on the PLF Web site, www.osbplf.org.

STAFF

Confidentiality

The most important thing for your staff to remember is that everything in a law office is confidential. Working in a law office can be exciting, and the staff may learn all kinds of interesting things about prominent or well-known people in the community. It can be tempting to disclose some of this information to outsiders, including family members. However, revealing such confidential information can be extremely harmful to other people, and it can result in a malpractice claim being brought against you. It can also result in the staff member's discharge from employment and the probability that another law firm will never hire the employee.

Family, friends, or acquaintances may assume staff know all about the law and ask them for legal advice. Advise your staff that providing advice constitutes the unauthorized practice of law. They must never give legal advice – even if they know the answer.

The OSB Web site, www.osbar.org, contains all the regulatory provisions that lawyers licensed to practice law in the state of Oregon must follow. Among these provisions are the Rules of Professional Conduct (ORPCs). All legal staff must be acquainted with the ORPCs and the other rules governing lawyer conduct. They should be aware that you can be disbarred for their misconduct and that they must always work under your supervision. As legal professionals, your staff should consider themselves bound by the ORPCs.

Your staff is an important resource for you and your clients, and it is important that they have both a professional demeanor and a professional attitude. To that end, review these points with your staff:

1. **Display Humanity to Clients**. Law offices are in business to help people. Many of the people who come to your office are troubled and uneasy. Employees should never lose the human touch and never forget that if it weren't for clients, the law office would be out of business and the staff would be out of a job.

2. **Don't Discuss Business Outside the Office**. Staff should never talk outside the office about what happens there. Lawyers have a professional responsibility to keep information relating to the representation of a client confidential. This information is considered privileged. Employees of a law office are also responsible for preserving the clients' confidential information. Violation of a client confidence is a most grievous error and grounds for instant dismissal.

3. **Be Careful What You Say Around Clients**. Clients often come to law firms because they have problems. Sometimes the number and severity of those problems can be overwhelming, and lawyers or staff may laugh or joke to release tension. Such levity may make the staff appear unfeeling, so take special care to make sure that clients or office visitors do not overhear discussions of this sort.

4. **Be Attentive to Economics in the Office**. The practice of law is a profession, but it is also a business. Remind employees that if they see a chance to save a dollar, they should let you know. If they are right, everyone will benefit.

5. **Be a Professional in Personal Appearance**. Clients pay money for help with their legal problems. They expect to pay a professional fee, and they expect to deal with professionals.

Therefore, follow the office dress code and dress like a professional. Avoid chewing gum, reading books at your desk, checking personal e-mail, surfing the Web, or any other activity that may not be well-received if viewed by a client.

6. **Be a Professional in Work Habits**. Lawyers deal in documents. What goes out of the office electronically or on paper is the hallmark of a legal business. Do not rely on spell-check or grammar check. Always proofread your work for accuracy and meaning. The final product should be crisp and professional. If what is being said does not make sense, bring it to the attention of the lawyer. If you are given an instruction you do not understand, ask.

7. **Establish Priorities and Keep the Work Moving**. Remember that clients want and need action. Today's work should get out today. Advise staff that if they have more work stacked up than they can handle today, they should check with you to determine what should be done first.

8. **Be Communicative and Cooperative**. Staff should communicate their needs and make suggestions for improvement. Lawyers and staff can work together efficiently and cooperatively if good communication exists.

Develop Office Manuals

The Policy Manual

An office policy manual is no longer considered a frill that only large law firms can afford. In law firms of all sizes, it is now a primary method of furnishing employees with information about their working environment, as well as what the office expects from them. Providing your staff with a written policy manual helps accomplish four basic goals:

1. Aids new employees in orientation and gives them information about their new employer.
2. Fosters a positive attitude toward the employer.
3. Explains work rules and penalties for their violation.
4. Protects the office through appropriate disclosures.

Your employees need to know what you expect of them and what they can expect in return. By putting your office policies in writing, everyone has a clear and concise direction when questions arise, avoiding misunderstandings and controversy.

Written policies also protect workers and shield the office from unnecessary claims and litigation. Putting a policy in writing gives you an opportunity to think it through and consider it carefully. It is far easier to show a court a written policy than an oral one.

Providing policies establishes the framework within which more specific guidance can be developed when necessary. By establishing carefully prepared policies that spell out the philosophy and goals of the office in the performance of a given function, you can develop procedures and rules that will achieve the desired result. Although you cannot anticipate all future situations, general policy statements provide guidance for when you must take action.

The term "policy" can be defined as a definite course of action selected from among alternatives and in light of given conditions to guide and determine current and future decisions. Policies are general statements of philosophy, principles, and objectives in a given area. When you establish written policies, you let the staff know exactly what you wish to accomplish and why. With this in mind, do not blindly adopt boilerplate policies without thinking them through. Consult the people affected and discuss the best possible solutions to fit your needs.

Fair policies produce consistent treatment of all employees and provide office management with a frame of reference for making uniform personnel decisions. They offer quick and decisive action with understanding and in many instances can bring about needed change.

A good policy should be:

1. up-to-date;
2. clearly understood by everyone;
3. consistently followed;
4. established by the proper authority; and
5. concise (one policy per topic).

When the final version of your office policy manual has been approved, arrange a meeting with staff to discuss existing policies, highlight new policies, and explain how the policies will be implemented. Introduce the policy manual in a positive way. Let employees know these policies are being adopted to create a fair workplace and to minimize misunderstandings and controversy. Emphasize that many of the policies have been long established by the firm and the manual is simply putting them in writing for everyone's benefit. Advise employees that all policies will be enforced and applied uniformly and without exception.

Encourage everyone to read the manual completely and carefully as soon after the meeting as possible, and establish a date when a receipt and acknowledgment statement must be signed and returned. Instruct employees to use the policy manual as a reference guide when any questions arise and, if something is not covered in the manual, to bring it to the attention of the person responsible for updates.

Periodically review all office memoranda dealing with subjects in the office policy manual (or new subjects appropriate for inclusion). Keep in mind that any major changes in the office structure will most likely require changes in the manual. Federal, state, and local laws and regulations may also necessitate an addition or change in the policy manual and should not be overlooked. Conduct a total audit of the manual every three to six years.

An outdated policy manual can be an enormous problem. If policies are not current, you may find yourself in a situation in which one employee has been treated differently than another. Don't let this happen to your office. Review the policy manual annually to make sure that new policy or personnel questions are adequately addressed in it. You may also find that a current policy is not working and a new policy should be implemented.

Sound policies do make a difference. They can work toward creating a secure foundation on which to build a unified work force and a harmonious work environment. They pay off in decreased turnover, greater job satisfaction, and increased productivity.

The Procedures Manual

Each of your employees performs many tasks. The methods used to complete these tasks are your office procedures. Without written procedures, however, employees may find themselves lost or confused and develop their own methods. Soon you will find everyone in the office performing the same tasks differently, with varying results. Important elements may be missed or overlooked, and any office consistency may be lost.

The basic advantages to providing a written procedures manual are:

1. **Uniformity**. Through a properly written procedures manual, any employee should be able to step in and complete or assist with any project. Should any employee's workload be more than the employee can handle, as often occurs in the practice of law, the work can be distributed to other employees and completed in the necessary time. This creates an efficient and productive staff who are able to timely handle all projects and produce a work product that is uniform in both accuracy and style.
2. **Reduced training time**. New employees can immediately review instructions for completing any work task – a sure way to enhance their performance and productivity.
3. **Fewer disruptions for clarifications**. Both existing and new employees should be able to use the office procedures manual as a quick reference guide, reducing the time required by administrative personnel and other employees to answer questions.
4. **Assignment of responsibility**. Written procedures make it easy to find out where a job has gone wrong. If a particular task is not performed, you can easily identify what caused the problem and how to correct it.
5. **Continuity**. As staff and lawyers join and leave the firm, written procedures promote continuity because everyone has the same information and guidelines.
6. **Clarified expectations**. The procedures manual helps employees to know exactly what is expected of whom. Uncertainty and frustration are reduced.

When you begin to write your own manual, you may want to review another firm's procedures. But remember that your law office is unique, and not all procedures will work in every office. Rather than adopting the procedures of others, look at your office's current practices and start from there. Creating an office procedures manual does not necessarily mean creating new ways of doing things. Often it means reducing your current procedures to writing.

Every office procedures manual should be detailed, complete, and accurate. It should be easy to read, with clear, concise directions and a user-friendly index. It should also contain examples and/or samples. Don't forget that this will be the "how-to" book for the employees using it, and it should be an educational tool as well as an easy reference guide.

Start with an outline of the topics to be covered, and then fill in the step-by-step procedures. As you describe procedures unfamiliar to a new employee, try to put yourself in the new employee's place. Remember, that person may have to learn procedures that differ from those they have used in the past. If certain areas have already generated questions in your office, be sure to cover them in your manual.

Most offices already have forms in use, and they should be incorporated as examples in the manual. When possible, include checklists to guide employees through all procedures necessary to complete each task.

A procedures manual should:

1. be an orientation tool;
2. be a training guide;
3. be a reference guide;
4. provide uniformity;
5. reduce disputes over work methods;

6. delegate through clearly outlined duties and responsibilities;

7. facilitate work measurement and provide information for cost control; and

8. improve morale by letting everyone know the rules.

A procedures manual will be successful only if you update it periodically. Keep your procedures manual on your computer network or in a loose-leaf notebook for easy updating. As you add new material and revise existing procedures, you can insert or delete pages as necessary.

CONTRACT WORK

Contract work is work done by an "outside" lawyer for another lawyer or a law firm. The outside lawyer contracts to perform specific work on specific cases and is usually paid by the hour for work performed. However, compensation arrangements vary depending on the type of case involved.

Contract work can arise in many ways. Sole practitioners and firms often have extra work but not enough to justify hiring an associate. Similarly, a new lawyer may have a case requiring legal expertise beyond his or her ability. In those situations, the lawyer in need of help might contract with another lawyer for help on one specific case. By doing this, the lawyer hiring additional help provides the client with competent representation and is able to maintain his or her primary relationship with the client. At the same time, the lawyer helping out on the case gains experience and income.

Malpractice Risk and Professional Liability Coverage

When entering into contract work arrangements, be aware of potential problems. Lawyers tend to be informal when dealing with each other. Nonetheless, you should take the same precautions as when dealing with clients directly.

Contract lawyers have contractual responsibilities to the primary lawyer and to the client. In addition, the contract lawyer must be aware of the risk of malpractice. Even though the contract lawyer may have only an indirect relationship with the client, he or she may still have a professional duty to that person. If something goes wrong, both the contract lawyer and the primary lawyer may be liable.

Depending on the type of work, the contract lawyer may be able to get an exemption from PLF coverage. Some contract lawyers confine their work to supervised activities and claim the exemption from PLF coverage. If you are doing contract work and want to claim an exemption from PLF coverage, be sure to follow PLF guidelines at all times. (*See* the PLF guidelines for law clerk/supervised lawyers following this chapter.)

Note that the exemption merely excuses the lawyer from purchasing malpractice coverage from the PLF. It does not affect any duty owed to the hiring lawyer. In addition, depending on the circumstances, the contract lawyer may be liable to the client for any malpractice in carrying out that work. So it is important to take the same precautions whether the work is exempt or nonexempt.

Staying Out of Trouble

To reduce the dangers inherent in contract work arrangements, take the same precautions used in attorney-client relationships. Document the arrangement, define the scope of the project, establish your status *vis-a-vis* the client and the PLF, and determine fees and other costs. You and the hiring attorney should settle administrative matters such as the form of the work product expected, billing method, retention of file material, and proprietary rights to forms created during the contract relationship. Use written agreements, engagement letters, and disengagement letters to memorialize these issues. For larger projects, keep the primary lawyer updated with periodic e-mails just as you would a client.

Scope of the Project

At your initial conference with the primary lawyer, determine exactly what is expected. How much time should be spent on each aspect of the project? What are the projected hours and what is to be done if more time is required? What is the procedure for modifying the project? When should the project be completed? (*See* the sample Project Assignment sheet at the end of this chapter.)

Contract Lawyer's Status

1. **Employee or Independent Contractor?** Contract lawyers are generally independent contractors. Discuss and clarify your status at the outset of your working relationship. If you are an independent contractor, the primary lawyer's firm should not withhold your income or payroll taxes. Workers' compensation, Social Security, and unemployment insurance do not accrue to the independent contractor. *See* Lisa C. Brown and Jim W. Vogele, "Contract Lawyers: Independent Contractors or Employees?" *In Brief* (July 2012), available on the PLF Web site, www.osbplf.org.

2. **Exempt or Nonexempt from PLF Coverage?** Another matter to decide is whether you will be handling the project as exempt or nonexempt from PLF coverage. This is especially important if you have claimed an exemption from coverage already. Review the PLF exemption guidelines and make sure your project can be conducted according to the exemption restrictions.

Remember that law clerk/supervised lawyer status does not preclude the possibility of being sued for malpractice. It simply means that you are not required to purchase PLF coverage. If you are exempt and are sued, you have no coverage and the PLF is not required to defend you.

Fees and Costs

At the outset of a contract arrangement, agree on your rate and other items to be billed. Will the fee be based on a simple hourly rate? Will you share in a contingent fee or some other fee-splitting arrangement? If so, proper disclosure must be made to the client. Who will pay for such things as copying, computerized legal research, and travel expenses? Will the primary lawyer reimburse you for costs, or will the primary lawyer's firm pay for costs as they arise? Will you use the firm's equipment and support staff?

Also, determine the form of your bills and the timing of submission. Does the primary lawyer want your time entered contemporaneously into the firm's billing system or a final invoice for the entire project when all the work is completed? When will the firm pay your bill? How much detail should the bill include?

Conflicts and Confidentiality

As a contract lawyer you must maintain a conflict system, because your projects come from such a wide range of sources. Both sides of a dispute may approach you to do work.

Before you begin work on a project, the primary lawyer must provide you with a list of all parties connected with the case. After you check these names for conflicts, enter the names into your conflict system. (For more information on setting up and using a conflict system, *see* Conflict of Interest Systems, *supra*.)

Confidentiality is another danger area. You may be doing contract work for many different law offices, which may expose you to information about cases other than the one you have been hired to work on. You may be blamed for the leakage of confidences. Knowledge about other cases may preclude you from working on those cases for another firm.

To avoid coming into contact with extraneous confidences, request that the primary lawyer's firm segregate you from matters other than the contract project. You should have no access to other files, and other cases should never be discussed with or around you.

Work Product and Further Responsibility

Clarify the final form of your work product. Does the primary lawyer want an electronic copy, hard copy, or both? If electronic, which format should you use? If the project involves research, does the primary lawyer want copies of all the cases or simply a list?

Along with the final work product, include your final billing statement and a closing cover letter or e-mail. The cover letter or e-mail should reiterate what work you did and alert the primary lawyer to any unfinished business on the case. Make clear that you are not taking any responsibility for any further aspects of the case.

Contract relationships can become quite complex if you take on significant responsibilities in representation of the underlying client. Your role, and that of the primary lawyer, may become blurred and disputes may arise over possession of files, use of specialized forms created in conjunction with the contract work, or other issues. You can avoid these disputes by entering into a written agreement that clearly states the terms, conditions, and expectations of the contract relationship.

Getting Started

The PLF has forms on its Web site, www.osbplf.org, to help you get started in your contract practice. These include a "Contract Lawyers Checklist," "Contract Project Intake Sheet," "Contract Project Letter of Understanding," "Letter Declining Contract Project," and "Project Assignment." The latter is at the end of this chapter.

PLF Exemption Guidelines
Law Clerk/Supervised Attorney

You may perform legal research and writing without purchasing PLF Coverage, provided:

1. your work is reviewed and supervised by an attorney with PLF coverage;

2. you make no strategy or case decisions;

3. you do not hold yourself out to any client as an attorney;

4. you sign no pleadings or briefs;

5. you attend no depositions as the attorney of record;

6. you make no court appearances as the attorney of record;

7. you do not use the title "attorney," "attorney at law," or "lawyer" on any correspondence or documents; and

8. you are not listed in the firm name or on the firm letterhead as an attorney or firm member (unless specified as retired). If you are retired, your name may be listed on the firm letterhead as "retired" or "of counsel (retired)," whichever applies. Note that if you are listed on the letterhead in this way, you may be vicariously liable for errors made by other members of the firm under the theory of apparent partnership or partnership by estoppel. The other members of the firm may also be vicariously liable for your errors.

Since you are an Oregon lawyer, you could be exposed to possible legal malpractice claims or lawsuits. We recommend the following safeguards in order to help protect yourself from possible claims or suits for legal malpractice:

1. Direct your legal research memos to your supervising attorney and never send them directly to the client;

2. Do not participate in or conduct client interviews;

3. Do not discuss the case, formally or informally, with the client. This includes discussion by phone and in person; and

4. It is permissible for you to have a business card that lists you as attorney at law. We recommend that you give these cards out only to attorneys for whom you are going to do work. We recommend that you use other titles on cards given out to witnesses, clients, or experts. Some options are investigator, paralegal, interviewer, law clerk, or research assistant.

Although these steps will not guarantee you freedom from legal malpractice claims, they do reduce your exposure to such claims.

If you have any questions about your PLF coverage or the activities which you can do as a lawyer exempt from PLF coverage, please contact the PLF, 503-639-6911 or 1-800-452-1639.

Project Assignment

Date of Assignment: _____

Assigning Lawyer: _____

Case Name: _____

Facts: _____

_____

_____

_____

_____

_____

_____

Issues to be Researched: _____

_____

_____

_____

_____

_____

Type of Work Product (Informal, Formal, Pleading, etc.): _____

_____

_____

Amount of Time to be Spent on Project: _____

DUE DATE: _____

RESOURCES

The following is a list of resources you may find helpful during your practice:

OREGON STATE BAR PROFESSIONAL LIABILITY FUND (PLF). The PLF provides free educational materials ranging from malpractice avoidance to time management solutions. The PLF also has practice aids and handbooks that are available at no charge. In addition, the PLF's Practice Management Program will send a practice management advisor to your office at no charge to help you set up or improve your law office systems. To download free practice aids and forms or order low- or no-cost CLE programs, visit the PLF's Web site, www.osbplf.org. For more information, call 503-639-6911 or 1-800-452-1639.

OREGON ATTORNEY ASSISTANCE PROGRAM. The Oregon Attorney Assistance Program (OAAP) is a free and *confidential* assistance program for all Oregon lawyers. Programs include assistance with alcoholism, drug addiction, burnout, career satisfaction, depression, anxiety, gambling addiction, sexual addiction, procrastination, relationship issues, stress management, time management, and other distress that may impair a lawyer's ability to function. For additional information or to access the program, visit the OAAP Web site at www.oaap.org or call the OAAP attorney counselors at 503-226-1057 or 1-800-321-6227.

PRACTICE TIPS FOR AVOIDING MALPRACTICE. The PLF periodically publishes a newsletter, *In Brief*. This newsletter is filled with information on how to avoid legal malpractice in specific areas of law. Technology updates, practice tips, and resources of interest to Oregon practitioners are also included. Past issues of the *In Brief* are available on the PLF Web site, www.osbplf.org, or call 503-639-6911 or 1-800-452-1639 for more information.

SAMPLE DISCLOSURE AND CONSENT LETTERS AND CHECKLISTS. Peter R. Jarvis, Mark Fucile, and Brad F. Tellam have prepared an excellent collection of disclosure and consent letters with checklists that are available to download from the PLF Web site, www.osbplf.org.

OREGON WOMEN LAWYERS. OWLS has 10 regional chapters in the state. The chapters hold luncheons that include guest speakers and also allow for networking opportunities. OWLS publishes a quarterly newsletter on topics of concern to women lawyers called the *AdvanceSheet*. For information, contact OWLS at 503-595-7826, via e-mail at info@oregonwomenlawyers.org or visit their Web site, www.oregonwomenlawyers.org.

OREGON WOMEN LAWYERS CONTRACT LAWYER REFERRAL SERVICE. OWLS coordinates a service for lawyers who are seeking contract work and attorneys who wish to hire contract lawyers. For information, contact OWLS at 503-595-7826 or visit their Web site, www.oregonwomenlawyers.org.

THE COMPLETE GUIDE TO CONTRACT LAWYERING 3rd Ed, 2003. Authors Deborah Arron and Deborah Guyol look at temporary legal services from the perspective of the contract attorney and the hiring law firm. The book addresses ethical considerations, malpractice liability, independent contractor vs. employee status, and other topics of interest. To order, contact Lawyer Avenue Press, 4701 SW Admiral Way, #278, Seattle, Washington 98116, 1-206-229-9754, or visit www.lawyeravenue.com. ($24.95).

NALS OF OREGON.
The main objective of NALS of Oregon is to further the education and training of legal support staff to enhance the competencies of members in the legal services profession. There are local chapters throughout the state of Oregon and members are typically career legal support staff who are interested in learning as much as possible about the legal profession and keeping up to date on changes in the law. For more information, visit the NALS of Oregon Web site at www.nalsor.org.

AMERICAN BAR ASSOCIATION GENERAL PRACTICE SECTION. This section offers a journal for general practitioners. It also has a publication catalog that lists books of interest to general practitioners. For more information, visit the ABA's Web site at www.americanbar.org. To order ABA books, CLEs, periodicals, and other ABA Web store products at a discount, visit the PLF Web site, www.osbplf.org.

AMERICAN BAR ASSOCIATION LAW PRACTICE MANAGEMENT DIVISION AND PUBLICATION CATALOG. This section publishes a journal geared to law practice management and also publishes books of interest to those who are running their own practices. Some of the particularly relevant books published by this section of the ABA include *Flying Solo: A Survival Guide for the Solo and Small Firm Lawyer*, 4th ed.; *How to Start and Build a Law Practice*, 5th ed.; *Keeping Good Lawyers: Best Practices to Create Career Satisfaction*; *Through the Client's Eyes: New Approaches to Get Clients to Hire You Again and Again*, 3rd ed.; *The Lawyer's Field Guide to Effective Business Development*; *The Lawyer's Guide to Records Management and Retention*; *Winning Alternatives to the Billable Hour: Strategies That Work*, 3rd ed.; *Making Partner: A Guide for Law Firm Associates*, 3rd ed.; and *Information Security for Lawyers and Law Firms*. For information on the Law Practice Management Division, call 1-312-988-5654. Information on ABA member services and resources is also available on the Web at www.americanbar.org. To order ABA law practice management books and other ABA Web store products at a discount, visit the PLF Web site, www.osbplf.org.

LOCAL BAR ASSOCIATIONS. Local bar associations have many resources to offer. They are often a good source of information on what is happening at the local courthouse, and they sometimes hold monthly CLEs or social gatherings. In addition, they sometimes offer group insurance coverage. Presidents of local bar associations are listed on the OSB Web site, www.osbar.org.

FOR ADDITIONAL INFORMATION ON THE OREGON STATE BAR RESOURCES AND SERVICES LISTED BELOW, VISIT THE OSB WEB SITE AT www.osbar.org.

LAWYER TO LAWYER PROGRAM. This program connects Oregon attorneys working in unfamiliar practice areas with experienced attorneys willing to offer informal advice at no charge. For names of resource attorneys and more information about Lawyer to Lawyer, call the OSB, 503-620-0222 or 1-800-452-8260, ext. 408.

SOLE AND SMALL FIRM PRACTITIONERS SECTION. The OSB has a sole and small firm practitioners section to provide networking and continuing legal education opportunities for attorneys in solo or small firm practices. For information, call the OSB, 503-620-0222 or 1-800-452-8260, ext. 385.

LAWYER REFERRAL SERVICE. This service distributes referrals to lawyers who register with the service. Attorneys registering with the service are allowed to charge $35 for the initial consultation. The rate charged after the initial consultation is at the lawyer's discretion. For information or current registration fees, contact the OSB at 503-620-0222 or 1-800-452-8260, ext. 418.

ETHICS AND MALPRACTICE AVOIDANCE UPDATES. The *Oregon State Bar Bulletin* periodically includes articles written by the OSB General Counsel's office on ethical issues commonly faced by practitioners. The PLF also regularly contributes articles on ethics, practice tips, and procedures for avoiding malpractice. Past issues of the *Bulletin* are available on the OSB Web site.

ETHICS OPINIONS/INQUIRIES. Ethics issues can often be resolved by reviewing the OSB Formal Ethics Opinions maintained on the OSB's Web site. Also, check *The Ethical Oregon Lawyer*. The publication is part of BarBooks™, and is available separately through the OSB Order Desk at 503-431-6413 or 1-800-452-8260, ext. 413. The OSB General Counsel's office provides ethics opinions and answers to ethics inquiries. The information is free. Call the OSB at 503-620-0222 or 1-800-452-8260, ext. 361 or 359.

MEMBERSHIP SECTIONS. OSB members are welcome to join any of the various subject matter sections. Participation in relevant sections can be a great help in developing a practice. The OSB Web site lists the various sections and their leaders. For more information, call 503-620-0222 or 1-800-452-8260, ext 385.

FORMS ON DISK. Many of the OSB CLE programs include materials with forms and the option of purchasing the forms on disk. OSB CLE publications and forms are also available on CD-ROM. For more information, call the OSB Order Desk at 503-431-6413 or 1-800-452-8260, ext. 413.

SAMPLE FEE AGREEMENTS. A collection of fee agreements, including agreements tailored to specific areas of law, is available in the *Fee Agreement Compendium*. The publication is part of BarBooks™, and is available separately through the OSB Order Desk at 503-431-6413 or 1-800-452-8260, ext. 413.

NEW LAWYERS DIVISION. This division of the OSB offers low-cost CLEs and other networking opportunities at chapter meetings throughout the state. For more information, call the OSB at 503-620-0222 or 1-800-452-8260, ext. 426.

OSB BARBOOKS™ ONLINE LIBRARY: The BarBooks™ online library is a free member benefit included as part of your regular bar dues, with publications in numerous practice areas. As an active or active pro bono member of the OSB, you may download any of the forms and jury instructions included in the BarBooks™ library, as well as the PDF of any book included in the library. BarBooks™ offers free one-hour Web conference training sessions every month, accredited for 1 Practical Skills MCLE credit. E-mail Linda Kruschke at lkruschke@osbar.org for more information. To access BarBooks™, use the Member Login on the OSB Web site.

NEW LAWYER MENTORING PROGRAM. The OSB and the Oregon Supreme Court launched this initiative to serve all incoming bar members starting in 2011. The mandatory program formalizes a process that for many decades took place organically, through connections forged at law firms and other close-knit bar communities. As our state bar has grown, the process of introducing new lawyers to the legal community, and guiding them through the transition to law practice, has grown more amorphous. The NLMP offers new bar members one-on-one guidance on elements of a highly competent practice, while promoting the professionalism, civility and collegiality that make Oregon among the best places in the country to practice law. For more information, visit the New Lawyer Mentoring Program page on the OSB Web site.

MEMBERSHIP DIRECTORY. The OSB Membership Directory is a listing of attorneys updated daily and is available on the OSB Web site.

INDEX OF FORMS

These forms are available on the PLF Web site, www.osbplf.org.

IMPORTANT NOTICES

Joint Sub-Committee on Public Safety
SB5533 - Public Defense Service Comission
March 11, 2015

Sample Budget
Consortium Law Office
(One Attorney)

Cost	Monthly	Yearly
Rent (Single Office in Suite)	$500.00	$6,000.00
Legal Assistant (part time @ $15.00 per hour plus taxes and no benefits)	$1,332.00	$15,984.00
Bar Dues	$41.25	$495.00
PLF Premium	$291.67	$3,500.00
Office Insurance (Premises Liability)	$50.00	$600.00
Health Insurance Premium	$450.00	$7,320.00
Sec of State Fee	$8.33	$100.00
Cell Phone	$150.00	$1,932.00
Phone/fax/ISP	$85.00	$1,020.00
Bookkeeping	$100.00	$1,200.00
Copying	$50.00	$600.00
Computer (hardware, software)	$50.00	$600.00
Collect Calls from Jail	$40.00	$480.00
CLE	$83.33	$1,000.00
Books (Criminal Code; Rules of Court; Kirkpatrick on Evidence)	$50.00	$1,100.00
Westlaw	$110.00	$1,320.00
OCDLA	$29.17	$350.00
Total	**$3,420.75**	**$43,601.00**

Published on *Home Forward* (http://www.homeforward.org/)

Am I Eligible?

Home Forward apartments are meant for people and families living on limited incomes. To find out if you qualify for one of our apartments, follow the three steps below.

1. Look Up Your Income Level

Using the table below, find the row for your family size, and then find your annual household income in that row. Then look at the top of that column to find your percentage number. Your percentage number measures your income in comparison to the average family of your size in the Portland area. You may want to write down your percentage number to remember it.

Income Guidelines for the Portland Metropolitan Area (Revised 3/15)

Household Size	30% of Area Median Income	50% of Area Median Income	80% of Area Median Income
1	$15,450	$25,750	$41,200
2	$17,650	$29,400	$47,050
3	$20,090	$33,100	$52,950
4	$24,250	$36,750	$58,800
5	$28,410	$39,700	$63,550
6	$32,570	$42,650	$68,250
7	$36,730	$45,600	$72,950
8	$40,890	$48,550	$77,650

2. Search for Housing

Income limits are listed in the property description for every apartment on this website. If your percentage number is the same or lower than the income limit shown for that apartment, then you are eligible to rent it.

3. Know Your History

Like other landlords, we need to make sure our applicants will be good tenants. This involves checking your:

Landlord References: We'll need to see good references from the places you have lived for the past three years. If there is a good reason you can't provide these, we may be able to use other types of references.

Credit History: We run a consumer credit check on every applicant. If you still owe money to a previous landlord, you might not be approved for residency.

Criminal History: We have specific guidelines at each of our properties regarding serious crimes, especially drug-related activity or violence. We run a criminal record check on every applicant.

4. Requirements for Public Housing

Many of our apartments are classified as public housing units, which means that you only pay 28.5 - 31% of your income as rent. These residences have additional requirements for residency.

For more information about the requirements, please see the document titled “Public Housing Apartment Criteria for Residency” in English [1], Russian [2], Spanish [3] and Vietnamese [4].

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Source URL: http://www.homeforward.org/find-a-home/get-an-apartment/am-i-eligible

Links:
[1] http://www.homeforward.org/sites/default/files/PH-Criteria-for-Residency.pdf
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[3] http://www.homeforward.org/sites/default/files/PH-Criteria-for-Residency_spanish.pdf
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOSEPH JEROME WILBUR, *et al.*, Plaintiffs, v. CITY OF MOUNT VERNON, *et al.*, Defendants.	No. C11-1100RSL MEMORANDUM OF DECISION

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." Plaintiffs filed this lawsuit in Skagit County Superior Court in order to challenge the constitutional adequacy of the public defense system provided by the City of Mount Vernon and the City of Burlington. The defendant municipalities removed the case to federal court on July 5, 2011. Testimony on this matter was heard by the Court commencing on June 3, 2013, and concluding on June 18, 2013. Additional briefing closed in August of 2013.[1]

At trial, plaintiffs set out to prove that the Cities of Mount Vernon and Burlington are regularly and systematically failing to provide effective assistance of counsel to indigent persons charged with crimes, thereby violating both the federal and state constitutions and

[1] In addition to the evidence presented at trial, the Court has considered the post-trial submissions of the parties, the Washington Defender Association, and the United States. The "Motion of Washington Defender Association For Leave to File Amicus Curiae Brief" (Dkt. # 321) is GRANTED.

necessitating injunctive relief. Defendants took the position that, whatever defects may have existed in their public defense systems before 2012, they have taken significant steps to improve the representation provided, including contracting with a different law firm to provide defense services, hiring additional public defenders, and paying them more. The Court must determine whether a constitutional right has been violated, whether the Cities are responsible for the violation, and what the appropriate remedy is.

FINDINGS OF FACT

Plaintiffs have shown, by a preponderance of the evidence, that indigent criminal defendants in Mount Vernon and Burlington are systematically deprived of the assistance of counsel at critical stages of the prosecution and that municipal policymakers have made deliberate choices regarding the funding, contracting, and monitoring of the public defense system that directly and predictably caused the deprivation. The period of time during which Richard Sybrandy and Morgan Witt (hereinafter, Sybrandy and Witt) provided public defense services for the Cities was marked by an almost complete absence of opportunities for the accused to confer with appointed counsel in a confidential setting. Most interactions occurred in the courtroom: discussions regarding possible defenses, the need for investigation, existing physical or mental health issues, immigration status, client goals, and potential dispositions were, if they occurred at all, perfunctory and/or public. There is almost no evidence that Sybrandy and Witt conducted investigations in any of their thousands of cases, nor is there any suggestion that they did legal analysis regarding the elements of the crime charged or possible defenses or that they discussed such issues with their clients. Substantive hearings and trials during that era were rare. In general, counsel presumed that the police officers had done their jobs correctly and negotiated a plea bargain based on that assumption.[2] The appointment of

[2] When asked to explain why there were so few trials during his tenure as public defender, Mr. Witt essentially said that trials were unnecessary because "we all knew where we were going."

counsel was, for the most part, little more than a formality, a stepping stone on the way to a case closure or plea bargain having almost nothing to do with the individual indigent defendant. To the extent that "adequate representation" presumes a certain basic representational relationship, there was a systemic failure in the Sybrandy and Witt era. Adversarial testing of the government's case was so infrequent that it was virtually a non-factor in the functioning of the Cities' criminal justice system.

This situation was the natural, foreseeable, and expected result of the caseloads the attorneys handled. Sybrandy and Witt, both of whom also had private practices (Mr. Witt spent only 40% of his time providing public defense services), each closed approximately 1,000 public defense cases per year in 2009, 2010, and 2011 and often spent less than an hour on each case. Although both counsel testified that they did not feel rushed or overworked, it is clear that, in light of the sheer number of cases they handled, the services they offered to their indigent clients amounted to little more than a "meet and plead" system. While this resulted in a workload that was manageable for the public defenders, the indigent defendants had virtually no relationship with their assigned counsel and could not fairly be said to have been "represented" by them at all. The Cities, which were fully aware of the number of public defenders under contract, remained wilfully blind regarding their overall caseloads and their case processing techniques. The City officials who administered the public defense contracts did not feel it was necessary for them to know how many non-public defense cases Sybrandy and Witt were handling, the number of public defense cases they were assigned, or even whether the defenders were complying with the standards for defense counsel set forth in the Cities' own ordinances and contracts. Even when Sybrandy and Witt expressly declined to provide basic services requested by the Cities – such as initiating contact with their clients and/or visiting in-custody defendants –

the Cities were not particularly concerned.[3] Eric Stendal, the contract administrator for the City of Mount Vernon, testified that as long as things were "quiet and good" and there was no significant increase in the costs the Cities incurred for their public defense system, defendants were happy with the arrangement and continued to contract with Sybrandy and Witt.

After this lawsuit was filed, Sybrandy and Witt were no longer willing to provide public defense services for the Cities. The Cities issued a request for proposals and ultimately hired Mountain Law to provide the necessary services. Mountain Law came on-line in April 2012 with two attorneys. The evidence regarding initial caseloads varies significantly: the Cities negotiated the new public defense contract on the assumption that over 1,700 cases would be transferred from Sybrandy and Witt during the transition period, but Mountain Law's caseload statistics show that it was assigned approximately 1,100 cases. Whatever the true numbers, it is clear that by the end of May each of the two public defenders was handling well over 400 cases. By the end of 2012, Mountain Law had added a third attorney and another 963 cases. The Cities were kept apprised of these numbers. They were also aware that, on June 15, 2012, the Supreme Court of Washington established 400 unweighted misdemeanor cases per year as "the maximum caseload[] for fully supported full-time defense attorneys for cases of average complexity and effort," assuming a "reasonably even distribution of cases throughout the year." Because the 400 caseload limit would not be effective until September 1, 2013, neither Mountain Law nor the Cities were particularly concerned that Michael Laws and Jesse Collins were each handling over 500 cases at any given time between April and August 2012. The mantra during that period and continuing through trial was that Mountain Law would

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[3] While negotiating the public defense contract in 2008, Mr. Sybrandy notified the Cities that "[t]here is much in the proposed contract which is not possible for us to comply with, at least at the level of compensation we have proposed." Tr. Ex. 36. Rather than raise the level of compensation to obtain the level of services required under Ordinance 3436 and, by extension, the standards endorsed by the Washington State Bar Association for the provision of public defense services, the Cities simply struck or ignored requirements related to, among other things, client interactions and reporting/monitoring.

continue to work toward the 400 annual caseload limit by adding attorneys as needed. As of the time of trial, Mountain Law had added two additional attorneys (one in August 2012 and another in March 2013), presumably reducing the per attorney caseload to some extent. The preponderance of the evidence shows, however, that Mountain Law continues to handle caseloads far in excess of the per attorney limits set forth in the Supreme Court's guidelines.[4]

The Court does not presume to establish fixed numerical standards or a checklist by which the constitutional adequacy of counsel's representation can be judged. The experts, public defenders, and prosecutors who testified at trial made clear that there are myriad factors that must be considered when determining whether a system of public defense provides indigent criminal defendants the assistance required by the Sixth Amendment. Factors such as the mix and complexity of cases, counsel's experience, and the prosecutorial and judicial resources available were mentioned throughout trial. The Washington Supreme Court took many of the relevant factors into consideration when it imposed a hard cap on the number of cases a public defender can handle over the course of a year:[5] the 400 caseload limit applies as long as counsel

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[4] The parties generally agree that the Standards for Indigent Defense adopted by the Washington Supreme Court provide a sort of best practices to which the Cities aspire. The evidence in the record strongly suggests that, even with the addition of Sade Smith and Stacy DeMass to the public defender ranks, defendants still run afoul of the per annum limitation. The question is not whether, on any particular day, a public defender has more or less than 400 open cases. No attorney can reasonably be expected to handle 400 criminal cases at once. Pursuant to the Standards, the goal is to have no more than 400 cases assigned to each public defender over the course of an entire year, with the assignments temporally spaced so that he or she can give each client the representation that is constitutionally required. Mountain Law opened 2,070 cases between April and December 2012 – even if all four attorneys had been on board during the entire period (and they were not), they would have far exceeded the Supreme Court's guidelines.

[5] The Washington Defender Association ("WDA"), a statewide organization of public defenders and public defender agencies that first proposed the caseload limits, argues that:

> Caseload levels are the single biggest predictor of the quality of public defense representation. Not even the most able and industrious lawyers can provide effective representation when their workloads are unmanageable. Without reasonable caseloads,

handles only misdemeanor cases, is employed full-time in public defense, is handling cases of average complexity and effort, counts every matter to which he or she is assigned to provide representation,[6] is fully supported, and has relevant experience. Where counsel diverges from these assumptions, the caseload limit must be lowered in an attempt to protect the quality of the representation provided.

While a hard caseload limit will obviously have beneficial effects and the Washington Supreme Court's efforts in this area are laudable, the issue for this Court is whether the system of public defense provided by the defendant municipalities allows appointed counsel to give each case the time and effort necessary to ensure constitutionally adequate representation for the client and to retain the integrity of our adversarial criminal justice system. Mount Vernon and Burlington fail this test. Timely and confidential input from the client regarding such things as possible defenses, the need for investigation, mental and physical health issues, immigration status, client goals, and potential dispositions are essential to an informed representational relationship. Public defenders are not required to accept their clients' statements at face value or to follow every lead suggested, but they cannot simply presume that the police officers and prosecutor have done their jobs correctly or that investigation would be futile. The nature and scope of the investigation, legal research, and pretrial motions practice in a particular case should reflect counsel's informed judgment based on the information obtained

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> even the most dedicated lawyers cannot do a consistently effective job for their clients. A warm body with a law degree, able to affix his or her name to a plea agreement, is not an acceptable substitute for the effective advocate envisioned when the Supreme Court extended the right to counsel to all persons facing incarceration.

WDA 2007 Final Standards for Public Defense Services with Commentary at 13 (http://www.defensenet.org/about-wda/standards).

[6] If the Cities adopt a numerical case weighting system that recognizes the greater or lesser workload required for various types of cases (and therefore more accurately estimates workload rather than just case counts), the Supreme Court's standards would limit each public defender to 300 weighted misdemeanor cases.

through timely and confidential communications with the client. A failure of communication precludes the possibility of informed judgment. If actual, individualized representation occurs – as opposed to a meet and plead system – the systemic result is likely to be more adversarial testing of the prosecutor's case throughout the proceeding and a healthier criminal justice system overall. Again, no hard and fast number of pretrial motions or trials is expected, but when the number of cases going to trial is both incredibly small (in absolute and comparative terms) and wildly out of line with the number of trials that occurred in nearby (and sometimes overlapping) jurisdictions, it may be, and in this case is, a sign of a deeper systemic problem.

A number of defendants' witnesses, including former Pierce County Executive and Prosecutor John Ladenburg, pointed out that the adequacy of counsel cannot fairly be judged in a vacuum: the Court must also take into consideration the resources available to the other side. If, in a time of fiscal constraint, the prosecutor is also overwhelmed and/or the municipal jail cannot accommodate any more inmates, the resulting plea offers are likely to be as good as or better than the public defender could negotiate even if he or she spent untold hours on legal research and investigation.[7] The Court does not dispute the fact that many, if not the vast majority, of the plaintiff class obtained a reasonable resolution of the charges against them. The problem is not the ultimate disposition: if plaintiffs were alleging that counsel had affirmatively erred and obtained a deleterious result, the Sixth Amendment challenge would have been brought under Strickland v. Washington, 466 U.S. 668 (1984), rather than Gideon v. Wainwright, 372 U.S. 335

[7] It is clear from the testimony of a former city attorney assigned to prosecute misdemeanor cases for one of the municipalities that the people of the City received even more ineffective representation than the individuals charged with crimes. There is no constitutional right regarding the quality of the people's lawyer, however, and the Court is not in a position to address the negative impacts that budgetary constraints have had on any part of the criminal justice system other than the provision of indigent defense. While the city attorney's willingness to grant overly-lenient plea agreements may explain Sybrandy and Witt's determination that investigation, research, and communication were unnecessary impediments to the expeditious resolution of their cases, it does not excuse their consistent failure to establish a meaningful attorney/client relationship with the people they represented.

(1963). The point here is that the system is broken to such an extent that confidential attorney/client communications are rare, the individual defendant is not represented in any meaningful way, and actual innocence could conceivably go unnoticed and unchampioned. Advising a client to take a fantastic plea deal in an obstruction of justice or domestic violence case may appear to be effective advocacy, but not if the client is innocent, the charge is defective, or the plea would have disastrous consequences for his or her immigration status. It is the lack of a representational relationship that would allow counsel to evaluate and protect the client's interests that makes the situation in Mount Vernon and Burlington so troubling and gives rise to the Sixth Amendment violation in this case.

Given the fiscal constraints imposed on both sides of the criminal justice equation in Mount Vernon and Burlington, it is not surprising that the Mountain Law attorneys had to adopt some of the same time-saving and "efficient" case management practices that dominated the Sybrandy and Witt era in order to handle the caseload they inherited in April 2012 and the additional cases that have been assigned to them each and every month thereafter. The evidence is clear that Mountain Law, while more willing to conduct an initial interview with their clients, is simply unable to do so in a majority of cases. Although Mountain Law staff schedule a meeting with the client as soon as the case is assigned, the attorneys' courtroom and other commitments often make it impossible to hold the meeting before the client's first appearance. Thus, the public defenders often meet their clients for the first time in the courtroom, sometimes with a plea offer already in hand. At that point, there is really no opportunity for a confidential interview, the client may or may not understand the proceedings, and the public defender is unprepared to go forward on the merits of the case. The client is given a choice between continuing the hearing so he or she can meet with the public defender or to accept whatever offer

happens to be on the table.[8] While there is some evidence of investigations, legal research, and an uptick in the number of cases set for trials in Mount Vernon and Burlington since Mountain Law took over, the numbers are still shockingly low. Mr. Laws apparently spoke to only three or four witnesses in the whole of 2012, a review of fifty Mountain Law case files showed no documentation of any legal analysis or research, and there is evidence of only one pre-trial motion and five or six trials in 2012.

The Court finds that, as of the date of trial, the representation provided to indigent defendants in Mount Vernon and Burlington remains inadequate. The Court would have to make several unsupported assumptions regarding Mountain Law's ability to clear the backlog of cases it inherited, the distribution of cases within the office, counsels' experience and proficiency, and the number of new cases opened each month to conclude that the defenders' current caseloads allow the kind of individualized client representation that every indigent criminal defendant deserves and on which our adversarial system of criminal justice depends. Even if the Court were willing to make those assumptions, there is no evidence that Mountain Law has rethought or restructured the case management procedures that were developed during the first few hectic months of its contract with the Cities. Rather than providing an opportunity for a representational relationship to develop and following up as appropriate given the facts of each case, Mountain Law allowed the massive caseload to determine the level of representation

[8] Defendants made much of the fact that other professionals involved in the criminal justice system – the judges and prosecutors – did not see anything wrong with the representation provided in any particular case. As the Court has already noted, the result obtained in an individual case would likely appear reasonable, especially when the client assures the presiding judicial officer that he or she is making a knowing and informed decision to plead guilty. But what the judges and prosecutors had no way of knowing was whether the client ever had a chance to meet with the public defender in a confidential setting, whether the attorney conducted an investigation or knew anything about the case other than what was in the charging document and/or police report, or whether a meaningful attorney/client relationship actually existed. No indigent criminal defendant testified that they enjoyed a representational relationship with Sybrandy, Witt, or Mountain Law, despite having positive things to say about certain conflict counsel and/or the Skagit County public defenders.

that would be afforded and has continued those practices even after adding additional attorneys.

The Court's findings should not be interpreted as an indictment of Mountain Law, its attorneys, or their legal acumen. The Court is encouraged by some of the changes Mountain Law is making in Mount Vernon and Burlington: the public defense system is definitely trending in the right direction, and the Court sees great promise in Mountain Law's dedicated young lawyers. By accepting a contract with the Cities of Mount Vernon and Burlington, however, Mountain Law became embroiled in an ongoing debate regarding the adequacy of our public defense systems in times of fiscal constraint and the meaning of the right to counsel fifty years after it was promised in Gideon v. Wainwright, 372 U.S. 335 (1963). Although the right to the assistance of counsel regardless of economic status is established by the Constitution, legislative enactments are required to ensure that the right is maintained, and funding limitations imposed over the past few years are having a cumulative and adverse impact at both the state and national levels.[9] In the State of Washington, there are undoubtedly a number of municipalities

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[9] The federal judiciary's system of indigent public defense services, long considered the gold standard in the United States, has been adversely affected by successive years of reduced budgets and the 2013 sequestration cuts. For the first time, federal public defenders were forced to take furlough days, making them unavailable to their clients and unable to attend court hearings. More cases were shifted to private lawyers, whose pay was reduced and delayed in an effort to cut costs. On November 6, 2013, fifty-eight Members of Congress sent a letter to the Speaker of the House and the Minority Leader indicating their grave concern that the underfunding of public defense at the federal level was placing the Sixth Amendment right to counsel in jeopardy (http://quigley.house.gov/uploads/FederalDefenderLetter1.pdf).

At the intersection of staggering caseloads and insufficient resources we even find federal courts struggling to justify procedures that simply do not hold up under constitutional scrutiny. For instance, United States Magistrate Judges in Arizona faced with an explosion in the number of illegal entry cases across the Mexican border started doing "mass" plea proceedings with up to seventy defendants pleading guilty at the same time. United States v. Arqueta-Ramos, 730 F.3d 1133, 1135-36 (9th Cir. 2013). During one such hearing, there were fifteen defense attorneys present, each representing between three and five defendants. Id. at 1136. The court advised the large group of defendants of their rights and then questioned them in groups of five, collectively asking questions to ascertain whether they understood their rights and the consequences of pleading guilty. Id. at 1139. The Ninth Circuit Court of Appeals struck down the court's collective group questioning because the court did not address any defendant personally during its advisement of rights or the small group questioning. Id. ("We act

whose public defense systems would, if put under a microscope, be found wanting. As defense counsel rightly pointed out, this is a test case that cannot properly be laid at Mountain Law's door. It was the confluence of factors in place in Mount Vernon and Burlington in 2011 - long before Mountain Law began providing public defense services - that brought the Cities to the attention of the ACLU and prompted this Sixth Amendment challenge.

CONCLUSIONS OF LAW

A. Right to Counsel

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."[10] Such assistance is vital to the proper functioning of our criminal justice system: in the absence of adequate representation, the prosecution's case may not be subjected to meaningful adversarial testing and the defendant may be unable to assert other rights he may have or to pursue valid defenses. U.S. v. Cronic, 466 U.S. 648, 654, 659 (1984). See also Powell v. Alabama, 287 U.S. 45, 68-69 (1932) ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every

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within a system maintained by the rules of procedure. We cannot dispense with the rules without setting a precedent subversive of the structure." (quoting United States v. Roblero-Solis, 588 F.3d 692, 693 (9th Cir. 2009)).

[10] Plaintiffs have also asserted a claim under Article I, Section 22 of the Washington State Constitution. Because the parties did not offer any evidence or legal argument peculiar to that claim, it has not been separately analyzed.

step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."). The United States Supreme Court has determined that the right to counsel is "fundamental and essential to a fair trial" and applies in both federal and state proceedings. Gideon v. Wainwright, 372 U.S. 335, 343-44 (1963) ("[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.").

Despite the broad language of the Sixth Amendment, Powell, and Gideon, it was not until 1972 that the Supreme Court made clear that the right to counsel extends to all cases in which the accused may be deprived of his liberty, whether characterized as a felony or a misdemeanor. In Argersinger v. Hamlin, 407 U.S. 25, 33 (1972), the Supreme Court noted that the legal and constitutional questions involved in the prosecution of petty offenses are not necessarily any less complex than those that arise in felony cases. In addition, the sheer volume of misdemeanor cases may give rise to unique procedural challenges that threaten the fairness of the criminal justice system:

> The volume of misdemeanor cases, far greater in number than felony prosecutions, may create an obsession for speedy dispositions, regardless of the fairness of the result. . . . An inevitable consequence of volume that large is the almost total preoccupation in such a court with the movement of cases. The calendar is long, speed often is substituted for care, and casually arranged out-of-court compromise too often is substituted for adjudication. Inadequate attention tends to be given to the individual defendant, whether in protecting his rights, sifting the facts at trial, deciding the social risk he presents, or determining how to deal with him after conviction. . . . Suddenly it becomes clear that for most defendants in the criminal process, there is scant regard for them as individuals. They are numbers on dockets, faceless ones to be processed and sent on their way. The gap between the theory and the reality is enormous. . . . One study concluded that misdemeanants represented by attorneys are five times as likely to emerge from police court with all charges dismissed as are defendants who face similar charges without counsel.

Id. at 34-36 (internal quotation marks and citations omitted). The Washington Supreme Court

recognized the primacy of the Argersinger decision in McInturf v. Horton, 85 Wn.2d 704, 707 (1975), overruling an earlier opinion that held there was no right to appointment of counsel in misdemeanor prosecutions. See also Washington Criminal Rule for Courts of Limited Jurisdiction 3.1 ("The right to a lawyer shall extend to all criminal proceedings for offenses punishable by loss of liberty regardless of their denomination as felonies, misdemeanors, or otherwise.").

Mere appointment of counsel to represent an indigent defendant is not enough to satisfy the Sixth Amendment's promise of the assistance of counsel. While the outright failure to appoint counsel will invalidate a resulting criminal conviction, less extreme circumstances will also give rise to a presumption that the outcome was not reliable. For example, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, if there is no opportunity for appointed counsel to confer with the accused to prepare a defense, or circumstances exist that make it highly unlikely that any lawyer, no matter how competent, would be able to provide effective assistance, the appointment of counsel may be little more than a sham and an adverse effect on the reliability of the trial process will be presumed. Cronic, 466 U.S. at 658-60; Avery v. Alabama, 308 U.S. 444, 446 (1940).

B. Municipal Liability under Section 1983

Under 42 U.S.C. § 1983, a municipality is a person and may therefore be liable for a constitutional deprivation. Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir. 2006).[11] Although a municipality may not be sued under § 1983 simply because an employee inflicted constitutional injury, where the injury is the result of a policy or custom of the municipality, the injury-generating acts are "properly speaking, acts of the municipality – that is, acts which the municipality has officially sanctioned or ordered." Pembauer v. City of

[11] Plaintiffs are not suing the individual public defenders for the way in which they performed a lawyer's traditional functions (a claim likely precluded by Polk County v. Dodson, 454 U.S. 312, 325 (1981)).

Cincinnati, 475 U.S. 469, 480 (1986) (internal quotation marks omitted). Discrete decisions by a government official with ultimate authority over the matter in question generally give rise to official municipal policy for purposes of § 1983. Id. at 480-81.

The Court finds that the public defense system in Mount Vernon and Burlington has systemic flaws that deprive indigent criminal defendants of their Sixth Amendment right to the assistance of counsel. Although counsel are appointed in a timely manner, the sheer number of cases has compelled the public defenders to adopt case management practices that result in most defendants going to court for the first time – and sometimes accepting a plea bargain – never having had the opportunity to meet with their attorneys in a confidential setting. The attorney represents the client in name only in these circumstances, having no idea what the client's goals are, whether there are any defenses or mitigating circumstances that require investigation, or whether special considerations regarding immigration status, mental or physical conditions, or criminal history exist. Such perfunctory "representation" does not satisfy the Sixth Amendment. See Strickland, 466 U.S. at 691 (counsel have a Sixth Amendment duty to conduct a reasonable investigation or to make a decision, based "on informed strategic choices made by the defendant and on information supplied by the defendant," that a particular investigation is unnecessary); Cronic, 466 U.S. at 658-60; Avery, 308 U.S. at 446; Powell, 287 U.S. at 58 ("It is not enough to assume that counsel thus precipitated into the case thought there was no defense, and exercised their best judgment in proceeding to trial without preparation. Nether they nor the court could say what a prompt and thorough-going investigation might disclose as to the facts."); Hurrell-Harring v. State of New York, 930 N.E.2d 217, 224 (N.Y. 2010) (recognizing that "[a]ctual representation assumes a certain basic representational relationship," such that the failure to communicate and/or appear at critical stages of the prosecution may be reasonably interpreted as nonrepresentation rather than ineffective representation).

Having found that plaintiffs' Sixth Amendment rights were violated, the Court

must determine whether the Cities are responsible for the constitutional deprivation. Plaintiffs have shown that the constitutional deprivations at issue here were the direct and predictable result of the deliberate choices of City officials charged with the administration of the public defense system. Intentional choices made while negotiating the public defender contracts and allocating funds to the public defender system left the defenders compensated at such a paltry level that even a brief meeting at the outset of the representation would likely make the venture unprofitable. And the Cities knew it. When Mountain Law took over the public defense contract, the Cities estimated there would be approximately 1,700 cases transferred from Sybrandy and Witt and yet chose a proposal pursuant to which they would pay only $17,500 per month. That works out to $10 per case for April 2012, with the per case rate reduced in future months by each additional case assigned to Mountain Law. Mountain Law had (and still has) every incentive to close cases as quickly as possible and to minimize the time spent on each case. While every attorney, whether privately or publicly retained, must be cognizant of costs when choosing a course of action, defending an indigent criminal defendant – any indigent criminal defendant – on $10 per month inclusive of staff, overhead, and routine investigation costs makes it virtually impossible that the lawyer, no matter how competent or diligent, will be able to provide effective assistance.[12]

Legislative and monitoring decisions made by the policymaking authorities of the Cities ensured that any defects in the public defense system would go undetected or could be easily ignored. Despite receiving monthly reports listing case assignments, types of cases, dispositions, and hours worked on each case, the administrators made no effort to calculate the number of cases assigned to Mountain Law or to evaluate the nature or extent of the services provided under the contract. After this litigation was filed, the City of Mount Vernon twice

[12] The Court recognizes that approximately 1,100 cases were transferred from Sybrandy and Witt to Mountain Law, making the actual pay per case closer to $16 for April 2012. Nevertheless, the conclusion that the Cities knowingly underfunded their public defense system remains inescapable.

amended its ordinance related to the provision of public defender services, both times removing what little "teeth" the previous ordinances had. For example, in January 2012, the City jettisoned its previously acknowledged obligation to develop "a procedure for systematic monitoring and evaluation of attorney performance based on published criteria" in favor of a newly-found concern that such monitoring and evaluation "is not practical nor consistent with attorney/client privilege nor the constitutional rights of indigent defendants." Tr. Exs. 45 and 147. In November 2012, Mount Vernon deleted references to specific duties of the public defenders, redefined "case" to exclude from the caseload calculation matters that would clearly count toward the 400 unweighted limit under the Supreme Court's Standards for Indigent Defense, and removed the requirement that the public defenders report hours worked on and the disposition of each case.

The Court finds that the combination of contracting, funding, legislating, and monitoring decisions made by the policymaking authorities for the Cities directly caused the truncated case handling procedures that have deprived indigent criminal defendants in Mount Vernon and Burlington of private attorney/client consultation, reasonable investigation and advocacy, and the adversarial testing of the prosecutor's case. The Cities are therefore liable under § 1983 for the systemic Sixth Amendment violation proved by plaintiffs. See Miranda v. Clark County, 319 F.3d 465 (9th Cir. 2003) (finding that county could be liable for constitutional deprivations arising from funding and case assignment policies); Clay v. Friedman, 541 F. Supp. 500, 502, 505-06 (N.D. Ill. 1982) (finding that administrative head of public defender's office could be liable for non-representative decision-making and that county could be liable for promulgating policies and customs that led to the constitutional deprivation).[13]

[13] To the extent Gausvik v. Perez, 239 F. Supp.2d 1047, 1065 (E.D. Wash. 2002), stands for the proposition that hiring an independent contractor, such as Mountain Law, to provide public defense services discharges a municipality's Sixth Amendment obligations, the Court finds it unpersuasive and unsupported by the cited authorities.

C. Injunctive Relief

Plaintiffs have succeeded on the merits of their claim, establishing both a systemic deprivation of the right to the assistance of counsel and the Cities' responsibility for the deprivation.[14] In order to obtain injunctive relief, plaintiffs must also show irreparable injury and the inadequacy of available legal remedies. Sierra Club v. Penfold, 857 F.2d 1307, 1318 (9th Cir. 1988). This burden is easily met here. A system that makes it impossible for appointed counsel to provide the sort of assistance required by the Sixth Amendment works irreparable harm: the lack of an actual representational relationship and/or adversarial testing injures both the indigent defendant and the criminal justice system as a whole. The exact impacts of the constitutional deprivation are widespread but difficult to measure on a case by case basis, making legal remedies ineffective. See Walters v. Reno, 145 F.3d 1031, 1048 (9th Cir. 1998).

This Court has broad authority to fashion an equitable remedy for the constitutional violations at issue in this case. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971) ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."). The Court has considered whether merely declaring that a constitutional right has been violated would be enough to work a change in defendants' conduct, such that affirmative injunctive relief would be unnecessary. Having carefully considered the testimony of the Cities' officials and reviewed the recent legislative and contractual developments, the Court has grave doubts regarding the Cities' ability and political will to make the necessary changes on their own. The Cities' unwillingness to accept that they had any duty to monitor the constitutional adequacy of the representation provided by the public defenders, their steadfast insistence that the defense services offered by Sybrandy and Witt were not just

[14] In Farrow v. Lipetzky, 2013 WL 1915700 (N.D. Cal. May 8, 2013), the case defendants cite for the proposition that a federal court has declined to use its equitable powers to monitor a public defense agency, the court found that no Sixth Amendment violation had occurred.

adequate, but "outstanding," their surprisingly slow response to the pendency of this litigation and the Supreme Court's adoption of specific caseload limits, and their budgetary constraints all lead to the conclusion that a declaration will not be sufficient to compel change.

The Court is sensitive to the Cities' interests in controlling the manner in which they perform their core functions, including the provision of services and the allocation of scarce resources. Having chosen to operate a municipal court system, however, defendants are obligated to comply with the dictates of the Sixth Amendment, and the Court will "not shrink from [its] obligation to enforce the constitutional rights of all persons." Brown v. Plata, __ U.S. __, 131 S. Ct. 1910, 1928 (2011) (internal quotation marks omitted). A continuing injunction is hereby entered against defendants as follows:

– Within seven days of the date of this Order, the officials charged with administering the public defense contracts in Mount Vernon and Burlington and all full- and part-time public defenders in those municipalities shall read the Washington Defender Association's 2007 Final Standards for Public Defense Services with Commentary (http://www.defensenet.org/about-wda/standards).

– The Cities of Mount Vernon and Burlington shall, within thirty days of the date of this Order, re-evaluate their existing contract for the provision of public defense in light of the Court's findings and ensure that the document encourages and is no way antithetical to a public defense system that allows for private attorney/client communications at the outset of the relationship and the ability to follow up as appropriate given the circumstances, including the client's status, input, and goals. While the standards adopted by the Washington Supreme Court and the experiences of the Washington Defender Association will undoubtedly inform any evaluation of the adequacy of defendants' system going forward, the constitutional benchmark cannot be reduced to a number, and the Court declines to adopt a hard caseload limitation. The critical issue is whether the system provides indigent criminal defendants the actual assistance of counsel, such that defendants have the opportunity to assert any rights or defenses that may be

available to them and appropriate adversarial testing occurs.

– The Cities shall hire one part-time Public Defense Supervisor to work at least twenty hours per week. The Public Defense Supervisor may be either a contractor or a part-time employee, but the funds for this position shall not come out of the existing budget for public defense services. The parties shall have sixty days from the date of this Order to reach agreement on selection of a Public Defense Supervisor. The Public Defense Supervisor will be part of the attorney/client confidential relationship between Mountain Law and its clients, but will not be part of the Mountain Law firm. The Public Defense Supervisor may not have worked previously for the Cities, Mountain Law, Baker Lewis, or any of the Cities' witnesses or attorneys. The Public Defense Supervisor must have a minimum of five years of experience as a public defender, including jury trial experience. If the parties fail to reach agreement within sixty days from the date of this Order, each side shall submit the names and resumes of two candidates willing to serve as the Public Defense Supervisor to the Court, which will then select the Public Defense Supervisor.

– The duties of the Public Defense Supervisor shall include:

1. Supervision and evaluation of whether the public defenders are making contact (in-person or by phone) in a confidential setting with each new client within 72 hours of appointment. If contact cannot be made within that time period, the Public Defense Supervisor shall document the reason(s) for the failure and whether an opportunity for confidential communications occurred prior to the client's first court hearing. The Public Defense Supervisor will also take steps to ensure that the public defenders perform the following tasks when they first meet with a client following a new case assignment: (i) advise the client of the right to jury trial and right to a speedy trial; (ii) advise the client of the elements of the charge and that the prosecutor must prove each element beyond a reasonable doubt to obtain a conviction; (iii) advise the client of the right to present a defense; (iv) advise the client that it is solely the client's decision whether to accept or reject any plea offer; and (v) discuss with the client any

potential witnesses or avenues of investigation.

2. Monthly supervision and evaluation of the first contact with clients, documenting whether the public defenders are determining if each client: (i) appears competent to proceed with the court process; (ii) has a sufficient literacy level to understand written court documents such as the guilty plea form and sentencing orders; (iii) needs an interpreter; and (iv) is a non-citizen in need of expert immigration advice from the WDA or another source.

3. Monthly supervision and evaluation of whether the public defenders are responding appropriately to information provided by the client and discovery obtained in each case, including pursuing additional discussions with the client, investigations, medical evaluations, legal research, motions, etc., as suggested by the circumstances.

4. Establishing a policy for public defenders to respond to all client contacts and complaints (including jail kites), including the length of time within which a response must occur. The Public Defense Supervisor shall review any and all client complaints obtained from any source and the public defender's response. Use or non-use of any particular complaint process shall in no way be considered a waiver of the client's rights. The Public Defense Supervisor shall establish a process for clients to pursue a complaint if the Public Defense Supervisor fails to resolve it to the client's satisfaction.

5. Monthly supervision and evaluation of whether the public defenders are appropriately using interpreters and translators before any decisions are made by the client.

6. Supervision and evaluation of courtroom proceedings to ensure that the public defenders are fulfilling their role as advocate before the court on the client's behalf.

7. Supervision and evaluation of whether the public defenders are fully advising clients of their options regarding possible dispositions, including information on treatment services, any options for a less onerous disposition based on treatment, explanations of plea offers, the consequences of a conviction, conditions that are normally imposed at sentencing, any applicable immigration consequences, and any other consequences about which the client has

expressed concern.

8. Supervision and evaluation of whether the public defenders are maintaining contemporaneous records on a daily basis showing the amount of time spent on each task for each case, recorded in tenth-of-an-hour increments.

9. Quarterly supervision and evaluation of whether cases are being allocated to each public defender fairly and in consideration of existing workloads, the seriousness of the charge(s), any factors that make the case more complex or time-consuming, and the attorney's experience level.

10. Quarterly selection and review of fifteen randomly chosen files from each public defender to ensure that the necessary tasks are being performed and documented, with appropriate time being spent on each task. The Public Defense Supervisor shall conduct a quarterly meeting with each public defender to advise how their performance can be improved based on the file review.

11. Collecting data on a quarterly basis showing: (i) the frequency of use of investigators and expert witnesses; (ii) the number of motions on substantive issues that are filed and the outcome of each motion; (iii) the frequency with which cases are resolved by outright dismissal or a nonconviction disposition; (iv) the frequency of pleas to a lesser charge; and (v) the number of trials (broken down by bench vs. jury trials) conducted and the outcome of the trials.

12. Conducting a quarterly analysis of whether the Cities' public defense system (i) provides actual representation of and assistance to individual criminal defendants, including reasonable investigation and advocacy and, where appropriate, the adversarial testing of the prosecutor's case and (ii) complies with all provisions of the public defense contract and all applicable provisions of the Cities' ordinances and regulations. The Public Defense Supervisor shall meet with the officials charged with administering the public defense contract to advise how the Cities' performance can be improved based on the quarterly analysis.

13. Submission of biannual reports to the parties explaining: (i) whether all of the duties specified above have been performed in the most recent six-month period, and if not, why not, including a specific discussion of each duty that has not been performed and the Public Defense Supervisor's recommendations for how to achieve compliance; (ii) whether the Cities' public defense system (a) provides actual representation of and assistance to individual criminal defendants, including reasonable investigation and advocacy and, where appropriate, the adversarial testing of the prosecutor's case and (b) complies with all provisions of the public defense contract and all applicable provisions of the Cities' ordinances and regulations, and if not, why not, including a specific discussion of each item where the Cities fall short and the Public Defense Supervisor's recommendations for how to achieve compliance. The Public Defense Supervisor shall submit his or her first report to the parties six months after the date of this Order. The Public Defense Supervisor shall continue to submit a report every six months thereafter for a period of 24 months or until the Court orders otherwise.

– Twelve months, 24 months, and 34 months after the entry of this Order, the Cities shall provide fifty case files, randomly selected by the Public Defense Supervisor, to plaintiffs' counsel so that they may evaluate the Cities' compliance with this Order and whether the Public Defense Supervisor is properly performing his or her duties. This Court shall retain jurisdiction over this case for three years from the date of entry of this Order, and this injunction shall remain in effect for that period. However, if the Public Defense Supervisor's annual reports show prior to that date that the system provides indigent criminal defendants actual representation by and assistance of counsel, such that defendants have the opportunity to assert any rights or defenses that may be available to them and appropriate adversarial testing occurs, defendants may petition the Court to dismiss the case and terminate the injunction at that point in time.

– If plaintiffs believe that the Cities' efforts to provide an adequate system of public defense are not trending in the right direction or a dispute arises as to compliance with the

injunctive provisions of this Order, plaintiffs' counsel shall notify defendants in writing of any objections they have regarding the Cities' efforts or compliance. Within fourteen days of receipt of the objections, the parties shall meet and confer to discuss and attempt to resolve the dispute. If the parties are not able to resolve the objections, plaintiffs may file a motion seeking appropriate relief. The motion shall be noted for consideration on the third Friday after filing, the motion and opposition pages shall not exceed 24 pages, and the reply shall not exceed twelve pages.

CONCLUSION

It has been fifty years since the United States Supreme Court first recognized that the accused has a right to the assistance of counsel for his defense in all criminal prosecutions and that the state courts must appoint counsel for indigent defendants who cannot afford to retain their own lawyer. The notes of freedom and liberty that emerged from Gideon's trumpet a half a century ago cannot survive if that trumpet is muted and dented by harsh fiscal measures that reduce the promise to a hollow shell of a hallowed right.

Dated this 4th day of December, 2013.

Robert S. Lasnik
United States District Judge

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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KIMBERLY HURRELL-HARRING, *et al.*, on Behalf of Themselves and All Others Similarly Situated,

Plaintiffs

-against-

THE STATE OF NEW YORK, *et al.*,

Defendants.

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INDEX No. 8866-07
(Connolly, J.)

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U.S. Department of Justice
Civil Rights Division, Special Litigation Section
950 Pennsylvania Avenue, NW
Washington, D.C. 20530
(202) 514-1089

STATEMENT OF INTEREST OF THE UNITED STATES

As the Supreme Court recognized in *Powell v. Alabama*, the constitutional right to counsel is more than a formality: It would be "vain" to give the defendant a lawyer "without giving the latter any opportunity to acquaint himself with the facts or law of the case." 287 U.S. 45, 59 (1932) (*quoting Com. v. O'Keefe*, 148 A. 73, 74 (Pa. 1929)). Without taking a stance on the merits of the case, the United States files this Statement of Interest to assist the Court in assessing whether the State of New York has "constructively" denied counsel to indigent defendants during criminal proceedings. Plaintiffs allege that their nominal representation amounted to no representation at all, such that the State failed to meet its *foundational* obligations to provide legal representation to indigent defendants. *Gideon v. Wainwright*, 372 U.S. 335 (1963). It is the position of the United States that constructive denial of counsel may occur in two, often linked circumstances:

(1) When, on a systemic basis, lawyers for indigent defendants operate under substantial structural limitations, such as a severe lack of resources, unreasonably high workloads, or critical understaffing of public defender offices; and/or

(2) When the traditional markers of representation—such as timely and confidential consultation with clients, appropriate investigation, and meaningful adversarial testing of the prosecution's case—are absent or significantly compromised on a system-wide basis.

Under either or both of these circumstances, a court may find that the appointment of counsel is superficial and, in effect, a form of non-representation that violates the Sixth Amendment guarantee of counsel.

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INTEREST OF THE UNITED STATES

The United States has authority to file this Statement of Interest pursuant to 28 U.S.C. § 517, which permits the Attorney General to attend to the interests of the United States in any case pending in a state court. The United States has an interest in ensuring that all jurisdictions—federal, state, and local—are fulfilling their obligation under the Constitution to provide effective assistance of counsel to individuals facing criminal charges who cannot afford an attorney, as required by *Gideon*. The United States can enforce the right to counsel in juvenile delinquency proceedings pursuant to the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 (Section 14141). The United States is currently enforcing Section 14141's juvenile justice provision through a comprehensive settlement with Shelby County, Tennessee.[1] An essential component of the agreement, which is subject to independent monitoring, is the establishment of a juvenile public defender system with "reasonable workloads" and "sufficient resources to provide independent, ethical, and zealous representation to Children in delinquency matters." *Id.* at 15.

As the Attorney General stated, "It's time to reclaim *Gideon*'s petition—and resolve to confront the obstacles facing indigent defense providers."[2] In March 2010, the Attorney General launched the Access to Justice Initiative to address the crisis in indigent defense services, and the Initiative provides a centralized vehicle for carrying out the Department of Justice's (Department) commitment to improving indigent defense.[3] The Department has also sought to

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[1] Mem. of Agreement Regarding the Juvenile Court of Memphis and Shelby Counties, Tennessee (2012), *available at* http://www.justice.gov/crt/about/spl/findsettle.php.

[2] Attorney General Eric Holder Speaks at the Justice Department's 50th Anniversary Celebration of the U.S. Supreme Court Decision in *Gideon v. Wainwright* (March 15, 2013), *available at* http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-1303151.html.

[3] The Initiative works with federal agencies and state, local, and tribal justice system stakeholders to increase access to counsel, highlight best practices, and improve the justice delivery systems that serve people who are unable to afford lawyers. More information is available at http://www.justice.gov/atj/.

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address this crisis through a number of grant programs, as well as through support for state policy reform, and has identified indigent defense as a priority area for Byrne-JAG funds, the leading source of federal justice funding to state and local jurisdictions.[4] In 2013, the Department's Office of Justice Programs announced a collection of grants totaling $6.7 million to improve legal defense service for the poor.[5] These grants were preceded by a 2012 $1.2 million grant program, *Answering Gideon's Call: Strengthening Indigent Defense Through Implementing the ABA Ten Principles of a Public Defense Delivery System*, administered by the Bureau of Justice Assistance.[6]

In addition, it is always in the interest of the United States to safeguard and improve the administration of criminal justice consistent with the prosecutor's professional duty as outlined in the American Bar Association (ABA) Criminal Justice Standards: "It is an important function of the prosecutor to seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, he or she should stimulate efforts for remedial action." ABA CRIMINAL JUSTICE STANDARDS, STANDARD 3-1.2(D), PROSECUTION AND DEFENSE FUNCTION (1993).[7]

Thus, in light of the United States' interest in ensuring that any constitutional deficiencies the Court may find are adequately remedied, the United States files this Statement of Interest to address the factors considered in a constructive denial of counsel claim.

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[4] *See* U.S. Gov't Accountability Office, *Indigent Defense: DOJ Could Increase Awareness of Eligible Funding and Better Determine the Extent to Which Funds Help Support this Purpose* 11-14 (May 2012), *available at* http://www.justice.gov/atj/idp/.

[5] As noted by Associate Attorney General Tony West in the announcement, "These awards, in conjunction with other efforts we're making to strengthen indigent defense, will fortify our public defender system and help us to meet our constitutional and moral obligation to administer a justice system that matches its demands for accountability with a commitment to fair, due process for poor defendants." Attorney General Holder Announces $6.7 Million to Improve Legal Defense Services for the Poor (Oct. 30, 2013), *available at* http://www.justice.gov/opa/pr/2013/October/13-ag-1156.html.

[6] Grants have been awarded to agencies in Texas, Delaware, Massachusetts, Mississippi, Tennessee, Utah and Michigan.

[7] *Available at* http://www.americanbar.org/groups/criminal_justice/standards.html.

BACKGROUND

Fifty years ago, the Supreme Court held that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Gideon*, 372 U.S. at 344. Four years later, the Supreme Court held that the right to counsel extended to juveniles in delinquency proceedings. *In re Gault*, 387 U.S. 1, 36 (1967). And yet, as the Attorney General recently noted, "America's indigent defense systems continue to exist in a state of crisis, and the promise of *Gideon* is not being met."[8] Recently, the federal district court in *Wilbur v. City of Mount Vernon* echoed this concern, stating, "The notes of freedom and liberty that emerged from Gideon's trumpet a half a century ago cannot survive if that trumpet is muted and dented by harsh fiscal measures that reduce the promise to a hollow shell of a hallowed right." 989 F.Supp.2d 1122, 1137 (W.D. Wash. 2013).

Our national struggle to meet the obligations recognized in *Gideon* and *Gault* is well documented.[9] *See*, *e.g.*, Am. Bar Ass'n, Standing Comm. on Legal Aid and Indigent Defendants Report, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* (2004); National Juvenile Defender Center (NJDC) State Assessments[10] (outlining obstacles to provision of juvenile defense services in numerous states). Despite long recognition that "the proper performance of the defense function is . . . as vital to the health of the system as the performance of the prosecuting and adjudicatory functions," Attorney General's Committee on Poverty and

[8] Attorney General Eric Holder Delivers Remarks at the Annual Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013), *available at* http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html.
[9] In March 2013, the Yale Law Journal held a symposium on the challenges of meeting *Gideon*'s promise and published the discussions. *See* 122 Yale L.J. 8 (June 2013).
[10] Assessments available at http://www.njdc.info/assessments.php.

the Administration of Federal Criminal Justice, *Final Report* 11 (1963), public defense agencies nationwide are continually funded at dramatically lower levels than prosecutorial agencies.[11]

Due to this lack of resources, states and localities across the country face a crisis in indigent defense.[12] In many states, remedying the crisis in indigent defense has required court intervention. *See e.g.*, *Pub. Defender v. State,* 115 So. 3d 261, 278-79 (Fla. 2013) (holding that courts must intervene when public defenders' excessive caseloads and lack of funding result in "nonrepresentation and therefore a denial of the actual assistance of counsel guaranteed by *Gideon* and the Sixth Amendment"); *Missouri Pub. Defender Comm'n v. Waters*, 370 S.W.3d 592, 607 (Mo. 2012) (ruling that the trial court erred when it appointed counsel to indigent defendants when, due to excessive caseloads and insufficient funding, that counsel could not provide adequate assistance, noting that "a judge may not appoint counsel when the judge is aware that, for whatever reason, counsel is unable to provide effective representation to a defendant"); *Duncan v. State*, 832 N.W.2d 761, 771 (Mich. Ct. App. 2012) (holding that, absent court intervention, "indigent persons who are accused of crimes in Michigan will continue to be subject to inadequate legal representation without remedy unless the representation adversely affects the outcome"); *State v. Citizen*, 898 So.2d 325, 338-39 (La. 2005) (holding that courts are obliged to halt prosecutions if adequate funding is not available to lawyers representing indigent defendants).

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[11] *Compare* Steven W. Perry & Duren Banks, U.S. Bureau of Justice Statistics, *Prosecutors in State Courts, 2007 Statistical Table*s 1 (2012) (noting that prosecution offices nationwide receive a budget of approximately $5.8 billion), *with* Lynn Langton & Donald J. Farole, Jr., U.S. Bureau of Justice Statistics, *Public Defender Offices, 2007 Statistical Tables* 1(2010) (noting that public defender offices nationwide had a budget of approximately $2.3 billion). *See also* Nat'l Right to Counsel Comm., *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel* 61-64 (2009) (collecting examples of funding disparities).

[12] John P. Gross, *Gideon at 50: A Three-Part Examination of Indigent Defense in America*, Nat'l Ass'n of Criminal Def. Lawyers (2013) (describing astonishingly low rates of compensation for assigned counsel across the nation); Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. Rev. L. & Soc. Change 427 (2009) (describing crises nationwide).

The United States is taking an active role to provide expertise on this pressing national issue. Last year, the United States filed a Statement of Interest in *Wilbur v. City of Mount Vernon*, a case in which indigent defendants challenged the constitutional adequacy of the public defense systems provided by the cities of Mount Vernon and Burlington in the Western District of Washington.[13] As in this case, the United States took no position on the merits of the plaintiffs' claims in *Wilbur*, but instead recommended to the court that, if it found for the plaintiffs, the court should ensure that counsel for indigent defendants have realistic workloads, sufficient resources, and are carrying out the hallmarks of minimally effective representation, "such as visiting clients, conducting investigations, performing legal research, and pursuing discovery." Ex. 1 at 5-10. The court in *Wilbur* ultimately ruled for the plaintiffs, finding "that indigent criminal defendants in Mount Vernon and Burlington are systematically deprived of the assistance of counsel at critical stages of the prosecution and that municipal policymakers have made deliberate choices regarding the funding, contracting, and monitoring of the public defense system that directly and predictably caused that deprivation." *Wilbur*, 989 F.Supp.2d at 1124. To remedy this systematic deprivation of counsel, the court ordered increased resources for indigent defense services, controls to be established for defenders' workloads, and monitoring of defenders' actual representation to ensure that they carry out the traditional markers of representation. *Id.* at 1134-37.

DISCUSSION

In this matter, Plaintiffs allege that indigent defendants within five New York counties have been constructively denied counsel in their criminal proceedings. That is, as a result of inadequate funding, indigent defendants face systemic risks of constructive denial of counsel

[13] Attached as Exhibit 1.

including: "the system-wide failure to investigate clients' charges and defenses; the complete failure to use expert witnesses to test the prosecution's case and support possible defenses; complete breakdowns in attorney-client communication; and a lack of any meaningful advocacy on behalf of clients." Plaintiffs' Mem. of Law in Opposition to the State Defendant's Motion for Summary Judgment at 41. An analysis of *Gideon* cases informs the United States' position that constructive denial of counsel may occur when: (1) on a systemic basis, counsel for indigent defendants face severe structural limitations, such as a lack of resources, high workloads, and understaffing of public defender offices; ***and/or*** (2) indigent defenders are unable or are significantly compromised in their ability to provide the traditional markers of representation for their clients, such as timely and confidential consultation, appropriate investigation, and meaningful adversarial testing of the prosecution's case. *Wilbur,* 989 F.Supp.2d 1122; *Pub. Defender v. State,* 115 So. 3d 261; *Missouri Pub. Defender Comm'n*, 370 S.W.3d 592; *Duncan*, 832 N.W.2d 761; *State v. Young*, 172 P.3d 138 (N.M. 2007); *Citizen*, 898 So.2d 325; *Lavallee v. Justices in Hampden Superior Court*, 812 N.E.2d 895 (Mass. 2004); *New York Cnty. Lawyers' Ass'n v. State*, 196 Misc. 2d. 761 (N.Y. Sup. Ct. 2003); *State v. Peart*, 621 So.2d 780, 789 (La. 1993).

Constructive denial may occur even in public defender systems that are not systematically underfunded if the attorneys providing defender services are unable to fulfill their basic obligations to their clients. The Supreme Court has recognized that, in some circumstances, "although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial."

United States v. Cronic, 466 U.S. 648, 659-60 (1984). This may occur when, for example, the defense attorney is not provided sufficient time to prepare. *Powell*, 287 U.S. at 53-58. Thus, whether there are severe structural limitations, the absence of traditional markers of representation, or both, the appointment of counsel is superficial and, in effect, a form of non-representation that may violate the guarantees of the Sixth Amendment.[14]

I. The Court May Consider Structural Limitations and Defenders' Failure to Carry Out Traditional Markers of Representation in its Assessment of Plaintiffs' Claim of Constructive Denial of Counsel.

It is a core guarantee of the Sixth Amendment that every criminal defendant, regardless of economic status, has the right to counsel when facing incarceration. *Gideon*, 372 U.S. at 340-44 (1963) (holding that the right to counsel is "fundamental and essential to a fair trial"). This right is so fundamental to the operation of the criminal justice system that its diminishment erodes the principles of liberty and justice that underpin all of our civil rights in criminal proceedings. *Gideon,* 372 U.S. at 340-341, 344; *Powell,* 287 U.S. at 67-69 ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel . . . . [A Defendant] requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."); *see also Alabama v. Shelton*, 535 U.S. 654 (2002).

[14] If the Plaintiffs prevail, the court may appoint a monitor as part of its authority to grant injunctive relief. Monitors, or their equivalent, have been utilized in similar cases. In *Wilbur*, pursuant to an order for injunctive relief, the court required the hiring of a "Public Defense Supervisor" to supervise the work of the public defenders. The supervision and monitoring includes extensive file review, caseload assessments, data collection, and reports to the court to ensure there is "actual" and appropriate representation for indigent criminal defendants in the cities of Mount Vernon and Burlington. *See Wilbur*, No. C11-1100RSL at 19. Similarly, in Grant County, Washington, an independent monitor was essential to implementing the court's injunction in a right-to-counsel case. *Best v. Grant Cnty.*, No. 04-2-00189-0 (Kittitas Cty. Sup. Ct. Dec. 21, 2004).

As the New York Court of Appeals held in this matter, claims of systemic constructive denial of counsel are reviewed under the principles enumerated in *Gideon* and the Sixth Amendment, not the *Strickland*[15] ineffective assistance standard which provides only retrospective, individual relief. *Hurrell-Harring v. State*, 930 N.E.2d 217, 224 (N.Y. 2010) (holding that these "allegations state a claim, not for ineffective assistance under *Strickland*, but for basic denial of the right to counsel under *Gideon*."); *see also Luckey v. Harris*, 860 F.2d 1012, 1017 (11th Cir. 1988) (holding that the Sixth Amendment protects rights that do not affect the outcome of a trial, and deficiencies that do not meet the "ineffectiveness" standard may still violate a defendant's rights under the Sixth Amendment); *Missouri Pub. Defenders Comm'n,* 370 S.W.3d at 607 (holding Sixth Amendment right to counsel requires more than just a "pro forma" appointment whereby the defendant has counsel in name only); *Powell*, 287 U.S. at 58-61 (holding that counsel's "appearance was rather pro forma than zealous and active [and] defendants were not accorded the right of counsel in any substantial sense"). Courts have consistently defined "constructive" denial of counsel as a situation where an individual has an attorney who is *pro forma* or "in name only."

A. Considering the Role of Structural Limitations

The provision of defense services is a multifaceted and complicated task. To guide the defense function, the ABA and NJDC have promulgated national standards to ensure that defenders are able to establish meaningful attorney-client relationships and provide the constitutionally required services of counsel. *See* ABA, STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION AND DEFENSE FUNCTION; Am. Bar Ass'n, Standing Comm. on Legal Aid and Indigent Defendants, *ABA Eight Guidelines of Public Defense Related to Excessive Workloads*

[15] *Strickland v. Washington*, 466 U.S. 668 (1984).

(2009); Am. Bar Ass'n, Standing Comm. on Legal Aid and Indigent Defendants, *ABA Ten Principles of a Public Defense Delivery System* (2002); NAT'L JUVENILE DEFENDER CTR., NATIONAL JUVENILE DEFENSE STANDARDS (2012). These standards emphasize the structural supports required to ensure that defenders can perform their duties. They include an independent defense function, early appointment, adequate staffing, funding for necessary services (e.g., investigation, retention of experts, and administrative staff), workload controls, training, legal research resources, and oversight connected to practice standards.

In assessing *Gideon* claims for systemic indigent defense failures, courts have considered the absence of these structural supports as reflected in insufficient funding, agency-wide lack of training and performance standards, understaffing, excessive workloads, delayed appointments, lack of independence for the defense function from the judicial or political function, and insufficient agency-wide expert resources.[16] In *Wilbur,* for example, the court noted the structural limitations—insufficient staffing, excessive caseloads, and almost non-existent supervision—that resulted in a system "broken to such an extent that confidential attorney/client communications are rare, the individual defendant is not represented in any meaningful way, and actual innocence could conceivably go unnoticed and unchampioned." *Wilbur*, 989 F.Supp.2d at 1127. The court continued,

> The Court does not presume to establish fixed numerical standards or a checklist by which the constitutional adequacy of counsel's representation can be judged. The experts, public defenders, and prosecutors who testified at trial made clear that there are myriad factors that must be considered when determining whether a system of public defense provides indigent criminal

[16] We note that, in alleging that there has been a constructive denial of counsel based on systemic indigent defense failures, plaintiffs are not seeking to reverse criminal convictions but are seeking only prospective injunctive relief. The Court may enter prospective relief upon a finding of a substantial risk of a constitutional violation. *See Brown v. Plata*, 131 S. Ct. 1910, 1941 (2011). In the context of a challenge to a criminal conviction, the defendant must also show that the denial of counsel caused actual prejudice to secure a reversal. *Strickland*, 466 U.S. 668. *Cronic,* 466 U.S. 648, creates a narrow exception to the need to show prejudice where the denial of counsel contaminates the entire criminal proceeding.

> defendants the assistance required by the Sixth Amendment. Factors such as the mix and complexity of cases, counsel's experience, and the prosecutorial and judicial resources available were mentioned throughout trial.

Wilbur, 989 F.Supp.2d at 1126.

Similarly, the court in *Pub. Defender v. State,* 115 So. 3d at 279, held that the public defender's office could withdraw from representation of indigent defendants because of structural limitations. Insufficient funds and the resultant understaffing created a situation where indigent defendants did not receive assistance of counsel as required by the Sixth Amendment. Courts have also held in indigent defense funding cases that budget exigencies cannot serve as an excuse for the oppressive and abusive extension of attorneys' professional responsibilities, and courts have the power to take corrective measures to ensure that indigent defendants' constitutional and statutory rights are protected. *See Citizen*, 898 So.2d at 336. Similarly, in *Lavallee*, 812 N.E.2d at 904, the court held that proactive steps may be necessary when an indigent defense compensation scheme "raises serious concerns about whether [the defendants] will ultimately receive the effective assistance of trial counsel." *See also New York Cnty. Lawyers' Ass'n*, 196 Misc. 2d. 761 (holding statutory rates for assigned counsel unconstitutional as they resulted in denial of counsel and excessive caseloads, among other issues); *Young,* 172 P.3d 138 (holding that inadequate compensation of defense attorneys deprived capital defendants of counsel). In all of these cases, the courts granted relief based on evidence that indigent defense services were subject to such substantial structural limitations that actual representation would simply not be possible.

Substantial structural limitations force even otherwise competent and well-intentioned public defenders into a position where they are, in effect, a lawyer in name only. Such limitations essentially require counsel to represent clients without being able to fulfill their basic

obligations to prepare a defense, including investigating the facts of the case, interviewing witnesses, securing discovery, engaging in motions practice, identifying experts when necessary, and subjecting the evidence to adversarial testing. Under these conditions, the issue is not effective assistance of counsel, but, as the Court of Appeals noted, "nonrepresentation." *Hurrell-Harring,* 930 N.E.2d at 224. Other courts have emphatically made this same point. As the Supreme Court of Louisiana stated, "We know from experience that no attorney can prepare for one felony trial per day, especially if he has little or no investigative, paralegal, or clerical assistance." *Peart,* 621 So.2d at 789. The court agreed with the trial court's characterization that "[n]ot even a lawyer with an S on his chest could effectively handle this docket." *Id.* The court concluded that "[m]any indigent defendants in Section E are provided with counsel who can perform only pro forma, especially at early stages of the proceedings. They are often subsequently provided with counsel who are so overburdened as to be effectively unqualified." *Id.*

B. Considering the Traditional Markers of Representation

In addition to the presence of structural limitations, courts considering systemic denial of counsel challenges have also examined the extent, or absence of, traditional markers of representation. The traditional markers of representation include meaningful attorney-client contact allowing the attorney to communicate and advise the client, the attorney's ability to investigate the allegations and the client's circumstances that may inform strategy, and the attorney's ability to advocate for the client either through plea negotiation, trial, or post-trial. These factors ensure that defense counsel provide the services that protect their client's due process rights.

The New York Court of Appeals recognized the importance of these traditional markers, stating, "Actual representation assumes a certain basic representational relationship." *Hurrell-Harring*, 930 N.E.2d at 224. Other courts have adopted this reasoning. For example, in *Wilbur*, 989 F.Supp.2d at 1128, clients met their attorneys for the first time in court and immediately accepted a plea bargain, without discussing their cases in a confidential setting. The court found that these services "amounted to little more than a 'meet and plead' system," and that the resulting lack of representational relationship violated the Sixth Amendment. *Id.* at 1124. Similarly, in *Pub. Defender v. State*, 115 So. 3d at 278, the court reasoned that denial of counsel was present where attorneys engaged in routine meeting and pleading practices, did not communicate with clients, were unable to investigate the allegations, and were unprepared for trial.

The absence of these traditional markers of representation has led courts to find non-representation in violation of the Sixth Amendment. *Wilbur*, 989 F.Supp.2d at 1131 (noting that in such cases "the appointment of counsel may be little more than a sham and an adverse effect on the reliability of the trial process will be presumed") (citing *Cronic*, 466 U.S. at 658-60, and *Avery v. Alabama*, 308 U.S. 444, 446 (1940)); *see also Pub. Defender,* 115 So. 3d at 278; *Citizen*, 898 So.2d 325; *Peart,* 621 So. 2d at 789. The traditional markers require the "opportunity for appointed counsel to confer with the accused to prepare a defense," engage in investigation, and advocate for the client. *Wilbur*, 989 F.Supp.2d at 1131; *Public Defender v. State,* 115 So. 3d at 278; *Peart,* 621 So.2d at 789; *see also Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012) ("[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the

accused."); *Powell*, 287 U.S. at 59-60 (finding that when "no attempt was made to investigate" the defendants lacked "the aid of counsel *in any real sense*") (emphasis added).

The New York Court of Appeals, along with many other courts, has taken note of the vital importance of these traditional markers of representation. These markers may be considered in conjunction with the structural limitations placed on counsel to determine whether the counties "constructively" denied counsel to indigent defendants during criminal proceedings. When assessing the merits of the case, this Court may use this framework to assess whether a systemic "constructive" denial of counsel in violation of *Gideon* and the Sixth Amendment occurred from either factor, standing alone or in conjunction.

CONCLUSION

The Court can consider structural limitations and defenders' failure to carry out traditional markers of representation in its assessment of Plaintiffs' claim of constructive denial of counsel.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

----------x

KIMBERLY HURRELL-HARRING, *et al.*, on Behalf of Themselves and All Others Similarly Situated,

Plaintiffs

-against-

THE STATE OF NEW YORK, et al.,

Defendants.

----------x

INDEX No. 8866-07
(Connolly, J.)

EXHIBIT 1 TO U.S. STATEMENT OF INTEREST

Judge Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

----------x

JOSEPH JEROME WILBUR, *et al.*,

Plaintiffs

v.

CITY OF MOUNT VERNON, *et al.*,

Defendants.

----------x

No. C11-1100RSL

STATEMENT OF INTEREST OF THE UNITED STATES

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STATEMENT OF INTEREST OF THE UNITED STATES

The United States files this Statement of Interest to assist the Court in answering the question of what remedies are appropriate and within the Court's powers should it find that the Cities of Mount Vernon and Burlington violate misdemeanor defendants' right to counsel. The United States did not participate in the trial in this case and takes no position on whether Plaintiffs should prevail on the merits. The United States files this SOI to provide expertise and a perspective that it may uniquely possess. If the Plaintiffs prevail, it is the position of the United States that the Court has discretion to enter injunctive relief aimed at the specific factors that have caused public defender services to fall short of Sixth Amendment guarantees, including the appointment of an independent monitor to assist the Court. The United States has found monitoring arrangements to be critically important in enforcing complex remedies to address systemic constitutional harms.

In discussing the remedies available to the Court in this Statement, the United States will address questions (1) and (3) of the Court's Order for Further Briefing, with particular focus on the role of an independent monitor. (Dkt. # 319.) To answer the Court's first question, the United States is unaware of any federal court appointing a monitor to oversee reforms of a public defense agency, but the Ninth Circuit has recognized a federal court's authority in this area under 42 U.S.C. § 1983. *Miranda v. Clark County, NV*, 319 F.3d 465 (9th Cir. 2003). The United States is aware of one case in which a federal court, through a Consent Order instituting reforms of a County public defender agency, received reports from the county regarding the progress of those reforms. *Stinson v. Fulton Cnty. Bd. of Comm'rs*, No. 1:94-CV-240-GET (N.D. Ga. May 21, 1999). However, the Court did not have the benefit of an independent monitor to assist it in assessing the implementation of the reforms.

Also, an independent monitor is currently monitoring systemic reform of a juvenile public defender system through an agreement between the United States and the Shelby County (TN) Juvenile Court ("Shelby County").

Finally, it is worth noting that but for removal to federal court by the Cities here, this matter would have proceeded in state court, and state court litigation over the crisis in indigent defense is not at all unusual. Those cases bear out the practicality—and, at times, the necessity—of court oversight in this area.

In answer to the Court's third question, a number of states have imposed "hard" caseload standards,[1] but the United States believes that, should any remedies be warranted, defense counsel's *workload* should be controlled to ensure quality representation. "Workload," as defined by the *ABA Ten Principles of a Public Defense Delivery System,* takes into account not only a defender's numerical caseload, but also factors like the complexity of defenders' cases, their skills and experience, and the resources available to them. Workload controls may require flexibility to accommodate local conditions. Due to this complexity, an independent monitor would provide the Court with indispensible support in ensuring that the remedial purpose of workload controls is achieved.

The Washington State Bar's Standards for Indigent Defense, incorporated by its Supreme Court in its criminal rules, considers the importance of workloads in evaluating the efficacy of defender services. Washington's move to implement workload controls is a welcome recognition of its obligation under *Gideon*. The United States recognizes that these standards are the result of work commenced at least since 2003 by the Washington State Bar Association's Blue Ribbon Commission on Criminal Defense and supported by the State Legislature, the

[1] For example, Arizona, Georgia, and New Hampshire have specific caseload limitations. A number of states have "soft" caseload caps by using a weighted system. See attached Exhibit 1 for a description of select jurisdictions.

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Washington Defender Association, and the Washington Association of Prosecuting Attorneys, among others. These workload controls are scheduled to go into effect October 2013.[2]

INTEREST OF THE UNITED STATES

The United States has authority to file this Statement of Interest pursuant to 28 U.S.C. § 517, which permits the Attorney General to attend to the interests of the United States in any case pending in federal court. The United States has an interest in ensuring that all jurisdictions—federal, state, and local—are fulfilling their obligation under the Constitution to provide effective assistance of counsel to individuals facing criminal charges who cannot afford an attorney, as required by *Gideon v. Wainwright*, 372 U.S. 335 (1963). The United States can enforce the right to counsel in juvenile delinquency proceedings pursuant the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 (Section 14141). As noted above, the United States is currently enforcing Section 14141's juvenile justice provision through a comprehensive out-of-court settlement with Shelby County.[3] An essential piece of the agreement, which is subject to independent monitoring, is the establishment of a juvenile public defender system with "reasonable workloads" and "sufficient resources to provide independent, ethical, and zealous representation to Children in delinquency matters." *Id.* at 14-15.

As the Attorney General recently proclaimed, "It's time to reclaim Gideon's petition – and resolve to confront the obstacles facing indigent defense providers."[4] In March 2010, the Attorney General launched the Access to Justice Initiative to address the access-to-justice crisis. Indigent defense reform is a critical piece of the office's work, and the Initiative provides a

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[2] The United States does not by this mean to endorse or detract from the efforts of these entities.

[3] Mem. of Agreement Regarding the Juvenile Court of Memphis and Shelby Counties, Tennessee (2012), *available at* http://www.justice.gov/crt/about/spl/findsettle.php.

[4] Attorney General Eric Holder Speaks at the Justice Department's 50th Anniversary Celebration of the U.S. Supreme Court Decision in *Gideon v. Wainwright*, March 15, 2013, *available at* http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-1303151.html.

centralized focus for carrying out the Department's commitment to improving indigent defense.[5] The Department has also sought to address this crisis through a number of grant programs.[6] The most recent is a 2012 $1.2 million grant program, *Answering Gideon's Call: Strengthening Indigent Defense Through Implementing the ABA Ten Principles of a Public Defense Delivery System* administered by the Bureau of Justice Assistance.[7] In light of the United States' interest in ensuring that any constitutional deficiencies the Court may find are adequately remedied, the United States files this Statement of Interest on the availability of injunctive relief.

BACKGROUND

The Plaintiffs' claims of deprivations of the right to counsel, if meritorious, are part of a crisis impacting public defender services nationwide. Fifty years ago, the Supreme Court held that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Gideon*, 372 U.S. at 344. And yet, as the Attorney General recently noted, "despite the undeniable progress our nation has witnessed over the last half-century—America's indigent defense systems continue to exist in a state of crisis," and "in some places—do little more than process people in and out of our courts."[8]

Our national difficulty to meet the obligations recognized in *Gideon* is well documented.[9] *See, e.g.* ABA Standing Committee on Legal Aid and Indigent Defendants Report, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*, (December 2004). Despite

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[5] The office works with federal agencies, and state, local, and tribal justice system stakeholders to increase access to counsel, highlight best practices, and improve the justice delivery systems that serve people who are unable to afford lawyers. More information is available at http://www.justice.gov/atj/.

[6] *See* Government Accountability Office, *Indigent Defense: DOJ Could Increase Awareness of Eligible Funding* 11-14 (May 2012), *available at* http://www.justice.gov/atj/idp/.

[7] Grants have been awarded to agencies in Texas, Delaware, Massachusetts, and Michigan.

[8] Attorney General Eric Holder Speaks at the American Film Institute's Screening of *Gideon's Army*, June 21, 2013, *available at* http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130621.html.

[9] In March 2013, the Yale Law Journal held a symposium on the challenges of meeting Gideon's promise and published resulting articles in its most recent issue. *See* 122 Yale L.J. __ (June 2013).

long recognition that "the proper performance of the defense function is . . . as vital to the health of the system as the performance of the prosecuting and adjudicatory functions," Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice, *Final Report* 11 (1963), public defense agencies nationwide remain at a staggering disadvantage when it comes to resources. Steven W. Perry & Duren Banks, U.S. Bureau of Justice Statistics, *Prosecutors in State Courts, 2007 Statistical Table*s 1 (2012) (noting that prosecution offices nationwide receive about 2.5 times the funding that defense offices receive); National Right to Counsel Committee, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel* 61-64 (2009) (collecting examples of funding disparities).

Due to this lack of resources, states and localities across the country face a crisis in indigent defense. Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. Rev. L. & Soc. Change 427 (2009) (describing crises nationwide). In many states, remedying the crisis in indigent defense has required court intervention. *E.g.*, *State v. Citizen*, 898 So.2d 325 (La. 2005); *Hurrell-Harring v. New York*, 930 N.E.2d 217 (N.Y. 2010); *Missouri Public Defender Comm'n v. Waters*, 370 S.W.3d 592 (Mo. 2012). The crisis in indigent defense extends to misdemeanor cases where many waive their right to counsel and end up unnecessarily imprisoned. NACDL, *Minor Crimes, Massive Waste* 21 (2009).[10]

DISCUSSION

It is the position of the United States that it would be lawful and appropriate for the Court to enter injunctive relief if this litigation reveals systemic constitutional deficiencies in the Defendants' provision of public defender services. Indeed, the concept of federal oversight to address the crisis in defender services has gained momentum in recent years. *See, e.g,. Gideon's*

[10] The report is available at http://www.opensocietyfoundations.org/reports/minor-crimes-massivewaste.

Broken Promise, *supra*, at 41-42 (recommending federal funding); Drinan, *The Third Generation of Indigent Defense Litigation*, *supra* (arguing federal judges are well suited to address systemic Sixth Amendment claims); Note, *Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 Harv. L. Rev. 2062 (2000) (advocating systemic litigation). (Again, the United States takes no position on the merits of the underlying suit.)

I. The Court Has Broad Authority to Enter Injunctive Relief, Including the Appointment of an Independent Monitor, if It Finds a Deprivation of the Right to Counsel.

If Plaintiffs prevail on the merits of their claims, or as part of a consent decree, this Court has broad authority to order injunctive relief that is adequate to remedy any identified constitutional violations within the Cities' defender systems. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971); *see also Thomas v. County of Los Angeles*, 978 F.2d 504, 509 (9th Cir. 1992) (noting that courts have power to issue "broad injunctive relief" where there exist specific findings of a "persistent pattern of [police] misconduct"). When crafting injunctive relief that requires state officials to alter the manner in which they execute their core functions, a court must be mindful of federalism concerns and avoid unnecessarily intrusive remedies. *Labor/Community Strategy Center v. Los Angeles County*, 263 F.3d 1041, 1050 (9th Cir. 2001). Courts have long recognized—across a wide range of institutional settings—that equity often requires the implementation of injunctive relief to correct unconstitutional conduct, even where that relief relates to a state's administrative practices. *See, e.g.*, *Brown v. Plata*, 131 S. Ct. 1910 (2011) (upholding injunctive relief affecting State's administration of prisons); *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) (upholding injunctive relief affecting State's administration of schools). Indeed, while courts "must be sensitive to the State's interest[s]," courts "nevertheless

must not shrink from their obligation to 'enforce the constitutional rights of all persons.'" *Plata*, 131 S. Ct. at 1928 (quoting *Cruz v. Beto,* 405 U.S. 319, 321 (1972)).

In crafting injunctive relief, the authority of the Court to appoint a monitor is well established. *Eldridge v. Carpenters 46*, 94 F.3d 1366 (9th Cir. 1996) (holding that district court's failure to appoint a monitor was an abuse of discretion where defendant insisted on retaining a hiring practice already held to be unlawfully discriminatory); *Nat'l Org. for the Reform of Marijuana Laws v. Mullen*, 828 F.2d 536, 543 (9th Cir. 1987); *Madrid v. Gomez*, 889 F. Supp. 1146, 1282 (N.D. Cal. 1995) (holding that the "assistance of a Special Master is clearly appropriate" because "[d]eveloping a comprehensive remedy in this case will be a complex undertaking involving issues of a technical and highly charged nature").

II. Appointment of an Independent Monitor Is Critical to Implementing Complex Remedies to Address Systemic Constitutional Violations.

In the experience of the United States, appointing a monitor can provide substantial assistance to courts and parties and can reduce unnecessary delays and litigation over disputes regarding compliance. This is especially true when institutional reform can be expected to take a number of years. A monitor provides the independence and expertise necessary to conduct the objective, credible analysis upon which a court can rely to determine whether its order is being implemented, and that gives the parties and the community confidence in the reform process. A monitor will also save the Court's time.

In Grant County, Washington, an independent monitor was essential to implementing the court's injunction in a right-to-counsel case. *Best et al. v. Grant County*, No. 04-2-00189-0 (Kittitas Cty. Sup. Ct., filed Dec. 21, 2004). There, the monitor assisted the court and parties for almost six years by conducting site visits, assessing caseloads, and completing quarterly reports on the County's compliance with court orders. We note that the monitor's term in Grant County

was limited from the outset to a defined period, and the monitor's final report noted work that still remained to be done.[11] In our experience, it is best to continue monitoring arrangements until the affected parties have demonstrated sustained compliance with the court's orders.

In 2009, the United States entered a Memorandum of Agreement with King County, Washington to reform the King County Correctional Facility. *United States v. King County, Washington*, No. 2:09-cv-00059 (W.D. Wash., filed Jan. 15, 2009). That successful reform process was assisted by an independent monitor. Other significant cases involving monitors include: *United States v. City of Pittsburgh*, No. 97-cv-354 (W.D. Pa., filed Feb. 26, 1997) (police; compliance reached in 1999); *United States v. Dallas County*, No. 3:07-cv-1559-N (N.D. Tex., filed Nov. 6, 2007) (jail); *United States v. Delaware*, No. 1-11-cv-591 (D. Del., filed Jun 6, 2011) (mental health system); *United States v. City of Seattle*, No. 12-cv-1282 (W.D. Wash., filed July 27, 2012)(police). In each of these cases, the independent monitor improved efficiency in implementation, decreased collateral litigation, and provided great assistance to the court.[12]

The selection of a monitor need not be a strictly top-down decision by the Court. The parties may agree on who should fill the role of the monitor, but if they cannot, the Court can order them to nominate monitor candidates for the Court's consideration. In addition, it should be noted that the cost of an independent monitor, however it is paid, should not reduce the funds available for indigent defense.

Finally, it should be noted that the appointment of an independent monitor can ensure public confidence in the reform process. With allegiance only to the Court and a duty to report its findings accurately and objectively, the monitor assures the public that the Cities will move

[11] The monitor's final report and two of its quarterly reports are attached as Exhibit 2.
[12] Summaries of those cases, relevant pleadings, and reports from the monitors can be found at http://www.justice.gov/crt/about/spl/findsettle.php.

forward in implementing the Court's order, and will not escape notice if they do not. Moreover, the Cities' progress towards implementing the Court's order will be more readily accepted by a broader segment of the public if that progress is affirmed by a monitor who is responsible for confirming each claim of compliance asserted by the Cities.

III. If the Court Finds Liability in this Case, its Remedy Should Include Workload Controls, Which Are Well-Suited to Implementation by an Independent Monitor.

Achieving systemic reform to ensure meaningful access to counsel is an important, but complex and time-consuming, undertaking. Any remedy imposed by the Court may require years of assessment to determine whether it is accomplishing its purpose, and the Court and the parties may need independent assistance to resolve concerns about compliance.

One source of complexity will be how the Court and parties assess whether public defenders are overburdened. In its Order for Further Briefing, the Court asked about "hard" caseload standards, which provide valuable, bright-line rules that define the outer boundaries of what may be reasonably expected of public defenders. *ABA Ten Principles*, *supra*. However, caseload limits alone cannot keep public defenders from being overworked into ineffectiveness; two additional protections are required. First, a public defender must have the authority to decline appointments over the caseload limit. Second, caseload limits are no replacement for a careful analysis of a public defender's *workload*, a concept that takes into account all of the factors affecting a public defender's ability to adequately represent clients, such as the complexity of cases on a defender's docket, the defender's skill and experience, the support services available to the defender, and the defender's other duties. *See id*. Making an accurate assessment of a defender's workload requires observation, record collection and analysis, interviews with defenders and their supervisors, and so on, all of which must be performed quarterly or every six months over the course of several years to ensure that the Court's remedies

are being properly implemented. The monitor can also assess whether, regardless of workload, defenders are carrying out other hallmarks of minimally effective representation, such as visiting clients, conducting investigations, performing legal research, and pursuing discovery. ABA Standing Committee on Legal Aid and Indigent Defendants, *Eight Guidelines of Public Defense Workloads* (August 2009). These kinds of detailed inquiries, carried out over sufficient time to ensure meaningful and long-lasting reform, are critical to assessing whether the Cities are truly honoring misdemeanor defendants' right to counsel, and they can be made most efficiently and reliably by an independent monitor. As shown in Exhibit 2, these are the kinds of inquires made by the independent monitor in the Grant County, Washington case. Also, should non-compliance be identified, early and objective detection by the monitor, as well as the identification of barriers to compliance, allow the parties to undertake corrective action.

An independent monitor may also obviate the need for the Court to dictate specific and rigid caseload requirements. In the Shelby County juvenile justice enforcement matter, for example, the County is required to establish a juvenile defender program that provides defense attorneys with reasonable workloads, appropriate administrative supports, training, and the resources to provide zealous and independent representation to their clients, but the agreement does not specify a numerical caseload limit. *See* Mem. of Agreement at 14-15.

CONCLUSION

Should the Court find for the Plaintiffs, it has broad powers to issue injunctive relief. That power includes the authority to appoint an independent monitor who would assist the Court's efforts to ensure that any remedies ordered are effective, efficiently implemented, and achieve the intended result.

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*Conditional Admission is Pending

CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2013, a copy of the foregoing was filed electronically. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

KIMBERLY HURRELL-HARRING, et al., on Behalf of Themselves and All Others Similarly Situated, Plaintiffs, -against- THE STATE OF NEW YORK, et al., Defendants.	Index No. 8866-07 (Connolly, J.)

STIPULATION AND ORDER OF SETTLEMENT

WHEREAS, Plaintiffs, on behalf of the Plaintiff Class, as defined by the Appellate Division, Third Department ("Plaintiffs"), commenced and are pursuing a class action lawsuit entitled *Hurrell-Harring, et al. v. State of New York, et al.*, Index No. 8866-07, in New York Supreme Court, Albany County, seeking declaratory and prospective injunctive relief for, among other things, the alleged deprivation by the State of New York and the Governor of the State of New York (the "State Defendants") of Plaintiffs' right to counsel in the counties of Onondaga, Ontario, Schuyler, Suffolk, and Washington (together the "Five Counties" and each a "County") guaranteed to Plaintiffs by the Sixth and Fourteenth Amendments to the United States Constitution, Article I, § 6 of the New York State Constitution, and various statutory provisions; and

WHEREAS, the parties have been engaged in litigation since November 2007 and the New York Court of Appeals has determined that Plaintiffs may proceed with their claims for actual and constructive denial of counsel, *Hurrell-Harring v. State of New York*, 15 NY3d 8 (2010); and

WHEREAS, the Appellate Division, Third Department determined that Plaintiffs could pursue

the litigation as a class action in accordance with Article 9 of the New York State Civil Procedure Law and Rules ("CPLR"), *Hurrell-Harring v. State of New York*, 81 AD3d 69 (3d Dept. 2011); and

WHEREAS, in 2010, the State established the Office of Indigent Legal Services ("ILS") and the Indigent Legal Services Board ("ILSB") (Executive Law Section 832 and Section 833, respectively) to, among other things, improve the quality of the delivery of legal services throughout the State for indigent criminal defendants; and

WHEREAS, the parties have conducted extensive fact and expert discovery, and have engaged in motion practice before the Court, and the Court has set the matter down for trial; and

WHEREAS, the parties have negotiated in good faith and have agreed to settle this Action on the terms and conditions set forth herein; and

WHEREAS, the parties agree that the terms of this settlement are in the public interest and the interests of the Plaintiff Class and that this settlement upon the order of the Court is the most appropriate means of resolving this action; and

WHEREAS, the parties understand that, prior to such Court order, the Court shall conduct a fairness hearing in accordance with CPLR Article 9 to determine whether the settlement contained herein should be approved as in the best interests of the Plaintiff Class; and

WHEREAS, ILS and the ILSB have the legal authority to monitor and study indigent legal services in the state, to recommend measures to improve those services, to award grant monies to counties to support their indigent representation capability, and to establish criteria for the distribution of such funds; and

WHEREAS, the parties agree that ILS is best suited to implementing, on behalf of the State, certain obligations arising under this Agreement; and

WHEREAS, the ILSB has reviewed those obligations contemplated under this Agreement for implementation by ILS and has directed ILS to implement such obligations in accordance with

the terms of this Agreement, and this direction is reflected in the *Authorization of the Indigent Legal Services Board and the New York State Office of Indigent Legal Services Concerning Settlement of the Hurrell-Harring Lawsuit*, appended hereto as Exhibit A and incorporated by reference herein; and

WHEREAS, ILS is legally required to execute this direction from the ILSB; and

WHEREAS, the Plaintiff Class entered into a settlement agreement with Ontario County dated June 20, 2014, and the Court approved the settlement and dismissed the Plaintiff Class's claims against Ontario County on September 2, 2014; and

WHEREAS, the Plaintiff Class entered into a settlement agreement with Schuyler County on September 29, 2014, which is currently scheduled for a fairness hearing on November 3, 2014; and

WHEREAS, Plaintiffs and the State intend that the terms and measures set forth in this Settlement Agreement will ensure counsel at arraignment for indigent defendants in the Five Counties, provide caseload relief for attorneys providing Mandated Representation in the Five Counties, improve the quality of Mandated Representation in the Five Counties, and lead to improved eligibility determinations;

NOW, THEREFORE, IT IS HEREBY STIPULATED, AGREED, AND ORDERED as follows:

I. PARTIES TO THIS AGREEMENT

The parties to this Settlement Agreement are the parties named in the Second Amended Complaint in the Action, which are the Plaintiff Class, the State of New York, Governor Andrew Cuomo, Onondaga County, Ontario County, Schuyler County, Suffolk County, and Washington County. If a County fails to execute the Agreement, it shall not be considered a party to this Agreement.

II. DEFINITIONS

As used in this Agreement:

Action means *Hurrell-Harring v. State of New York*, Case No. 8866-07 (Supreme Court, Albany County), filed on November 8, 2007.

Agreement and **Settlement Agreement** mean this Stipulation and Order of Settlement dated as of October 21, 2014 between and among Plaintiffs, the State Defendants, and the Five Counties.

Arraignment means the first appearance by a person charged with a crime before a judge or magistrate, with the exception of an appearance where no prosecutor appears and no action occurs other than the adjournment of the criminal process and the unconditional release of the person charged (in which event Arraignment shall mean the person's next appearance before a judge or magistrate).

Effective Date means the date of entry of the order of Supreme Court, Albany County approving this Settlement Agreement.

Executive means the Office of the Governor.

Five Counties means Ontario, Onondaga, Schuyler, Suffolk, and Washington Counties, each of which was named as a defendant in the Second Amended Complaint filed on August 26, 2008 in *Hurrell-Harring v. State of New York*. Each of the Five Counties may also be referred to as a **County** in this Agreement.

Mandated Representation means constitutionally mandated publicly funded representation in criminal cases for people who are unable to afford counsel.

Plaintiffs or **Plaintiff Class** means the class of individuals certified by the Appellate Division on January 6, 2011 in *Hurrell-Harring v. State of New York*.

III. COUNSEL AT ARRAIGNMENT

(A) (1) The State of New York (the "State") shall ensure, within 20 months of the Effective Date and continuing thereafter, that each criminal defendant within the Five Counties who is eligible for publicly funded legal representation ("Indigent Defendant") is represented by counsel in person at his or her Arraignment. A timely Arraignment with counsel shall not be delayed pending a determination of a defendant's eligibility.

(2) Within 6 months of the Effective Date, the New York State Office of Indigent Legal Services ("ILS"), in consultation with the Executive, the Five Counties, and any other persons or entities it deems appropriate, shall develop a written plan to implement the obligations specified above in paragraph III(A)(1), which plan shall include interim steps for achieving compliance with those obligations. That plan shall be provided to the parties, who shall have 30 days to submit comments. Within 30 days of the end of such comment period (which will be no later than 8 months after the Effective Date), ILS shall finalize its plan and provide it to the parties. Starting within 6 months of finalization of the plan, the State shall undertake good faith efforts to begin implementing the plan, subject to legislative appropriations.

(3) The parties acknowledge that the State may seek to satisfy the obligations set forth in paragraph III(A)(1) by ensuring the existence and maintenance within each of the Five Counties of an effective system for providing each Indigent Defendant with representation by counsel in person at his or her Arraignment. Nothing in this provision alters the State's obligations set forth in paragraph III(A)(1).

(4) Incidental or sporadic failures of counsel to appear at Arraignments within a County shall not constitute a breach of the State's obligations under paragraph III(A)(1).

(B) The Executive shall coordinate and work in good faith with the Office of Court Administration ("OCA") to ensure, on an ongoing basis, that each judge and magistrate within the Five Counties, including newly appointed judges and magistrates, is aware of the responsibility to provide counsel to Indigent Defendants at Arraignments, and, subject to constitutional and statutory limits regarding prompt arraignments, to consider adjustments to court calendars and Arraignment schedules to facilitate the presence of counsel at Arraignments. If, notwithstanding the Executive's satisfaction of the terms of this paragraph III(B), lack of cooperation from OCA prevents the provision of counsel at some Arraignments, the State shall not be deemed in breach of the settlement for such absence of counsel at those Arraignments.

(C) In accordance with paragraph IX(B), the State shall use $1 million in state fiscal year 2015/2016 for the purposes of paying any costs associated with the interim steps described in paragraph III(A)(2). The State shall use these funds in the first instance to pay the Five Counties for the costs, if any, incurred by them in connection with the interim steps described in paragraph III(A)(2), and thereafter any remaining amounts shall be used to pay costs incurred by ILS.

(D) ILS, in consultation with the Executive, OCA, the Five Counties, and any other individual or entity it deems appropriate, shall, on an ongoing basis, monitor the progress toward achieving the purposes set forth in paragraph III(A)(1) above. Such monitoring shall include regular, periodic reports regarding: (1) the sufficiency of any funding committed to those purposes; (2) the effectiveness of any system implemented in accordance with paragraph III(A)(3) in ensuring that all Indigent Defendants are represented by counsel at Arraignment; and (3) any remaining barriers to ensuring the representation of all Indigent Defendants at Arraignment. Such reports shall be made available to counsel for the Plaintiff Class and the public.

(E) In no event shall the Five Counties be obligated to undertake any steps to implement the State's obligations under Section III until funds have been appropriated by the State for paragraph III(A)(1) or paragraph III(A)(2). Nothing in this paragraph shall alter the Five Counties' obligations under Section VII.

IV. CASELOAD RELIEF

(A) Within 6 months of the Effective Date, ILS shall ensure that the caseload/workload of each attorney providing Mandated Representation in the Five Counties can be accurately tracked and reported on at least a quarterly basis, including private practice caseloads/workloads. In accordance with paragraph IX(B), the State shall provide $500,000 in state fiscal year 2015/2016 to ILS for the purposes of paying any costs associated with the obligations contained in this paragraph IV(A), and ILS shall use those funds for such purposes. To the extent practicable, and subject to the specific funding commitments in this Agreement, the tracking system developed by ILS should be readily deployable across the state.

(B) (1) Within 9 months of the Effective Date, ILS, in consultation with the Executive, OCA, the Five Counties, and any other persons or entities ILS deems appropriate, shall determine:

(i) the appropriate numerical caseload/workload standards for each provider of mandated representation, whether public defender, legal aid society, assigned counsel program, or conflict defender, in each County, for representation in both trial- and appellate-level cases; (ii) the means by which those standards will be implemented, monitored, and enforced on an ongoing basis; and (iii) to the extent necessary to comply with the caseload/workload standards, the number of additional attorneys (including supervisory attorneys), investigators, or other non-attorney staff, or the amount of other in-kind resources necessary for each provider

of Mandated Representation in the Five Counties.

(2) In reaching these determinations, ILS shall take into account, among other things, the types of cases attorneys handle, including the extent to which attorneys handle non-criminal cases; the private practice caseloads/workloads of attorneys; the qualifications and experiences of the attorneys; the distance between courts and attorney offices; the time needed to interview clients and witnesses, taking into account travel time and location of confidential interview facilities; whether attorneys work on a part-time basis; whether attorneys exercise supervisory responsibilities; whether attorneys are supervised; and whether attorneys have access to adequate staff investigators, other non-attorney staff, and in-kind resources.

(3) In no event shall numerical caseload/workload standards established under paragraph IV(B)(1) or paragraph IV(E) be deemed appropriate if they permit caseloads in excess of those permitted under standards established for criminal cases by the National Advisory Commission on Criminal Justice Standards and Goals (Task Force on Courts, 1973) Standard 13.12.

(C) Starting within 6 months of ILS having made the caseload/workload determinations specified above in paragraph IV(B), the State shall take tangible steps to enable providers of Mandated Representation to start adding any staff and resources determined to be necessary to come into compliance with the standards.

(D) (1) Within 21 months of ILS having made the caseload/workload determinations specified above in paragraph IV(B) (which shall be no later than 30 months from the Effective Date) (the "Implementation Date") and continuing thereafter, the State shall ensure that the caseload/workload standards are implemented and adhered to by all providers of Mandated Representation in the Five Counties.

(2) The parties acknowledge that the State may delegate to ILS the primary responsibility for overseeing the implementation, monitoring, and enforcement of the caseload/workload standards required hereunder, provided, however, that nothing in this provision alters the State's obligations set forth in this Section IV.

(3) The parties acknowledge that the State may seek to satisfy the obligation in paragraph IV(D)(1) by ensuring the existence and maintenance within each of the Five Counties of an effective system for implementing and enforcing any caseload/workload standards adopted under this Section IV. Nothing in this provision alters the State's obligations set forth in this Section IV.

(E) Beginning approximately 18 months after the Implementation Date, and no less frequently than annually thereafter, ILS shall review the appropriateness of any such standards in light of any change in relevant circumstances in each of the Five Counties. Immediately following any such review, ILS shall recommend to the Executive whether and to what extent the established caseload/workload standards should be amended on the basis of changed circumstances. Any proposed change to a caseload/workload standard implemented hereunder by ILS shall be submitted by ILS for approval by the Executive, provided, however, that such approval shall not be unreasonably withheld. Nothing in this provision shall limit the authority of ILS or the ILSB pursuant to Executive Law Article 30, Sections 832 and 833.

(F) Incidental or sporadic noncompliance with the caseload/workload standards by individual attorneys providing Mandated Representation shall not constitute a breach of the State's obligations under this Section IV.

V. INITIATIVES TO IMPROVE THE QUALITY OF INDIGENT DEFENSE

(A) No later than 6 months following the Effective Date, ILS, in consultation with the Five Counties, the providers of Mandated Representation in the Five Counties, and any other individual or entity ILS deems appropriate, shall establish written plans to ensure that attorneys providing Mandated Representation in criminal cases in each of the Five Counties: (1) receive effective supervision and training in criminal defense law and procedure and professional practice standards; (2) have access to and appropriately utilize investigators, interpreters, and expert witnesses on behalf of clients; (3) communicate effectively with their clients (including by conducting in-person interviews of their clients promptly after being assigned) and have access to confidential meeting spaces; (4) have the qualifications and experience necessary to handle the criminal cases assigned to them; and (5) in the case of assigned counsel attorneys, are assigned to cases in accordance with County Law Article 18-B and in a manner that accounts for the attorney's level of experience and caseload/workload. At a minimum, such plans shall provide for specific, targeted progress toward each of the objectives listed in this paragraph V(A), within defined timeframes, and shall also provide for such monitoring and enforcement procedures as are deemed necessary by ILS.

(B) ILS shall thereafter implement the plans developed in accordance with paragraph V(A). To address costs associated with implementing these plans, ILS shall provide funding within each County through its existing program for quality improvement distributions, provided, however, that ILS shall take all necessary and appropriate steps to ensure that any distributions intended for use in accomplishing the objectives listed in paragraph V(A) are used exclusively for that purpose.

(C) In accordance with paragraphs IX(B) and IX(E), respectively, the State shall provide to ILS $2 million in each of state fiscal year 2015/2016 and state fiscal year 2016/2017 for the purposes of accomplishing the objectives set forth in

paragraph V(A), and ILS shall use such funds for those purposes. No portion of such funds shall be attributable to ILS's operating budget but shall instead be distributed by ILS to the Five Counties.

(D) The Five Counties may, but shall not be obligated to, pay all or a portion of the funds identified in paragraph V(C) to ILS to provide services designed to effectuate the objectives set forth in paragraph V(A), provided such services are rendered in state fiscal years 2015/2016 and 2016/2017 and pursuant to a written agreement between ILS and the relevant County.

VI. ELIGIBILITY STANDARDS FOR REPRESENTATION

(A) ILS shall, no later than 6 months following the Effective Date, issue criteria and procedures to guide courts in counties outside of New York City in determining whether a person is eligible for Mandated Representation. ILS may consult with OCA to develop and distribute such criteria and procedures. ILS shall be responsible for ensuring the distribution of such criteria and procedures to, at a minimum, every court in counties outside of New York City that makes determinations of eligibility (and may request OCA's assistance in doing so) and every provider of mandated representation in the Five Counties. The Five Counties shall undertake best efforts to implement such criteria and procedures as developed by ILS. Nothing in this paragraph otherwise obligates the Five Counties to develop such criteria and procedures.

(B) At a minimum, the criteria and procedures shall provide that: (1) eligibility determinations shall be made pursuant to written criteria; (2) confidentiality shall be maintained for all information submitted for purposes of assessing eligibility; (3) ability to post bond shall not be considering sufficient, standing alone, to deny eligibility; (4) eligibility determinations shall take into account the actual cost of retaining a private attorney in the relevant jurisdiction for the category of crime charged; (5) income needed to meet the reasonable living expenses of the

applicant and any dependent minors within his or her immediate family, or dependent parent or spouse, should not be considered available for purposes of determining eligibility; and (6) ownership of an automobile should not be considered sufficient, standing alone, to deny eligibility where the automobile is necessary for the applicant to maintain his or her employment. In addition, ILS shall set forth additional criteria or procedures as needed to address: (7) whether screening for eligibility should be performed by the primary provider of Mandated Representation in the county; (8) whether persons who receive public benefits, cannot post bond, reside in correctional or mental health facilities, or have incomes below a fixed multiple of federal poverty guidelines should be deemed presumed eligible and be represented by public defense counsel until that representation is waived or a determination is made that they are able to afford private counsel; (9) whether (a) non-liquid assets and (b) income and assets of family members should be considered available for purposes of determining eligibility; (10) whether debts and other financial obligations should be considered in determining eligibility; (11) whether ownership of a home and ownership of an automobile, other than an automobile necessary for the applicant to maintain his or her employment, should be considered sufficient, standing alone, to deny eligibility; and (12) whether there should be a process for appealing any denial of eligibility and notice of that process should be provided to any person denied counsel.

(C) ILS shall issue an annual report regarding the criteria and procedures used to determine whether a person is eligible to receive Mandated Representation in each of the Five Counties. Such report shall, at a minimum, analyze: (1) the criteria used to determine whether a person is eligible; (2) who makes such determinations; (3) what procedures are used to come to such determinations; (4) whether and to what extent decisions are reconsidered and/or appealed; and (5) whether and to what extent those criteria and procedures comply with the criteria and procedures referenced in paragraph VI(A). The first such report shall

be issued no later than 12 months following the establishment of the criteria and procedures discussed in paragraph VI(A).

VII. COUNTY COOPERATION

The Five Counties shall use best efforts to cooperate with the State and ILS to the extent necessary to facilitate the implementation of the terms of this Agreement. This obligation is in no way subject to or conditioned upon any obligations undertaken by Ontario and Schuyler Counties by virtue of their separate agreements to settle this Action. Such cooperation shall include, without limitation: (1) the timely provision of information requested by the State or ILS; (2) compliance with the terms of the plans implemented pursuant to paragraphs III(A)(2), IV(B)(1), and V(A); (3) assisting in the distribution of the eligibility standards referenced in part VI(A); (4) assisting in the monitoring, tracking, and reporting responsibilities set forth in parts III(D), IV(A), and VI(C); (5) ensuring that the providers of Mandated Representation and individual attorneys providing Mandated Representation in the Five Counties provide any necessary information, compliance, and assistance; (6) undertaking best efforts to ensure the passage of any legislation and/or legislative appropriations contemplated by this Agreement; and (7) any other measures necessary to ensure the implementation of the terms of this Agreement. County failure to cooperate does not relieve the State of any of its obligations under this Settlement Agreement.

VIII. MONITORING AND REPORTING

In order to permit Plaintiffs to assess compliance with all provisions of this Agreement, the State shall:

(A) Promptly provide to Plaintiffs copies of the following documents upon their finalization and subsequent to any amendment thereto:

(1) The plan(s) concerning counsel at arraignment referenced in paragraph III(A)(2);

(2) The reports concerning counsel at arraignment referenced in paragraph III(D);

(3) The determinations regarding caseload/workload referenced in paragraph IV(B)(1) and any changes proposed or made pursuant to paragraph IV(E);

(4) The plan(s) for quality improvement referenced in paragraph V(A);

(5) The eligibility criteria referenced in paragraph VI(A);

(6) The reports regarding eligibility determinations referenced in paragraph VI(C);

(7) The relevant portions of each Executive Budget submitted during the term of this Agreement.

(B) Provide written reports to Plaintiffs concerning the State's efforts to carry out its obligations under this Agreement and the results thereof, including, without limitation:

(8) Ensuring counsel at arraignment pursuant to paragraph III(A)(1);

(9) Coordinating with OCA pursuant to paragraph III(B);

(10) Implementing the tracking system referenced in paragraph IV(A);

(11) Implementing the caseload/workload standards referenced in paragraph IV(B) or paragraph IV(E) and ensuring that those caseload/workload standards are adhered to;

(12) Implementing the plans referenced in paragraph V(A).

Within 90 days of the Effective Date, the State and Plaintiffs shall meet and confer in good faith to identify the content and frequency of the specific reports

identified above that will be provided to Plaintiffs pursuant to this Section VIII.

IX. BEST EFFORTS AND APPROPRIATIONS

(A) The parties shall use their best efforts to obtain the enactment of all legislative measures necessary and appropriate to implement the terms of the Settlement Agreement.

(B) The Executive shall include in an Executive budget appropriation bill submitted to the Legislature for state fiscal year 2015/2016 sufficient appropriation authority to fund $3.5 million for purposes of implementing paragraphs III(C), IV(A), and V(C) of this Agreement.

(C) In order to prevent the obligation to provide counsel at Arraignment as set forth in Section III from imposing any additional financial burden on any County, the Executive shall include in an Executive budget appropriation bill submitted to the Legislature for the state fiscal year 2016/2017, and for each state fiscal year thereafter, sufficient appropriation authority for such funds that it, in consultation with ILS, OCA, the Five Counties, and any other individual or entity the Executive deems appropriate, determines, in its sole discretion, are necessary to accomplish the purposes set forth in Section III.

(D) In order to prevent the caseload/workload standards implemented under Section IV from imposing an additional financial burden on any County, the Executive shall include in an Executive budget appropriation bill submitted to the Legislature for the state fiscal year 2016/2017, and for each state fiscal year thereafter, sufficient appropriation authority for such funds that it, in consultation with ILS, OCA, the Five Counties, and any other individual or entity it deems appropriate, determines, in its sole discretion, are necessary to accomplish the purposes set forth in Section IV. In the absence of such funds, the Five Counties shall not be required to implement the caseload/workload standards referenced in

Section IV; provided, however, that nothing in this provision alters the State's obligation to ensure that caseload/workload standards are implemented and adhered to.

(E) The Executive shall include in an Executive budget appropriation bill submitted to the Legislature for the state fiscal year 2016/2017 sufficient appropriation authority to fund $2 million to ILS for the purposes of implementing paragraph V(C).

(F) The Executive shall use best efforts to seek and secure the funding described in paragraphs IX(B), IX(C), IX(D), and IX(E), as well as any other funding or resources necessary, as determined in the sole discretion of the Executive, to implement the terms of this Agreement including, without limitation, funding and resources sufficient for ILS to carry out its responsibilities under the Agreement. Consistent with the State Constitution and the State Finance Law, this Agreement is subject to legislative appropriation of such funding. The State shall perform its obligations under this Agreement in each fiscal year for the term of the Agreement to the extent of the enacted appropriation therefor.

(G) Except as provided in paragraph XIII(A), nothing herein shall be construed to obligate the Five Counties to provide funding to implement any of the obligations under this Agreement.

X. LEGISLATIVE PROCESS AND OUTCOMES

(A) Upon the Effective Date, this Action shall be conditionally discontinued only as to the parties that execute this Agreement, pending the enactment of the budget for the state fiscal year 2015/2016 and, if required, the completion of the meet-and-confer process described in paragraph X(B) below.

(1) No later than 21 days after the enactment of the 2015/2016 budget, the State shall provide Plaintiffs with written notice stating whether or not the

State believes that it can fully implement its obligations under this Agreement in light of the amount of funding appropriated by the Legislature.

(2) If the written notice provided under X(A)(1) sets forth the State's determination that the State can fully implement all of its obligations under this Agreement, then this Action shall be discontinued with prejudice only as to the parties that execute this Agreement. Such discontinuance shall not preclude Plaintiffs from commencing any new action pursuant to paragraph X(C)(2) below.

(B) If at any time the State believes it cannot fully implement one or more of its obligations under this Agreement in light of the Legislature's action, the State shall notify Plaintiffs in writing of that fact and the parties shall meet and confer to determine whether they can mutually resolve the issue(s). If the parties are unable to resolve the matter within 45 days of the written notice provided by the State, the State within 10 days shall notify Plaintiffs in writing which obligation(s) the State is unable to fully implement. If the State notifies Plaintiffs that it cannot fully implement one or more of its obligations in Section III, Plaintiffs may pursue, as specified in paragraph X(C)(1) or X(C)(2), as appropriate, judicial remedies on their claims for actual denial of counsel. If the State notifies Plaintiffs that it cannot fully implement one or more of its obligations in Section IV or V of this Agreement, Plaintiffs may pursue, as specified in paragraph X(C)(1) or X(C)(2), as appropriate, judicial remedies on their claims for constructive denial of counsel. The State shall remain obligated to comply with the relevant affected provision(s) of the Agreement to the extent it has funding to do so and shall remain obligated to implement all provisions not affected by legislative action unless the State notifies Plaintiffs within 90 days of enactment of the 2015/2016 budget that it can implement no provision of Sections III, IV, and V of the Agreement, in which case the entire Agreement

shall be deemed null and void, and the relevant parties shall be restored to the same positions in the litigation that they had immediately prior to October 21, 2014.

(C) (1) State Fiscal Year 2015/2016. If the State, pursuant to paragraph X(B), notifies Plaintiffs within 90 days of enactment of the 2015/2016 budget that it cannot fully implement one or more of its obligations under the Agreement, Plaintiffs may pursue judicial remedies as allowed under paragraph X(B) by restoring this Action to the trial calendar by serving written notice upon the Court and the relevant parties that have signed the Agreement within 30 days after receiving such notice from the State, in which case the relevant parties shall be restored to the same positions in the litigation that they had immediately prior to October 21, 2014, with respect to the restored claim(s).

(2) State Fiscal Year 2016/2017 to the Expiration of this Agreement. In accordance with any notice pursuant to paragraph X(B) with respect to the 2016/2017 state fiscal year or any later state fiscal year through the expiration of this Agreement, Plaintiffs may pursue judicial remedies as allowed under paragraph X(B) only by filing a new action for declaratory and prospective injunctive relief. Nothing in the Stipulation of Discontinuance filed in this Action is intended to bar or shall have the effect of barring, by virtue of the doctrine of res judicata or other principles of preclusion, any new action as allowed under paragraph X(B) or any claims within such action. Neither the State nor any other defendant shall assert or argue that any such action or claim asserted therein is barred by virtue of the prior discontinuance of this Action.

(3) Nothing in this paragraph shall be construed to alter the parties' rights under paragraph XIII(S).

XI. DISPUTE RESOLUTION

(A) If Plaintiffs believe that the State is not in compliance with a provision of this Settlement Agreement, Plaintiffs shall give notice to all parties in writing, and shall state with specificity the alleged non-compliance. Upon receipt of such notice by the State, Plaintiffs and the State will promptly engage in good-faith negotiations concerning the alleged non-compliance and appropriate measures to cure any non-compliance. Any party may request the participation of ILS in such negotiations. If Plaintiffs and the State have not reached an agreement on the existence of the alleged non-compliance and curative measures within forty-five (45) days after receipt of such notice of alleged non-compliance, Plaintiffs may seek all appropriate judicial relief with respect to such alleged non-compliance, upon ten (10) days' prior notice in accordance with the Escalation Notice terms set forth in paragraph XI(B). The State and Plaintiffs may extend these time periods by written agreement. Nothing said by either party or counsel for either party during those meetings may be used by the other party in any subsequent litigation, including, without limitation, litigation in connection with this Agreement, for any purpose whatsoever.

(B) Plaintiffs shall provide notice ("Escalation Notice") to the individuals identified in paragraph XIII(G)(2) at least ten (10) business days before seeking judicial relief as described in paragraph XI(A), which notice shall inform such individuals that Plaintiffs intend to seek judicial relief and shall attach the notice provided under paragraph XI(A).

(C) Notwithstanding the dispute resolution procedures set forth above, if exigent circumstances arise, Plaintiffs shall be able to seek expedited judicial relief against the State based upon an alleged breach of this Agreement, upon five (5) business days' prior notice to the individuals identified in paragraphs XIII(G)(1) and XIII(G)(2).

(D) Plaintiffs shall not seek to enforce any provision of this Agreement against any County. No provision of this Agreement shall form the basis of any cause of action by Plaintiffs against any County. In no event shall County action or inaction relieve the State of any of its obligations under this Agreement.

(E) If the State believes that a County is not meeting its obligations under this Agreement, it may seek relief following the same procedures as set out above in paragraphs XI(A), XI(B), and XI(C).

(F) Venue over any disputes concerning enforcement of this Agreement (1) between Plaintiffs and the State, (2) involving all the parties to this Agreement, or (3) between the State and more than one County shall be in a court of competent jurisdiction in Albany County. Venue over any disputes concerning enforcement of this Agreement between the State and a single County shall be in a court of competent jurisdiction in that County.

XII. ATTORNEYS' FEES AND COSTS

(A) The State agrees to make a payment to Plaintiffs' counsel, the New York Civil Liberties Union Foundation and Schulte Roth & Zabel LLP, in the aggregate amount of $5.5 million, as follows:

(1) The sum of $2.5 million (Two Million Five Hundred Thousand Dollars) for which an I.R.S. Form 1099 shall be issued to the New York Civil Liberties Foundation, and the sum of $3.0 million (Three Million Dollars) for which an I.R.S. Form 1099 shall be issued to Schulte Roth & Zabel LLP in full and complete satisfaction of any claims against the State and the Five Counties for attorneys' fees, costs, and expenditures incurred by Plaintiffs for any and all counsel who have at any time represented Plaintiffs in the Action through the Effective Date.

(2) The payment of $2.5 million referred to in this paragraph shall be made payable and delivered to "New York Civil Liberties Union Foundation," 125 Broad Street, 19th Floor, New York, New York 10004. The payment of $3.0 million referred to in this paragraph shall be made payable and delivered to "Schulte Roth & Zabel LLP," 919 Third Avenue, New York, New York 10022.

(B) Any taxes on payments and/or interest or penalties on taxes on the payments referred to in paragraph XII(A) of this Agreement shall be the sole responsibility of the New York Civil Liberties Union Foundation and Schulte Roth & Zabel LLP, respectively, and Plaintiffs' attorneys shall have no claim, right, or cause of action against the State of New York or any of its agencies, departments, or subdivisions on account of such taxes, interests, or penalties.

(C) Payment of the amounts recited in paragraph XII(A) above will be made (1) after the filing of a stipulation of discontinuance as set forth in paragraph XIV(A), upon complete discontinuance of this Action, or paragraph XIV(B), in the case of a partial restoration of this Action, and (2) subject to the approval of all appropriate New York State officials in accordance with Section 17 of the New York State Public Officers Law. Plaintiffs' counsel agree to execute and deliver promptly to counsel for the State all payment vouchers and other documents necessary to process such payments, including, without limitation, a statement of the total attorney hours expended on this matter and the value thereof and all expenditures. Counsel for the State shall deliver promptly to the Comptroller such documents and any other papers required by the Comptroller with respect to such payments. Pursuant to CPLR 5003a(c), payment shall be made within ninety (90) days of the Comptroller's determination that all papers required to effectuate the settlement have been received by him. In the event that payment in full is not made within said ninety-day period, interest shall accrue on the outstanding balance at the rate set forth in CPLR 5004, beginning on the ninety-first day after

the Comptroller's determination.

(D) Upon receipt of and in consideration of the payment of the sums set forth in paragraph XII(A), Plaintiffs shall (1) in the case of a complete discontinuance of this Action pursuant to paragraph XIV(A), waive, release, and forever discharge the State Defendants, including the State of New York, and the Five Counties and each of their respective current and former employees in their individual capacities, and their heirs, executors, administrators, and assigns from any and all claims for attorneys' fees, costs, and expenditures incurred in connection with this Action through the Effective Date; or (2) in the case of a partial discontinuance of this Action pursuant to paragraph XIV(B), waive, release, and forever discharge the State Defendants, including the State of New York, and the Five Counties and each of their respective current and former employees in their individual capacities, and their heirs, executors, administrators, and assigns from any and all claims for attorneys' fees, costs, and expenditures incurred in connection with this Action through the Effective Date, it being specifically understood that, upon such restoration, Plaintiffs shall also be free to seek reimbursement for their attorneys' fees, costs, and expenditures incurred after the Effective Date.

(E) Plaintiffs' counsel agree to maintain their billing records and documents evidencing payment of expenses relating to this Action for the term of this Agreement.

(F) In the event that this Agreement becomes null and void pursuant to paragraph X(B) or Section XVI, then (1) the State shall be under no obligation to make the payments referred to in paragraph XII(A); and (2) Plaintiffs shall be free to seek reimbursement of their full attorneys' fees, costs, and expenditures incurred in connection with this Action (including those incurred both before and after the date of this Agreement).

XIII. GENERAL PROVISIONS

(A) Supplementation of Funds. State funds received by a County pursuant to this settlement shall be used to supplement and not supplant any local funds that such County currently spends for the provision of counsel and expert, investigative, and other services pursuant to County Law Article 18-B. All such state funds received by a County shall be used to improve the quality of Mandated Representation services provided pursuant to County Law Article 18-B.

(B) Modification. This Agreement may not be modified without the written consent of the parties and the approval of the Court. However, the parties agree that non-material modifications of this Settlement Agreement can be made, with the written consent of the parties, without approval of the Court. For purposes of this paragraph, written consent from a County shall be deemed to exist with respect to a modification of any provision of this Agreement other than Section VII if such County (1) has been notified in writing that Plaintiffs and the State have agreed upon such modification; and (2) does not, within ten (10) business days of receipt of such notice, object in writing to such modification.

(C) Expiration of Agreement. This Agreement shall expire 7.5 years after the Effective Date.

(D) Entire Agreement. This Agreement contains all the terms and conditions agreed upon by the parties with regard to the settlement contemplated herein, and supersedes all prior agreements, representations, statements, negotiations, and undertakings (whether oral or written) with regard to settlement, provided, however, that nothing herein shall be deemed to abrogate or modify the separate settlement agreements entered into between Plaintiffs and Ontario County, dated June 20, 2014, and between Plaintiffs and Schuyler County, dated September 29, 2014.

(E) Interpretation. The parties acknowledge that each party has participated in the drafting and preparation of this Agreement; consequently, any ambiguity shall not be construed for or against any party.

(F) Time Periods. If any of the dates or periods of time described in this Agreement fall or end on a public holiday or on a weekend, the date or period of time shall be extended to the next business day. A "day" shall mean a calendar day unless otherwise specifically noted.

(G) Notice.

(1) All notices required under or contemplated by this Agreement shall be sent by U.S. mail and electronic mail as follows (or to such other address as the recipient named below shall specify by notice in writing hereunder):

If to the State Defendants:

Adrienne Kerwin Assistant Attorney General The Capitol Albany, New York 12224 Adrienne.Kerwin@ag.ny.gov	Seth H. Agata Acting Counsel to the Governor New York State Capitol Building Albany, New York 12224 Seth.Agata@exec.ny.gov

If to Plaintiffs:

Corey Stoughton New York Civil Liberties Union Foundation 125 Broad Street New York, New York 10004 cstoughton@nyclu.org	Kristie M. Blase Schulte Roth & Zabel LLP 919 Third Avenue New York, New York 10022 kristie.blase@srz.com

If to Onondaga County:

Gordon Cuffy
Onondaga County Attorney
Department of Law
John H. Mulroy Civic Center
421 Montgomery Street, 10th Floor
Syracuse, New York 13202
GordonCuffy@ongov.net

If to Ontario County:

Michael Reinhardt
Ontario County Courthouse
27 North Main Street
Canandaigua, New York 14424
Michael.Reinhardt@co.ontario.ny.us

If to Schuyler County:

Geoffrey Rossi
Schuyler County Attorney
105 9th Street
Unit 5
Watkins Glen, New York 14891
grossi@schuyler.co.ny

If to Suffolk County:

Dennis Brown
Suffolk County Attorney
H. Lee Dennison Building
100 Veterans Memorial Highway
P.O. Box 6100, 6th Floor
Hauppauge, New York 11788
dennis.brown@suffolkcountyny.gov

If to Washington County:

William A. Scott Fitzgerald Morris Baker Firth P.C. 16 Pearl Street Glens Falls, New York 12801 WAS@fmbf-law.com

If to ILS:

Joseph Wierschem Counsel Office of Indigent Legal Services Alfred E. Smith Building, 29th Floor 80 South Swan Street Albany, New York 12224 Joseph.Wierschem@ils.ny.gov

(2) Any Escalation Notice shall be sent as follows:

If to the State Defendants:

Meg Levine Deputy Attorney General Division of State Counsel Office of the Attorney General The Capitol Albany, New York 12224 Meg.Levine@ag.ny.gov	Seth H. Agata Acting Counsel to the Governor New York State Capitol Building Albany, New York 12224 Seth.Agata@exec.ny.gov

(3) Each party shall provide notice to the other parties of any change in the individuals or addresses listed above within thirty (30) days of such change, and the new information so provided will replace the notice listed herein for such party.

(H) No Admission. Nothing in this Agreement shall be construed as an admission of law or fact or acknowledgement of liability, wrongdoing, or violation of law by the State or any Ratifying County regarding any of the allegations contained in the Second Amended Complaint in this Action, or as an admission or

acknowledgment by the State or any other defendant concerning whether Plaintiffs are the prevailing party in the Action by virtue of this settlement.

(I) Precedential Value. This Agreement and any Order entered thereon shall have no precedential value or effect whatsoever, and shall not be admissible, in any other action or proceeding as evidence or for any other purpose, except in an action or proceeding to enforce this Agreement.

(J) No Waiver for Failure to Enforce. Failure by any party to enforce this entire Agreement or any provision thereof with respect to any deadline or other provision herein shall not be construed as a waiver of its right to enforce deadlines or provisions of this Agreement.

(K) Unforeseen Delay. If an unforeseen circumstance occurs that causes the State or ILS to fail to timely fulfill any requirement of this Agreement, the State shall notify the Plaintiff in writing within twenty (20) days after the State becomes aware of the unforeseen circumstance and its impact on the State's ability to perform and the measures taken to prevent or minimize the failure. The State shall take all reasonable measures to avoid or minimize any such failure. Nothing in this paragraph shall alter any of the State's obligations under this Agreement or Plaintiffs' remedies for a breach of this Agreement.

(L) No Third-Party Beneficiaries. No person or entity other than the parties hereto (a "third party") is intended to be a third-party beneficiary of the provisions of this Agreement for purposes of any civil, criminal, or administrative action, and accordingly, no such third party may assert any claim or right as a beneficiary or protected class under this Agreement. This Agreement is not intended to impair or expand the rights of any third party to seek relief against the State, any County, or their officials, employees, or agents for their conduct; accordingly, this Agreement does not alter legal standards governing any such claims, including those under New York law.

(M) Ineffectiveness Claims Unimpaired. Nothing in this Agreement is intended to, or shall be construed to, impair, curtail, or operate as a waiver of the rights of any current or former member of the Plaintiff Class with respect to such member's individual criminal case, including, without limitation, any claim based on ineffective assistance of counsel.

(N) Confidential Information Relating to Plaintiff Class Members. The parties acknowledge that privileged and confidential information of Plaintiff Class members, including documents and deposition testimony designated as confidential, information protected by the attorney-client privilege and/or work product doctrine, and documents revealing individuals' social security numbers, private telephone numbers, financial information, and other private and sensitive personal information, was disclosed and obtained during the pendency of this Action. None of the State Defendants or the Five Counties shall use or disclose to any person such documents or information except as required by law. If any of the State Defendants or the Five Counties receives a subpoena, investigative demand, formal or informal request, or other judicial, administrative, or legal process (a "Subpoena") requesting such confidential information, that party shall (1) give notice and provide a copy of the request to Plaintiffs as soon as practicable after receipt and in any case prior to any disclosure; (2) reasonably cooperate in any effort by Plaintiffs to move to quash, move for protective order, narrow the scope of, or otherwise obtain relief with respect to the Subpoena; and (3) refrain from disclosing any privileged or confidential information before Plaintiffs' efforts to obtain relief have been exhausted.

(O) Binding Effect on Successors. The terms and conditions of this Agreement, and the commitments and obligations of the parties, shall inure to the benefit of, and be binding upon, the successors and assigns of each party.

(P) Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of New York, without regard to the conflicts of law provisions thereof.

(Q) Signatories. The undersigned representative of each party to this Agreement certifies that each is authorized to enter into the terms and conditions of this Agreement and to execute and bind legally such party to this document.

(R) Counterparts. This Stipulation may be executed in counterparts, and each counterpart, when executed, shall have the full efficacy of a signed original. Photocopies and PDFs of such signed counterparts may be used in lieu of the originals for any purpose.

(S) Covenant Not to Sue. Plaintiffs agree not to sue the State Defendants during the duration of this Agreement on any cause of action based upon any statutory or constitutional claim set forth in the Second Amended Complaint, except that Plaintiffs retain their rights to (1) restore this Action pursuant to paragraph X(C)(1); (2) commence a new action pursuant to paragraph X(C)(2); and (3) enforce the terms of this Agreement.

(T) Authority of ILS. The parties acknowledge that the New York Office of Indigent Legal Services and the Board of Indigent Legal Services have the authority to monitor and study indigent legal services in the state, award grant money to counties to support their indigent representation capability, and establish criteria for the distribution of such funds.

(U) ILS as Signatory to this Agreement. ILS is a signatory to this Agreement for the limited purpose of acknowledging and accepting its responsibilities under this Agreement.

XIV. DISCONTINUANCE WITH PREJUDICE

(A) Without delay after the State provides the notice specified by paragraph X(A)(2), a Stipulation and Order of Discontinuance substantially in the form attached hereto as Exhibit B, shall be executed by counsel for Plaintiffs, the State Defendants, and the relevant Ratifying Counties, and filed with the Court. Nothing in the Stipulation and Order of Discontinuance so filed is intended to bar or shall have the effect of barring, including by virtue of the doctrine of res judicata or other principles of preclusion, a new action, as permitted by paragraph X(C)(2), or any claims within that action. Nor shall anything in the Stipulation and Order of Discontinuance prevent any party from enforcing this Agreement.

(B) In the event that the Action is partially restored pursuant to paragraph X(C)(1), without delay after Plaintiffs provide notice as required by paragraph X(C)(1), the relevant parties shall confer and draft a stipulation of discontinuance that discontinues with prejudice all claims that are not restored pursuant to paragraph X(C)(1). Such stipulation shall be executed by counsel for Plaintiffs, the State Defendants, and the relevant Ratifying Counties, as appropriate, and filed with the Court. Nothing in such stipulation is intended to bar or shall have the effect of barring, including by virtue of the doctrine of res judicata or other principles of preclusion, a new action, as permitted by paragraph X(C)(2), or any claims within that action. Nor shall anything in such stipulation prevent any party from enforcing this Agreement.

XV. COUNTY APPROVAL

This Agreement shall not be binding on any County unless and until the required legislative approval in that County has been obtained and the Agreement has been signed on behalf of the County (in which case, a County may be referred to as a "Ratifying County"). In the event that any County's legislature does not approve this Agreement (a "Non-Ratifying County") and, as a result, one or more of the Counties does not become a party to this Agreement, the Agreement

shall nonetheless remain in effect and binding upon all the parties that have signed it, each of which shall perform all obligations hereunder owed to the other parties that have signed the Agreement. In the event a Non-Ratifying County fails to become a party to this Agreement, (1) this Action shall not be discontinued as against any Non-Ratifying County and Plaintiffs shall be free to pursue any claims they may have against such Non-Ratifying County and seek any and all relief to which Plaintiffs may be entitled, except insofar as such claims have been or may be dismissed pursuant to Plaintiffs' separate settlement agreements with Ontario County and Schuyler County; (2) any stipulation of discontinuance filed hereunder (including the Stipulation and Order of Discontinuance attached as Exhibit B) shall be modified to exclude any Non-Ratifying County and make clear that Plaintiffs' claims against such Non-Ratifying County are not discontinued; (3) each Non-Ratifying County shall be considered a third party pursuant to paragraph XIII(L) for purposes of this Agreement; and (4) the releases in paragraph XII(D) shall be ineffective as to such Non-Ratifying County. For the avoidance of doubt, as between Plaintiffs and the State: (a) the benefits of this Agreement, including, without limitation, the releases referred to in Section XII and the covenant not to sue referred to in paragraph XIII(S), shall accrue to the State and Plaintiffs, and (b) the State's and ILS's obligations relating to Sections III, IV, V, and VI shall remain in effect as to all Five Counties independent of County ratification of this Agreement.

XVI. COURT REVIEW AND APPROVAL

This Settlement Agreement is subject to approval by the Court pursuant to CPLR 908. In the event that the Court does not approve the Settlement Agreement, then the parties shall meet and confer for a period of 30 days to determine whether to enter into a modified agreement prior to the resumption of litigation. If the parties have not entered into a modified agreement within such 30-day period, then this Agreement shall become null and void, and the relevant parties shall request the case be restored to the trial calendar and shall be restored to the same positions in the litigation that they had immediately prior to October 21, 2014.

Attorneys for Plaintiffs

By: _____
COREY STOUGHTON
CHRISTOPHER DUNN
MARIKO HIROSE
ERIN HARRIST
PHILIP DESGRANGES
DANA WOLFE

NEW YORK CIVIL LIBERTIES UNION FOUNDATION

Dated: 10/21/2014

Attorneys for Plaintiffs

SCHULTE ROTH & ZABEL LLP

By: _____
GARY STEIN
DANIEL GREENBERG
KRISTIE BLASE
MATTHEW SCHMIDT
DANIEL COHEN
AMANDA JAWAD
NOAH GILLESPIE
PETER SHADZIK

Dated: 10/21/2014

Attorneys for Defendant New York State and Governor Andrew M. Cuomo

ERIC T. SCHNEIDERMAN,
Attorney General for the State of New York

By: _____
ADRIENNE J. KERWIN, *Assistant Attorney General*

Dated: 10/21/2014

For Defendant Governor Andrew M. Cuomo

ANDREW M. CUOMO,
Governor of the State of New York

By: _____
SETH H. AGATA, *Acting Counsel to the Governor*

Dated: 10/21/2014

New York State Office of Indigent Legal Services

WILLIAM LEAHY,
Director

_____

Dated: 10/21/2014

DOC ID - 22028239.1

Attorneys for Defendant Onondaga County

GORDON J. CUFFY, County Attorney

_____

Dated: _____

Attorneys for Defendant Suffolk County

DENNIS M. BROWN, County Attorney

_____

Dated: _____

For Defendant Washington County

JAMES T. LINDSAY,
Chairman of the Board of Supervisors

_____

Dated: _____

Attorneys for Ontario County

JOHN PARK, County Attorney

By: _____
MICHAEL REINHARDT

Dated: _____

Attorneys for Schuyler County

GEOFFREY ROSSI, County Attorney

_____

Dated: _____

So Ordered.

Dated: _____

_____
HON. GERALD W. CONNOLLY

DOC ID - 22028239.1

AUTHORIZATION OF THE INDIGENT LEGAL SERVICES BOARD AND THE NEW YORK STATE OFFICE OF INDIGENT LEGAL SERVICES CONCERNING SETTLEMENT OF THE *HURRELL-HARRING V. STATE OF NEW YORK* LAWSUIT

Pursuant to New York State Executive Law §832, the Office of Indigent Legal Services ("ILS") has the authority to act in pursuit of its statutory responsibility to make efforts to improve the quality of mandated legal representation in the state of New York. See §832 (1) and (3) (a) through (k). ILS has the further responsibility under §832 (3) (l) "to make recommendations for consideration by the indigent legal services board." ("the Board"). The Board has the authority "to accept, reject or modify recommendations made by the office[,]" §833 (7) (c); and once it has done so, the Office has a duty under §832 (3) (m) to execute its decisions. The Board and ILS have reviewed the agreement settling the action of Hurrell-Harring, et al. v. State of New York, et al., Index No. 8866-07 ("the Agreement"), and the State's obligations contained therein that are expressly intended for implementation by ILS. The Board and ILS acknowledge that those obligations constitute measures that, once implemented, will improve the quality of indigent legal services. Consequently, the Board accepts the recommendation of ILS that ILS implement the obligations under the Agreement and hereby authorizes and directs ILS to implement those obligations in accordance with the terms of the Agreement. The Board represents and warrants that it is authorized to take this action. Moreover, ILS represents and warrants that it has reviewed the obligations contained in the Agreement, and agrees to implement the obligations identified in the Agreement. The Board hereby authorizes ILS to sign the Agreement.

Dated: October 21, 2014

INDIGENT LEGAL SERVICES BOARD

By: John R. Dunne

JOHN DUNNE, Board Member

Dated: October 21, 2014

OFFICE OF INDIGENT LEGAL SERVICES

By: William J. Leahy

WILLIAM LEAHY, Director

DOC ID - 22026855.1

OREGON RULES OF PROFESSIONAL CONDUCT

(as amended effective February 19, 2015)

CONTENTS

RULE 1.0 TERMINOLOGY

(a) "Belief" or "believes" denotes that the person involved actually supposes the fact in question to be true. A person's belief may be inferred from circumstances.

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

(c) "Electronic communication" includes but is not limited to messages sent to newsgroups, listservs and bulletin boards; messages sent via electronic mail; and real time interactive communications such as conversations in internet chat groups and conference areas and video conferencing.

(d) "Firm" or "law firm" denotes a lawyer or lawyers, including "Of Counsel" lawyers, in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a private or public legal aid or public defender organization, a legal services organization or the legal department of a corporation or other public or private organization. Any other lawyer, including an office sharer or a lawyer working for or with a firm on a limited basis, is not a member of a firm absent indicia sufficient to establish a de facto law firm among the lawyers involved.

(e) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

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

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

(h) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question, except that for purposes of determining a lawyer's knowledge of the existence of a conflict of interest, all facts which the lawyer knew, or by the exercise of reasonable care should have known, will be attributed to the lawyer. A person's knowledge may be inferred from circumstances.

(i) "Matter" includes any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and any other matter covered by the conflict of interest rules of a government agency.

(j) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(k)"Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(l) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(m) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(n) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(o) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(p) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(q) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostatting, photography, audio or videorecording and electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Adopted 01/01/05

Amended 01/01/14: "Electronic communications" substituted for "email."

Comparison to Oregon Code

This rule replaces DR 10-101 and is significantly more expansive. Some DR 10-101 definitions were retained, but others were not incorporated into this rule.

The definition of "firm member" was eliminated as not necessary, but a reference to "of counsel" was retained in the definition of "firm." The definition of "firm" also distinguishes office sharers and lawyers working in a firm on a limited basis.

The concept of "full disclosure" is replaced by "informed consent," which, in some cases, must be "confirmed in writing."

The definition of "professional legal corporation" was deleted, as the term does not appear in any of the rules and does not require explanation.

The definitions of "person" and "state" were also eliminated as being unnecessary.

Comparison to ABA Model Rule

The Model Rules do not define "information relating to the representation of a client;" it was added here to make it clear that ORPC 1.6 continues to protection of the same information protected by DR 4-101 and the term is defined with the DR definitions of confidences and secrets. The MR definition of "firm" was revised to include a reference to "of counsel" lawyers. The MR definition of "knowingly, known or knows" was revised to include language from DR 5-105(B) regarding knowledge of the existence of a conflict of interest. The definition of "matter" was moved to this rule from MR 1.11 on the belief that it has a broader application than to only former government lawyer conflicts. The MR definition of "writing" has been expanded to include "facsimile" communications.

CLIENT-LAWYER RELATIONSHIP

RULE 1.1 COMPETENCE

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

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Reasonably"

Comparison to Oregon Code

This rule is identical to DR 6-101(A).

Comparison to ABA Model Rule

This is the ABA Model Rule.

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

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

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

(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows 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.

(d) Notwithstanding paragraph (c), a lawyer may counsel and assist a client regarding Oregon's marijuana-related laws. In the event Oregon law conflicts with federal or tribal law, the lawyer shall also advise the client regarding related federal and tribal law and policy.

Adopted 01/01/05

Amended 02/19/15: Paragraph (d) added

Defined Terms (see Rule 1.0):

"*Fraudulent*"
"*Informed consent*"
"*Knows*"
"*Matter*"
"*Reasonable*"

Comparison to Oregon Code

This rule has no real counterpart in the Oregon Code. Subsection (a) is similar to DR 7-101(A) and (B), but expresses more clearly that lawyers must defer to the client's decisions about the objectives of the representation and whether to settle a matter. Subsection (b) is a clarification of the lawyer's right to limit the scope of a representation. Subsection (c) is similar to DR 7-102(A)(7), but recognizes that counseling a client about the meaning of a law or the consequences of proposed illegal or fraudulent conduct is not the same as assisting the client in such conduct. Paragraph (d) had no counterpart in the Oregon Code.

Comparison to ABA Model Rule

ABA Model Rule 1.2(b) states that a lawyer's representation of a client "does not constitute an endorsement of the client's political, economic, social or moral views or activities." It was omitted because it is not a rule of discipline, but rather a statement intended to encourage lawyers to represent unpopular clients. Also, MR 1.2(c) refers to "criminal" rather than "illegal" conduct.

RULE 1.3 DILIGENCE

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

Adopted 01/01/05

Defined Terms (see Rule 1.0)

"*Matter*"

Comparison to Oregon Code

This rule is identical to DR 6-101(B).

Comparison to ABA Model Rule

The ABA Mode Rule requires a lawyer to "act with reasonable diligence and promptness in representing a client."

RULE 1.4 COMMUNICATION

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

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
Adopted 01/01/05

Defined Terms (see Rule 1.0):

"*Knows*"
"*Reasonable*"
"*Reasonably*"

Comparison to Oregon Code

This rule has no counterpart in the Oregon Code, although the duty to communicate with a client may be inferred from other rules and from the law of agency.

Comparison to ABA Model Rule

This is the former ABA Model Rule. ABA MR 1.4 as amended in 2002 incorporates provisions previously found in MR 1.2; it also specifically identifies five aspects of the duty to communicate.

RULE 1.5 FEES

(a) A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee or a clearly excessive amount for expenses.

(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.

(c) A lawyer shall not enter into an arrangement for, charge or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of spousal or child support or a property settlement;

(2) a contingent fee for representing a defendant in a criminal case; or

(3) a fee denominated as "earned on receipt," "nonrefundable" or in similar terms unless it is pursuant to a written agreement signed by the client which explains that:

(i) the funds will not be deposited into the lawyer trust account, and

(ii) the client may discharge the lawyer at any time and in that event may be entitled to a refund of all or part of the fee if the services for which the fee was paid are not completed.

(d) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the client gives informed consent to the fact that there will be a division of fees, and

(2) the total fee of the lawyers for all legal services they rendered the client is not clearly excessive.

(e) Paragraph (d) does not prohibit payments to a former firm member pursuant to a separation or retirement agreement, or payments to a selling lawyer for the sale of a law practice pursuant to Rule 1.17.

Adopted 01/01/05

Amended 12/01/10: Paragraph(c)(3) added.

Defined Terms (see Rule 1.0):

"Firm"
"Informed Consent"
"Matter"
"Reasonable"

Comparison to Oregon Code

Paragraphs (a), (b) and (c)(1) and (2) are taken directly from DR 2-106, except that paragraph (a) is amended to include the Model Rule prohibition against charging a "clearly excessive amount for expenses." Paragraph (c)(3) had no counterpart in the Code. Paragraph (d) retains the substantive obligations of DR 2-107(A) but is rewritten to accommodate the new concepts of "informed consent" and "clearly excessive." Paragraph (e) is essentially identical to DR 2-107(B).

Comparison to ABA Model Rule

ABA Model Rule 1.5(b) requires that the scope of the representation and the basis or rate of the fees or expenses for which the client will be responsible be communicated to the client before or within a reasonable time after the representation commences, "preferably in writing." Model Rule 1.5(c) sets forth specific requirements for a contingent fee agreement, including an explanation of how the fee will be determined and the expenses for which the client will be responsible. It also requires a written statement showing distribution of all funds recovered. Paragraph (c)(3) has no counterpart in the Model Rule. Model Rule 1.5(e) permits a division of fees between lawyers only if it is proportional to the services performed by each lawyer or if the lawyers assume joint responsibility for the representation.

RULE 1.6 CONFIDENTIALITY OF INFORMATION

(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).

(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) in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm. In those circumstances, a lawyer may disclose with respect to each affected client the client's identity. the identities of any adverse parties, the nature and extent of the legal services involved, and fee and payment information, but only if the information revealed would not compromise the attorney-client privilege or otherwise prejudice any of the clients. The lawyer or lawyers receiving the information shall

have the same responsibilities as the disclosing lawyer to preserve the information regardless of the outcome of the contemplated transaction.

(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 8.7or 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.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Adopted 01/01/05

Amended 12/01/06: Paragraph (b)(6) amended to substitute "information relating to the representation of a client" for "confidences and secrets."

Amended 01/20/09: Paragraph (b)(7) added.

Amended 01/01/14: Paragraph (6) modified to allow certain disclosures to avoid conflicts arising from a change of employment or ownership of a firm. Paragraph (c) added.

Defined Terms (see Rule 1.0):

"Believes"
"Firm"
"Information relating to the representation of a client"
"Informed Consent"
"Reasonable"
"Reasonably"
"Substantial"

Comparison to Oregon Code

This rule replaces DR 4-101(A) through (C). The most significant difference is the substitution of "information relating to the representation of a client" for "confidences and secrets." Paragraph (a) includes the exceptions for client consent found in DR 4-101(C)(1) and allows disclosures "impliedly authorized" to carry out the representation, which is similar to the exception in DR 4-101(C)(2).

The exceptions to the duty of confidentiality set forth in paragraph (b) incorporate those found in DR 4-101(C)(2) through (C)(5). There are also two new exceptions not found in the Oregon Code: disclosures to prevent "reasonably certain death or substantial bodily harm" whether or not the action is a crime, and disclosures to obtain legal advice about compliance with the Rules of Professional Conduct.

Paragraph (b)(6) in the Oregon Code pertained only to the sale of a law practice.

Paragraph (b)(7) had no counterpart in the Oregon Code.

Comparison to ABA Model Rule

ABA Model Rule 1.6(b) allows disclosure "to prevent reasonably certain death or substantial bodily harm" regardless of whether a crime is involved. It also allows disclosure to prevent the client from committing a crime or fraud that will result in significant financial injury or to rectify such conduct in which the lawyer's services have been used. There is no counterpart in the Model Rule for information to monitoring responsibilities.

RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

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

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

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

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

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

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

(2) the representation is not prohibited by law;

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

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

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Believes"
"Confirmed in writing"
"Informed consent"
"Knows"
"Matter"
"Reasonably believes"

Comparison to Oregon Code

The current conflicts of interest prohibited in paragraph (a) are the self-interest conflicts currently prohibited by DR 5-101(A) and current client conflicts prohibited by DR 5-105(E). Paragraph (a)(2) refers only to a "personal interest" of a lawyer, rather than the specific "financial, business, property or personal interests" enumerated in DR 5-101(A)(1). Paragraph (a)(3) incorporates the "family conflicts" from DR 5-101(A)(2).

Paragraph (b) parallels DR 5-101(A) and DR 5-105(F) in permitting a representation otherwise prohibited if the affected clients give informed consent, which must be confirmed in writing. Paragraph (b)(3) incorporates the "actual conflict" definition of DR 5-105(A)(1) to make it clear that that a lawyer cannot provide competent and diligent representation to clients in that situation.

Paragraph (b) also allows consent to simultaneous representation "not prohibited by law," which has no counterpart in the Oregon Code. According to the official Comment to MR 1.7 this would apply, for instance, in jurisdictions that prohibit a lawyer from representing more than one defendant in a capital case, to certain representations by former government lawyers, or when local law prohibits a government client from consenting to a conflict of interest.

Comparison to ABA Model Rule

This is essentially identical to the ABA Model Rule, except for the addition of paragraphs (a)(3) and (b)(3) discussed above; also, the Model Rule uses the term "concurrent" rather than "current." The Model Rule allows the clients to consent to a concurrent conflict if "the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal."

RULE 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, confirmed in writing, except as permitted or required under these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift, unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, domestic partner, child, grandchild, parent, grandparent, or other relative or individual with whom the lawyer or the client maintains a close familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information related to the representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregate agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement;

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith;

(3) enter into any agreement with a client regarding arbitration of malpractice claims without informed consent, in a writing signed by the client; or

(4) enter into an agreement with a client or former client limiting or purporting to limit the right of the client or former client to file or to pursue any complaint before the Oregon State Bar.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a current client of the lawyer unless a consensual sexual relationship existed between them before the client-lawyer relationship commenced; or have sexual relations with a representative of a current client of the lawyer if the sexual relations would, or would likely, damage or prejudice the client in the representation. For purposes of this rule:

(1) "sexual relations" means sexual intercourse or any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party; and

(2) "lawyer" means any lawyer who assists in the representation of the client, but does not include other firm members who provide no such assistance.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

Adopted 01/01/05

Amended 01/01/13: Paragraph (e) amended to mirror ABA Model Rule 1.8(e).

Defined Terms (see Rule 1.0):

"Confirmed in writing"
"Information relating to the representation of a client"
"Informed consent"
"Firm"
"Knowingly"
"Matter"
"Reasonable"
"Reasonably"
"Substantial"
"Writing"

Comparison to Oregon Code

This rule has no exact counterpart in the Oregon Code, although it incorporates prohibitions found in several separate disciplinary rules.

Paragraph (a) replaces DR 5-104(A) and incorporates the Model Rule prohibition against business transactions with clients even with consent except where the transaction is "fair and reasonable" to the client. It also includes an express requirement to disclose the lawyer's role and whether the lawyer is representing the client in the transaction.

Paragraph (b) is virtually identical to DR 4-101(B).

Paragraph (c) is similar to DR 5-101(B), but broader because it prohibits soliciting a gift as well as preparing the instrument. It also has a more inclusive list of "related persons."

Paragraph (d) is identical to DR 5-104(B).

Paragraph (e) incorporates ABA Model Rule 1.8(e).

Paragraph (f) replaces DR 5-108(A) and (B) and is essentially the same as it relates to accepting payment from someone other than the client. This rule is somewhat narrower than DR 5-108(B), which prohibits allowing influence from someone who "recommends, employs or pays" the lawyer.

Paragraph (g) is virtually identical to DR 5-107(A).

Paragraph (h)(1) and (2) are similar to DR 6-102(A), but do not include the "unless permitted by law" language. Paragraph (h)(3) retains DR 6-102(B), but substitutes "informed consent, in a writing signed by the client" for "full disclosure." Paragraph (h)(4) is new and was taken from Illinois Rule of Professional Conduct 1.8(h).

Paragraph (i) is essentially the same as DR 5-103(A).

Paragraph (j) retains DR 5-110, reformatted to conform to the structure of the rule.

Paragraph (k) applies the same vicarious disqualification to these personal conflicts as provided in DR 5-105(G).

Comparison to ABA Model Rule

This rule is identical to ABA Model Rule 1.8 with the following exceptions. MR 1.8 (b) does not require that the client's informed consent be confirmed in writing as required in DR 4-101(B). MR 1.8 (h) does not prohibit agreements to arbitrate malpractice claims. MR 1.8 (j) does not address sexual relations with representatives of corporate clients and does not contain definitions of terms.

RULE 1.9 DUTIES TO FORMER CLIENTS

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

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

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

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

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

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

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

(d) For purposes of this rule, matters are "substantially related" if (1) the lawyer's representation of the current client will injure or damage the former client in connection with the same transaction or legal dispute in which the lawyer previously represented the former client; or (2) there is a substantial risk that confidential factual information as would normally have been obtained in the prior representation of the former client would materially advance the current client's position in the subsequent matter.

Adopted 01/01/05

Amended 12/01/06: Paragraph (d) added.

Defined Terms (see Rule 1.0):

"Confirmed in writing"
"Informed consent"
"Firm"
"Knowingly"
"Known"
"Matter"
"Reasonable"
"Substantial"

Comparison to Oregon Code

This rule replaces DR 5-105(C), (D) and (H). Like Rule 1.7, this rule is a significant departure from the language and structure of the Oregon Code provisions on conflicts. Paragraph (a) replaces the sometimes confusing reference to "actual or likely conflict" between current and former client with the simpler "interests [that are] materially adverse." The prohibition applies to matters that are the same or "substantially related," which is virtually identical to the Oregon Code standard of "significantly related."

Paragraph (b) replaces the limitation of DR 5-105(H), but is an arguably clearer expression of the prohibition. The new language makes it clear that a lawyer who moves to a new firm is prohibited from being adverse to a client of the lawyer's former firm only if the lawyer has acquired confidential information material to the matter while at the former firm.

Paragraph (c) makes clear that the duty not to use confidential information to the client's disadvantage continues after the conclusion of the representation, except where the information "has become generally known."

Paragraph (d) defines "substantially related." The definition is taken in part from former DR 5-105(D) and in part from Comment [3] to ABA Model Rule 1.9.

Comparison to ABA Model Rule

ABA Model Rule 1.9(a) and (b) require consent only of the former client. The Model Rule also has no definition

of "substantially related;" this definition was derived in part from the Comment to MR 1.9.

RULE 1.10 IMPUTATION OF CONFLICTS OF INTEREST; SCREENING

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer or on Rule 1.7(a)(3) and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9, unless the personally disqualified lawyer is promptly screened from any form of participation or representation in the matter and written notice of the screening procedures employed is promptly given to any affected former client.

(d) A disqualification prescribed by this rule may be waived by the affected clients under the conditions stated in Rule 1.7.

(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

Adopted 01/01/05

Amended 12/01/06: Paragraph (a) amended to include reference to Rule 1.7(a)(3).

Amended 01/01/14: Paragraph (c) revised to eliminate detailed screening requirements and to require notice to the affected client rather than the lawyer's former firm.

Defined Terms (see Rule 1.0):

"Firm"
"Know"
"Knowingly"
"Law firm"
"Matter"
"Screened"
"Substantial"

Comparison to Oregon Code

Paragraph (a) is similar to the vicarious disqualification provisions of DR 5-105(G), except that it does not apply when the disqualification is based only on a "personal interest" of the disqualified lawyer that will not limit the ability of the other lawyers in the firm to represent the client.

Paragraph (b) is substantially the same as DR 5-105(J).

Paragraph (d) is similar to DR 5-105 in allowing clients to consent to what would otherwise be imputed conflicts.

Paragraph (e) has no counterpart in the Oregon Code because the Oregon Code does not have a special rule addressing government lawyer conflicts.

Comparison to ABA Model Rule

Paragraph (a) is similar to the ABA Model Rule, but includes reference to "spouse/family" conflicts which are not separately addressed in the Model Rule. Paragraph (b) is identical to the ABA Model Rule.

The title was changed to include "Screening."

RULE 1.11 SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENTGOVERNMENT OFFICERS AND EMPLOYEES

(a) Except as Rule 1.12 or law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9 (c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter substantially in accordance with the procedures set forth in Rule 1.10(c); and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter substantially in accordance with the procedures set forth in Rule 1.10(c).

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) use the lawyer's public position to obtain, or attempt to obtain, special advantage in legislative matters for the lawyer or for a client.

(ii) use the lawyer's public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client.

(iii) accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official.

(iv) either while in office or after leaving office use information the lawyer knows is confidential government information obtained while a public official to represent a private client.

(v) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the lawyer's former client and the appropriate government agency give informed consent, confirmed in writing; or

(vi) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk or staff lawyer to or otherwise assisting in the official duties of a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) Notwithstanding any Rule of Professional Conduct, and consistent with the "debate" clause, Article IV, section 9, of the Oregon Constitution, or the "speech or debate" clause, Article I, section 6, of the United States Constitution, a lawyer-legislator shall not be subject to discipline for words uttered in debate in either house of the Oregon Legislative Assembly or for any speech or debate in either house of the United States Congress.

(f) A member of a lawyer-legislator's firm shall not be subject to discipline for representing a client in any claim against the State of Oregon provided:

(1) the lawyer-legislator is screened from participation or representation in the matter in accordance with the procedure set forth in Rule 1.10(c) (the required affidavits shall be served on the Attorney General); and

(2) the lawyer-legislator shall not directly or indirectly receive a fee for such representation.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Confirmed in writing"
"Informed consent"
"Firm"
"Knowingly"
"Knows"
"Matter"
"Screened"
"Substantial"
"Tribunal"
"Written"

Comparison to Oregon Code

This rule has no exact counterpart in the Oregon Code, under which the responsibilities of government lawyers are addressed in DR 5-109 and DR 8-101, as well as in the general conflict limitations of DR 5-105. This rule puts all the requirements for government lawyers in one place.

Paragraph (a) is essentially the same as DR 5-109(B).

Paragraph (b) imputes a former government lawyer's unconsented-to conflicts to the new firm unless the former government lawyer is screened from participation in the matter, as would be allowed under DR 5-105(I).

Paragraph (c) incorporates the prohibitions in DR 8-101(A)(1), (A)(4) and (B). It also allows screening of the disqualified lawyer to avoid disqualification of the entire firm.

Paragraph (d) applies concurrent and former client conflicts to lawyers currently serving as a public officer or employee; it also incorporates in (d)(2) (i) –(iv) the limitations in DR 8-101(A)(1)-(4), with the addition in (d)(2)(iv) of language from MR 1.11 that a lawyer is prohibited from using only that government information that the lawyer knows is confidential. Paragraph (d)(2)(v) is the converse of DR 5-109(B), and has no counterpart in the Oregon Code other than the general former client conflict provision of DR 5-105. Paragraph (d)(2)(vi) has no counterpart in the Oregon Code; it is an absolute bar to negotiating for private employment while a serving in a non-judicial government position for anyone other than a law clerk or staff lawyer assisting in the official duties of a judicial officer.

Paragraph (e) is taken from DR 8-101(C) to retain a relatively recent addition to the Oregon Code.

Paragraph (f) is taken from DR 8-101(D), also to retain a relatively recent addition to the Oregon Code.

Comparison to ABA Model Rule

Paragraph (a) is identical to the ABA Model Rule, with the addition of a cross-reference to Rule 1.12, to clarify the scope of the rule.

Paragraphs (b) and (c) are identical to the Model Rule, except that the limitation on apportionment of fees does not apply when a former government lawyer is disqualified and screened from participation in a matter. MR 1.10(c) does not prescribe the screening methods; MR 1.0 defines screening as "timely…procedures that are reasonably adequate."

Paragraphs (d)(2)(i)-(iv) are not found in the Model Rules; as discussed above, they are taken from DR 8-101(A). Paragraph (d)(2)(v) is modified to require consent of the lawyer's former client as well as the appropriate government agency, to continue the Oregon Code requirement of current and former client consent in such situations. Paragraph (d)(2)(vi) deviates from the Model Rule to clarify that the exception applies to staff lawyers who do not perform traditional "law clerk" functions.

Paragraph (e) has no counterpart in the Model Rules.

Paragraph (f) also has no counterpart in the Model Rules.

RULE 1.12 FORMER JUDGE, ARBITRATOR, MEDIATOR OR OTHER THIRD-PARTY NEUTRAL

(a) Except as stated in paragraph (d) and Rule 2.4(b), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk or staff lawyer to or otherwise assisting in the official duties of a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter substantially in accordance with the procedures set forth in Rule 1.10(c); and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

Adopted 01/01/05

Amended 01/01/14: References in paragraph (a) reversed.

Defined Terms (see Rule 1.0):

"*Confirmed in writing*"
"*Informed consent*"
"*Firm*"
"*Knowingly*"
"*Matter*"
"*Screened*"
"*Substantial*"
"*Tribunal*"
"*Written*"

Comparison to Oregon Code

Paragraph (a) is essentially the same as DR 5-109(A), with an exception created for lawyers serving as mediators under Rule 2.4(b).

Paragraph (b) has no equivalent rule in the Oregon Code; like Rule 1.11(d)(2)(vi) it address the conflict that arises when a person serving as, or as a clerk or staff lawyer to, a judge or other third party neutral, negotiates for employment with a party or a party's lawyer. This

situation is covered under DR 5-101(A), but its application may not be as clear.

Paragraph (c) applies the vicarious disqualification that would be imposed under DR 5-105(G) to a DR 5-109 conflict; the screening provision is broader than DR 5-105(I), which is limited to lawyers moving between firms.

Paragraph (d) has no counterpart in the Oregon Code.

Comparison to ABA Model Rule

This is the ABA Model Rule, except that it requires screening substantially in accordance with the specific procedures in Rule 1.10(c). It deviates slightly to clarify that (b) applies to staff lawyers who do not perform traditional "law clerk" functions.

RULE 1.13 ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, referral to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent may only be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Adopted 01/01/05

Amended 12/01/06: Paragraph (b) amended to conform to ABA Model Rule 1.13(b).

Defined Terms (see Rule 1.0):

"Believes"
"Information relating to the representation"
"Knows"
"Matter"
"Reasonable"
"Reasonably"
"Reasonably believes"
"Reasonably should know"
"Substantial"

Comparison to Oregon Code

This rule has no counterpart in the Oregon Code.

Comparison to ABA Model Rule

This is the ABA Model Rule, as amended in August 2003, except that in paragraph (g), the words "may only" replace "shall" to make it clear that the rule does not require the organization to consent.

RULE 1.14 CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Believes"
"Information relating to the representation of a client"
"Reasonably"
"Reasonably believes"
"Substantial"

Comparison to Oregon Code

Paragraph (b) is similar to DR 7-101(C), but offers more guidance as to the circumstances when a lawyer can take protective action in regard to a client. Paragraph (a) and (c) have no counterparts in the Oregon Code, but provide helpful guidance for lawyers representing clients with diminished capacity.

Comparison to ABA Model Rule

This is the ABA Model Rule.

RULE 1.15-1 SAFEKEEPING PROPERTY

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession separate from the lawyer's own property. Funds, including advances for costs and expenses and escrow and other funds held for another, shall be kept in a separate "Lawyer Trust Account" maintained in the jurisdiction where the lawyer's office is situated. Each lawyer trust account shall be an interest bearing account in a financial institution selected by the lawyer or law firm in the exercise of reasonable care. Lawyer trust accounts shall conform to the rules in the jurisdictions in which the accounts are maintained. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) A lawyer may deposit the lawyer's own funds in a lawyer trust account for the sole purposes of paying bank service charges or meeting minimum balance requirements on that account, but only in amounts necessary for those purposes.

(c) A lawyer shall deposit into a lawyer trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred, unless the fee is denominated as "earned on receipt," "nonrefundable" or similar terms and complies with Rule 1.5(c)(3).

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

Adopted 01/01/05

Amended 11/30/05: Paragraph (a) amended to eliminate permission to have trust account "elsewhere with the consent of the client" and to require accounts to conform to jurisdiction in which located. Paragraph (b) amended to allow deposit of lawyer funds to meet minimum balance requirements.

Amended 12/01/10: Paragraph (c) amended to create an exception for fees "earned on receipt" within the meaning of Rule 1.5(c)(3).

Defined Terms (see Rule 1.0):

"Law firm"
"Reasonable"

Comparison to Oregon Code

Paragraphs (a)-(e) contain all of the elements of DR 9-101(A)-(C) and (D)(1), albeit in slightly different order. The rule is broader than DR 9-101 in that it also applies to the property of prospective clients and third persons received by a lawyer. Paragraph (c) makes it clear that fees and costs paid in advance must be held in trust until earned unless the fee is denominated "earned on receipt" and complies with the requirements of Rule 1.5(c)(3).

Comparison to ABA Model Rule

Paragraph (a) has been modified slightly from the Model Rule, which applies only to property held "in connection with a representation," while Oregon's rule continues to apply to all property, regardless of the capacity in which it is held by the lawyer. The Model Rule allows trust accounts to be maintained "elsewhere with the consent of the client or third person." There is no requirement in the Model Rule that the account to be labeled a "Lawyer Trust Account" or that it be selected by the lawyer "in the exercise of reasonable care." The Model Rule also makes no provision for "earned on receipt fees."

RULE 1.15-2 IOLTA ACCOUNTS AND TRUST ACCOUNT OVERDRAFT NOTIFICATION

(a) A lawyer trust account for client funds that cannot earn interest in excess of the costs of generating such interest ("net interest") shall be referred to as an IOLTA (Interest on Lawyer Trust Accounts) account. IOLTA accounts shall be operated in accordance with this rule and with operating regulations and procedures as may be established by the Oregon State Bar with the approval of the Oregon Supreme Court.

(b) All client funds shall be deposited in the lawyer's or law firm's IOLTA account unless a particular client's funds can earn net interest. All interest earned by funds held in the IOLTA account shall be paid to the Oregon Law Foundation as provided in this rule.

(c) Client funds that can earn net interest shall be deposited in an interest bearing trust account for the client's benefit and the net interest earned by funds in such an account shall be held in trust as property of the client in the same manner as is provided in paragraphs (a) through (d) of Rule 1.15-1 for the principal funds of the client. The interest bearing account shall be either:

(1) a separate account for each particular client or client matter; or

(2) a pooled lawyer trust account with subaccounting which will provide for computation of interest earned by each client's funds and the payment thereof, net of any bank service charges, to each client.

(d) In determining whether client funds can or cannot earn net interest, the lawyer or law firm shall consider the following factors:

(1) the amount of the funds to be deposited;

(2) the expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;

(3) the rates of interest at financial institutions where the funds are to be deposited;

(4) the cost of establishing and administering a separate interest bearing lawyer trust account for the client's benefit, including service charges imposed by financial institutions, the cost of the lawyer or law firm's services, and the cost of preparing any tax-related documents to report or account for income accruing to the client's benefit;

(5) the capability of financial institutions, the lawyer or the law firm to calculate and pay income to individual clients; and

(6) any other circumstances that affect the ability of the client's funds to earn a net return for the client.

(e) The lawyer or law firm shall review the IOLTA account at reasonable intervals to determine whether circumstances have changed that require further action with respect to the funds of a particular client.

(f) If a lawyer or law firm determines that a particular client's funds in an IOLTA account either did or can earn net interest, the lawyer shall transfer the funds into an account specified in paragraph (c) of this rule and request a refund for the lesser of either: any interest earned by the client's funds and remitted to the Oregon Law Foundation; or the interest the client's funds would have earned had those funds been placed in an interest bearing account for the benefit of the client at the same bank.

(1) The request shall be made in writing to the Oregon Law Foundation within a reasonable period of time after the interest was remitted to the Foundation and shall be accompanied by written verification from the financial institution of the interest amount.

(2) The Oregon Law Foundation will not refund more than the amount of interest it received from the client's funds in question. The refund shall be remitted to the financial institution for transmittal to the lawyer or law firm, after appropriate accounting and reporting.

(g) No earnings from a lawyer trust account shall be made available to a lawyer or the lawyer's firm.

(h) A lawyer or law firm may maintain a lawyer trust account only at a financial institution that:

(1) is authorized by state or federal banking laws to transact banking business in the state where the account is maintained;

(2) is insured by the Federal Deposit Insurance Corporation or an analogous federal government agency;

(3) has entered into an agreement with the Oregon Law Foundation:

(i) to remit to the Oregon Law Foundation, at least quarterly, interest earned by the IOLTA account, computed in accordance with the institution's standard accounting practices, less reasonable service charges, if any; and

(ii) to deliver to the Oregon Law Foundation a report with each remittance showing the name of the lawyer or law firm for whom the remittance is sent, the number of the IOLTA account as assigned by the financial institution, the average daily collected account balance or the balance on which the interest remitted was otherwise computed for each month for which the remittance is made, the rate of interest applied, the period for which the remittance is made, and the amount and description of any service charges deducted during the remittance period; and

(4) has entered into an overdraft notification agreement with the Oregon State Bar requiring the financial institution to report to the Oregon State Bar Disciplinary Counsel when any properly payable instrument is presented against such account containing insufficient funds, whether or not the instrument is honored.

(i) Overdraft notification agreements with financial institutions shall require that the following information be provided in writing to Disciplinary Counsel within ten banking days of the date the item was returned unpaid:

(1) the identity of the financial institution;

(2) the identity of the lawyer or law firm;

(3) the account number; and

(4) either (i) the amount of the overdraft and the date it was created; or (ii) the amount of the returned instrument and the date it was returned.

(j) Agreements between financial institutions and the Oregon State Bar or the Oregon Law Foundation shall apply to all branches of the financial institution. Such agreements shall not be canceled except upon a thirty-day notice in writing to OSB Disciplinary Counsel in the case of a trust account overdraft notification agreement or to the Oregon Law Foundation in the case of an IOLTA agreement.

(k) Nothing in this rule shall preclude financial institutions which participate in any trust account overdraft notification program from charging lawyers or law firms for the reasonable costs incurred by the financial institutions in participating in such program.

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

(m) For the purposes of paragraph (h)(3), "service charges" are limited to the institution's following customary check and deposit processing charges: monthly maintenance fees, per item check charges, items deposited charges and per deposit charges. Any other fees or transactions costs are not "service charges" for purposes of paragraph (h)(3) and must be paid by the lawyer or law firm.

Adopted 01/01/05

Amended 11/30/05: Paragraph (a) amended to clarify scope of rule. Paragraph (h) amended to allow remittance of interest to OLF in accordance with bank's standard accounting practice, and to report either the average daily collected account balance or the balance on which interest was otherwise computed. Paragraph (j) amended to require notice to OLF of cancellation of IOLTA agreement. Paragraph (m) and (n) added.

Amended 01/01/12: Requirement for annual certification, formerly paragraph (m), deleted and obligation moved to ORS Chapter 9.

Amended 01/01/14: Paragraph (f) revised to clarify the amount of interest that is to be refunded if client funds are mistakenly placed in an IOLTA account.

Defined Terms (see Rule 1.0)

"*Firm*"
"*Law Firm*"
"*Matter*"
"*Reasonable*"
"*Writing*"
"*Written*"

Comparison to Oregon Code

This rule is a significant revision of the IOLTA provisions of DR 9-101 and the trust account overdraft notification provisions of DR 9-102. The original changes were prompted by the US Supreme Court's decision in *Brown v. Washington Legal Foundation* that clients are entitled

to "net interest" that can be earned on funds held in trust. Additional changes were made to conform the rule to banking practice and to clarify the requirement for annual certification.

Comparison to ABA Model Rule

The Model Rule has no equivalent provisions regarding IOLTA and the trust account overdraft notification programs. In most jurisdictions those are stand-alone Supreme Court orders.

RULE 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.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Believes"
"Fraud"
"Fraudulent"
"Reasonable"
"Reasonably"
"Reasonably believes"
"Substantial"
"Tribunal"

Comparison to Oregon Code

This rule is essentially the same as DR 2-110, except that it specifically applies to declining a representation as well as withdrawing from representation. Paragraph (a) parallels the circumstances in which DR 2-110(B) mandates withdrawal, and also includes when the client is acting "merely for the purpose of harassing or maliciously injuring" another person, which is prohibited in DR 2-109(A)(1) and DR 7-102(A)(1).

Paragraph (b) is similar to DR 2-110(C) regarding permissive withdrawal. It allows withdrawal for any reason if it can be accomplished without "material adverse effect" on the client. Withdrawal is also allowed if the lawyer considers the client's conduct repugnant or if the lawyer fundamentally disagrees with it.

Paragraph (c) is like DR 2-110(A)(1) in requiring compliance with applicable law requiring notice or permission from the tribunal; it also clarifies the lawyer's obligations if permission is denied.

Paragraph (d) incorporates DR 2-110(A)(2) and (3). The final sentence has no counterpart in the Oregon Code; it recognizes the right of a lawyer to retain client papers and other property to the extent permitted by other law. The "other law" includes statutory lien rights as well as court decisions determining lawyer ownership of certain papers created during a representation. A lawyer's right under other law to retain papers and other property remains subject to other obligations, such as the lawyer's

general fiduciary duty to avoid prejudicing a former client, which might supersede the right to claim a lien.

Comparison with ABA Model Rule

This is essentially identical to the Model Rule except that MR 1.16(d) refers on to the retention of the client's "papers." The additional language in the Oregon rule was taken from ORS 86.460.

RULE 1.17 SALE OF LAW PRACTICE

(a) A lawyer or law firm may sell or purchase all or part of a law practice, including goodwill, in accordance with this rule.

(b) The selling lawyer, or the selling lawyer's legal representative, in the case of a deceased or disabled lawyer, shall provide written notice of the proposed sale to each current client whose legal work is subject to transfer, by certified mail, return receipt requested, to the client's last known address. The notice shall include the following information:

(1) that a sale is proposed;

(2) the identity of the purchasing lawyer or law firm, including the office address(es), and a brief description of the size and nature of the purchasing lawyer's or law firm's practice;

(3) that the client may object to the transfer of its legal work, may take possession of any client files and property, and may retain counsel other than the purchasing lawyer or law firm;

(4) that the client's legal work will be transferred to the purchasing lawyer or law firm, who will then take over the representation and act on the client's behalf, if the client does not object to the transfer within forty-five (45) days after the date the notice was mailed; and

(5) whether the selling lawyer will withdraw from the representation not less than forty-five (45) days after the date the notice was mailed, whether or not the client consents to the transfer of its legal work.

(c) The notice may describe the purchasing lawyer or law firm's qualifications, including the selling lawyer's opinion of the purchasing lawyer or law firm's suitability and competence to assume representation of the client, but only if the selling lawyer has made a reasonable effort to arrive at an informed opinion.

(d) If certified mail is not effective to give the client notice, the selling lawyer shall take such steps as may be reasonable under the circumstances to give the client actual notice of the proposed sale and the other information required in subsection (b).

(e) A client's consent to the transfer of its legal work to the purchasing lawyer or law firm will be presumed if no objection is received within forty-five (45) days after the date the notice was mailed.

(f) If substitution of counsel is required by the rules of a tribunal in which a matter is pending, the selling lawyer shall assure that substitution of counsel is made.

(g) The fees charged clients shall not be increased by reason of the sale except upon agreement of the client.

(h) The sale of a law practice may be conditioned on the selling lawyer's ceasing to engage in the private practice of law or some particular area of practice for a reasonable period within the geographic area in which the practice has been conducted.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Known"
"Law firm"
"Matter"
"Reasonable"
"Tribunal"
"Written"

Comparison to Oregon Code

This rule continues DR 2-111which, when adopted in 1995, was derived in large part from Model Rule 1.17.

Comparison to ABA Model Rule

The Model Rule requires sale of the entire practice or practice area, and also requires that the selling lawyer cease to engage in the private practice of law, or the area of practice sold, within a certain geographic area. The Model Rule gives the client 90 days to object before it will be presumed the client has consented to the transfer of the client's files. The Model Rule requires notice to all clients, not only current clients, but does not require that it be sent by certified mail. The Model Rule does not address the selling lawyer's right to give an opinion of the purchasing lawyer's qualifications. The Model Rule does not allow for client consent to an increase in the fees to be charged as a result of the sale.

RULE 1.18 DUTIES TO PROSPECTIVE CLIENT

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter; and

(ii) written notice is promptly given to the prospective client

Adopted 01/01/05

Amended 12/11/09: Paragraph (d) amended to conform to ABA Model Rule 1.18 except for prohibition against disqualified lawyer being apportioned a part of the fee.

Amended 01/01/14: Paragraphs (a) and (b) amended slightly to conform to changes in the Model Rule.

Defined Terms (see Rule 1.0):

"*Confirmed in writing*"
"*Informed consent*"
"*Firm*"
"*Knowingly*"
"*Matter*"
"*Screened*"
"*Substantial*"
"*Written*"

Comparison to Oregon Code

This rule has no counterpart in the Oregon Code. It is consistent with the rule of lawyer-client privilege that defines a client to include a person "who consults a lawyer with a view to obtaining professional legal services." OEC 503(1)(a). The rule also codifies a significant body of case law and other authority that has interpreted the duty of confidentiality to apply to prospective clients.

Comparison to ABA Model Rule

This is identical to the ABA Model Rule, except it doesn't prohibit the screened lawyer from sharing in the fee.

COUNSELOR

RULE 2.1 ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Adopted 01/01/05

Comparison to Oregon Code

This rule has no counterpart in the Oregon Code, although it codifies the concept of exercising independent judgment that is fundamental to the role of the lawyer and which is mentioned specifically in DRs 2-103, 5-101, 5-104, 5-108 and 7-101.

Comparison to ABA Model Rule

This is the ABA Model Rule.

RULE 2.2 [RESERVED]

RULE 2.3 EVALUATION FOR USE BY THIRD PERSONS

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"*Believes*"
"*Informed consent*"
"*Knows*"
"*Matter*"
"*Reasonably believes*"
"*Reasonably should know*"

Comparison to Oregon Code

This rule is similar to DR 7-101(D), which was adopted in 1997 based on *former* ABA Model Rule 2.3. Paragraph (b) is new in 2002 to require client consent only when the evaluation poses is a risk of material and adverse affect on the client. Under paragraph (a), when there is no such risk, the lawyer needs only to determine that the evaluation is compatible with other aspects of the relationship.

Comparison to ABA Model Rule

This is the ABA Model Rule.

RULE 2.4 LAWYER SERVING AS MEDIATOR

(a) A lawyer serving as a mediator:

(1) shall not act as a lawyer for any party against another party in the matter in mediation or in any related proceeding; and

(2) must clearly inform the parties of and obtain the parties' consent to the lawyer's role as mediator.

(b) A lawyer serving as a mediator:

(1) may prepare documents that memorialize and implement the agreement reached in mediation;

(2) shall recommend that each party seek independent legal advice before executing the documents; and

(3) with the consent of all parties, may record or may file the documents in court.

(c) The requirements of Rule 2.4(a)(2) and (b)(2) shall not apply to mediation programs established by operation of law or court order.

Adopted 01/01/05

Amended 01/01/14: Original paragraph (c) relating to firm representation deleted to eliminate conflict with RPC 1.12.

Defined Terms (see Rule 1.0):

"Matter"

Comparison to Oregon Code

This rule retains much of *former* DR 5-106.

Comparison to ABA Model Rule

ABA Model Rule 2.4 applies to a lawyer serving as a "third-party neutral," including arbitrator, mediator or in "such other capacity as will enable the lawyer to assist the parties to resolve the matter." It requires that the lawyer inform unrepresented parties that the lawyer is not representing them and, when necessary, explain the difference in the role of a third-party neutral. The Model Rule does not address the lawyer's drafting of documents to implement the parties' agreement, or the circumstances in which a member of the lawyer's firm can represent a party.

ADVOCATE

RULE 3.1 MERITORIOUS CLAIMS AND CONTENTIONS

In representing a client or the lawyer's own interests, a lawyer shall not knowingly bring or defend a proceeding, assert a position therein, delay a trial or take other action on behalf of a client, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law, except that a lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration may, nevertheless so defend the proceeding as to require that every element of the case be established.

Adopted 01/01/05

Amended 12/01/06: Paragraph (a) amended to make applicable to a lawyer acting in the lawyer's own interests.

Defined Terms (see Rule 1.0):

"Knowingly"

Comparison to Oregon Code

This rule retains the essence of DR 2-109(A)(2) and DR 7-102(A)(2), although neither Oregon rule expressly confirms the right of a criminal defense lawyer to defend in a manner that requires establishment of every element of the case.

Comparison to ABA Model Rule

This is the ABA Model Rule, tailored slightly to track the language of DR 2-109(A)(2) and DR 7-102(A)(2).

RULE 3.2 [RESERVED]

RULE 3.3 CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if permitted, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false;

(4) conceal or fail to disclose to a tribunal that which the lawyer is required by law to reveal; or

(5) engage in other illegal conduct or conduct contrary to these Rules.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if permitted, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, but in no event require disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Adopted 01/01/05

Amended 12/01/10: Paragraphs (a)(3) and (b) amended to substitute "if permitted" for "if necessary;" paragraph (c) amended to make it clear that remedial measures do not require disclosure of information protected by Rule 1.6.

Defined Terms (see Rule 1.0):

"Believes"
"Fraudulent"
"Knowingly"
"Known"
"Knows"
"Matter"
"Reasonable"
"Reasonably believes"
"Tribunal"

Comparison to Oregon Code

Paragraph (a)(1) is similar to DR 7-102(A)(5), but also requires correction of a previously made statement that turns out to be false.

Paragraph (a)(2) is the same as DR 7-106(B)(1).

Paragraph (a)(3) combines the prohibition in DR 7-102(A)(4) against presenting perjured testimony or false evidence with the remedial measures required in DR 7-102(B). The rule clarifies that only materially false evidence requires remedial action. While the rule allows a criminal defense lawyer to refuse to offer evidence the lawyer reasonably believes is false, it recognizes that the lawyer must allow a criminal defendant to testify.

Paragraphs (a)(4) and (5) are the same as DR 7-102(A)(3) and (8), respectively.

Paragraph (b) is similar to and consistent with the interpretations of DR 7-102(B)(1).

Paragraph (c) continues the duty of candor to the end of the proceeding, but, notwithstanding the language in paragraphs (a)(3) and (b), does not require disclosure of confidential client information otherwise protected by Rule 1.6.

Paragraph (d) has no equivalent in the Oregon Code.

Comparison to ABA Model Rule

Subsections (4) and (5) of paragraph (a) do not exist in the Model Rule. Also, MR 3.3 (c) requires disclosure even if the information is protected by Rule 1.6.

RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

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

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

(1) expenses reasonably incurred by a witness in attending or testifying;

(2) reasonable compensation to a witness for the witness's loss of time in attending or testifying; or

(3) a reasonable fee for the professional services of an expert witness.

(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, knowingly make a frivolous discovery request or fail to make reasonably diligent

effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused;

(f) advise or cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for purposes of making the person unavailable as a witness therein; or

(g) threaten to present criminal charges to obtain an advantage in a civil matter unless the lawyer reasonably believes the charge to be true and if the purpose of the lawyer is to compel or induce the person threatened to take reasonable action to make good the wrong which is the subject of the charge.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"*Believes*"
"*Knowingly*"
"*Matter*"
"*Reasonable*"
"*Reasonably*"
"*Reasonably believes*"
"*Tribunal*"

Comparison to Oregon Code

Paragraph (a) is similar to DR 7-109(A).

Paragraph (b) includes the rules regarding witness contact from DR 7-109, and also the prohibition against falsifying evidence that is found in DR 7-102(A)(6).

Paragraph (c) is generally equivalent to DR 7-106(C)(7).

Paragraph (d) has no equivalent in the Oregon Code.

Paragraph (e) is the same as DR 7-106(C)(1), (3) and (4).

Paragraph (f) retains the language of DR 7-109(B).

Paragraph (g) retains DR 7-105.

Comparison to ABA Model Rule

Paragraphs (a), (c), (d) and (e) are the Model Code, with the addition of a "knowingly" standard in (a) and (d). Paragraph (b) has been amended to retain the specific rules regarding contact with witnesses from DR 7-109, beginning with "…or pay…." Paragraph (f) in the Model Rule prohibits requesting a person other than a client to refrain from volunteering information except when the person is a relative, employee or other agent of the client and the lawyer believes the person's interests will not be adversely affected. Paragraph (g) does not exist in the Model Rules.

RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte on the merits of a cause with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment;

(d) engage in conduct intended to disrupt a tribunal; or

(e) fail to reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of their families, of which the lawyer has knowledge.

Adopted 01/01/05

Amended 12/01/06: Paragraph (b) amended to add "on the merits of the cause."

Defined Terms (see Rule 1.0):

"*Known*"
"*Tribunal*"

Comparison to Oregon Code

Paragraph (a) has no counterpart in the Oregon Code.

Paragraph (b) replaces DR 7-110, making ex parte contact subject only to law and court order, without additional notice requirements.

Paragraph (c) is similar to DR 7-108(A)-(F).

Paragraph (d) is similar to DR 7-106(C)(6).

Paragraph (e) retains the DR 7-108(G).

Comparison to ABA Model Rule

This is essentially the ABA Model Rule, with the addition of paragraph (e), which has no counterpart in the Model Rule.

RULE 3.6 TRIAL PUBLICITY

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may:

(1) reply to charges of misconduct publicly made against the lawyer; or

(2) participate in the proceedings of legislative, administrative or other investigative bodies.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

(e) A lawyer shall exercise reasonable care to prevent the lawyer's employees from making an extrajudicial statement that the lawyer would be prohibited from making under this rule.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Firm"
"Knows"
"Matter"
"Reasonable"
"Reasonably should know"
"Substantial"

Comparison to Oregon Code

Paragraph (a) replaces DR 7-107(A).

Paragraph (b) has no counterpart in the Oregon Code.

Paragraphs (c)(1) and (2) retain the exceptions in DR 7-107(B) and (C).

Paragraph (d) applies the limitation of the rule to other members in the subject lawyer's firm or government agency.

Paragraph (e) retains the requirement of DR 7-107(C).

Comparison to ABA Model Rule

This is essentially the ABA Model Rule, although the Model Rule has an exception in (c) that allows a lawyer to make statements to protect the client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the client. Model Rule 3.6 has no counterpart to paragraphs (c)(1) and (2) or (e) .

RULE 3.7 LAWYER AS WITNESS

(a) A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a witness on behalf of the lawyer's client unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case;

(3) disqualification of the lawyer would work a substantial hardship on the client; or

(4) the lawyer is appearing pro se.

(b) A lawyer may act as an advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness on behalf of the lawyer's client.

(c) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a member of the lawyer's firm may be called as a witness other than on behalf of the lawyer's client, the lawyer may continue the representation until it is apparent that the lawyer's or firm member's testimony is or may be prejudicial to the lawyer's client.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"*Firm*"
"*Substantial*"

Comparison to Oregon Code

This rule retains DR 5-102 in its entirety.

Comparison to ABA Model Rule

This rule is similar to the ABA Model Rule. Paragraph (a) of the Model Rule applies only when the lawyer is likely to be a necessary witness. In the Model Rule, paragraph (b) does not apply if the witness lawyer will be required to disclose information protected by Rule 1.6 or 1.9. Paragraph (c) has no counterpart in the Model Rule.

RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause; and

(b) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"*Known*"
"*Knows*"
"*Tribunal*"

Comparison to Oregon Code

Paragraph (a) is essentially the same as DR 7-103(A).

Paragraph (d) is essentially the same as DR 7-103(B), with the addition of an exception for protective orders.

Comparison to ABA Model Rule

The ABA Model Rule contains four additional provisions: prosecutors are (1) required to make reasonable efforts to ensure that accused persons are advised of the right and afforded the opportunity to consult with counsel; (2) prohibited from seeking to obtain a waiver of important pretrial rights from an unrepresented person; (3) prohibited from subpoenaing a lawyer to present evidence about current or past clients except when the information is unprivileged, necessary to successful completion of an ongoing investigation or prosecution, and there is no other feasible means of obtaining the information; and (4) prohibited from making extrajudicial public statements that will heighten public condemnation of the accused. The Model Rule also requires prosecutors to exercise reasonable care that other people assisting or associated with the prosecutor do not make extrajudicial public statements that the prosecutor is prohibited from making by Rule .3.6.

RULE 3.9 ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

Adopted 01/01/05

Comparison to Oregon Code

This rule has no counterpart in the Oregon Code.

Comparison to ABA Model Rule

This is the ABA Model Rule.

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting an illegal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"*Fraudulent*"
"*Knowingly*"

Comparison to Oregon Code

This rule has no direct counterpart in Oregon, but it expresses prohibitions found in DR 1-102(A)(3), DR 7-102(A)(5) and DR 1-102(A)(7).

Comparison to ABA Model Rule

This is the ABA Model Rule, except that MR 4.1(b) refers to "criminal" rather than "illegal" conduct.

RULE 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

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:

(a) the lawyer has the prior consent of a lawyer representing such other person;

(b) the lawyer is authorized by law or by court order to do so; or

(c) a written agreement requires a written notice or demand to be sent to such other person, in which case a copy of such notice or demand shall also be sent to such other person's lawyer.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Knows"
"Written"

Comparison to Oregon Code

This rule retains the language of DR 7-104(A), except that the phrase "or on directly related subjects" has been deleted. The application of the rule to a lawyer acting in the lawyer's own interests has been moved to the beginning of the rule.

Comparison to ABA Model Rule

This rule is very similar to the ABA Model Rule, except that the Model Rule does not apply to a lawyer acting in the lawyer's own interest. The Model Rule also makes no exception for communication required by a written agreement.

RULE 4.3 DEALING WITH UNREPRESENTED PERSONS

In dealing on behalf of a client or the lawyer's own interests with a person who is 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 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.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Knows"
"Matter"
"Reasonable"
"Reasonably should know"

Comparison to Oregon Code

This rule replaces DR 7-104(B). It is expanded to parallel Rule 4.2 by applying to situations in which the lawyer is representing the lawyer's own interests. The rule is broader than DR 7-104(B) in that it specifically prohibits a lawyer from stating or implying that the lawyer is disinterested. It also imposes an affirmative requirement on the lawyer to correct any misunderstanding an unrepresented person may have about the lawyer's role. The rule continues the prohibition against giving legal advice to an unrepresented person.

Comparison to ABA Model Rule

This is essentially identical to the ABA Model Rule, with the addition "or the lawyers own interests" at the beginning and end to make it clear that the rule applies even when the lawyer is not acting on behalf of a client.

RULE 4.4 RESPECT FOR THE RIGHTS OF THIRD PERSONS; INADVERTENTLY SENT DOCUMENTS

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

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

Adopted 01/01/05

Amended 12/01/06: Paragraph (a) amended to make applicable to a lawyer acting in the lawyer's own interests.

Amended 01/01/14: Paragraph (b) amended to expand scope to electronically stored information.

Defined Terms (see Rule 1.0):

"Knowingly"
"Knows"
"Reasonably should know"
"Substantial"

Comparison to Oregon Code

This rule had no equivalent in the Oregon Code, although paragraph (a) incorporates aspects of DR 7-102(A)(1).

Comparison to ABA Model Rule

This is essentially the ABA Model Rule, except that the MR does not include the prohibition against "harassment" nor does it contain the modifier "knowingly" at the end of paragraph (a) which makes it clear that a lawyer is not responsible for inadvertently violating the legal rights of another person in the course of obtaining evidence.

LAW FIRMS AND ASSOCIATIONS

RULE 5.1 RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORY LAWYERS

A lawyer shall be responsible for another lawyer's violation of these Rules of Professional Conduct if:

(a) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(b) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Knowledge"
"Knows"
"Law Firm"
"Partner"
"Reasonable"

Comparison to Oregon Code

This rule is essentially the same as DR 1-102(B) although it specifically applies to partners or others with comparable managerial authority, as well as lawyers with supervisory authority.

Comparison to ABA Model Rule

ABA Model Rule 5.1 contains two additional provisions. The first requires partners and lawyers with comparable managerial authority to make reasonable efforts to ensure that the firm has in place measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct. The second requires lawyers having direct supervisory authority over another lawyer to make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

RULE 5.2 RESPONSIBILITIES OF A SUBORDINATE LAWYER

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Reasonable"

Comparison to Oregon Code

Paragraph (a) is identical to DR 1-102(C).

Paragraph (b) has no equivalent in the Oregon Code.

Comparison to ABA Model Rule

This is the ABA Model Rule.

RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANCE

With respect to a nonlawyer employed or retained, supervised or directed by a lawyer:

(a) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(b) except as provided by Rule 8.4(b), a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Adopted 01/01/05

Amended 01/01/14: Title changed from "Assistants" to "Assistance" in recognition of the broad range of nonlawyer services that can be utilized in rendering legal services.

Defined Terms (see Rule 1.0):

"Knowledge"
"Knows"
"Law firm"
'Partner"
"Reasonable"

Comparison to Oregon Code

This rule has no counterpart in the Oregon Code. Paragraph (a) is somewhat similar to the requirement in DR 4-101(D), but broader because not limited to disclosure of confidential client information.

Paragraph (b) applies the requirements of DR 1-102(B) to nonlawyer personnel. An exception by cross-reference to Rule 8.4(b) is included to avoid conflict with the rule that was formerly DR 1-102(D).

Comparison to ABA Model Rule

This is similar to the ABA Model Rule, although the Model Rule also requires law firm partners and other lawyers with comparable managerial authority to make reasonable efforts to ensure that the firm has in place measures giving reasonable assurance that the conduct of nonlawyer assistants is compatible with the professional obligations of lawyers. Also, the Model Rule does not have the "except as provided in 8.4(b)" language in paragraph (b), since the Model Rule has no counterpart to DR 1-102(D).

RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm or firm members may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons.

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price.

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter; and

(5) a lawyer may pay the usual charges of a bar-sponsored or operated not-for-profit lawyer referral service, including fees calculated as a percentage of legal fees received by the lawyer from a referral.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation, except as authorized by law; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

(e) A lawyer shall not refer a client to a nonlawyer with the understanding that the lawyer will receive a fee, commission or anything of value in exchange for the referral, but a lawyer may accept gifts in the ordinary course of social or business hospitality.

Adopted 01/01/05

Amended 01/01/13: Paragraph (a)(5) added.

Defined Terms (see Rule 1.0):

"Firm"
"Law firm"
"Matter"
"Partner"
"Reasonable"

Comparison to Oregon Code

Paragraph (a)(1) is the same as DR 3-102(A)(1). Paragraph (a)(2) is similar to DR 3-102(A)(2), except that it addresses the purchase of a deceased, disabled or departed lawyer's practice and payment of an agreed price, rather than only authorizing reasonable compensation for services rendered by a deceased lawyer. Paragraph (a)(3) is identical to DR 3-102(A)(3). Paragraphs (a)(4) and 9a)(5) have no counterpart in the Oregon Code.

Paragraph (b) is identical to DR 3-103.

Paragraph (c) is identical to DR 5-108(B).

Paragraph (d) is essentially identical to DR 5-108(D).

Paragraph (e) is the same as DR 2-105, approved by the Supreme Court in April 2003.

Comparison to ABA Model Rule

This is the ABA Model Rule with the addition of paragraphs (a)(5) and (e), which have no counterpart in the Model Rule. Paragraph (a)(5) is similar to MR 7.2(b)(2).

RULE 5.5 UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternate dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission;

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice; or

(5) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission.

(d) A lawyer admitted in another jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

(e) A lawyer who provides legal services in connection with a pending or potential arbitration proceeding to be held in his jurisdiction under paragraph (c)(3) of this rule must, upon engagement by the client, certify to the Oregon State Bar that:

(1) the lawyer is in good standing in every jurisdiction in which the lawyer is admitted to practice; and

(2) unless the lawyer is in-house counsel or an employee of a government client in the matter, that the lawyer

(i) carries professional liability insurance substantially equivalent to that required of Oregon lawyers, or

(ii) has notified the lawyer's client in writing that the lawyer does not have such insurance and that Oregon law requires Oregon lawyers to have such insurance.

The certificate must be accompanied by the administrative fee for the appearance established by the Oregon State Bar and proof of service on the arbitrator and other parties to the proceeding.

Adopted 01/01/05

Amended 01/01/12: Paragraph (e) added.

Amended 02/19/15: Phrase "United States" deleted from paragraphs (c) and (d), to allow foreign-licensed lawyers to engage in temporary practice as provided in the rule.

Defined Terms (see Rule 1.0):

"*Matter*"
"*Reasonably*"
"*Tribunal*"

Comparison to Oregon Code

Paragraph (a) contains the same prohibitions as DR 3-101(A) and (B).

Paragraph (b), (c), (d) and (e) have no counterpart in the Oregon Code.

Comparison to ABA Model Rule

Paragraphs (a), (b) and (c)(1)-(4) are identical to the Model Rule. MR 5.5(d) includes what is (c)(5) in the Oregon rule. Paragraph (e) has no counterpart in the Model Rule.

RULE 5.6 RESTRICTIONS ON RIGHT TO PRACTICE

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a direct or indirect restriction on the lawyer's right to practice is part of the settlement of a client controversy.

Adopted 01/01/05

Comparison to Oregon Code

Paragraph (a) is similar to DR 2-108(A), but in addition to partnership or employment agreements, includes shareholders and operating "or other similar type of agreements," in recognition of the fact that lawyers associate together in organizations other than traditional law firm partnerships.

Paragraph (b) is similar to DR 2-108(B).

Comparison to ABA Model Rule

This is the ABA Model Rule with the addition of the words "direct or indirect" in paragraph (b) to address agreements that are not strictly part of the "settlement agreement."

RULE 5.7 [RESERVED]

PUBLIC SERVICE

RULE 6.1 [RESERVED]

RULE 6.2 [RESERVED]

RULE 6.3 MEMBERSHIP IN LEGAL SERVICES ORGANIZATION

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Knowingly"
"Law firm"

Comparison to Oregon Code

This rule is similar to DR 5-108(C)(10 and (2).

Comparison to ABA Model Rule

This is the ABA Model Rule.

RULE 6.4 LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration, notwithstanding that the reform may affect the interest of a client of the lawyer. When the lawyer knows that the interest of a client may be materially benefited by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Knows"

Comparison to Oregon Code

This rule is similar to DR 5-108(C)(3).

Comparison to ABA Model Rule

This is the ABA Model Rule.

RULE 6.5 NONPROFIT AND COURT-ANNEXED LIMITED LEGAL SERVICES PROGRAMS

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rule 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Knows"
"Law firm"
"Matter"

Comparison to Oregon Code

This rule has no equivalent in the Oregon Code. It was adopted by the ABA in 2002 to address concerns that strict application of conflict of interest rules might be deterring lawyers from volunteering in programs that provide short-term limited legal services to clients under the auspices of a non-profit or court-annexed program.

Comparison to ABA Model Rule

This is the ABA Model Rule.

INFORMATION ABOUT LEGAL SERVICES

RULE 7.1 COMMUNICATION CONCERNING A LAWYER'S SERVICES

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Adopted 01/01/05

Amended 12/01/06: Paragraph (a)(5) reworded to conform to former DR 2-101(A)(5).

Amended 01/01/14: Model Rule 7.1 language substituted for former RPC 7.1.

Comparison to Oregon Code

The rule retains the essential prohibition against false or misleading communications, but not the specifically enumerated types of communications deemed misleading.

Comparison to ABA Model Rule

This is the ABA Model Rule.

RULE 7.2 ADVERTISING

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit lawyer referral service; and

(3) pay for a law practice in accordance with Rule 1.17.

(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

Adopted 01/01/05

Amended 01/01/14: Revised to track more closely Model Rule 7.2 and eliminate redundant language.

Defined Terms (see Rule 1.0):

"Law firm"

Comparison to Oregon Code

This rule retains DR 2-103's permission for advertising in various media, provided the communications are not false or misleading and do not involve improper in-person contact. It retains the prohibition against paying another to recommend or secure employment, with the exception of a legal service plan or not-for-profit lawyer referral service. The rule also continues the requirement that communications contain the name and office address of the lawyer or firm.

Comparison to ABA Model Rule

This rule is drawn from and is very similar to the ABA Model Rule, except that the MR allows payment only to a lawyer referral service approved by an appropriate regulatory agency. The MR also permits reciprocal referral agreements between lawyers and between lawyers and nonlawyer professionals, which is directly contradictory to Oregon RPC 5.4(e).

RULE 7.3 SOLICITATION OF CLIENTS

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the target of the solicitation is such that the person could not exercise reasonable judgment in employing a lawyer;

(2) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(3) the solicitation involves coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside of the envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraph (a).

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Adopted 01/01/05

Amended 01/01/14: The title is changed and the phrase "target of the solicitation" or the word "anyone" is substituted for "prospective client" to avoid confusion with the use of the latter term in RPC 1.8. The phrase "Advertising Material" is substituted for "Advertising" in paragraph (c).

Defined Terms (see Rule 1.0):

"Electronic communication"
"Known"
"Knows"
"Matter"
"Reasonable"
"Reasonably should know"
"Written"

Comparison to Oregon Code

This rule incorporates elements of DR 2-101(D) and (H) and DR 2-104.

Comparison to ABA Model Rule

This rule closely mirrors the Model Rule, although the MR has no counterpart to paragraph (b)(1).

RULE 7.4 [RESERVED]

RULE 7.5 FIRM NAMES AND LETTERHEADS

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is a fact.

(e) A lawyer may be designated "Of Counsel" on a letterhead if the lawyer has a continuing professional relationship with a lawyer or law firm, other than as partner or associate. A lawyer may be designated as "General Counsel" or by a similar professional reference on stationery of a client if the lawyer of the lawyer's firm devotes a substantial amount of professional time in the representation of the client.

Adopted 01/01/05

Amended 01/01/14: The rule was modified to mirror the ABA Model Rule.

Defined Terms (see Rule 1.0):

"Firm"
"Law firm"
"Partner"
"Substantial"

Comparison to Oregon Code

This rule retains much of the essential content of DR 2-102.

Comparison to ABA Model Rule

This is the Model Rule.

RULE 7.6 [RESERVED]

MAINTAINING THE INTEGRITY OF THE PROFESSION

RULE 8.1 BAR ADMISSION AND DISCIPLINARY MATTERS

(a) An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(1) knowingly make a false statement of material fact; or

(2) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

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

(c) A lawyer who is the subject of a complaint or referral to the State Lawyers Assistance Committee shall, subject to the exercise of any applicable right or privilege, cooperate with the committee and its designees, including:

(1) responding to the initial inquiry of the committee or its designees;

(2) furnishing any documents in the lawyer's possession relating to the matter under investigation by the committee or its designees;

(3) participating in interviews with the committee or its designees; and

(4) participating in and complying with a remedial program established by the committee or its designees.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Knowingly"
"Known"
"Matter"
"Writing"

Comparison to Oregon Code

Paragraph (a) replaces DR 1-101, but is broader because the Oregon rule applies only to misconduct in connection with the lawyer's own or another person's application for admission and this rule applies to any "disciplinary matter." Paragraph (a)(2) replaces DR 1-103(C) but requires only that a lawyer respond rather than "cooperate."

Paragraph (b) is the same as DR 1-103(D). It is placed here because it pertains to the obligations of a lawyer regarding the lawyer's own professional conduct.

Paragraph (c) is the same as DR 1-103(F). It is placed here because it pertains to the obligations of a lawyer regarding the lawyer's own professional conduct.

Comparison to ABA Model Rule

Paragraph (a) is identical to Model Rule 8.1. Paragraphs (b) and (c) have no counterpart in the Model Rules and are taken from the Oregon Code.

RULE 8.2 JUDICIAL AND LEGAL OFFICIALS

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard to its truth or falsity concerning the qualifications or integrity of a judge or adjudicatory officer , or of a candidate for election or appointment to a judicial or other adjudicatory office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Knows"

Comparison to Oregon Code

Paragraph (a) is essentially the same as DR 8-102(A) and (B), although the Oregon rule prohibits "accusations" rather than "statements" and applies only to statements about the qualifications of the person.

Comparison to ABA Model Rule

This is the ABA Model Rule, except that the Model Rule also prohibits statements pertaining to "other legal officers."

RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer

in other respects shall inform the Oregon State Bar Client Assistance Office.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This rule does not require disclosure of information otherwise protected by Rule 1.6 or ORS 9.460(3), or apply to lawyers who obtain such knowledge or evidence while:

(1) acting as a member, investigator, agent, employee or as a designee of the State Lawyers Assistance Committee;

(2) acting as a board member, employee, investigator, agent or lawyer for or on behalf of the Professional Liability Fund or as a Board of Governors liaison to the Professional Liability Fund; or

(3) participating in the loss prevention programs of the Professional Liability Fund, including the Oregon Attorney Assistance Program.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Knows"
"Substantial"

Comparison to Oregon Code

This rule replaces DR 1-103(A) and (E). Paragraph (a) is essentially the same as DR 1-103(A), although the exception for confidential client information is found in paragraph (c). Also, the rule now requires that misconduct be reported to the OSB Client Assistance Office, to conform to changes in the Bar Rules of Procedure that were effective August 1, 2003.

Paragraph (b) has no counterpart in the Oregon Code, although the obligation might be inferred from DR 1-103(A).

Paragraph (c) incorporates the exception for information protected by rule and statute. It also incorporates the exception contained in DR 1-103(E).

Comparison to ABA Model Rule

This is essentially the ABA Model Rule, expanded slightly. Paragraph (c) includes a reference to ORS 9.460(3) to parallel the exceptions in DR 1-103(A). Paragraph (c) in the Model Rule refers only to "information gained…while participating in an approved lawyer assistance program."

RULE 8.4 MISCONDUCT

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

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

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

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

(4) engage in conduct that is prejudicial to the administration of justice; or

(5) state or imply an ability to influence improperly a government agency or official or to achieve results by mans that violate these Rules or other law, or

(6) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

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

(b) Notwithstanding paragraphs (a)(1), (3) and (4) and Rule 3.3(a)(1), it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct. "Covert activity," as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.

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

Adopted 01/01/05

Amended 12/01/06: Paragraph (a)(5) added.

Amended 02/19/15: Paragraphs (a)(7) and (c) added.

Defined Terms (see Rule 1.0):

"Believes"
"Fraud"
"Knowingly"
"Reasonable"

Comparison to Oregon Code

This rule is essentially the same as DR 1-102(A).

Paragraph (b) retains DR 1-102(D).

Comparison to ABA Model Rule

Paragraphs (a)(1) through (6) are the same as Model Rule 8.4(a) through (f), except that MR 8.4(a) also prohibits attempts to violate the rules. Paragraph (a)(7) reflects language in Comment [3] of the Model Rule.

Paragraphs (b) and (d) have no counterpart in the Model Rule.

RULE 8.5 DISCIPLINARY AUTHORITY; CHOICE OF LAW

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

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

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

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

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Believes"
"Matter"
"Reasonably believes"
"Tribunal"

Comparison to Oregon Code

This rule has no counterpart in the Oregon Code. A similar version based on *former* ABA Model Rule 8.5 was adopted by the Supreme Court in 1996 as Bar Rule of Procedure 1.4.

BR 1.4(a) specifically provides that the Supreme Court's jurisdiction over a lawyer's conduct continues whether or not the lawyer retains authority to practice law in Oregon and regardless of where the lawyer resides.

BR 1.4(b)(1) is essentially the same as 8.5(b)(1).

BR 1.4(b)(2) applies the Oregon Code if the lawyer is licensed only in Oregon. If the lawyer is licensed in Oregon and another jurisdiction, the rules of the jurisdiction in which the lawyer principally practices apply, or if the conduct has its predominant effect in another jurisdiction in which the lawyer is licensed, then the rules of that jurisdiction will apply.

Comparison to ABA Model Rule

This is the ABA Model Rule, as amended in 2002 in conjunction with the adoption of the amendments to Rule 5.5 regarding multijurisdictional practice. As amended, the rule applies to lawyers not licensed in the jurisdiction if they render or offer to render any legal services in the jurisdiction.

RULE 8.6 WRITTEN ADVISORY OPINIONS ON PROFESSIONAL CONDUCT; CONSIDERATION GIVEN IN DISCIPLINARY PROCEEDINGS

(a) The Oregon State Bar Board of Governors may issue formal written advisory opinions on questions under these Rules. The Oregon State Bar Legal Ethics Committee and General Counsel's Office may also issue informal written advisory opinions on questions under these Rules. The General Counsel's Office of the Oregon State Bar shall maintain records of both OSB formal and informal written advisory opinions and copies of each shall be available to the Oregon Supreme Court, Disciplinary Board, State Professional Responsibility Board, and Disciplinary Counsel. The General Counsel's Office may also disseminate the bar's advisory opinions as it deems appropriate to its role in educating lawyers about these Rules.

(b) In considering alleged violations of these Rules, the Disciplinary Board and Oregon Supreme Court may consider any lawyer's good faith effort to comply with an opinion issued under paragraph (a) of this rule as:

(1) a showing of the lawyer's good faith effort to comply with these Rules; and

(2) a basis for mitigation of any sanction that may be imposed if the lawyer is found to be in violation of these Rules.

(c) This rule is not intended to, and does not, preclude the Disciplinary Board or the Oregon Supreme Court from considering any other evidence of either good faith or basis for mitigation in a bar disciplinary proceeding.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"*Written*"

Comparison to Oregon Code

This rule is identical to DR 1-105, amended only to refer to "General Counsel's Office" in the second sentence of paragraph (a), rather than only to "General Counsel," to make it clear that opinions of assistant general counsel are covered by the rule.

Comparison to ABA Model Rule

This rule has no counterpart in the Model Rules.

DR 1-101	Rule 8.1(a)
DR 1-102(A)(1)	Rule 8.4(a)(1)
DR 1-102(A)(2)	Rule 8.4(a)(2)
DR 1-102(A)(3)	Rule 8.4(a)(3)
DR 1-102(A)(4)	Rule 8.4(a)(4)
DR 1-102(A)(5)	Rule 7.1(a)(5)
DR 1-102(B)(1)	Rule 5.1(c)(1)
DR 1-102(B)(2)	Rule 5.1(c)(2)
DR 1-102(C)	Rule 5.2(a)
DR 1-102(D)	Rule 8.4(b)
DR 1-103(A)	Rule 8.3(a)
DR 1-103(B)	Rule 8.3(b)
DR 1-103(C)	Rule 8.1(a)
DR 1-103(D)	Rule 8.1(b)
DR 1-103(E)	Rule 8.3(c)
DR 1-103(F)	Rule 8.1(c)
DR 1-104	Eliminated
DR 1-105	Rule 8.6
DR 2-101(A)(1)	Rule 7.1(a)(1)
DR 2-101(A)(2)	Rule 7.1(a)(2)
DR 2-101(A)(3)	Rule 7.1(a)(3)
DR 2-101(A)(4)	Rule 7.1(a)(4)
DR 2-101(A)(5)	eliminated
DR 2-101(A)(6)	Rule 7.1(a)(6)
DR 2-101(A)(7)	Rule 7.1(a)(7)
DR 2-101(A)(8)	Rule 7.1(a)(8)
DR 2-101(A)(9)	Rule 7.1(a)(9)
DR 2-101(A)(10)	Rule 7.1(a)(10)
DR 2-101(A)(11)	Rule 7.1(a)(11)
DR 2-101(A)(12)	Rule 7.1(a)(12)
DR 2-101(B)	eliminated
DR 2-101(C)	Rule 7.1(b)
DR 2-101(D)	Rule 7.3(b)

DR 2-101(E)	Rule 7.1(c)
DR 2-101(F)	Rule 7.1(d)
DR 2-101(G)	Rule 7.1(e)
DR 2-101(H)	Rule 7.3(c)
DR 2-102(A)	Rule 7.5(a)
DR 2-102(B)	Rule 7.5(b)
DR 2-102(C)	Rule 7.5(c)
DR 2-102(D)	Rule 7.5(d)
DR 2-102(E)	Rule 7.5(e)
DR 2-102(F)	Rule 7.5(f)
DR 2-103(A)	Rule 7.2(a)
DR 2-103(B)	Rule 7.2(b)
DR 2-103(C)	Rule 7.2(c)
DR 2-104(A)(1)	Rule 7.3(a)
DR 2-104(A)(2)	Rule 7.3(a)
DR 2-104(A)(3)	Rule 7.3(d)
DR 2-104(B)	Eliminated
DR 2-105	Rule 5.4(e)
DR 2-106(A)	Rule 1.5(a)
DR 2-106(B)	Rule 1.5(b)
DR 2-106(C)	Rule 1.5(c)
DR 2-107(A)	Rule 1.5(d)
DR 2-107(B)	Rule 1.5(e)
DR 2-108	Rule 5.6
DR 2-109	Rule 3.1
DR 2-110	Rule 1.16
DR 2-111	Rule 1.17
DR 3-101(A)	Rule 5.5(a)
DR 3-101(B)	Rule 5.5(a)
DR 3-102	Rule 5.4(a)
DR 3-103	Rule 5.4(b)
DR 4-101(A)-C)	Rule 1.6(a)-(b)

DR 4-101(D)	Rule 5.3(b)
DR 5-101(A)(1)	Rule 1.7(a)(2)
DR 5-101(A)(2)	Rule 1.7(a)(3)
DR 5-101(B)	Rule 1.8(c)
DR 5-102	Rule 3.7
DR 5-103(A)	Rule 1.8(i)
DR 5-103(B)	Rule 1.8(e)
DR 5-104(A)	Rule 1.8(a)
DR 5-104(B)	Rule 1.8(d)
DR 5-105(A)(1)	Rule 1.7(b)(3)
DR 5-105(B)	Rule 1.0(i)
DR 5-105(C)	Rule 1.9(a)
DR 5-105(D)	Rule 1.9(a)
DR 5-105(E)	Rule 1.7(a)
DR 5-105(F)	Rule 1.7(b)
DR 5-105(G)	Rule 1.8(k)
DR 5-105(H)	Rule 1.9(b)
DR 5-105(I)	Rule 1.10(c)
DR 5-105(J)	Rule 1.10(b)
DR 5-106	Rule 2.4
DR 5-107	Rule 1.8(g)
DR 5-108(A)	Rule 1.8(f)
DR 5-108(B)	Rule 5.4(c)
DR 5-109(A)	Rule 1.12(a)
DR 5-109(B)	Rule 1.11(a)
DR 5-110	Rule 1.8(j)
DR 6-101(A)	Rule 1.1
DR 6-101(B)	Rule 1.3
DR 6-102(A)	Rule 1.8(h)(1)-(2)
DR 6-102(B)	Rule 1.8(h)(3)
DR 7-101(A)	Rule 1.2(a)

DR 7-101(B)	Rule 1.2(a)
DR 7-101(C)	Rule 1.14
DR 7-101(D)	Rule 2.3
DR 7-102(A)(1)	Rule 3.1, 4.4(a)
DR 7-102(A)(2)	Rule 3.1
DR 7-102(A)(3)	Rule 3.3(a)(4)
DR 7-102(A)(4)	Rule 3.3(a)(3)
DR 7-102(A)(5)	Rule 3.3(a)(1)
DR 7-102(A)(6)	Rule 3.4(b)
DR 7-102(A)(7)	Rule 1.2(c)
DR 7-102(A)(8)	eliminated
DR 7-102(B)	Rule 3.3(b)
DR 7-103	Rule 3.8
DR 7-104(A)(1)	Rule 4.2
DR 7-104(A)(2)	Rule 4.3
DR 7-105	Rule 3.4(g)
DR 7-106(A)	Rule 3.4(c)
DR 7-106(B)(1)	Rule 3.3(a)(2)
DR 7-106(B)(2)	eliminated
DR 7-106(C)(1)	Rule 3.4(e)
DR 7-106(C)(2)	eliminated
DR 7-106(C)(3)	Rule 3.4(e)
DR 7-106(C)(4)	Rule 3.4(e)
DR 7-106(C)(5)	eliminated
DR 7-106(C)(6)	Rule 3.5(d)
DR 7-106(C)(7)	Rule 3.4(c)
DR 7-107(A)	Rule 3.6(a)
DR 7-107(B)	Rule 3.6(b)
DR 7-107(C)	Rule 3.6(c)
DR 7-108(A)	Rule 3.5(b)
DR 7-108(B)	Rule 3.5(b)
DR 7-108(C)	eliminated
DR 7-108(D)	Rule 3.5(c)
DR 7-108(E)	Rule 3.5(c)
DR 7-108(F)	Rule 3.5(c)
DR 7-108(G)	Rule 3.5(e)
DR 7-109(A)	Rule 3.4(a)
DR 7-109(B)	Rule 3.4(f)
DR 7-110	Rule 3.5(b)
DR 8-101(A)(1)	Rule 1.11(c) & (d)(i)
DR 8-101(A)(2)	Rule 1.11(d)(ii)
DR 8-101(A)(3)	Rule 1.11(d)(iii)
DR 8-101(A)(4)	Rule 1.11(c) & (d)(iv)
DR 8-101(B)	eliminated
DR 8-101(C)	Rule 1.11(e)
DR 8-101(D)	Rule 1.11(f)
DR 8-102	Rule 8.2
DR 8-103	Rule 8.2(b)
DR 9-101(A)-(C)	Rule 1.15-1(a)-(e)
DR 9-101(D)(1)	Rule 1.15(a)
DR 9-101(D)(2)-(4)	Rule 1.15-2(a)-(h)
DR 9-102	Rule 1.15(i)-(l)
DR 10-101	Rule 1.0

Rule 1.0	DR 10-101
Rule 1.0(i)	DR 5-105(B)
Rule 1.1	DR 6-101(A)
Rule 1.2(a)	DR 7-101(A)&(B)
Rule 1.2(c)	DR 7-102(A)(7)
Rule 1.3	DR 6-101(B)
Rule 1.5(a)	DR 2-106(A)
Rule 1.5(b)	DR 2-106(B)
Rule 1.5(c)	DR 2-106(C)
Rule 1.5(d)	DR 2-107(A)
Rule 1.5(e)	DR 2-107(B)
Rule 1.6(a)-(b)	DR 4-101(A)-(C)
Rule 1.7(a)(1)	DR 5-105(E)
Rule 1.7(a)(2)	DR 5-101(A)(1)
Rule 1.7(a)(3)	DR5-101(A)(2)
Rule 1.7(b)	DR 5-105(F)
Rule 1.7(b)(3)	DR 5-105(A)(1)
Rule 1.8(a)	DR 5-104(A)
Rule 1.8(b)	DR 4-101(B)
Rule 1.8(c)	DR 5-101(B)
Rule 1.8(d)	DR 5-104(B)
Rule 1.8(e)	DR 5-103(B)
Rule 1.8(f)	DR 5-108(A)
Rule 1.8(g)	DR 5-107
Rule 1.8(h)(1)-(2)	DR 6-102(A)
Rule 1.8(h)(3)	DR 6-102(B)
Rule 1.8(i)	DR 5-103(A)
Rule 1.8(j)	DR 5-110
Rule 1.8(k)	DR 5-105(G)
Rule 1.9(a)	DR 5-105(C)&(D)
Rule 1.9(b)	DR 5-105(H)
Rule 1.10(a)	DR 5-105(G)
Rule 1.10(b)	DR 5-105(J)

Rule 1.10(c)	DR 5-105(I)
Rule 1.11(a)	DR 5-109(B) & 8-101(B)
Rule 1.11(b)	DR 5-105(G)
Rule 1.11(c)	DR 8-101(A)(4)
Rule 1.11(d)(2)(i)-(iv)	DR 8-101(A)(1)-(4)
Rule 1.11(e)	DR 8-101(C)
Rule 1.11(f)	DR 8-101(D)
Rule 1.12(a)	DR 5-109(A)
Rule 1.14	DR 7-101(C)
Rule 1.15-1	DR 9-101(A)-(C) & (D)(1)
Rule 1.15-2(a)-(h)	DR 9-101(D)(2)-(4)
Rule 1.15-2(i)-(l)	DR 9-102
Rule 1.16	DR 2-110
Rule 1.17	DR 2-111
Rule 2.3	DR 7-101(D)
Rule 2.4	DR 5-106
Rule 3.1	DR 2-109 & 7-102(A)(1) & (2)
Rule 3.3(a)(1)	DR 7-102(A)(5)
Rule 3.3(a)(2)	DR 7-106(B)(1)
Rule 3.3(a)(3)	DR 7-102(A)(4)
Rule 3.3(a)(4)	DR 7-102(A)(3)
Rule 3.3(a)(5)	DR 7-102((A)(8)
Rule 3.3(b)	DR 7-102(B)
Rule 3.4(a)	DR 7-109(A)
Rule 3.4(b)	DR 7-102(A)(6) & 7-109(B)&(C)
Rule 3.4(c)	DR 7-106(A) & (C)(7)
Rule 3.4(e)	DR 7-106(C)(1), (3)&(4)

Rule 3.4(f)	DR 7-109(B)
Rule 3.4(g)	DR 7-105
Rule 3.5(b)	DR 7-108(A)&(B) & DR 7-110
Rule 3.5(c)	DR 7-108(D)-(F)
Rule 3.5(d)	DR 7-106(C)(6)
Rule 3.5(e)	DR 7-108(G)
Rule 3.6(a)	DR 7-107(A)
Rule 3.6(b)	DR 7-107(B)
Rule 3.6(c)	DR 7-107(C)
Rule 3.7	DR 5-102
Rule 3.8	DR 7-103
Rule 4.2	DR 7-104(A)(1)
Rule 4.3	DR 7-104(A)(2)
Rule 4.4(a)	DR 7-102(A)(1)
Rule 5.1(a)	DR 1-102(B)(1)
Rule 5.1(b)	DR 1-102(B)(2)
Rule 5.2(a)	DR 1-102(C)
Rule 5.3(B)	DR 4-101(D)
Rule 5.4(a)	DR 3-102
Rule 5.4(b)	DR 3-103
Rule 5.4(c)	DR 5-108(B)
Rule 5.4(d)	DR 5-108(D)
Rule 5.4(e)	DR 2-105
Rule 5.5(a)	DR 3-101
Rule 5.6	DR 2-108
Rule 6.3	DR 5-108(C)(1)&(2)
Rule 6.4	DR 5-108(C)(3)
Rule 7.1(a)(1)	DR 2-101(A)(1)
Rule 7.1(a)(2)	DR 2-101(A)(2)
Rule 7.1(a)(3)	DR 2-102(A)(3)

Rule 7.1(a)(4)	DR 2-102(A)(4)
Rule 7.1(a)(5)	DR 1-102(A)(5)
Rule 7.1(a)(6)	DR 2-101(A)(6)
Rule 7.1(a)(7)	DR 2-101(A)(7)
Rule 7.1(a)(8)	DR 2-101(A)(8)
Rule 7.1(a)(9)	DR 2-101(A)(9)
Rule 7.1(a)(10)	DR 2-101(A)(10)
Rule 71.(a)(11)	DR 2-101(A)(11)
Rule 7.1(a)(12)	DR 2-101(A)(12)
Rule 7.1(b)	DR 2-101(C)
Rule 7.1(c)	DR 2-101(D)
Rule 7.1(d)	DR 2-101(F)
Rule 7.1(e)	DR 2-101(G)

Rule 7.2(a)	DR 2-103(A)
Rule 7.2(b)	DR 2-103(B)
Rule 7.2(c)	DR 2-103(C)
Rule 7.3(a)	DR 2-104(A)(1)
Rule 7.3(b)	DR 2-101(D)
Rule 7.3(c)	DR 2-101(H)
Rule 7.3(d)	DR 2-104(A)(3)
Rule 7.5(a)	DR 2-102(A)
Rule 7.5(b)	DR 2-102(B)
Rule 7.5(c)	DR 2-102(C)
Rule 7.5(d)	DR 2-102(D)
Rule 7.5(e)	DR 2-102(E)
Rule 7.5(f)	DR 2-102(F)

Rule 8.1(a)	DR 1-101 & 1-103(C)
Rule 8.1(b)	DR 1-103(D)
Rule 8.1(c)	DR 1-103(F)
Rule 8.2(a)	DR 8-102
Rule 8.2(b)	DR 8-103
Rule 8.3(a)	DR 1-103(A)
Rule 8.3(b)	DR 1-103(B)
Rule 8.3(c)	DR 1-103(E)
Rule 8.4(a)(1)-(4)	DR 1-102(A)(1)-(4)
Rule 8.4(b)	DR 1-102(D)
Rule 8.6	DR 1-105