OREGON RULES OF PROFESSIONAL CONDUCT

(as amended effective January 11, 2018)

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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/XX/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/XX/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 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 contact information 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.

Amended 01/01/17: Revised to remove "not-for-profit" from (2) and to require listing "contact information" in lieu of "office address."

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 lawyer shall not solicit professional employment by any means when:

(a) the lawyer knows or reasonably should know that the physical, emotional or mental state of the subject of the solicitation is such that the person could not exercise reasonable judgment in employing a lawyer;

(b) the subject of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(c) the solicitation involves coercion, duress or harassment.

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).

Amended 01/01/17: Deleting requirement that lawyer place "Advertising Material" on advertising.

Amended 01/11/18: Deleting requirements specific to "in-person, telephone or real-time electronic contact" and deleting exception for prepaid and group legal service plans

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.

(d) This rule does not require disclosure of mediation communications otherwise protected by ORS 36.220.

Adopted 01/01/05

Amended 1/11/2018 to add subsection "d" relating to mediation communications.

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 means 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/XX/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)
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DR 2-104(B)	Eliminated
DR 2-105	Rule 5.4(e)
DR 2-106(A)	Rule 1.5(a)
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DR 5-109(A)	Rule 1.12(a)
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DR 7-101(A)	Rule 1.2(a)

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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**
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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)**
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DR 7-104(A)(1)	**Rule 4.2**
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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)**
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Rule 1.8(d)	DR 5-104(B)
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Rule 1.8(g)	DR 5-107
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Rule 1.8(i)	DR 5-103(A)
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Rule 3.3(b)	DR 7-102(B)
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Rule 7.1(a)(5)	DR 1-102(A)(5)
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Rule 7.2(c)	DR 2-103(C)
Rule 7.3(a)	DR 2-104(A)(1)
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Rule 7.3(c)	DR 2-101(H)
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Rule 8.6	DR 1-105

POTENTIAL MALPRACTICE CLAIM CHECKLIST

This checklist is intended for use in conjunction with a sample letter to the client, regarding a potential malpractice claim against an attorney.

		Yes	No
1.	Has lawyer taken an action, or failed to take an action, that could have an adverse impact on the matter? (In other words, has the lawyer committed potential legal malpractice?)		
2.	Contact the Professional Liability Fund (or other professional liability insurance carrier) and speak to a Claims Attorney regarding the matter.		
3.	Consider whether to: a) consult with in-house counsel or risk management partner at your firm; b) retain outside ethics counsel; or c) contact OSB General Counsel for guidance.		
4.	Does a personal conflict of interest exist under Oregon RPC 1.7(a)(2)? Is there a significant risk that the lawyer's representation of one or more clients will be materially limited by the lawyer's personal interest in the matter due to the alleged conduct? *See, e.g.*, OSB Formal Ethics Opinion No. 2009-182; The Ethical Oregon Lawyer § 9.2 (OSB Legal Pubs 2015).		
5.	If the answer to 4 is yes, does the lawyer reasonably believe that the lawyer will be able to provide competent and diligent representation to each affected client?		
6.	If the answer to 5 is no, prepare a complete copy of client file for production to client, take appropriate measures to withdraw, send a disengagement letter, and provide an accounting to the client of any funds in trust (and return any unearned fees). *See also*, "Production of Client File or Documents" practice aid (www.osbplf.org).		
7.	Consider carefully whether facts or circumstances exist, that would make it preferable for the client to obtain new counsel, even if the conflict arguably could be waived.		
8.	If the answers to 4 and 5 are yes, and 7 has been analyzed, lawyer should contact client to discuss conflict and determine if client will provide informed consent to continue the representation. Lawyer may want to prepare a draft letter to client before meeting or phone call to frame discussion. *See also*, "Malpractice Disclosure Letters" practice aid (www.osbplf.org).		
9.	After client contact, revise malpractice disclosure letter and provide to PLF (or other carrier) Claims Attorney (or your own ethics counsel) for review and comments.		
10.	Retain signed copy of informed consent letter for lawyer's records.		

USING EMAIL IN THE OFFICE

Email is now the primary way we communicate with clients, opposing counsel, and others. Unfortunately, "You've got mail!" is no longer exciting news. The volume of messages we receive overwhelms many of us. Some lawyers report spending up to three hours each day reading, responding to, and filing email.
T, Keep these points in mind:

- Consider whether you must respond to each email received, especially if you are copied on the email or if your response is merely "thank you." Do your part to cut down on the flow of unnecessary email.

- Evaluate whether to continue an existing email discussion or start a new message. This is especially important if you are volleying an attachment back and forth with comments. Avoid straying from the original topic of your email communications.

- Limit email to the purpose for which it was intended:

    - Providing quick answers to straightforward, yes and no questions.
    - Making or confirming appointments, court dates, or other calendar commitments.
    - Transmitting documents.
    - Distributing information quickly to many people.
    - Short, simple communication.

- Avoid replying by email when your message is likely to be misunderstood:

    - You are unclear about the question asked.
    - The question is complicated and requires a detailed answer.
    - The subject is sensitive and your words could be misinterpreted.

    The telephone is a better alternative in these circumstances. You can always send a confirming email or letter after the fact.

- Craft your subject line. This will allow your recipient to know at a glance what your email is about and keep you "on topic" when composing the body of your message. "Reminder – Meeting Scheduled June 1 at 10:00 am" is better than "Meeting." If you want action, request it. "Final draft attached for your approval." If there is no need for a message beyond the descriptive subject line, consider ending with "End of Message" or "EOM." For example, "Please review and return by noon today. (EOM)." Never send email without a subject line.

- Add a personal salutation before you launch into the substance of your message. ("Dear Dr. Smith," "Dr. Smith," "John.")

- Email that is clear, concise, and actionable will improve the quality of responses and eliminate the need for multiple emails asking for further clarification.

    - State your most important point first.
    - Format your email so busy readers can see key content without scrolling down the body of the message, otherwise, it may be overlooked. Bullet points and numbered lists are helpful.
    - Use complete sentences paragraphs of three to five lines.
    - Do not use ALL CAPS. The reader may believe you are shouting. Caps may emphasize a word or two.
    - Choose font styles and colors that make your message easy to read. Black is the best font color for the body of your message.

- Specify the response you want from the reader. Do you want the reader to schedule a follow-up appointment or phone call? Do you want the reader to reply with an answer to a question? Include your contact

information so the reader can respond in the most effective manner, which may be to pick up the phone to get clarification. Include "thank you in advance" with any request.

- Add a proper closing. ("Warmest regards," "Sincerely.")

- Create and use an email signature that includes contact information (your full name, title or status, firm name, mailing address, telephone, direct dial number, facsimile, email address, and Web site.)

- Consider adding a marketing message at the end of your email signature. It could refer to an upcoming presentation you are doing or an article on your Web site. Keep it short and change the message periodically to keep it fresh.

- Consider attaching a virtual business card (vCard) to your messages. Besides standard contact information, a vCard can include logos, photographs, and even audio clips. The file format (.vcf) is standard and accessible by all users. In Outlook, start by creating a contact card for yourself. To attach your contact card to your emails, click on Help. Search for "create vCard" and follow the steps.

- Before hitting the "Send" button:

    - Check the "To" box. Is your email properly addressed?
    - Run spell check.
    - Run grammar check.
    - Carefully proofread your email. When satisfied, click "Send."

- Establish a policy for responding to client email messages: "I reply to emails within 24 hours," "… by the end of the next business day," etc. Set a time that fits you, your clientele, and your practice. Communicate your policy at the first client meeting so clients know what to expect when they email your office.

- Observe best practices to avoid accidental waiver of attorney-client privilege and other mistakes:

    - Use email headers for any notices or disclaimers ("This message is confidential and may contain sensitive and private privileged information. If you are **not** the intended recipient, or if you believe you have received this message in error, please notify me immediately by reply email. Please keep the contents confidential and delete the message and any attachments from your system.")

    - Always confirm client email addresses. Send new clients an initial greeting before you begin substantive communications. A short message welcoming the client to the firm and asking the client to reply will verify that you have the correct address.

    - Advise your non-business clients to not read, download, or respond to attorney-client email while at work. Some jurisdictions have held that no attorney-client privilege applies when an employee uses a computer at work to access personal email over the employer's Internet connection.

    - Give all clients the choice to opt-out of communicating by unencrypted email. For more information, and sample language to include in your fee agreement or engagement letter, see the PLF practice aid, *Engagement Letter and Fee Agreement – Advanced*, available on the PLF Web site, www.osbplf.org.

    - Use Word or WordPerfect to draft lengthy, complex messages. Save frequently to avoid losing your work. Once you are satisfied with the text, you can paste it into an email message.

USING EMAIL IN THE OFFICE

- Use the "hands-off" method when finished composing. Type your message, and then take your hands off the keyboard. Carefully review what you have written.

- Beware of auto complete and name caching in Outlook and similar programs. These features "help" you by remembering email addresses you have entered . Unfortunately, they can also cause you to send a message to the wrong recipient. One workaround is to type *the full name* of your recipient when addressing an email. Other options include deleting unwanted names proposed by your email program or turning off the auto complete feature, (Instructions for Outlook users are at the end of this document.)

- If your email and voicemail are integrated, important messages from clients can easily be saved as part of the client's electronic file. Simply save the .wav file to the client's electronic folder as you would any email attachment. This allows you to preserve the exact message left by the client. Listen to the message any time by using your audio player (Windows Media Player or QuickTime).

- Establish a reliable means of filing client email. Capture all messages, sent and received, and attachments. Retain them just as you would correspondence, pleadings, or other client documents. See *Documenting Email as Part of the Client's File* on the PLF Web site, www.osbplf.org.

Email tips compiled from these resources:

E-Writing: http://bit.ly/2kDuPNn
Sender, Beware: http://bit.ly/2jQS4nG
The Email Blizzard: http://bit.ly/2jQS9Yw
Writing Effective Emails: http://bit.ly/1e7de4P
Using Email Effectively: http://bit.ly/2kI1T6m
Email Tips: http://bit.ly/1L8AraD
Using Email Effectively as a Communication Tool: http://bit.ly/2ldChMM
Using Email Effectively: http://bit.ly/2jR1gIB
Working Better: How to Use Your Email Effectively: http://bit.ly/2jSj15v
How to Use Email Effectively at Work: http://bit.ly/2jSndSH

USING EMAIL IN THE OFFICE

Outlook Users – Instructions for Deleting Unwanted Names or Turning off Automatic Completion of Email Names

To Turn Off Automatic Name Checking in Outlook:

1. In Outlook 2002, 2003, or 2007, first locate the Tools menu, then click Options.

2. Click the Preferences tab. Choose Email Options, and then click Advanced Email Options.

3. In Outlook 2002 or 2003, locate the "When sending a message" group, and click to clear the "Suggest names while completing To, Cc, and Bcc fields." In Outlook 2007, locate "When sending a message," and click to Clear "Automatic Name Checking." Press OK.

4. In Outlook 2010, locate the File tab. Under Help, select Options. In the navigation pane on the left, choose Mail. Scroll down to "Send Messages." Click to clear "Automatic Name Checking." Press OK.

To Delete Names from the Email Cache in Outlook 2002, 2003, 2007 or 2010:

1. Begin by typing the name in the To box of a message.

2. When the auto complete list appears, press the DOWN ARROW key on your keyboard to select the name you want to delete.

3. Press the DELETE key to remove the entry from cache.

4. Quit and then restart Outlook.

How to Correct Single Auto-complete Entries in Outlook 2002, 2003, 2007 or 2010:

Single auto complete entries (auto complete entries that show only one item in the list) cannot be deleted. To correct the incorrect entry, add a second entry that uses the same first three letters as the original, and then delete the incorrect entry. Use these steps to delete the bad entry:

1. In a new email message type the correct name in the To box. (The first three letters must be the same as the old incorrect one.)

2. In the CC box, type the first three letters of the recipient to reveal the auto correct name list with both entries now showing.

3. Use the arrow keys to select the incorrect entry, and then press DELETE.

4. Quit and then restart Outlook.

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Legal Practice Tips

How to Fire a Client:
Do's and Don'ts When Ending Representation
By Beverly Michaelis

Do you have a file in your office that you just can't stand to look at? (Hint: It's often related to the client you don't like.) Has it been languishing on the corner of your desk or pushed out-of-sight on your credenza? Is a deadline approaching, but you just can't seem to get started? These unwanted files are a major cause of ethics complaints and legal malpractice claims. And most lawyers have at least one. To free yourself from this potentially dangerous situation, gather your courage, take a stand, and fire your problem clients. The first step is to identify the clients and cases you should let go.

Whom Should I Fire?

Some lawyers can easily identify their "dog" files. Others may find this task more difficult. Whether or not you think you know your "dog" files, it never hurts to stop and thoughtfully evaluate your caseload three or four times a year. Try to make it a regular, quarterly practice. When you do, ask yourself if any of these situations sound familiar:

The Client Who Owes You Money

Whether the client never had the money to pay your fees to begin with, or somewhere along the way the account just became delinquent, involuntary pro bono cases are a bad idea. When you continue working for a client who is not paying your bill, you are sending the message that you are not worth the fee you charge. This practice not only emboldens the non-paying client to continue not paying you, but also can be demoralizing and financially damaging to you, your family and your staff. Instead, establish specific billing and accounts receivable practices, spell them out clearly in your fee agreement, and enforce the rules. These situations rarely get better, and the longer you stay on the case, the harder it will be for you to withdraw.

The "Difficult" Client

Also known as the client you hate working for. You know who they are: The client who tracks down your home phone number and calls you on the weekend for non-emergency matters. The client who makes a habit of dropping by your office unexpectedly. The client who complains about every bill and pushes the limit by paying late or at the last possible moment to avoid late fees. The client who won't listen to your advice and fails to cooperate in keeping appointments, providing documents or answering questions. The client who wants to be your co-counsel. The client who is rude to you or your staff. Letting this client go will lift your spirits and instantly lower your stress level. Keeping this client may lead to an ethics complaint or a legal malpractice claim, since this file is generally the last to be worked on, if it receives any attention at all. Learn to spot (and fire) this type of client early in the case. Better yet – avoid representing this client in the first place.

The Case Better Left to Someone Else

Even when you get along famously with your client, and finances are not an issue, some matters simply aren't worth keeping (or taking on). If your favorite client has talked you into helping him or her with a matter that is outside your area of expertise, heed the red flag.

Many a legal malpractice claim can be traced back to a lawyer's initial bad judgment in accepting a case that should have been declined. When friends, family and long-time clients apply pressure, many lawyers succumb to the hero syndrome, believing they can save the day. Resist this temptation. You wouldn't suggest that a loved one see a dermatologist for chest pains. The practice of law is no different. Act in your client's best interests and match him or her with the right professional. This advice holds doubly true in the case of friends or family, where the combination of inexperience plus lack of objectivity and client control can spell ethics or malpractice trouble. You can never go wrong by directing your potential client to the right practitioner. As the friend, family member or long-time lawyer, you can then assume a more fitting role: remain associated with the matter – if appropriate and helpful – or lend moral support. But leave the primary representation to the capable, disinterested colleague who is best suited to handle it.

How Do I Fire My Client?

Oregon Rule of Professional Conduct (ORPC) 1.16(b) specifically permits a lawyer to withdraw from representation if:

Withdrawal can be accomplished without material adverse effect on the interests of the client. ORPC 1.16(b)(1).

The client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement. ORPC 1.16(b)(4).

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. ORPC 1.16(b)(5).

The representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client. ORPC 1.16(b)(6).

Other good cause exists. ORPC 1.16(b)(7).

Any one of these grounds, in addition to others listed in ORPC 1.16(b), is sufficient. To withdraw from representing the non-paying client, the difficult client, or the case better left to another practitioner, follow the steps set out in ORPC 1.16(c) and (d):

Give reasonable notice to the client.

Allow time for employment of other counsel.

Surrender papers and property to which the client is entitled.

Refund any advance payment of fees or expenses that have not been earned or incurred.

Comply with applicable law requiring notice to or permission of a tribunal to withdraw.

Take other appropriate action necessary to protect the client's interests.

Lawyers who inappropriately seek to enforce attorney fee liens over client files, withhold file contents or charge clients for file copies risk an ethics complaint or a legal malpractice claim. (See "*Difficult Paradigm: Are Lien Rights Absolute?*" and "*Client Files Revisited: More Light on a Topic That Won't Go Away*," by Helen Hierschbiel, OSB assistant general counsel, published in the *OSB Bulletin,* May 2006 and January 2006, respectively.)

In addition, you should:

Advise the client of (or confirm) the reason for termination in writing. Avoid commenting on the merits of the case. Since you are terminating representation before conclusion of the matter, advise the client *generally* that time limitations may or do apply, and stress the need to hire another lawyer immediately.

Keep a copy of any documents returned to the client and preserve your file for at least 10 years.

Cooperate fully with the client's new legal counsel, if any. Provide that person with a complete copy of the file, and make sure a substitution of counsel is timely filed with the court by the client's new legal counsel.

Reviewing your caseload three or four times a year will help you identify and promptly withdraw from problem cases. Then take the wisdom you've gained and apply it the next time you are screening a new client or matter. If unpaid fees are a perennial problem in your practice, follow the suggestions below to keep on top of overdue accounts. And above all, keep up these practices. Your vigilance is the key to successfully avoiding or withdrawing from the "dog" files.

Other Practical Tips

Keep an Eye on Your Accounts

Do not allow outstanding fees to accumulate. 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, the client may be dissatisfied with an aspect of your representation. Speaking with the client helps you to decipher and address the real issues behind the client's non-payment. Once you understand the situation, you can decide whether you want to continue or withdraw from the representation. Do not discontinue providing essential legal services due to non-payment unless you have properly withdrawn from the case.

Streamline the Process with Form Letters

Creating form letters to have on hand when you want to withdraw from a case will make the process much simpler. For the prospective client who did not sign and return your fee agreement, pay your retainer or respond as requested, your letter might say something like this:

Dear Client:

Since I have not heard from you for the past (*30, 45, or other number of your choosing*) days, I assume you do not wish to retain me further or to proceed with this matter. For that reason, I am now closing my file and will take no further action in the matter.

> You (*are*) (*may be*) facing some time deadlines. If you decide to proceed, you should contact another attorney immediately. If you fail to do so, your legal matter may be barred by a time limit.
>
> *Very truly yours,*
> *Sam Lawyer*

If your client owes you outstanding fees and costs, download and use the PLF form letter, "Disengagement Letter 3 – Unpaid Fees," available on the PLF website at www.osbplf.org. Once there, select *Practice Aids and Forms* under Loss Prevention, and follow the link to "Disengagement Letters." While at the website, consider downloading the eight other nonengagement and disengagement letters for your forms file.

For the client or case you should never have taken, your letter might say:

> Dear Client:
>
> The purpose of this letter is to confirm, based on our conversation of (date), that (firm name) will not continue to represent you in (describe matter) because (give reason for declining if possible and appropriate to state it). OR: The purpose of this letter is to confirm, based on our conversation of (date), that (firm name) will not continue to represent you in (describe matter). We feel that your interests would be better served by retaining another lawyer to assist you in this matter.
>
> You should be aware that any action in your case must be filed within the applicable statute of limitations. I strongly recommend that you consult with another lawyer concerning your rights in this matter. Our decision should not be taken as a statement of the merits of your case.
>
> *Very truly yours,*
> *Samantha Attorney*

To Sue or Not to Sue

As a general rule, avoid suing clients for fees. Make an effort to determine the root of the client's dissatisfaction. It is natural to be defensive about your work on a case, but try to put your emotional investment in the matter aside while attempting to resolve a fee dispute. Really listen to the client's side of the argument. If appropriate, offer to arbitrate the fee dispute through the OSB Fee Arbitration Program, or consider other alternative dispute resolution methods.

Before suing a client for fees, consider the following:

> Do you stand to gain or lose a substantial amount of money?
>
> Was a good result obtained in the underlying case?
>
> Has an uninvolved, experienced lawyer reviewed the file for possible malpractice?
>
> Does the client have any grounds to credibly dispute the debt or any part of it?
>
> Have you offered to arbitrate or compromise?
>
> Will a judgment be collectible if obtained?
>
> 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 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.

Perhaps Abraham Lincoln said it best: "It is more important to know what cases not to take than it is to know the law."

ABOUT THE AUTHOR

The author is a lawyer and practice management adviser with the Professional Liability Fund.

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FORMAL OPINION NO 2005-61

Conflicts of Interest, Current Clients: Malpractice, Failure to Timely File, Settlement between Lawyer and Client

Facts:

Lawyer is retained by Client to represent Client in asserting two factually and legally separate claims against two separate individuals. Lawyer timely files a complaint on one claim but fails to do so on the other claim.

Questions:

1. May Lawyer negotiate a settlement with Client for Lawyer's failure to file one of the claims on a timely basis?

2. In the absence of such a settlement, may Lawyer continue to handle the claim that was timely filed?

Conclusions:

1. Yes, qualified.

2. Yes, qualified.

Discussion:

Oregon RPC 1.8(h) provides in part:

> (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. . . .

Lawyer may ethically effect a settlement with Client if Lawyer first advises Client "in writing" that independent representation for Client is desirable in connection with any proposed settlement. *Cf. In re Smith*, 9 DB Rptr 79 (1995) (lawyer violated *former* DR 6-102(A) by requiring clients to sign agreement that included language purporting to limit liability of lawyer with respect to clients' use of documents prepared or reviewed and approved by lawyer).

Oregon RPC 1.7 provides, in pertinent part:

> (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:
>
> . . . .
>
> (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; . . .
>
> . . . .
>
> (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;
>
> (4) each affected client gives informed consent,[1] confirmed in writing.

---

[1] Oregon RPC 1.0(g) provides:

> "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

Depending on the facts and circumstances, the pendency or potential pendency of a malpractice claim by Client against Lawyer could trigger the requirements of Oregon RPC 1.7(a)(2). *Compare In re Knappenberger*, 337 Or 15, 90 P3d 614 (2004),[2] *with In re Lawrence*, 332 Or 502, 31 P3d 1078 (2001).[3] If Oregon RPC 1.7(a)(2) applies, Lawyer may not represent Client on the claim that was timely filed unless Lawyer obtains Client's informed consent, confirmed in writing.

Approved by Board of Governors, August 2005.

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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.

[2] The court in *In re Knappenberger*, 337 Or at 28, stated:

> Many errors by a lawyer may involve a low risk of harm to the client or low risk of ultimate liability for the lawyer, thereby vitiating the danger that the lawyer's own interests will endanger his or her exercise of professional judgment on behalf of the client. Even if the risk of some harm to the client is high, the actual effect of that harm may be minimal, or, if an error does occur, it may be remedied with little or no harm to the client. In those circumstances, it is possible for a lawyer to continue to exercise his or her professional judgment on behalf of the client without placing the quality of representation at risk.

[3] In *In re Lawrence*, 332 Or at 506, the trial court entered a default judgment against the accused lawyer's client after the lawyer failed to file a timely response. The lawyer advised the client he had a viable legal malpractice claim against him, but continued to represent the client in other matters without making a full written disclosure, and importantly, the lawyer obtained a written release from his client, which provided that the lawyer would continue to handle other matters for the client for no fee in exchange for his client giving up any malpractice claim against the lawyer.

COMMENT: For additional information on this general topic and related subjects, see *The Ethical Oregon Lawyer* § 9.2-1 to § 9.2-1(c) (personal-interest conflicts), § 9.3 (limiting or settling malpractice claims) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* § 54 (2000) (supplemented periodically); ABA Model RPC 1.7; and ABA Model RPC 1.8(h). *Cf. In re Brown*, 277 Or 121, 559 P2d 884, *corrected on denial of reh'g,* 277 Or 731, 561 P2d 1030 (1977); OSB Formal Ethics Op No 2005-32.

FORMAL OPINION NO 2005-41

Competence and Diligence: Client with Diminished Capacity

Facts:

For many years, Lawyer has represented Client on business matters. Recently, however, Lawyer has begun to observe extraordinary behavior by Client that appears to be out of character with Client's former behavior and contrary to Client's own best interests. Based on these observations, Lawyer becomes reasonably concerned that Client is no longer capable of handling Client's own affairs. When Lawyer discusses these concerns with Client, however, Client tells Lawyer to mind Lawyer's own business.

Question:

Notwithstanding Client's directions, may Lawyer take steps to protect what Lawyer believes to be Client's best interests?

Conclusion:

Yes, qualified.

Discussion:

As a general proposition, lawyers owe their clients a duty of competent and diligent representation as well as a duty to preserve information relating to the representation. See, for example, Oregon RPC 1.1, Oregon RPC 1.3, and Oregon RPC 1.6, discussed in OSB Formal Ethics Op No 2005-18 and OSB Formal Ethics Op No 2005-17. Although these duties are nearly absolute, Oregon RPC 1.14 provides an exception:

> (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.

A lawyer in such a situation must reasonably believe that there is a need for protective action and then may take only such action as is reasonably necessary under the circumstances. If, for example, Lawyer expects that Client's questionable behavior can be addressed by Lawyer raising the issue with Client's spouse or child, a more extreme course of action, such as seeking the appointment of a guardian, would be inappropriate.

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and related subjects, see *The Ethical Oregon Lawyer* chapter 18 (representing clients with diminished capacity and disability) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 16–24 (2000) (supplemented periodically); and ABA Model RPC 1.14.

See also OSB Formal Ethics Op No 2005-159, which states that (1) a lawyer representing a mentally ill parent in a dependency or termination-of-parental-rights case should seek the lawful objectives of the client and not substitute the lawyer's own interest, and (2) a lawyer may seek appointment of a guardian to speak for the client, or may take other protective action for the client as limited by the disciplinary rule, if the client cannot act in his or her own interests.

FORMAL OPINION NO 2005-30

[REVISED 2016]

Conflicts of Interest, Current Clients: Simultaneous Representation of Insurer and Insured

Facts:

Insured has a property-damage insurance policy with Insurer. When Insured's property is damaged by the negligent conduct of a third party, Insurer pays Insured to the extent required by the policy, minus the applicable deductible. The policy provides that, to the extent that Insurer pays Insured, Insurer is subrogated to Insured's claims against third parties.

Insurer now proposes to pay Lawyer to represent both Insurer and Insured in an action against a third party to recover damages not reimbursed by Insurer to Insured as well as the sums that Insurer paid to Insured. At the time that Insurer makes this request, it does not appear that the interests of Insurer and Insured do or may diverge.

Question:

May Lawyer undertake to represent both Insurer and Insured in an action against the third party?

Conclusion:

Yes, qualified.

Discussion:

In undertaking this representation, Lawyer would have both Insurer and Insured as clients, even though the action may be prosecuted

solely in Insured's name.[1] *See, e.g.*, ABA Informal Ethics Op No 1476 (1981); ABA Formal Ethics Op No 282 (1950); 1 *Insurance* ch 14 (Oregon CLE 1996 & Supp 2003). Since Insurer would be paying Lawyer's fee, Lawyer must comply with the requirements of Oregon RPC 1.8(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 not 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.

Oregon RPC 5.4(c) is also relevant:

> 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.

As long as Lawyer does not permit improper influence within the meaning of Oregon RPC 5.4(c) and obtains informed consent from Insured pursuant to Oregon RPC 1.8(f)(1) and Oregon RPC 1.0(g),[2] the

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[1] Any assumption that a tripartite relationship exists can be overcome by the specific facts and circumstances in a particular matter. *See In re Weidner*, 310 Or 757, 801 P2d 828 (1990) (articulating the test for an attorney-client relationship); *Evraz Inc., N.A., v. Continental Ins. Co.,* Civ No 3:08-cv-00447-AC, 2013 WL 6174839 (D Or, Nov 21, 2013) (finding no tripartite relationship when insurer did not hire lawyer and when lawyer had made it clear to insurer that she only represented insured).

[2] Oregon RPC 1.0(g) provides:

> "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

simultaneous representation would not be prohibited. There also is no reason this representation should be prohibited by Oregon RPC 1.7.[3] As discussed in OSB Formal Ethics Op No 2005-27, a lawyer may represent multiple clients without special disclosure and consent if it does not reasonably appear that a conflict is present. *Cf. In re Stauffer*, 327 Or 44,

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give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.

[3] Oregon RPC 1.7 provides:

> (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.

48 n 2, 956 P2d 967 (1998) (citing *In re Samuels & Weiner*, 296 Or 224, 230, 674 P2d 1166 (1983)).

Approved by Board of Governors, February 2016.

COMMENT: For more information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 3.5-3 (payment of fees by nonclients), § 10.2-2(e)(5) (insurer-insured conflicts) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* § 134 (2000) (supplemented periodically); and ABA Model RPC 1.8(f). See also OSB Formal Ethics Op No 2005-166 (rev 2016) (insurance defense lawyer may not agree to comply with insurer's billing guidelines if to do so requires lawyer to materially compromise his or her ability to exercise independent judgment on behalf of client in violation of RPCs); OSB Formal Ethics Op No 2005-115 (rev 2014) (lawyer may not ethically permit representation of client to be controlled by others); OSB Formal Ethics Op No 2005-98 (lawyer may ethically agree with insurer to handle number of cases for insurer at flat rate per case regardless of amount of work required as long as overall fee is not clearly excessive and as long as lawyer does not permit existence of agreement to limit work that lawyer would otherwise do for particular client).

FORMAL OPINION NO 2005-77

[REVISED 2016]

Conflicts of Interest, Current Clients: Representation of Insured after Investigation of Matter for Insurer

Facts:

Lawyer is retained by Insurer to review an insurance policy issued to Insured because of a complaint filed by a third party against Insured. Lawyer advises Insurer that Insurer has a duty to defend Insured but may well not have a duty to pay any ultimate judgment. After that work is completed, Insurer asks Lawyer to represent Insurer and Insured in defense of the underlying litigation subject to a reservation of rights.

Question:

May Lawyer represent Insurer and Insured in defense of the underlying litigation?

Conclusion:

See discussion.

Discussion:

As discussed in OSB Formal Ethics Op No 2005-30 (rev 2016), both Insured and Insurer would be Lawyer's clients in the defense of the underlying action.[1] Simultaneous representation in insurance defense cases is generally permissible: a conflict that falls within Oregon RPC 1.7 generally will not exist because the clients have common interest in

[1] Any assumption that a tripartite relationship exists can be overcome by the specific facts and circumstances in a particular matter. *See In re Weidner*, 310 Or 757, 801 P2d 828 (1990) (articulating the test for an attorney-client relationship); *Evraz Inc., N.A., v. Continental Ins. Co.*, Civ No 3:08-cv-00447-AC, 2013 WL 6174839 (D Or, Nov 21, 2013) (finding no tripartite relationship when insurer did not hire lawyer and when lawyer had made it clear to insurer that she only represented insured).

defeating the claim.[2] *See also* OSB Formal Ethics Op No 2005-121 (rev 2016).

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[2] If the representation of one client will be directly adverse to the other client, the proposed representation would be impermissible even if both Insurer and Insured consented. *See In re Holmes*, 290 Or 173, 619 P2d 1284 (1980) (under *former* DR 5-105, consent would not have cured actual conflict of interest between lawyer's two clients). If there a significant risk that the representation of one client will be materially limited by the lawyer's responsibilities to the other client, the representation would be permissible, but only if Lawyer reasonably believes that he or she is able to competently represent both clients, and Insurer and Insured give informed consent, confirmed in writing. *Cf. In re Barber*, 322 Or 194, 904 P2d 620 (1995).

Oregon RPC 1.7 provides:

> (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.

In this situation, however, the fact of Lawyer's recently completed work for Insurer on the coverage question must also be considered. Because of that work, if there is a significant risk that Lawyer's representation of Insured in defense of the underlying claim will be materially limited by Lawyer's responsibilities to Insurer, a conflict will be present under Oregon RPC 1.7(a). Consequently, Lawyer could not represent both Insurer and Insured in the underlying action without a reasonable belief that Lawyer could competently represent both clients, and only after receiving informed consent, confirmed in writing, from both Insurer and Insured pursuant to Oregon RPC 1.7(b), Oregon RPC 1.0(b), and (g). The disclosure to Insured must include a discussion of the fact of the prior representation of Insurer on the coverage question and its potential significance. *Cf. In re Germundson*, 301 Or 656, 661, 724 P2d 793 (1986); *In re Montgomery*, 292 Or 796, 802–04, 643 P2d 338 (1982); *In re Benson*, 12 DB Rptr 167 (1998); *In re Rich*, 13 DB Rptr 67 (1999).

Oregon RPC 1.0(b) and (g) provide:

> (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. . . . 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.
>
> . . . .
>
> (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.

Oregon RPC 1.8(f) and Oregon RPC 5.4(c) also apply to this situation.[3] On the present facts, however, these rules do not create any additional requirements beyond those created by Oregon RPC 1.7.

Approved by Board of Governors, February 2016.

[3] Oregon RPC 1.8(f) provides:

> (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.

Oregon RPC 5.4(c) provides:

> (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.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 3.5-3 (payment of fees by nonclients), § 10.2 (multiple-client conflicts rules), § 10.2-2 to § 10.2-2(b) (conflicts between current clients), § 10.2-2(e)(1) (creative lawyering to limit conflicts), § 10.2-2(e)(5) (insurer-insured conflicts), chapter 20 (conflicts-waiver letters) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 121–122, 128, 130, 134 (2000) (supplemented periodically); ABA Model RPC 1.0(b) and (e); ABA Model RPC 1.7; ABA Model RPC 1.8(f); and ABA Model RPC 5.4(c). *See also* OSB Formal Ethics Op No 2005-157 (rev 2016); Washington Advisory Op No 943 (1985) (available at <www.wsba.org/resources-and-services/ethics/advisory-opinions>).

FORMAL OPINION NO 2005-166

[REVISED 2016]

Competence and Diligence: Compliance with Insurance Defense Guidelines

Facts:

Insurer has an ongoing professional relationship with Lawyer to defend claims asserted against its insureds. As a part of that relationship, Insurer requires Lawyer to agree to comply with its Litigation Billing/ Management Guidelines (the "Guidelines").[1] The Guidelines may mandate, among other things, (1) approval by Insurer before Lawyer may schedule and take depositions, conduct legal research, prepare substantive motions, or hire experts; (2) delegation of particular tasks to paralegals; and (3) submission to Insurer of status reports or litigation plans or both.

A cause of action is filed against defendant Insured. Insurer retains Lawyer to provide a defense for Insured. Insurer sends Lawyer a cover letter confirming representation, along with the claim file. The letter contains a reminder to Lawyer to comply with Insurer's Guidelines. Insurer also requests that Lawyer sign an acknowledgement form that Lawyer has received the claim file and the Guidelines.

Question:

May Lawyer agree to comply with the Guidelines without regard to their effect on Lawyer's clients?

Conclusion:

No.

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[1] The Guidelines may also be referred to as "case handling" or "case management" guidelines.

Discussion:

Lawyer may sign and return the acknowledgment letter to indicate that Lawyer has accepted the *assignment* of the matter, but must advise Insurer that he or she cannot agree to comply with Guidelines that might compromise Lawyer's ethical obligations as discussed below.

Lawyer may comply with the Guidelines only if Lawyer has an opportunity to review and evaluate the Guidelines with respect to each case and, based on that review, Lawyer reasonably concludes that compliance with the Guidelines will not materially compromise Lawyer's professional, independent judgment or Lawyer's ability to provide competent representation to Insured. Lawyer cannot agree to comply with the Guidelines before reviewing and analyzing the facts and issues of each case because such an advance agreement would potentially surrender Lawyer's professional judgment. Moreover, throughout the case, Lawyer has an ongoing ethical obligation to reevaluate whether his or her continued compliance with the Guidelines impedes his or her ability to exercise independent judgment.

In Oregon, a lawyer retained by an insurer to represent both the insurer and the insured must treat the insured as the "primary client" whose protection must remain the lawyer's "dominant concern."[2] OSB Formal Ethics Op No 2005-121 (rev 2016); OSB Formal Ethics Op No 2005-77 (rev 2016); OSB Formal Ethics Op No 2005-30 (rev 2016).

Oregon RPC 1.8(f) provides:

> (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] Any assumption that a tripartite relationship exists can be overcome by the specific facts and circumstances in a particular matter. *See In re Weidner*, 310 Or 757, 801 P2d 828 (1990) (articulating the test for an attorney-client relationship); *Evraz Inc., N.A., v. Continental Ins. Co.*, Civ No 3:08-cv-00447-AC, 2013 WL 6174839 (D Or, Nov 21, 2013) (finding no tripartite relationship when insurer did not hire lawyer and when lawyer had made it clear to insurer that she only represented insured).

> (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.

Oregon RPC 1.1 requires that Lawyer provide "competent representation" to Insured, which requires the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Notwithstanding the directives set forth in the Guidelines, Lawyer must not allow his or her professional judgment or the quality of his or her legal services to be compromised materially by Insurer.

Under Oregon RPC 5.5(a), Lawyer also must not assist a nonlawyer in the unauthorized practice of law. Thus, Lawyer may comply with the Guidelines requirements that certain tasks be delegated to a paralegal only if, in Lawyer's independent professional judgment, the particular task is appropriate for performance by a paralegal in the particular case and the paralegal is appropriately supervised.

Insurer may require Lawyer to inform Insurer about the litigation process through periodic status reports, detailed billing statements, and the submission of other information. Lawyer's compliance with this aspect of the Guidelines does not necessarily violate Lawyer's ethical obligations if the disclosure of such information advances the interests of both Insured and Insurer, and does not otherwise compromise Lawyer's duty to maintain his or her independent judgment. *Cf.* OSB Formal Ethics Op No 2005-157 (rev 2016).

In the final analysis, Lawyer must determine on a case-by-case and step-by-step basis whether compliance with the Guidelines will restrict Lawyer's ability to perform tasks that, in Lawyer's professional judgment, are necessary to protect Insured's interests. Lawyer cannot commit in advance to comply with Guidelines that restrict Lawyer's representation of Insured, possibly to Insured's detriment. Lawyer also must continue to monitor the effect of the Guidelines during the entire course of representation. If Lawyer cannot ethically comply with any particular aspect of the Guidelines, Lawyer must obtain a modification of

the Guidelines from Insurer, or decline or withdraw from the representation.

Approved by Board of Governors, February 2016.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 3.5-3 (payment of fees by nonclients), § 10.2-2(e)(5) (insurer-insured conflicts) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 3, 16, 134 (2000) (supplemented periodically); and ABA Model RPC 1.8.

FORMAL OPINION NO 2005-121

[REVISED 2016]

Conflicts of Interest, Current Clients: Insurance Defense

Facts:

Plaintiff files a complaint against Insured that includes two claims for relief. Insured has an insurance policy pursuant to which Insurer owes a duty to defend against, and a duty to pay damages on, the first claim for relief. Insurer would have no such duties, however, if Plaintiff had sued only on the second claim for relief. The amount of damages sought on the second claim exceeds policy limits.

Insured tenders the defense of the entire action to Insurer. Insurer accepts the tender of defense of both claims subject to a reservation of rights with respect to the second claim. Insurer then hires Lawyer to represent Insured in the case brought by Plaintiff.

After reviewing the pleadings and investigating the facts, Lawyer concludes that the first claim for relief may be subject to a motion to dismiss or a summary judgment motion or that it may be possible, for a sum that Insurer would be willing to pay, to settle the first claim only. The second claim, however, is not potentially subject to such motions and cannot be settled. Lawyer also knows that Insured does not want Lawyer to bring such a motion or effect such a partial settlement because doing so would leave Insured without an Insurer-paid defense on the second claim for relief and would diminish the ability of Insured to get funds from Insurer to help settle the case as a whole.

Question:

May Lawyer file a motion against the first claim or settle it?

Conclusion:

No.

Discussion:

As a general proposition, a lawyer who represents an insured in an insurance defense case has two clients: the insurer and the insured.[1] OSB Formal Ethics Op No 2005-77 (rev 2016); OSB Formal Ethics Op No 2005-30 (rev 2016). Consequently, a lawyer in such a situation must be mindful of the restrictions in Oregon RPC 1.7 on current-client conflicts of interest:

> (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;

[1] Any assumption that a tripartite relationship exists can be overcome by the specific facts and circumstances in a particular matter. *See In re Weidner*, 310 Or 757, 801 P2d 828 (1990) (articulating the test for an attorney-client relationship); *Evraz Inc., N.A., v. Continental Ins. Co.*, Civ No 3:08-cv-00447-AC, 2013 WL 6174839 (D Or, Nov 21, 2013) (finding no tripartite relationship when insurer did not hire lawyer and when lawyer had made it clear to insurer that she only represented insured).

> (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.

For the definitions of *informed consent* and *confirmed in writing*, see Oregon RPC 1.0(b) and (g).[2]

The relationship between Lawyer, Insured, and Insurer is both created and limited by the insurance policy. As the court stated in *Nielsen v. St. Paul Companies*, 283 Or 277, 280, 583 P2d 545 (1978), for example:

> When a complaint is filed against the insured which alleges, without amendment, that the insured is liable for conduct covered by the policy, the insurer has the duty to defend the insured, even though other conduct is also alleged which is not within the coverage. . . . The insurer owes a duty to defend if the claimant can recover against the insured under the allegations of the complaint *upon any basis* for which the insurer affords coverage. [Emphasis in original; citations omitted.]

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[2] Oregon RPC 1.0(b) and (g) provide:

> (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. . . . 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.
>
> . . . .
>
> (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.

See also ABA Formal Ethics Op No 282 (1950), which notes that simultaneous representation of insurers and insureds in actions brought by third parties generally does not raise conflict problems because of the "community of interest" growing out of the insurance contract.

When an insurer defends an insured without any reservation of rights (by which the insured reserves its right to deny coverage), there is little or no opportunity for a conflict of interest because the community of interest between the insurer and insured should be complete. When an insurer defends subject to a reservation or rights, however, a risk of conflict is present. To minimize this risk and to permit joint representation in such cases, both the ethics rules and insurance law require that a lawyer hired by the insurer to defend an insured must treat the insured as "the primary client" whose protection must be the lawyer's "dominant" concern. *See, e.g.*, ABA Informal Ethics Op No 1476 (1981); 1 *Insurance* chs 6, 14 (Oregon CLE 1996 & Supp 2003).[3] Consequently, a lawyer who is hired to defend the insured in a situation such as the one described in this opinion cannot file a motion that would adversely affect the insured's right to a defense or to coverage but must instead act in a manner that is consistent with the interests of the insured.[4] *See* 1 *Insurance*, chs 6, 14. *See also Barmat v. John & Jane Doe Partners A-D*, 155 Ariz 519, 747 P2d 1218, 1219 (1987).

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[3] The law also provides that if there is a potential conflict between the insurer and the insured, the facts found by the court in the action by the third party against the insured will not be given collateral estoppel effect as to either the insurer or the insured in a subsequent coverage dispute. *See, e.g.*, *Ferguson v. Birmingham Fire Ins. Co.*, 254 Or 496, 509–11, 460 P2d 342 (1969).

[4] The insurer is free to hire other counsel to litigate the coverage issue.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 10.2-2(e)(5) (insurer-insured conflicts) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* § 134 (2000); ABA Model RPC 1.0(b), (e); and ABA Model RPC 1.7.

FORMAL OPINION NO 2005-85

Identifying the Client: Corporations and Partnerships

Facts:

Corporation has two shareholders, *A* and *B*, who are not members of the same family. Partnership has two owners, *C* and *D*, who are not members of the same family.

Questions:

1. Does representation of Corporation automatically constitute representation of *A* and *B*?

2. Does representation of Partnership automatically constitute representation of *C* and *D*?

3. Does representation of *A* or *B* automatically constitute representation of Corporation?

4. Does representation of *C* or *D* automatically constitute representation of Partnership?

Conclusions:

1. No.

2. No.

3. No.

4. No.

Discussion:

Identifying the client is essential to a proper determination of matters such as to whom the lawyer owes a duty of confidentiality under ORS 9.460(3) and Oregon RPC 1.6 and whether a current- or former-client conflict exists under Oregon RPC 1.7, Oregon RPC 1.8, and Oregon RPC 1.9. *Cf.* OSB Formal Ethics Op No 2005-62; OSB Formal

Ethics Op No 2005-119; *In re Morris*, 326 Or 493, 953 P2d 387 (1998); *In re Henderson*, 10 DB Rptr 51 (1996).

A lawyer who represents an entity, such as a corporation or partnership, generally represents that entity only and not its employees, shareholders, or owners. See Oregon RPC 1.13(a), which provides that "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." See also *In re Weidner*, 310 Or 757, 801 P2d 828 (1990), and OSB Formal Ethics Op No 2005-46, in which we noted that the modern test for the presence or absence of a lawyer-client relationship is, in essence, the reasonable-expectations test.

In *In re Banks*, 283 Or 459, 584 P2d 284 (1978), the court observed that, in general, representation of an entity, such as a corporation, does not automatically constitute representation of its shareholders. Nevertheless, the court held that representation of a corporation whose stock was owned by a single person or by a single person and member of the person's family constituted representation of the person when, at the time of the legal work in question, the person "*was* the corporation" and had "*no real reason . . . to differentiate in his mind between his own and corporate interests.*" *In re Banks*, 283 Or at 472, 474 (emphasis in original). On the other hand, the court in *In re Kinsey*, 294 Or 544, 562 n 10, 660 P2d 660 (1983), noted that the normal entity theory applied when a corporation was owned by shareholders who were not members of the same family. The opinions in both *Banks* and *Kinsey* represent applications of the reasonable-expectations test.[1]

[1] The *Banks* rule should not apply, for example, when the sole shareholder is a major corporation and its subsidiary is itself a major corporation that is independently run and is in an altogether different line of business. *Hartford Acc. & Indem. Co. v. RJR Nabisco, Inc.*, 721 F Supp 534, 540 (SDNY 1989); *Am. Special Risk Ins. Co. v. Delta Am. Re Ins. Co.*, 634 F Supp 112, 120 n 14 (SDNY 1986); *Pennwalt Corp. v. Plough, Inc.*, 85 FRD 264, 268–69 (D Del 1980). The *Banks* rule also may not apply if the "family" of shareholders is an extended and fractious family rather than a family whose interests are aligned, as was the case in *Banks.*

On the facts presented, and based on the foregoing discussion, representation of a corporation or partnership with two shareholders or owners who are not family members does not automatically constitute representation of the shareholders or owners. A contrary rule could well require the lawyer to withdraw whenever the two shareholders disagreed on a matter. *Cf.* OSB Formal Ethics Op No 2005-40; DC Bar Ethics Op No 216 (1991). If, however, a lawyer tells the shareholders or owners that they are individual clients or otherwise leads the shareholders or owners reasonably to believe that they are also the lawyer's clients, they will be held to be clients.[2]

Similarly, there is no reason for a reverse imputation. In other words, representation of one of two unrelated shareholders or owners should not be deemed as a matter of law to constitute representation of Corporation or Partnership. Once again, however, a lawyer who reasonably leads Corporation or Partnership (or the other shareholder or owner) to believe that they are clients will be held to have additional clients.

Approved by Board of Governors, August 2005.

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[2] A lawyer who wishes to negate any possible application of the *Banks* outcome would be well advised to send the shareholders or owners a letter to the effect that they are not the lawyer's clients.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 5.1 to § 5.3-2 (client identification) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* § 14 (2000) (supplemented periodically); and ABA Model RPC 1.7–1.8.

FORMAL OPINION NO 2005-16

Communicating with Unrepresented Persons

Facts:

Lawyer *A* represents Client *A*, who was injured when struck by a car driven by a person whom Lawyer *A* does not know to be represented by counsel. Lawyer *A* would like to send a letter to this person, informing the person of the seriousness of the injuries to Client *A* and recommending that the person instruct his or her insurance carrier to accept a policy-limits demand.

Lawyer *B*, who represents Criminal Defendant *B*, learns that Witness, who may or may not also be implicated in the same crime, has been subpoenaed to appear before the grand jury investigating Criminal Defendant *B*. To help Criminal Defendant *B*, Lawyer *B* would like to advise Witness to assert the Fifth Amendment privilege against self-incrimination. Lawyer *B* does not know whether Witness has counsel.

Question:

May either Lawyer *A* or Lawyer *B* engage in the proposed communication?

Conclusion:

No.

Discussion:

Oregon RPC 4.2 provides:

> 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.

Oregon RPC 4.3 provides:

> 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.

Oregon RPC 4.2 does not apply because Lawyer *A* and Lawyer *B* do not know that the persons to whom they propose to speak are represented by counsel on the same or related matters. *Cf.* OSB Formal Ethics Op No 2005-6. On the other hand, Oregon RPC 4.3 applies and would clearly be violated by the proposed conduct. *Cf. In re Bauer*, 283 Or 55, 581 P2d 511 (1978) (lawyer not guilty of violating *former* DR 7-105(A)(2) because no advice was given).

Approved by Board of Governors, August 2005.

COMMENT: For additional information on the general topic and other related subjects, see *The Ethical Oregon Lawyer* § 8.5-1 to § 8.5-2 (communications with persons other than the client) (OSB Legal Pubs 2015); and *Restatement (Third) of the Law Governing Lawyers* §§ 98–99, 103 (2000) (supplemented periodically). *See also In re Jeffery*, 321 Or 360, 372, 898 P2d 752 (1995) (lawyer violated *former* DR 7-104(A)(2) for communicating with unrepresented party with adverse interests); OSB Formal Ethics Op No 2005-89 (district attorney may suggest civil compromise to victim of crime as long as district attorney does not violate Oregon RPC 4.3).

FORMAL OPINION NO 2005-132

Communicating with Adverse Expert Witness: Dissuasion of Witness from Testifying

Facts:

During the course of preparation in a civil case in either state or federal court, Lawyer learns the identity of (1) a fact witness, and (2) an expert retained by opposing counsel.

Questions:

1. May Lawyer contact the fact witness without notice to or consent from opposing counsel?

2. May Lawyer contact the expert without notice to or consent from opposing counsel?

3. May Lawyer attempt to dissuade either witness from testifying?

Conclusions:

1 Yes, qualified.

2. No, in federal civil litigation; for state civil litigation, see discussion.

3. No.

Discussion:

1. *Contact with Adverse Fact Witnesses*.

Oregon RPC 3.4(c) provides that a lawyer shall not "knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists," and Oregon RPC 3.3(a)(5) prohibits "other illegal conduct or conduct contrary to these Rules." Neither Oregon nor federal statutes, cases, or court rules of procedure and evidence prohibit a lawyer from contacting

unrepresented[1] fact witnesses. Oregon and federal appellate cases have not interpreted existing statutes or rules so as to prohibit such contact. Moreover, the existence of formal civil discovery mechanisms does not prohibit lawyers from using other lawful methods of obtaining information from fact witnesses.[2]

2. *Contact with Adverse Expert Witnesses*.

In contrast with the federal rules, Oregon rules of civil procedure contain no provision for obtaining formal discovery of expert witnesses. *See* FRCP 26(b)(4). Therefore, the propriety of a lawyer's contact with an expert witness depends on whether the lawyer is involved in state or federal civil litigation.[3]

a. *Violation of rules of a tribunal*.

FRCP 26(b)(4) provides that the facts known and opinions held by experts may be obtained "only" as provided in the federal civil procedure rules, that is, through written interrogatories, unless the parties agree or the court orders otherwise. The Ninth Circuit has interpreted FRCP 26(b)(4) to prohibit contact with adverse expert witnesses retained to testify at trial. *See Campbell Indus. v. M/V Gemini*, 619 F2d

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[1] The lawyer may not contact a witness who is represented by counsel. Oregon RPC 4.2. *See* OSB Formal Ethics Op No 2005-6; OSB Formal Ethics Op No 2005-126. The lawyer also may not contact a management employee or certain other persons employed by a represented entity. *See* OSB Formal Ethics Op No 2005-80 (rev 2016).

[2] *See Trans-World Investments v. Drobny*, 554 P2d 1148, 1151 (Alaska 1976) (informal methods of discovery encouraged as facilitating early evaluation and settlement of litigation); *Int'l Bus. Machines Corp. v. Edelstein*, 526 F2d 37, 43 (2d Cir 1975) (district court could not interfere with counsel's ability to conduct pretrial interviews with government witnesses confidentially, without presence of opposing counsel or reporter); *Gregory v. United States*, 369 F2d 185, 188 (DC Cir 1966) (both sides have equal right to interview witnesses, especially eyewitnesses).

[3] The result in federal civil litigation differs from that reached in criminal cases, due to the different statutory and case-law contexts, although the analytical approach is the same. *See* OSB Formal Ethics Op No 2005-131 (*ex parte* contact with adverse expert witness not ethically prohibited in criminal case).

24, 27 (9th Cir 1980) (district court ruled and party conceded on appeal that contacts with expert retained by other side was a "flagrant abuse" of federal discovery rules, which require court permission for oral discovery of experts). Contact with an adverse expert retained to testify in federal civil litigation would violate the rules of the tribunal and Oregon RPC 3.4(c).

Oregon has no equivalent to FRCP 26(b)(4) or any other rule for formal discovery of adverse experts in civil cases.[4] Accordingly, contact with adverse experts does not violate any established rule of procedure or evidence in violation of Oregon RPC 3.3(a)(5) or Oregon RPC 3.4(c).

b. *Prejudice to the administration of justice*.

Conduct that prejudices the administration of justice is prohibited by Oregon RPC 8.4(c). In federal civil litigation, the "flagrant abuse" of established procedures limiting contact with experts would prejudice the administration of justice by undermining the functioning of the proceeding. Oregon RPC 8.4(a)(4). In state court civil litigation, however, contact with expert witnesses, which is not expressly prohibited, would not of itself necessarily prejudice either the procedural functioning of the proceeding or a substantive right of a party. *Cf. In re Haws*, 310 Or 741, 746–47, 801 P2d 818 (1990) (two-month delay in forwarding client's nonexempt wages to bankruptcy trustee did not prejudice the administration of justice).

Even when contact with an adverse expert is not prohibited, other principles may limit the contact. An expert witness not retained to testify at trial is considered to be a representative of the lawyer and the expert's opinions and knowledge are privileged. *See* Legislative Commentary to OEC 503(1)(e), *reprinted in* Laird C. Kirkpatrick, *Oregon Evidence* § 503.2 (6th ed 2013) (definition of representative of lawyer does not include an expert "employed to testify as a witness"); FRE 501 (privileges in civil cases are a matter of state law). Unauthorized efforts to discover privileged opinions and knowledge would

[4] ORS 135.815 and ORS 138.835 provide for reciprocal disclosure of trial witnesses in criminal cases.

prejudice the administration of justice. Moreover, any suggestion by a lawyer that there is no privilege would violate Oregon RPC 8.4(a)(3), which prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice."

3. *Attempt to Dissuade Witness from Testifying*.

Even when allowed, there are ethical limits to a lawyer's *ex parte* investigation of witnesses. For example, a lawyer cannot misrepresent the identity or motive of the interviewer. *See* Oregon RPC 4.3; Oregon RPC 8.4(a)(3); *cf*. OSB Formal Ethics Op No 2005-42; *In re Chambers*, 292 Or 670, 680–81, 642 P2d 286 (1982) (lawyer unethically told adverse party he was insurance investigator rather than lawyer). Harassing interview or investigation techniques may violate Oregon RPC 4.4(a) (lawyer cannot take action that would harass or maliciously injure another).

A lawyer may also not attempt to influence the witness by improper means. Offering an illegal inducement or offering payment contingent on the content of the witness's testimony or the outcome of the case is prohibited by Oregon RPC 3.4(b). Attempting to persuade a witness not to testify would be prejudicial to the administration of justice, because, if successful, it would obviously constitute substantial harm to the functioning of the proceeding as well as to the substantive interest of a party. Oregon RPC 8.4(a)(4). Moreover, Oregon RPC 3.4(f)[5] prohibits a lawyer from advising or causing a witness to secrete himself or herself, which would be the practical effect of a successful attempt to persuade a witness not to testify. Even if unsuccessful, the attempt is prejudicial to the administration of justice. *In re Boothe*, 303 Or 643, 653, 740 P2d 785 (1987).

[5] Oregon RPC 3.4(f) provides:

> A lawyer shall not . . . 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. . . ."

Approved by Board of Governors, August 2005.

COMMENT: This opinion replaces OSB Formal Ethics Op No 2005-118. For additional information on this general topic, and other related subjects, see *The Ethical Oregon Lawyer* § 8.6-3 (making a witness unavailable), § 8.6-4 (obeying rules of the tribunal), § 8.11 (conduct prejudicial to the administration of justice) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 106, 116 (2000) (supplemented periodically); and ABA Model RPC 3.3–3.4.