Practicing Inclusion: How to Best Represent Clients with Disabilities

Cosponsored by the Disability Law Section

Friday, June 7, 2019
9 a.m.–4:30 p.m.

2 Access to Justice credits, 1.5 Ethics (Oregon specific) credits, 1 Abuse Reporting credit, 1 Mental Health/Substance Use credit, and .5 General CLE credit
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OREGON STATE BAR
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SCHEDULE

8:00  Registration

9:00  Courtroom Accommodations—Tips from the Bench

- The new Multnomah County Courthouse—better access, navigation, and participation for persons with disabilities
- Requesting services and assistance from the courts for accommodations
- Accessing services for telephone and in-person administrative hearings
- Requesting accommodations from the Office of Administrative Hearings

The Honorable Nan Waller, Multnomah County Circuit Court, Portland
John Mann, Chief Administrative Law Judge, Office of Administrative Hearings, Tualatin

10:00  Break

10:15  Using the Interactive Process for Court Accommodations

- Borrowing employment best practices to identify and obtain reasonable accommodations for court participants with disabilities
- Recognizing the need for accommodation and evaluating options
- Selecting the right accommodation, implementation, and monitoring

Bill Spiry, Spiry Law LLC, Eugene

11:15  Interacting and Working Together When Mental Health or Cognitive Disability Is a Concern

- Maintaining an attorney-client relationship
- Earning trust and soothing client concerns while keeping a professional relationship
- Ethically and effectively gathering information about a client’s wishes from family and providers
- How clinical, medical, and person-centered services view disability and capacity

Risa Davis, Risa Davis Attorney at Law LLC, Portland
Terisa Page Gault, Harris Velázquez Gibbens, Hillsboro
Jennifer Jim, Clinical Director, Sequoia Mental Health Services, Aloha
Gordon Magella, Disability Rights Oregon, Portland
Che Walker, Director of Clinical Services, Partnerships in Community Living Inc., Monmouth

12:15  Lunch

1:15  Legal Ethics with a Twist

- Examine actual complaints
- Explore interesting circumstances

Scott Morrill, JD, Portland

2:15  Break

2:30  Lawyer Well-Being: Healthy Awareness of Mental Health and Substance Use Issues

- Research highlighting mental health and substance use challenges in the legal profession
- The need for greater support of lawyer well-being
- Factors that prevent lawyers from seeking help
- Be aware: signs and symptoms of anxiety, depression, unhealthy stress, and problematic substance use

Douglas Querin, Oregon Attorney Assistance Program, Portland
3:30  Mandatory Abuse Reporting for Oregon Lawyers
    ✦ Duty to report child and elder abuse
    ✦ Differences between the reporting requirements
    ✦ When a lawyer is required to report
    ✦ When ethical obligations as a lawyer preclude reporting
    Linn Davis, Oregon State Bar, Tigard

4:30  Adjourn
**FACULTY**

**Linn Davis,** *Oregon State Bar, Tigard.* Mr. Davis is an assistant general counsel at the Oregon State Bar. He manages the bar’s Client Assistance Office and screens concerns about lawyers when they first come to the attention of the bar. He previously served as an assistant disciplinary counsel for the Oregon State Bar and as a prosecutor in the New York County District Attorney’s Office.

**Risa Davis,** *Risa Davis Attorney at Law LLC, Portland.* Ms. Davis’s legal work has focused on employment law, civil rights, and student rights, and she has practiced as the owner of a small firm, a sole practitioner, and a contract attorney for larger firms. Recently, she has moved into an advisory position within a large local company, and she is transitioning her legal practice to solely pro bono work on behalf of individuals who identify as having a disability. Ms. Davis is serving her second term as chair of the Oregon State Bar Disability Law Section.

**Terisa Page Gault,** *Harris Velázquez Gibbens, Hillsboro.* Ms. Gault practice is focused exclusively on Social Security disability matters. She has appeared on behalf of clients across the United States. She is chair of the Oregon Trial Lawyers Association Social Security Disability Section and a member of the Oregon State Bar Disability Law Section Executive Committee, the National Organization of Social Security Claimants Representatives, Oregon Social Security Claimants Representatives, and the Washington County Bar Association.

**Jennifer Jim,** *Clinical Director, Sequoia Mental Health Services, Aloha.*

**Gordon Magella,** *Disability Rights Oregon, Portland.* As a staff attorney at Disability Rights Oregon, Mr. Magella works primarily on issues involving services for people with intellectual and developmental disabilities with a focus on achieving community inclusion, strong community-based services, and supported employment for those individuals. In 2018, Mr. Magella was appointed by Governor Brown to serve on the Oregon Council on Developmental Disabilities. He is past chair of the Oregon State Bar Disability Law Section. He is admitted to practice in Oregon and Ohio and before the U.S. Supreme Court.

**John Mann,** *Chief Administrative Law Judge, Office of Administrative Hearings, Tualatin.* ALJ Mann was appointed Chief Administrative Law Judge of the Office of Administrative Hearings in August 2017. Prior to his appointment, he served as a Presiding Administrative Law Judge with the OAH, supervising the work of Senior Administrative Law Judges. ALJ Mann began working for the OAH as an ALJ in September 2003 and has conducted hearings in most of the OAH’s program areas, including unemployment, implied consent, child support, special education, and numerous licensing and regulatory agencies.

**Scott Morrill, JD,** *Portland.* Mr. Morrill is the former manager of the Oregon State Bar Client Assistance Office and former assistant disciplinary counsel at the bar. During his tenure at the bar, he was a frequent presenter on ethics topics. Prior to working at the bar, Mr. Morrill was in private practice handling criminal law, domestic relations, and personal injury cases. He also served as Tualatin’s municipal court judge and did pro tem work for the Beaverton Justice Court.

**Douglas Querin,** *Oregon Attorney Assistance Program, Portland.* Mr. Querin is an Attorney-Counselor with the Oregon Attorney Assistance Program, providing resource referrals and confidential behavioral health and addiction counseling services to Oregon lawyers, judges, and law students. He practiced law in Oregon for over 25 years before becoming licensed as a Professional Counselor and certified as a Drug and Alcohol Counselor. Mr. Querin frequently presents at Oregon law schools, law firms, and bar associations on professional well-being in the legal community.
Bill Spiry, Spiry Law LLC, Eugene.

Che Walker, Director of Clinical Services, Partnerships in Community Living Inc., Monmouth.

The Honorable Nan Waller, Multnomah County Circuit Court, Portland. Judge Waller is the Mental Health Court Judge and manages the Aid and Assist docket for the court. She was appointed to the Multnomah County Circuit Court bench in 2001 by Governor Kitzhaber. She served as the Chief Family Law Judge for five years and as Presiding Judge for six years. Judge Waller is a member of the Judicial Leadership Education Committee and the Oregon Supreme Court Council on Inclusion and Fairness. Judge Waller chairs a subcommittee of the Local Public Safety Coordinating Council to Reduce Racial and Ethnic Disparities as well as the Mental Health and Public Safety subcommittee. She serves on the Behavioral Health Justice Reinvestment Steering Committee, the Governor’s Children’s Cabinet, and the Child Welfare Oversight Board. Judge Waller has received many awards, including the Mental Health Award for Excellence, the Crime Citizens Commission Distinguished Service Award, the Oregon State Bar Public Service Award, the Oregon National Alliance on Mental Illness Gordon and Sharon Smith New Freedom Award, the Oregon State Bar Wallace P. Carson Award for Judicial Excellence, and the University of Oregon Frohnmayer Award for Public Service. She was named National CASA Judge of the Year and the Classroom Law Project Legal Citizen of the Year.
Chapter 1A

Presentation Slides: The New Multnomah County Circuit Courthouse

THE HONORABLE NAN WALLER
Multnomah County Circuit Court
Portland, Oregon
The New Multnomah County Circuit Courthouse

21st Century Accessibility for a Diverse Community

Designed to symbolize the transparency of the justice system

17 Floors  44 Courtrooms  6 Public Elevators
More Spacious Public Spaces (lobbies, waiting areas, jury assembly)
Accessibility Overview

- New construction means compliance with 2010 ADA Standards for Accessible Design
  - Everything from ramps & clearances for mobility devices to door push/pull force to single-handed operation of restroom fixtures
- Utilizing technology for accessibility and an overall better public experience
- Added and improved services for accessibility writ large

Facility Accessibility

Spacious main entrance and security screening area
Facility Accessibility

Fully accessible queuing for up to 80 people, with room for additional 100 on (covered) exterior plaza

Facility Accessibility

• One courtroom per floor is fully accessible to mobility devices for jurors, witnesses, spectators and the Judge

• All courtrooms fully accessible for jurors, witnesses and spectators
Facility Accessibility

- All courtrooms have space for wheelchairs in jury box and gallery
- Courtroom doors do not have automatic door openers due to noise concerns resulting from delayed closure

Auxiliary Aids

- New infrared-based assistive listening system in all courtrooms and primary public spaces (e.g. jury assembly room)
- Individual neckloops for hearing aid or cochlear implant compatibility
- Improved sound system equipment for better listening clarity
Accessible Modern Technology

- Interactive Wayfinding & Digital Information Screens
  - Visual information on how and where to find services with options for vision limitations
  - Staffed information desk for in-person assistance when needed

- Self-service kiosks for routine functions such as paying parking tickets, etc.
  - Some §508 compliant and with accessible reach and clearance (details not yet finalized)
  - Digital elevator call system with alternative audio output
  - Alternative format court documents
Services for a better public experience

- Improved services for self-represented parties
  - Legal Resource Center
  - Court Navigator Staff
  - Centralized Public Service
  - (TBD: Opportunity for dovetailing with wider social services / disability services)

- Reduced confusion, stress, anxiety - important for people with many invisible disabilities
Chapter 1B

Presentation Slides: Representing a Client with a Disability at the Office of Administrative Hearings

JOHN MANN
Chief Administrative Law Judge
Office of Administrative Hearings
Tualatin, Oregon
Chapter 1B—Presentation Slides: Representing a Client with a Disability at the OAH

Representing a Client with a Disability at the Office of Administrative Hearings

John Mann
Chief Administrative Law Judge
Office of Administrative Hearings

Sources of Law Requiring Accommodation of Disabilities

- Americans with Disabilities Act (ADA) - 42 USC 12101 et seq
  - Title II of the ADA discrimination on the basis of disability in services, programs, and activities provided by State and local government entities.
  - This includes administrative hearing services.

- Oregon Law – ORS 659A.142(5)(a)
  - It is an unlawful practice for state government to exclude an individual from participation in or deny an individual the benefits of the services, programs or activities of state government or to make any distinction, discrimination or restriction because the individual has a disability.
 SOURCES OF LAW REQUIRING ACCOMMODATION OF DISABILITIES

○ Due Process

  • Goldberg v. Kelly, 397 US 254 (1970) recognized that a fundamental aspect of due process is the right to be heard at a meaningful time and in a meaningful manner. (267) “The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard.”

○ Administrative Procedures Act – Duty of Inquiry

  • ORS 183.417(8) “The officer presiding at the hearing shall ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the presiding officer in the case and the correct application of the law to those facts.”

  • Statutory obligation to ensure a full and fair inquiry necessarily implies that the ALJ make some effort to ensure that all parties will be given a full and fair opportunity to participate in the hearing and to provide evidence.

 SOURCES OF LAW REQUIRING ACCOMMODATION OF DISABILITIES

○ Berwick v. Department of Human Services, 74 Or.App 460 (1985)

  • Duty of the hearing officer to assure parties a full and fair hearing. This “requires the hearings officer to make sure that the claimant is able to present all significant favorable evidence. When the claimant is represented by an attorney, the hearings officer can normally rely on the attorney to produce that evidence. However, when the claimant is unrepresented or is represented by a lay person, as petitioner was and as many AFSD claimants are, the hearings officer's responsibility is greater.”

  • “Hearings officers must assist claimants, in part by following up on potentially favorable lines of inquiry and in part by helping claimants present their evidence in its best light.”
**SOURCES OF LAW REQUIRING ACCOMMODATION OF DISABILITIES**

- Duty to Develop the Record
  - Affirmative obligation to ensure that all parties are given a full and fair opportunity to present argument and evidence.
  - Implies a duty to ensure that individuals are not deprived of the opportunity to participate in hearings due to a disability.

**TELEPHONE HEARINGS**

- Approximately 80% of OAH hearings are by telephone.
  - Unemployment Benefits
  - Social Services Benefits
  - Child Support Hearings
  - Some DMV Hearings
  - Some Professional Licensing and Regulatory Agency Hearings

- Benefits of Phone Hearings
  - Physical access usually not an issue
  - Travel is usually not required
  - May be less stressful for persons with mental health conditions

- Challenges for phone hearings
  - Hearing impairments
  - Language barriers (not a disability, but still requires accommodation)
IN-PERSON HEARINGS

- OAH Offices in Four Cities
  - Salem
  - Eugene
  - Tualatin
  - Portland (DMV Hearings Only)

- Off-site Hearings
  - State Agency Buildings
    - Typically for Professional Licensing and Regulatory Agencies
  - DMV Hearings
    - Held at various public buildings throughout the state

IN-PERSON HEARINGS

- Benefits of In-Person Hearings
  - Easier for individuals with hearing impairments or who require language interpretation.
  - Less opportunity for external distractions.

- Challenges for In-Person hearings
  - Physical access to buildings
  - Travel
  - Parking
  - Can be more stressful
REQUESTING AN ACCOMMODATION

- **OAH Website:**
  https://www.oregon.gov/oah/Pages/ADA-Accommodations.aspx

- Website includes a form that may be used to request an accommodation
  - Use of the form is not mandatory; parties may request accommodation by telephone

- Accommodation may be requested by any hearing participant:
  - Party
  - Attorney
  - Witness

REQUEST FORM

1. Date of Request: __________________________
2. Name of person needing ADA accommodation (Applicant): ______________________________________
   Contact Name: _________________________  Relationship to Applicant: ___________________________
   Mailing Address: _______________________________________________________________________
   Phone No.: ____________________________  Email Address: ________________________________
   TTY: _________________________________  Fax No.: _______________________________________  
   Please list preferred contact method: _______________________________________________________

   OTHER INFORMATION
   1. Case No. and type of case (if known): ___________________________________________________
   2. Time and date of hearing or prehearing conference (if known): ___________________________
   3. What is your role in the hearing (party, witness, representative, lawyer): ___________________
   4. Describe the nature of the hearing: _____________________________________________________
   5. It would help us to assist you if we know more information. Completing this section is optional and you
      are not required to fill it out. If you choose to fill it out, please select what best describes the disability or
      condition for which you need an assistive device, service, or accommodation (circle all that apply):
      - Blind/Visual Impairment
      - Medical Restrictions/Requirements
      - Deaf/Hearing Impairment
      - Cognitive Impairment or Injury
      - Speech/Vocal Impairment
      - Other:
      - Mobility Impairment
   6. What type of accommodation do you need and prefer? ______________________________________
      ___________________________________________________________________________________
      ___________________________________________________________________________________
      ___________________________________________________________________________________
      ___________________________________________________________________________________

   Submitting This Form:
   You have many options to submit this form, including US Mail, personal delivery, email or fax. Please
   select the option that is most convenient for you:
   Mailing Address: Office of Administrative Hearings
   PO Box 14020
   Salem, Oregon 97309-4020
WHERE TO SUBMIT THE REQUEST FORM

<table>
<thead>
<tr>
<th>Method</th>
<th>Office/Contact Information</th>
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<tbody>
<tr>
<td>By Mail</td>
<td>Office of Administrative Hearings</td>
</tr>
<tr>
<td></td>
<td>PO Box 14020</td>
</tr>
<tr>
<td></td>
<td>Salem, Oregon 97309-4020</td>
</tr>
<tr>
<td>By Fax</td>
<td>503-947-1920</td>
</tr>
<tr>
<td>By Email</td>
<td><a href="mailto:rema.a.bergin@oregon.gov">rema.a.bergin@oregon.gov</a></td>
</tr>
<tr>
<td>Submit in Person</td>
<td>Salem Office:</td>
</tr>
<tr>
<td></td>
<td>4600 25th Ave. NE, Suite 140</td>
</tr>
<tr>
<td></td>
<td>Salem, OR 97301</td>
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<tr>
<td></td>
<td>Tualatin Office:</td>
</tr>
<tr>
<td></td>
<td>7995 SW Mohawk St., Entrance B</td>
</tr>
<tr>
<td></td>
<td>Tualatin, OR 97062</td>
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<tr>
<td></td>
<td>Eugene Office</td>
</tr>
<tr>
<td></td>
<td>2510 Oakmont Way</td>
</tr>
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<td>Eugene, OR 97401</td>
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</tbody>
</table>

REQUESTING ACCOMMODATIONS – BEST PRACTICES

- Contact the OAH as soon as possible once you know that accommodation may be needed.
  - This could be for a client, an attorney, an assistant, or a witness.
- Provide specific information about the accommodation that is needed.
  - You are not required to disclose medical information.
- Where appropriate, you may raise the issue at a prehearing conference.
- You may be contacted by OAH management to discuss how best to accommodate your needs.
There are no course materials for this session.
Chapter 3

Interacting and Working Together When Mental Health or Cognitive Disability Is a Concern

RISA DAVIS
Risa Davis Attorney at Law LLC
Portland, Oregon

TERISA PAGE GAULT
Harris Velázquez Gibbens
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JENNIFER JIM
Clinical Director
Sequoia Mental Health Service
Aloha, Oregon

GORDON MAGELLA
Disability Rights Oregon
Portland, Oregon

CHE WALKER
Director of Clinical Services, Partnerships in Community Living Inc.
Monmouth, Oregon

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Chapter 3—Interacting and Working Together When Mental Health or Cognitive Disability Is a Concern

Introductions

• Che Walker, M.S., LPC, NCC, Director of Clinical Services, Partnerships in Community Living, Inc.
• Jennifer Jim, Clinical Director, Sequoia Mental Health Service
• Terisa Page Gault, Harris Velazquez Gibbens
• Gordon Magella, Disability Rights Oregon
• Risa Davis, Attorney at Law, LLC
### Panel Overview

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<td>• Familiarize how clinical, medical, and person-centered services view disability and capacity</td>
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<td>• Ethical Rules and Considerations</td>
<td>• Review how to maintain an ethical and appropriate attorney-client relationship</td>
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<td>• Information Gathering</td>
<td>• Explore how to ethically and effectively gather information about a client’s wishes</td>
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<td>• Communication Strategies</td>
<td>• Explore how to earn trust and soothe client concerns while maintaining a professional relationship</td>
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### Disability Through Different Lenses

- **Client Advocate**

- **Intellectual Developmental Disability Field (DHS, Chile Welfare, SPD)**

- **Medical Viewpoint (Physician, Psychiatrist, Psychotherapist)**

- **Law Enforcement Perspective**
Ethical Rules and Considerations

• ORPC 1.14 – Client with Diminished Capacity
  (a) Maintain a normal lawyer-client relationship as far as reasonably possible
  (b) Lawyer may take reasonably necessary protective action
  (c) Apply Rule 1.6 (disclosure may be authorized when taking protective action)

• ORPC 1.6 – Confidentiality of Information
  (a) Keep information confidential
  (b) Reasonably necessary disclosure may be authorized in some circumstances

Information Gathering

• Utilizing (leveraging!) sources of information
  • Client
  • Family
  • Medical providers
  • Disability-specific providers

• Assessing conflicts and undue influence
Communication Strategies

• Clients may know how they communicate most effectively
• Factual understanding vs abstract conceptualization
• Framing representation
• Discerning client intent
• Constant informed consent
• Attention and memory concerns
• Delusions and hallucinations
• Create a toolbox
## Communication Toolkit

### ASK ABOUT COMMUNICATION NEEDS AND PREFERENCES – USE THE “PLATINUM RULE”

<table>
<thead>
<tr>
<th>CONTENT</th>
<th>TONE AND PACE</th>
<th>TIME, PLACE AND FORMAT</th>
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| • Literal and specific  
• Avoid slang, idioms and sarcasm  
• Keep questions short and provide structured questions (options) when possible  
• Use names regularly to hold attention and be clear  
• Listen and sympathize with the delusional/hallucination experience without agreeing/arguing reality – “I can’t see them, but I know you can,” “I understand what you are feeling is scary” | • Slow down  
• Wait for a response after asking a question – allow time for processing  
• Consider body language and eye contact  
• Take a break  
• Don’t take things personally  
• Set limits and expectations as necessary – “I have 20 minutes,” “if you continue yelling, we’ll need to take a break and reschedule” | • Consider in-person vs telephone communication  
• Consider time-of-day  
• Limit distractions  
• Consider use of written material  
• Double-up on communication modes (e.g. verbally highlight salient points in documents)  
• Consider encouraging note-taking when helpful and appropriate | •  
•  
•  
•  
• |
| • Short sentences  
• Consider rephrasing and repetition  
• Address one topic/provide one instruction at a time  
• Consider checking understanding by asking information to be repeated/paraphrased | • Consider how to best get and maintain attention  
• Provide extra time for decision-making  
• Avoid finishing other’s sentences/thoughts  
• Consider personal space  
• | • Consider other needs (pain, hunger, bathroom)  
• Consider use of visuals, diagrams, flow-charts  
• Consider use of colored paper for written communication – color may vary | •  
•  
•  
•  
• |
I’m OK, You’re . . . ? What Lawyers Should Know About Their Clients’ Capacity to Make Decisions

Oregon death row inmate and convicted two-time murderer Gary Haugen just wants to be executed.

State law allows inmates like him to end their appeals and accept execution, he told The Oregonian in an interview in July. So he finds it ironic and absurd that people, including two of his court-appointed attorneys, question his mental competency to make that choice.

Needless to say, those attorneys disagree.

“The bottom line, with the criminal-justice system, is criminal practice is mental-health practice,” one of his now-former lawyers, W. Keith Goody of Washington, told The Bulletin. “If you don’t have a good foundation in mental health, you’re not doing your job as a lawyer.”

Experts on diminished capacity say that lawyers like Goody are doing the right thing when they press to have their clients evaluated. In fact, they say that lawyers should ask themselves whether their clients may have diminished capacity much more frequently than they do, given the increasing number of Middle East war veterans with diagnosed or undiagnosed brain injuries and aging baby boomers.

“Delusions and hallucinations are easy to spot,” says Alex Bassos, training director for Metropolitan Public Defender Services, Inc. (MPD) in Multnomah and Washington counties and co-author of the book Mental Health and Criminal Defense. “It’s tough to miss when someone is adamant about aliens or distracted by conversations with people who aren’t there. As a result, psychosis is likely to be identified by the defense attorney, acknowledged by the district attorney and understood by the judge.”

“But,” says Bassos, “many folks with delusions or hallucinations are still competent. So psychosis ends up being over-diagnosed in the criminal-justice system. What goes under-diagnosed are cognitive disabilities and head injuries. Traumatic brain injuries, for example, can be difficult for a lay person to identify. But if an attorney can identify the red flags, an expert can do some testing. You may find that the person is quite incapacitated.”

With older clients, “About one-half of all 90-year-olds have some degree of dementia, says Dr. Linda Ganzini, professor of psychiatry and medicine at Oregon Health & Science University whose research interests include geriatric mental health. “It really increases after age 70 and is very common in the 80s and 90s. It also increases as people develop certain kinds of illnesses, such as strokes or other neurological disease. Primary-care providers, such as doctors and nurse practitioners, miss about one-half of the cases of early dementia.”

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What a Lawyer’s Duty Is

Bassos’ colleague Lane Borg, who is the executive director of MPD’s Multnomah County office, also teaches ethics at Lewis & Clark Law School.

In that class, he says, “We start with duties to clients.”

Under Oregon Rule of Professional Conduct 1.14, when a client’s capacity to make “adequately considered” decisions is diminished because the client is under-age, mentally impaired or for some other reason, the lawyer is required to maintain a normal client-lawyer relationship “as far as reasonably possible.”

According to Oregon State Bar General Counsel Helen Hierschbiel, this means that “the lawyer owes the impaired client, just like any other client, the duty to communicate, the duty of zealous representation, the duty to preserve confidentiality and the duty of loyalty, to mention a few.”

“In the normal lawyer-client relationship,” she explains, “the lawyer acts as the client’s agent to carry out the client’s lawful wishes. The lawyer advises the client on the law, presents options and ultimately leaves the important decision-making to the client. The smooth operation of this relationship presumes the client is capable of understanding the options presented and of making important decisions. The lawyer should start with the assumption that the client is competent.”

But with some clients, more than others, the lawyer cannot rely on this presumption.

In his ethics class, Borg says, he distinguishes between various kinds of diminished capacity.

“One thing we focus on a lot is when someone has permanent or sustained diminished capacity, such as Alzheimer’s,” he says.

“The next thing is evolving limited capacity, e.g., minors. At what point, between infant and teenager, can the lawyer say, ‘I can rely on my client’s decision?’”

Then there’s diminished capacity caused by everything from substance abuse to undiagnosed cognitive disability.

“In my experience,” says Borg, “the most common way to identify a client as potentially having a cognitive deficiency is that he can’t read. I don’t think that in itself is the type of impairment that would be diminished capacity, but today, if a person in his 20s or 30s can’t read. . .”

“The more subtle client impairment issues are typically with clients who are out of custody,” Borg continues. “You have to dig for their history: past psychiatric hospitalizations, etc. HIPAA (the federal Health Insurance Accountability and Portability Act) has certainly complicated that. And there are ethical implications in going to a potentially impaired client and asking him to sign a waiver.”
In both the criminal and civil law arenas, OHSU’s Ganzini says, “Lawyers should have a high degree of suspicion as clients gets older.”

Ganzini also notes that some kinds of legal representation are more affected by diminished capacity than others.

“Look at the context in which the legal event—a change in a will or a trust—is occurring,” she suggests. “People with dementia become much more susceptible to undue influence. They may have trouble understanding the risks of certain transactions to themselves.”

**What Is the Required Capacity?**

Context also is crucial to answering the question: What does my client need to have the capacity to do?

For a criminal defendant (excluding the issue of whether he has a mental disease or defect that mitigates or negates his criminal culpability) the answer is: be fit to proceed.

Under ORS 161.360, a defendant may be found incapacitated before or during trial if, as a result of mental disease or defect, he is unable to understand the nature of the proceedings against him, assist and cooperate with his attorney or participate in his defense.

Inherent in these requirements is the defendant’s ability to make decisions.

“There are certain decisions that a lawyer can’t make for the client,” says MPD’s Bassos. “Whether to plead guilty, to have a jury trial, to testify, to assert a guilty-except-insane defense, to appeal.”

On the civil side, Stephen Owen, a litigator with Fitzwater Meyer in Portland, says that “the first thing I ask myself is, ‘What action am I taking on behalf of my client? What level of capacity is required?’”

Even within his own field, Owen notes that different levels of capacity are required for different client decisions.

“Capacity is a sliding scale,” he says, “from testamentary (e.g., making a will) to contractual.”

So, for making a will, “The statute [ORS 112.225] says that you need to be of a sound mind. The tests come from case law: Do you know what a will does? Do you know what your will does? Do you know, generally, what you own? Do you know the natural objects of your bounty?”

Owen says that “one reason there is such a low level of capacity for making a will is it’s not an adversarial process.”

At the other end of the “sliding scale” for capacity in civil law are such things as entering into contracts and deeding over property.
“A person must possess greater competency to execute a deed than to execute a will,” the Oregon Supreme Court stated in *First Christian Church v. McReynolds*, 194 Or 68, 72 (1952).

A deed, it pointed out, is irrevocable; a will is not.

**How to Collect Client Information**

Once a lawyer understands her ethical duty to clients with diminished capacity and has identified the standard for capacity appropriate to the case at hand, she should collect information from her client.

But that, says MPD’s Bassos, requires some finesse.

“Your job as a criminal defense attorney,” he says, “is as much about being a social worker as a legal advocate.”

For example, Bassos says that “as an attorney, both in terms of exploring the person’s illness and story, you don’t want to accuse your client of being stupid. You want to do it without being insulting. Competent people make bad decisions all the time, and then rationalize them, and those explanations can be pretty bizarre. But you can’t say, ‘You know that’s crazy, right?’ So you explore the story. Anybody who’s been in practice any period of years knows of bizarre stories that turned out to be true.”

“Sometimes,” says Bassos, “clients shade stories in ways that they think will sound better but actually are worse for their defense. Explore. Drop whatever judgment you may have about the client or the client’s situation, and don’t be accusatory in even subtle ways. If you sound judgmental or accusing, you get off on a bad foot and will have a completely different relationship with the client.”

“I’ve definitely worked with attorneys who thought their clients were being jerks,” Bassos continues. “I said to the attorneys, ‘Here’re some red flags.’ After we did some investigation, we found out the clients were profoundly disabled. They were using the defense mechanism of being jerky. It pushes people away and they don’t explore. They would rather be thought of as mean or jerky than powerless or disabled.”

Bassos says the attorney also has to make sure his client understands the information the attorney is providing to the client.

“Factual understanding—the client’s ability to understand facts—plays so prominent a role that it sometimes overwhelms everything else,” says Bassos.

To make his point, Bassos recites a frequently heard courtroom exchange between a judge and a defendant.

“Judge: ‘Do you know who I am?’
Defendant: ‘You’re the judge; you’re in control.’
Judge: ‘Do you know who he is?’
Defendant: ‘He’s my attorney; he stands up for me.’”

“That’s factual understanding,” says Bassos. “That’s really different from the ability to make a decision: to hold two abstract concepts and make a choice. Some people find it very difficult to hold two abstract possibilities in their mind and choose between them: ‘If you go to trial, these kinds of things will happen but, more importantly, the result will be up in the air, and if you are convicted the judge can do whatever he wants to do within a fairly broad range.’ That’s really hard to understand because it is several abstracts down the road, versus a plea deal, where you know what kind of jail time you’ll get, and that you’ll be on probation.”

But, as elder-law litigator Owen observes, “However you explain things, no matter what your client’s capacity is, your explanation will influence his decision.”

“Is your advocacy steering the client to make a decision he is unsure of?” he asks rhetorically. “Attorneys struggle with that all the time. We’re fooling ourselves if we don’t think how we put information out there influences people. You hope that when you lay it out as neutrally as possible, the client will make the right decision. Then he doesn’t. Then you start shifting the emphasis of certain information. I think everybody does that. It’s tough dealing with clients in general: adding in diminished capacity makes it that much harder.”

Michelle R. Guyton, associate professor of psychology at Pacific University’s Hillsboro campus, says that when a lawyer is collecting client information with an eye to diminished capacity, “One good test is to give a simple set of statements and ask the person to repeat it back.”

“For example,” she says, “the lawyer could give a simple definition of possible legal outcomes, based on current charges, and see if the person could repeat it back. If he cannot, that can signal attention or memory problems.”

Guyton adds, “Another warning sign is the inability to switch topics mentally.”

“Some folks with cognitive problems will keep talking about the same thing over and over, and have real trouble moving to new things,” she says.

Finally, says Guyton, an individual with impaired cognition also may talk about things in a very vague and general way.

“He may use a lot of colloquial phrases to fill in his speech, but provide little data or substance,” she says. “His language skills likely are not impaired, so he may sound fine, but the thoughts behind what he says may be very hazy and disorganized.”

OHSU’s Ganzini stresses that with an elderly client, it is important to “Let the client fully explain.”

“Don’t finish his sentences for him,” she says. “Lawyers work hard to develop rapport with clients, but it means they end up doing all the talking. People with Alzheimer’s often have
pretty good language skills, but after about five minutes, you should ask yourself, ‘Does what the client is saying completely make sense to me? Does this story make sense to me?’ ”

Ganzini says that a lawyer also should note whether his client has picked up information about what is going on in the world from outside sources.

“If he’s not getting those clues,” she says, “it’s often a sign that something’s wrong with his brain. A person who used to watch TV news or read the newspaper but no longer does may have changed his habit not because he’s not interested, but because he no longer can understand the information.”

Where to Get Help

An attorney who suspects that his client may have diminished capacity can get help from multiple sources, including the bar and mental-health professionals.

“Our office gets quite a few inquiries about dealing with clients with diminished capacity,” says General Counsel Hierschbiel, whose office fields most such calls to the bar.

“Occasionally there are questions about representing children,” she says, “but a typical call would be a lawyer who did estate planning for a now-elderly couple a number of years ago. One of the clients’ children contacts the lawyer and says, ‘We’re worried about our parents. They’re making bad financial decisions. We think they no longer are capable: what should we do?’ The question is, ‘What can the lawyer do about that?’”

What the lawyer would like to do, say Hierschbiel and her bar colleague Chris Mullmann, is represent the children to petition for conservatorship and/or guardianship.

But, says Mullmann, who is in charge of the bar’s Client Assistance Office, “The lawyer has to act in his client’s best interest. Representing the client’s children is not in his client’s best interest from the client’s point of view, so someone else has to do it.”

“What we tell the lawyer is, ‘Look at ORPC 1.14,’” says Mullmann. “Treat the client as much as possible like a regular client. Then, if the lawyer gets down the road and says, ‘My client really needs a conservator,’ someone else has to handle that.”

In addition to providing ethical guidance, the General Counsel’s Office refers lawyers to outside lawyers for practical advice.

Mullmann says that questions to the bar about diminished capacity and estate planning often come from general practitioners.

“We refer them to experts in that area at the bar’s Lawyer Referral Service or to officers of the Elder Law Section,” he says. “We aren’t allowed to refer to specific lawyers.”
Mullmann says that because of the job market, “We’re now seeing more young lawyers hanging out shingles without mentors. We encourage them to call us.”

Another practical resource is a professional who can consult with the attorney and/or evaluate the client.

“Some disabilities,” notes the MPD’s training director, Bassos, “are really hard to flesh out if you are not a professional.”

While the Oregon State Hospital’s Forensics Psychiatric Services Program provides court-ordered psychological and psychiatric evaluations, experts for evaluations that aren’t court-ordered can be obtained privately and paid with public funds—even if the lawyer is retained—if the lawyer can establish the need for the evaluation, the reasonableness of the cost and the client’s inability to pay for the evaluation himself.

Psychologist Guyton, who has a part-time practice doing lawyer consultations and criminal-defendant evaluations, says that recently she’s had more than one case where the defendant’s attorney said of his client, “Something’s not quite right. He can’t weigh the information to make decisions.”

“It turned out his client is mentally disabled,” she says.

Guyton says that she, Bassos and others are starting to look at ways to increase lawyers’ ability to recognize potentially incapacitated clients, including training their legal assistants.

“We want to give them the correct language to voice their concerns,” she says of legal assistants and attorneys, “rather than just ‘There’s something weird about this guy.’”

When Bassos would like a client to be evaluated by someone like Guyton without court order, he says he tells him, “We need to get an evaluation to show that you are not mentally ill. This issue may come up at trial, and we have to be prepared for it.”

“Who knows?” he says. “Maybe the client is right and he’s not ill.”

Ganzini says that if a lawyer sees potential diminished capacity in an elderly or other client, he should arrange for the client’s primary medical-care provider to test his cognition.

“Simply explain to the client that wills get challenged as people get older,” she suggests. “Ask if you can have his primary medical-care provider do a simple cognition test. The client should ask the provider, but the lawyer should follow up with the provider to see that that happened and to get the results.”

“The more cognitively impaired they are,” Ganzini warns, “the more resistant they are going to be to testing. You’ll maybe lose a client once in a while by requesting testing, but you’ll save yourself a very difficult court battle.”
**Interacting With the Court**

Representing a client with diminished capacity presents a criminal defense attorney with some unique challenges compared to estate-planning or other practitioners.

For example, says MPD’s Borg, a criminal defendant may come to court while under the influence of alcohol or controlled substances.

“Some judges will ask a few questions to get at whether the defendant seems to be tracking,” he says. “The dilemma for the criminal defense attorney is if he knows his client is impaired. He can’t let the proceeding go forward: if the client is high, it seems like a good deal; then later he’ll say, ‘I didn’t want to plead out.’”

Borg says that in such situations, “Often you’ll hear the attorney say to the court, ‘My client isn’t feeling well; can we set this over?’”

“But,” Borg continues, “if the judge makes an inquiry of the attorney, you can’t make something up.” Fortunately, he says, “Most experienced judges go right to the client for information. If he’s impaired, he’s taken into custody for detoxification.”

Borg says a criminal-defense attorney also may face an ethical dilemma if his client’s capacity is impaired by legal substances, such as prescribed anti-psychotics.

“I think I’m OK saying to the judge, ‘Don’t take my client into custody, he’s been seeing a psychiatrist and had a recent change in medications,’” says Borg, “because I’m protecting my client from being taken into custody.” (Under ORCP 1.14, if a lawyer reasonably believes that a client has diminished capacity, is therefore at risk of “substantial” physical, financial or other harm unless action is taken and cannot adequately act in his own interest, the lawyer is required to take reasonably necessary protective action and may reveal information about the client to the extent reasonably necessary to protect his interests.)

The trial court also may order a criminal defendant to undergo a “fitness to proceed” evaluation under ORS 131.360.

“‘Fitness to proceed’ is an emerging area,” says Borg, noting, “There’s been a change in terminology. In the old days it was whether you were unable to ‘aid and assist’ your lawyer. Now it’s ‘fitness to proceed’: do you understand the nature of the proceedings?”

“‘Aid and assist’ requires the lawyer to bring the issue of diminished capacity to the attention of the court,” Borg says. “In some ways, it’s easier for criminal defense lawyers than for other lawyers because they have that obligation. What they struggle with is when a client is going to drop an appeal or proceed with a guilty but insane defense. It’s within the client’s purview to make those kinds of decisions. If you simply don’t agree with the decision, but he is competent, you don’t have much of an option. But if you believe the client is incompetent, there may be ways to bring that issue to the attention of the court so the client’s competency is addressed.
That’s where the client’s constitutional rights get folded into the lawyer’s ethical obligations. That’s exactly what’s happening in the Haugen (death row) case.”

Err on the Side of Caution

The bottom line, say the experts, is to err on the side of suspecting diminished capacity.

“It’s critically important that the lawyer doesn’t draw conclusions about a defendant and his mental health without doing his homework,” says one of Haugen’s former lawyers, Goody, a trial and appellate attorney with an interest in mental health issues.

“A great many people who appear to be entirely normal are profoundly ill,” says Goody. “I have repeatedly seen lawyers come in—this is the exception rather than the rule—and say, ‘He (the defendant) seems fine to me.’ Lawyers are not trained to see mental illness. I’m not saying that I see it. I just know what I don’t know.”

Janine Robben has been a member of the Oregon State Bar since 1980 and is a frequent contributor to the Bulletin. She is legal director of the Oregon Crime Victims Law Center. She notes that quotations from OSB general counsel Helen Hierschbiel are from Hierschbiel’s May 2004 Bulletin article, “Impaired Clients: Challenging and unique ethical considerations,” and from an interview with her for this article.

Endnotes


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Bar Counsel

Ethics Advisory Opinions: What Are They and How Do I Get One?\textsuperscript{1}

One of the most highly valued services the Oregon State Bar provides to its members is the ethics assistance offered by its general counsel’s office. We receive an average of 20–25 calls each day, most of which we answer the same day received. Some members refer to this service as the “Ethics Hot Line.” In addition, our office receives about a dozen emails each week from members with ethics questions. We strive to (and generally do) respond to these written requests for assistance within three business days. Providing ethics advisory opinions is a bar service that dates back decades and, based on the informal feedback we receive, is extremely popular.

Although many Oregon lawyers take advantage of this service, questions about how exactly it works remain. We hope to answer the most common questions here.

Are my communications with the bar confidential?

No. The bar does not provide legal advice; instead we explain how the rules have been interpreted and offer guidance about how to steer clear of misconduct. As a result, communications between the general counsel’s office and Oregon lawyers seeking ethics guidance are not subject to the attorney-client privilege. Moreover, the OSB is subject to the public records laws. Consequently, any records submitted to the bar or generated by the bar in the course of answering ethics questions may be subject to disclosure upon request. See OSB Bylaw 19.102.

By contrast, lawyers’ conversations with the Professional Liability Fund about their own possible malpractice are confidential.

Does the bar keep a record of our conversation?

Yes, although our notes of telephone calls are relatively sparse. Generally, we record the date, name of lawyer (if provided), basic facts, the rule or rules discussed and a brief summary of the guidance provided. Telephone records and written informal advisory opinions are kept for five years. See OSB Bylaw 19.103.

Do I have to give my name?

No. We do not require that lawyers provide us with their names when requesting an advisory opinion.

Am I allowed to share confidential information with the bar?

Generally, no. Oregon RPC 1.6(a) prohibits lawyers from disclosing information relating to the representation of a client. “Information relating to the representation of a client” is defined to include both attorney-client privileged communications and all other information a lawyer gains during the course of representing a client that the client has asked be kept secret, or that likely would be embarrassing or detrimental to the client if disclosed. RPC 1.0(f).

\textsuperscript{1} By Helen Hierschbiel. From the Oregon State Bar Bulletin, August/September 2015. Reprinted with permission.
Oregon RPC 1.6(a) permits disclosure of confidential information when “impliedly authorized to carry out the representation.” ABA Formal Op No 98-411 (1998) interprets this rule “to allow disclosures of client information to lawyers outside the firm when the consulting lawyer reasonably believes the disclosure will further the representation by obtaining the consulted lawyer’s experience or expertise for the benefit of the consulting lawyer’s client.”

In addition, Oregon RPC 1.6(b)(3) provides an exception to the general rule, allowing lawyers to reveal information relating to the representation of a client to the extent the lawyer reasonably believes is necessary to secure legal advice about the lawyer’s compliance with the rules of professional conduct. Note, however, that this exception applies only when the lawyer is seeking legal advice; because the bar does not provide legal advice, and the communications between the bar and the lawyer are not privileged, this exception does not apply when a lawyer seeks ethics guidance from the bar.

In short, lawyers should definitely not disclose privileged communications when seeking an advisory opinion from the general counsel’s office, and they should carefully consider whether disclosure to the bar of any other information relating to the representation would be detrimental or embarrassing to the client.

**How do I protect my client’s confidences and still get ethics guidance from the bar?**

We recommend that lawyers pose their questions in the form of a hypothetical. For example, rather than referring to clients by name, refer to them as A, B or C. As noted in OSB Formal Ethics Op No 2011-184, however, “[f]raming a question as a hypothetical is not a perfect solution . . . Lawyers face a significant risk of violating Oregon RPC 1.6 when posing hypothetical questions if the facts provided permit persons outside the lawyer’s firm to determine the client’s identity. Where the facts are so unique or where other circumstances might reveal the identity of the consulting lawyer’s client even without the client being named, the lawyer must first obtain the client’s informed consent for the disclosures.”

If you have a question that relates to a matter that is particularly sensitive, you may want to consider speaking with a private lawyer, with whom you can have a privileged conversation. In addition, some conflict questions require significant factual detail in order to provide the most helpful guidance. Again, consulting with a private lawyer in these situations may be the best course in order to both obtain an opinion you can truly rely on and to protect your client’s confidentiality.

**Do I have to make my request in writing?**

No. Bar members can telephone the general counsel’s office for reactions to ethics questions, but those verbal reactions do not qualify as a basis for mitigation of disciplinary sanctions under RPC 8.6(b) unless they are confirmed in writing.

**What if I think I have made an ethical blunder?**

Call a private lawyer, not the bar. Bar advisory opinions are intended for the lawyer’s own prospective conduct, not as a means to resolve misconduct that has already occurred. If you disclose your own misconduct to the bar, we may feel compelled to open an investigation into the matter, particularly if we think it is serious misconduct.
Chapter 3—Interacting and Working Together When Mental Health or Cognitive Disability Is a Concern

Although we are aware of only one instance where the bar opened an investigation based on a lawyer disclosing misconduct in a detailed, written request for an advisory opinion, lawyers should be mindful when talking with general counsel’s office that lawyers at the bar have the same obligation to report professional misconduct that other Oregon lawyers do under Oregon RPC 8.3.

What reporting obligation?

Except in limited circumstances, 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 must report the matter to the OSB Client Assistance Office. See RPC 8.3. For more information about your duty to report misconduct, see “Other People’s Mistakes,” by Amber Hollister, OSB Bulletin (Oct. 2014); www.osbar.org/publications/bulletin/14oct/barcounsel.html.

Is my reliance on an advisory opinion a defense to a disciplinary charge?

No. Oregon RPC 8.6(b), however, does allow the disciplinary board and Oregon Supreme Court to consider a lawyer’s good-faith effort to comply with a written advisory opinion as a basis for mitigation of any sanction that may be imposed.

Is there a difference between a formal and an informal written advisory opinion?

Yes. An informal advisory opinion is issued by general counsel’s office. Formal advisory opinions are drafted by the OSB Legal Ethics Committee and adopted by the Board of Governors. Informal advisory opinions are typically issued within three business days. Formal advisory opinions can take a year or more to complete, as they are drafted by volunteer lawyers and the Legal Ethics Committee only meets six times a year. Consequently, formal ethics opinions are limited to topics that are likely to benefit a large number of lawyers. The formal opinion process is described in more detail in Section 19.3 of the OSB Bylaws, here: https://www.osbar.org/_docs/rulesregs/bylaws.pdf.

May I call to find out whether an opposing lawyer’s conduct violates the ethics rules?

Generally, no. Advisory opinions are provided only to lawyers seeking guidance about their own prospective conduct. See OSB Bylaw 19.102. On the other hand, we will assist lawyers with determining whether they have a duty under RPC 8.3 to report alleged misconduct by other lawyers.

How do I access this benefit?

You can call the main OSB main number, (503) 620-0222, and tell the receptionist that you are looking for ethics assistance, and the receptionist will connect you to an available lawyer. Alternatively, you can call the general counsel or deputy general counsel directly. Also, feel free to drop us a line, either by email or mail. More information about this service can be found on the legal ethics home page of the OSB website here: www.osbar.org/ethics.

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Ethics opinions are published and updated on the bar’s website at https://www.osbar.org/ethics/toc.html.

An archive of Bar Counsel articles is available here: https://www.osbar.org/ethics/bulletinbarcounsel.html.

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Chapter 3—Interacting and Working Together When Mental Health or Cognitive Disability Is a Concern

Sources for Ethics Guidance

The Oregon Rules of Professional Conduct
Modeled after the ABA Model Rules of Professional Conduct

Download a Complete Set of the Oregon Rules of Professional Conduct –
https://www.osbar.org/_docs/rulesregs/orpc.pdf

Representing Clients with Diminished Capacity – Rule 1.14

Client Confidentiality – Rule 1.6

ORS 9.490(1) makes the Rules of Professional Conduct binding on lawyers and subject to discipline for violations

Bar Resources
Oregon Formal Ethics Opinions –
https://www.osbar.org/ethics/ethicsops.html

Legal Ethics Hotline – 503-431-6475
This is the number for Lawyers to use to get Personal Ethics Assistance!

Formal and Informal Ethics Advisory Opinions
You can call OSB main number 503-620-0222

You can contact the General Counsel or Deputy General Counsel directly:

Amber Hollister, General Counsel
503-620-0222 ext. 312
ahollister@osbar.org

Nik Chourey, Deputy General Counsel
503-620-0222 ext. 363
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Archive of Bar Counsel Ethics Articles
https://www.osbar.org/ethics/bulletinbarcounsel.html
Oregon Rules of Professional Conduct

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 This is the ABA Model Rule.
Comment on ABA Rule 1.14

Client-Lawyer Relationship
ABA Rule 1.14 Client With Diminished Capacity – Comment

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian’s misconduct. See Rule 1.2(d).
Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating
to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.
Oregon Rules of Professional Conduct

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

(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

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.
Chapter 4

Legal Ethics with a Twist

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Chapter 4—Legal Ethics with a Twist

Lawyer Ethics (with a Twist)

A criminal defense lawyer met with her client and told him that she had good news and bad news. What’s the bad news? The bad news is that the blood tests prove you committed the crime. What is the good news? She replied, “Your cholesterol is only 120.

My name is Scott Morrill and I became a lawyer in 1991. This session is scheduled for 50 minutes. But because I am used to getting paid by the hour, please forgive me if I go a bit over. I promise to wrap things up in 4 or 5 hours at the most.

For nearly 15 years I worked for the Oregon State Bar in lawyer ethics. As you know, you are governed by a set of rules we informally refer to as the lawyer ethics rules. Some variation of the rules exist in each state and they are usually formally called the rules of professional conduct, or something similar. We are not very creative when it comes to names. Depending on the state the rules are enforced by the state bar association, the state Supreme Court or a stand-alone agency. But, they all pretty much operate the same, except Hawaii where the lawyers get to wear leis to work and Alaska where they usually wear seal skins.

First, some terms and acronyms. While we are not creative when it comes to names we do love acronyms and specialized terms almost as much as politicians.

LAWYER- this seems obvious.

DISHONEST LAWYER- also obvious and what I specialized in. Wait! I don’t mean I was a dishonest lawyer, I mean I specialized in figuring out which lawyers were dishonest.

COMPLAINANT- annoying people who file complaints about lawyers that used to clutter my desk. Sorry, did I say that out loud?

ALJ- administrative law judge.
DB- disciplinary board.
DCO- disciplinary counsel.
CAO- client assistance office.
BR- bar rule
ETC. . .

RCMP- oops, my wife is Canadian and this stands for the Royal Canadian Mounted Police whose primary function is to dress in bright red uniforms, wear cowboy hats (unless they are Sikh in which case they wear turbans, also really cool) and ride around on horses looking really awesome.

OK, got it? Great. Keep all this in mind as I proceed.

This is how it works. Someone files a complaint. Or, a particularly energetic lawyer regulator reads the local newspaper (online of course because who reads paper copies of newspapers) and sees that a lawyer may have done a bad thing.
Aside- I once read in my local newspaper about a lawyer who had done something during a trial that I was pretty sure violated the rules. I showed the article to my boss the next day and he told me to open an investigation and assign the investigation of the complaint to myself. The next day I cancelled my newspaper subscription, all my news magazine subscriptions, stopped watching the news and rarely surfed the internet except for sports scores.

Where was I? Oh yes, someone files a complaint about a lawyer.

Aside- Oh, did I forget to mention that people are not limited to filing complaints about their own lawyer? Yeah, you can file complaints about any lawyer: the opposing lawyer, the lawyer in a matter you have no interest in. In fact, you are required by Oregon Rule of Professional Conduct 8.3 to file a complaint about your fellow lawyer if you know that they have violated the rules. Yes, there are lots of caveats and exceptions such as whether or not the information you have is protected by the attorney-client privilege, but . . .

Anyway, there are people who apparently cannot afford cable TV, a newspaper or magazine subscriptions who entertain themselves by going to their local courthouses and sitting in on trials. They are open to the public and free to attend. I once received a complaint from one of these people who thought one of the lawyers was a bit rude with a witness. The complainant was not involved with the trial and none of the parties actually involved had any complaints. I dismissed the complaint. Being rude does not violate any rule of professional conduct, unless the lawyer is REALLY, REALLY RUDE. Oregon RPC 8.4(a)(4) tells us that it is misconduct to engage in activity that is prejudicial to the administration of justice. For instance, there are examples of complaints from around the country where a lawyer went off on a court and was prosecuted for that kind of conduct.

People can file complaints about their neighbor if the neighbor happens to be a lawyer. The best example of this was the anonymous complaint I received that a lawyer was driving too fast on a rural, dirt road and kicking up dust that was covering the complaining party’s lawn decorations. A set of gnomes, plastic flamingos and gazing balls, if I recall. The interesting thing is that we have to advise the lawyer if a complaint is ever filed, regardless of the validity. While the complainant tried to remain anonymous, when I advised the lawyer about the complaint he immediately recognized who it was that had filed the complaint. Oh, and the complainant put his return address on the envelope. . .

I handled several complaints from neighbors about lawyers with encroaching fences, barking dogs and broken down cars in the yard. OK, the broken down car complaint got my attention and I called the lawyer and suggested he donate it to a local charity or something. The rest I dismissed out-of-hand.

But, I’m veering off topic. After my office received a complaint and once we stopped laughing—oops, did I say that out loud? After we received a complaint we first decided- if true, did it implicate any rules. Then we decided if the complaint was even believable. Bar Rule 2.5 says that a complaint must show sufficient evidence to support a reasonable belief that misconduct may have occurred. Pretty squishy and while I was at the bar no one ever convinced a trial panel or court that the bar had not met this standard.
Right, the rules. Maybe now is a good time to discuss what you are not allowed to do.

OK, that about covers it. . .

Fine, here is the gist of the rules. No lying, cheating or stealing. No using your client’s money for your own benefit like gambling or paying off witnesses. No sex with your clients, no conflicts of interest, no talking to the judge behind the other party’s back, no slacking, no gouging, no quitting without good cause and for heaven’s sake no pursuing stupid legal claims.

I will explain some of the most important rules and try to give real examples of what I had to deal with over the years. My examples are taken from real complaints. They are 100% mostly true.

No commingling (combining) your client’s money with another client’s money, or your own money, except if you can get a better interest rate from the bank and doing so benefits the state bar association.

Oregon Rule of Professional Conduct 1.15-1. See, this is the stuff that gets you an ethics credit.

Now, if you get retainer money from clients you are supposed to put that money in an interest bearing account, unless the amount is too small or the interest rate is too low (and with current bank interest rates that means all the money) and then you can aggregate all your clients’ money and put it into one account. The interest from that aggregated account generally gets paid to the state bar association, which of course is generally run by lawyers.

Seriously, usually the interest is turned over to legal aid organizations who give it to poor people so they can then give it to other lawyers. I really don’t see anything wrong with the system, do you?

In one particularly interesting year lawyers turned over nearly $500,000 to the bar. One lawyer was responsible for over half that amount. That means some lawyer’s client left a big pile of money with their lawyer. After I’m done here maybe you should all check your trust accounts. I will only take 25% of whatever you have as a finder’s fee.

No incompetence. ORPC 1.1. Incompetence must be really bad before the rule is invoked. When someone would ask me for an example I would say that a lawyer who did nothing for 20 years other than divorce cases who one day decided to take on a complex, commercial litigation case without knowing the first thing about complex, commercial litigation cases was probably incompetent. Otherwise if you passed the bar exam and had a pulse, you are probably competent. The pulse part may not even matter as there are several examples of lawyers continuing to practice even after they were dead.

Seriously though, most claims of incompetence are actually malpractice issues. Everyone makes mistakes. If you make a mistake your client can sue for malpractice. We did have one lawyer who pursued a trade mark infringement claim on behalf of his client, but forgot to hire an expert engineer to testify that his client’s product was essentially the same as the one being sold by the other party. Generally speaking juries don’t believe lawyers are competent to testify about
engineering issues, too much math. Neither did we- that lawyer was found to have been incompetent and to have committed malpractice.

No conflicts of interest. You cannot represent one client who is fighting with one of your other clients. Sounds simple, right? Unfortunately, it is not, mostly because the rule was written by lawyers. Here is what it actually says:

**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.

**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(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.
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(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.

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.

Actually, there’s more. But, you get the idea. Here is the best way to figure out if you have a conflict of interest.
Here is my favorite complaint that involved both allegations of incompetence and conflicts of interest. I have changed only the names to protect the guilty. Stepson (let’s call him Hap as in hapless) wrote to complain that his step brothers (let’s call them Will and John from the movie Step Brothers) were interfering with his attempt to hire a lawyer to help dear old stepmom (let’s call her Lizzy because she lived in an assisted care facility) re-write her will. Hap’s allegation was that the lawyer Will and John hired for Lizzy were not competent because the lawyer (let’s call her Lacey as in straight-laced) was thwarting his efforts to write Will and John out of Lizzy’s will and write himself in instead. He reported that the step brothers never visited Lizzy in her assisted living facility and that he visited her all the time. He claimed that made Lacey incompetent for not knowing his actual client, Lizzy, wanted the change. He also alleged that Lacey had a conflict of interest because she actually represented Will and John, not Lizzy.

After letting Lacey tell her version of the facts, which were quite different from Hap’s, we followed up with the assisted care facility. Turns out their records showed Will and John visited Lizzy regularly and that Hap had visited only one time. That one time was when he took her for an outing- directly to his long-time criminal defense lawyer’s office. Hap’s criminal defense lawyer made the very bad decision to change Lizzy’s will to exclude Will and John and to make Hap the sole beneficiary. We also spoke to the lawyer who drafted Lizzy’s original will a decade earlier who confirmed that Lizzy was in complete possession of all her faculties when she decided to give her entire estate to Will and John and that she specifically intended to exclude Hap.

Needless to say we dismissed Hap’s complaints. In what was a big surprise to Hap and his lawyer we then opened an investigation into Hap’s lawyer’s conduct. The issue here was that Hap’s lawyer barely knew Lizzy, was a criminal defense lawyer with no estate planning experience and professed to represent Lizzy when in fact he was just doing Hap’s bidding. That creates both a competency concern (Oregon RPC 1.1) and a conflict of interest concern (Oregon RPC 1.7), but not for Lacey who took the time to meet Lizzy without any relatives around and determined that Lizzy could make her up her own damn mind about who she wanted to give her property to- that being Will and John.

Next Issue.

I assume you noticed that the rules prohibit having sex with a current client. It doesn’t prohibit you from having sex with a former client. It doesn’t prohibit you having sex with a client if you had sex with the client before they became a client. The only way you can violate this rule is if you get a client that you have never had sex with previously and then you have sex while they are a client. Seems like a pretty easy rule to comply with.

But, apparently not. We disciplined several lawyers every year for not being able to follow this very simple rule. The worst example of these conflicts are the lawyers who represent clients in prison, profess to fall in love with them and then marry their clients while they are still in prison. The good news is that unless the prison has very lax security or a very liberal definition of visit, then the lawyers could not violate the sex with client rule as long as the client was still in prison. We could never quite figure out why the lawyers would marry their incarcerated clients.
Chapter 4—Legal Ethics with a Twist

Then there was the lawyer who was caught at the Oregon-Nevada state line who had her 97 year old client with her and was trying to make it to Vegas in order to marry him. The lawyer was in her 40’s. The client had very little cognitive function but a lot of money. She claimed it was true love and that her 97 year old client had professed his undying love and desire to marry her. It was a simple matter for the bar to disbar her. As I noted, they were caught at the state line after the lawyer’s car broke down and another motorist noticed her pushing her client down the road in his wheel chair. The lawyer was charged with criminal elder abuse, kidnapping and failing to stay in her lane while operating a non-motorized vehicle on a public highway (OK, I made up the last part).

You may not disclose your clients’ confidences or secrets. ORPC 1.6 and 1.9.

Unless it is necessary to write a best-selling book and make a lot of money. There are lots of best sellers written by lawyers and former lawyers about their most interesting cases.

Lawyers may not withdraw from representing a client unless the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement. ORPC 1.16. Translation- your client doesn’t pay your bill. You know the special code you should use should you need the court’s permission to withdraw? Use the following line in your supporting affidavit: “Irreconcilable differences” (loosely translated from the Latin irratatis clientarium). Translation- the client is not paying me.

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. ORPC 3.1. Translation- if you can make an argument with a straight face and the judge does not bust out laughing, it is OK.

Hey, I’m not kidding here. I did some pro tem work every now and then and was a municipal court judge. One day a middle aged woman came in with an older fellow. The older fellow was the woman’s father and a lawyer. He explained that he was representing his daughter for a traffic ticket. The court room was full of other defendants, a bunch of other lawyers and some sheriff deputies. Anyway, the older fellow started by making a motion to dismiss the case on United Stated Constitutional grounds. His argument went something like this. The 3rd Amendment guarantees freedom of religion and the traffic rule his daughter was accused of violating infringed on her objection to traffic rules generally because of her religion. OK, I’m embellishing the story a bit, but that was essentially the argument.

This put me in a very difficult position. I didn’t want to lose control of the courtroom, but it was all I could do not to join in the laughter coming from all the other lawyers in the back. The point is that this lawyer’s position was probably frivolous and he could have been sanctioned for violating the rule. I handled it by putting my hand in front of my face until I stopped giggling and then denied his motion.

Which reminds me about another incident in the same courtroom. Only this time I was the lawyer representing my wife (probably that was a conflict of interest, but I digress, and the
statute of limitations has probably passed) for a traffic violation. She had been pulled over for an expired registration. I was horrified because I was responsible in our family for making sure our cars were properly registered and insured and I could not understand how the registration had expired. After careful review I figured out that the registration issued by the State was for a date that could not exist (March 00, 2000) (must have had something to do with the Y2K thing). So, I went with my wife and our infant son (I was trying to play the sympathy and cuteness cards) to the hearing. When my wife’s name was called I went up and made my very passionate plea for her innocence based on an impossible expiration date. The judge looked at the paperwork, probably without really listening to my impassioned speech, and dismissed the case. My legal representation was obviously brilliant. The funny thing is that as I made my way down the courtroom isle with other defendants lined up on both sides, one of them tugged at my suit jacket and asked me to represent them.

One of our most memorable complainants was the rabbit hoarder. Most people are familiar with the concept of hoarding. Some people hoard cats or dogs and others hoard newspapers, something that is becoming harder to do as not many newspapers are still in business. This person hoarded rabbits. There were hundreds of live ones and every time the hoarder was found out there was a prosecution, which just caused the hoarder to move to a different county and start over again. More disturbing was that if one of the rabbits died it would end up in the hoarder’s freezer. Freezers full of rabbits.

The hoarder was a real pain for prosecutors because the hoarder would always try to get positive public opinion by claiming to be a compassionate animal lover who was saving the rabbits. Generally prosecutors would just ignore the hoarding until the situation became too extreme to ignore. Also, it turns out that in Oregon there is a VERY dedicated and energetic group of rabbit enthusiast who put pressure on the DA’s to prosecute.

Anyway, once the hoarder realized the public opinion strategy was not working the hoarder started filing complaints about the prosecutors. There is a special rule that says prosecutors may not charge crimes that they know they cannot prove. Oregon RPC 3.8. The flaw with these complaints about the prosecutors was that they were 100% successful in prosecuting the hoarder for animal abuse, which is pretty good evidence that the prosecutors were not pursuing charges they could not prove.

The hoarder then resorted to filing complaints about the defense lawyers. Because the hoarder was poor, spending money on rabbit chow, there was always a court appointed lawyer involved. I can imagine the public defender’s office drawing straws to see who was up next.

The hoarder’s favorite strategy was to complain that the free defense lawyer was making false statements to the prosecutors or the judges. Oregon RPC 3.3 says a lawyer shall not knowingly make a false statement of fact or law to a tribunal.

The key word here is knowingly. If the lawyer does not know that the statement is false then it is ok to make it. The hoarder would lie to the free lawyer about some important fact and when the lawyer repeated it to the prosecutor or the court the hoarder would correct the statement and
complain that it was the lawyer who was lying. I imagine you can all see the flaw in that logic and why the complaints were dismissed.

The last I heard of the hoarder was that she there were complaints about the judges involved in the cases. Fortunately in Oregon we did not have jurisdiction over judge complaints or that would have really kept us hopping.

The most important thing I learned from the hoarder experience is that the humane society does not just deal with dogs and cats. There is a fierce contingent of rabbit sympathizers looking out for rabbit’s best interests. This group of business savvy, retired activists is a force to be reckoned with. They followed the antics of this particular hoarder very closely and made sure that we recognized that the complaints about the prosecutors were frivolous. I’m glad I no longer have a rabbit’s foot for good luck.

Oregon RPC 3.4 requires lawyers to be fair to the opposing lawyer and opposing client.

Sorry. Seriously, you cannot be sneaky.

The rules actually prohibit you from obstructing the other side’s access to evidence, from falsifying evidence, from altering evidence, from helping a client testify falsely, or from offering money to a witness in exchange for favorable testimony. Refer to Oregon RPC 3.4.

Lawyers are not supposed to violate the rules of the court, make frivolous requests from the opposing side, fail to respond to reasonable requests from the opposing side, refer to irrelevant facts, suggest a client or witness hide out somewhere, or threaten to bring criminal charges in order to gain an advantage.

Again, seriously. Oregon RPC 3.1 and 3.4.

You are prohibited from trying to improperly influence judges. You cannot bribe judges or talk to them about current cases outside the courtroom. Can you take judges to lunch? What happens if you are married to a judge? I don’t honestly know the answer to some of these questions, but I suppose there is great fodder here for stand-up comics and sitcoms.

There are extra special rules for prosecutors. Any prosecutors in the room? They are not supposed to pursue charges they know are not supported by probable cause. What’s probable cause, you ask. Probable cause is when there is a reasonable basis for believing that a crime may have been committed or when evidence of the crime is present in the place to be searched. The U.S. Supreme Court says while probable cause is a concept that is a "practical, non-technical" standard that calls upon the "factual and practical considerations of everyday life on which reasonable and prudent men [...] act". Courts often adopt a broader, more flexible view of probable cause when the alleged offenses are serious.

There is a concept we lawyers are familiar with- weasel words. It means words that have a very wide range of possible meanings. Wiggle room, imprecise, vague, and hard to define. How many weasel words are there to define probable cause? Let’s see- reasonable. Believing. May. Come on- even the Supreme Court recognizes there is no hard and fast definition. The Court calls for an approach that relies on a factual and practical basis like what a prudent person would use. It
adopts a broad and flexible view of probable cause. I mean, really, could any regulatory agency discipline a prosecutor with this kind of standard?

Well, actually, yes. Here are the examples:

1. The prosecutor who was pursuing charges against a man for the sole purpose of getting that man to drop a civil complaint he was pursuing against the officers who beat him senseless when they arrested him.

2. The prosecutor who brought charges against the husband of the woman he was having an affair with.

3. The prosecutor who pursued charges against the child who harassed another child with name calling. OK, even with the ever expanding universe of political correctness and anti-bullying sentiment, there are some things better left to parents and not the courts.

4. Then there was the prosecutor who thought it would be cool to do his own detective work by going to the crime scene himself (never a good idea in the first place). What he found actually tended to show the defendant was innocent. So, instead of dropping the charges the prosecutor hid the evidence in order to keep his charges alive. He was disbarred.

You are prohibited from communicating with people you know are represented by their own lawyer. Refer to Oregon RPC 4.2. There was the case of the lawyer who knowingly called the represented opposing client. When the lawyer was asked why he communicated with a person he knew was represented he said that he was so excited by the information that he forgot the guy had his own lawyer. The lawyer was disciplined.

There is a rule that governs how you are supposed to deal with people who don’t have their own lawyers. Refer to Oregon RPC 4.3. You have to make it clear that you are working for the benefit of their own client, not the unrepresented person. You may not give that person legal advice, except to tell that person they should consult with a lawyer. Sounds to me like a rule designed to get lawyers more work.

Another rule requires you to report misconduct by other lawyers. Let me read the rule:

Oregon RPC 8.3 says 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 bar.

Remember my earlier comments about weasel words? How about “knows” and “has committed” and “substantial question” and “honesty, trustworthiness or fitness”. Pretty weasel-y.

And then this. A lawyer may not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects or engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer’s fitness to practice law.

More weasel words like: may, reflect other respects, fitness.
Itsy bitsy crimes like most misdemeanors are okay unless they involve moral turpitude. In all my years investigating what moral turpitude means I never found a clear explanation. I suppose like the famous Supreme Court opinion defining pornography, you’ll know it when you see it.

OK, what do people actually complain about? Pretty much everything from the quality of your services to your choice in ties. Here are some actual quotes from complaints my office received.

-I would like to submit a formal complaint about my attorney on below charges:
Discrimination due to my senseless knowledge of the law and my nervous, fidgety personality.

-I filed in California for disillusion of marriage.

Being disillusioned with your marriage is probably a good reason for getting divorced, but not such a good reason to file a complaint about your lawyer.

-My lawyer provided me with excellent legal misrepresentation in a very smart way.

I’m not sure if this is a backhanded compliment or forehanded criticism.

-I am writing this exposition in accordance with an expletive and explicit explication based on a malapropas incident.

I don’t know what this means, but I like the alliteration.

-I am currently in jail on several charges of alleged arson. My character has been totally deflamated.

-I wrote my attorney a letter and told him I felt like I was being put on the back burner. He told me I was being put on the back burner.

The lawyer’s response is not one we recommend.

-I told the judge that I was and am 100% positive that I’m not guilty and the crime would never happen again ever.

Well, that settles that.

-If you call my mother she will say that I’m not guilty and that prison is not the place for me.

You have to respect motherly love.

-Your bar members have broken the law over my head at least a dozen times.

-And a related complaint- My lawyer embarrassed and humiliated me by hitting me over the head with his legal pad.

And the lawyer’s response- I admit that I hit my client over the head with my legal pad, but I warned him in advance that I was going to do it.

-I made no disturbance at all. The only sign that I was in a delusional state was probably my lack of any weapon and the fact that I wrote my demand letter in crayon.
Hard to argue with his logic.

-From an inmate: Look at my jail identification number: 666. See, they hate me.

-From another inmate: In August I turn in my prison number. Now, I beg you to please tell me what I can have in my possession. What length of knife blade, what stun device, what mace or pepper spray? PS- keep the drawing I made on the envelope as a free gift.

I suspect this fellow is back in jail. But, the drawing still adorns the wall in my former office.

-I was hysterical, naturally being a woman and all. . .

Look- I didn’t write this, the complainant wrote it. Don’t accuse me of being sexist. Sheesh.

-Perjury is a crime! Planting evidence is a crime! Bleach removes more than hair color!

It is a good strategy to mix helpful advice with bad news.

-I’m being held illegally in prison way beyond my expiration date.

-My lawyer made a comment to the judge. I asked her why she did that and she told me that she saw it in a movie.

Not a good explanation.

-From an inmate: As it is obvious I am a consumer of correctional services. Signed- Inmate #1471213.

Is there a customer service hotline for inmates?

-My lawyer told me that it was either her staff’s fault or some other person’s fault. The buck does not stop at her desk even though 3000 of my bucks did.

-The only time my attorney acted quickly was when he deposited my fee into his account.

Complainants aren’t the only ones who say odd things. Here are some remarks from lawyers.

-My client is willing to exchange the property on a weekend so long as it is not a weekend which falls on a full moon. In addition, Pisces and Aquarius have to be in alignment. My client will also require that an auger be present and will slaughter a lamb and read the liver. He will also observe the flights of any birds over the sacrifice. If the auger gives his approval then we can exchange the property. Thank you for your cooperation.

I’m guessing this was a very contentious divorce case.

-My client’s story is so full of holes that I could strain a shaken, not stirred martini through it and James Bond would be a customer for life.
Actually, the last thing my client needs is a fair trial. What he needs is an unfair trial where the jury ignores the facts and the judge ignores the law. If my client does receive a fair trial he will be convicted on multiple charges.

**Oh, and sometimes complainants are not too happy with the complaint system. Here are some examples:**

- I believe a rookie meter maid with subpoena power could have done a better job considering my complaint.

- You can take your response and spread it on a garden to grow vegetables.

- Your investigation was premature and half witty.

  At the time I thought I was quite witty.

- In the end of the state bar’s ethics rules should be added “Just Kidding”. It would save time and effort.

OK, so hopefully you know a little bit about lawyer ethics and maybe I even entertained you some. Seriously though, this stuff is important. I met hundreds of lawyers and nonlawyers who worked hard to keep lawyers honest and ethical. They took their jobs seriously. And for you this is also important. The regulatory agencies can take away your license to practice temporarily or permanently. They can suspend you and make you take remedial classes. The vast majority of lawyers I met or communicated with were decent, hardworking, good people trying to make a living and trying to help their clients.

In my experience in Oregon legitimate complaints were handled appropriately and lawyers were disciplined when they deserved it. Of course we made mistakes, but the system made accommodations for mistakes by having liberal appeal rights. Frivolous complaints were handled professionally, even when the complainant was rude or unreasonable. For instance, even the fellow who wrote to me expressing his displeasure in this way was treated with respect. He wrote, “Your competence has not improved over the years. You did not accurately evaluate the charge against the lawyer at any time. I suggest whoever employed you should have analyzed your last name Morr-ill which means more sick. This behavior of yours is a sickness in this case and this state. I wouldn’t be surprised that if the bar would drop its requirement of a law degree, I would pass the bar exam with higher scores than most bar employees.”

It goes on, but you get the idea.

This letter went directly to the executive director of my agency who responded this way:

Dear Sir, I am satisfied that your complaints about the lawyer received a fair and appropriate review. While I fully understand your disagreement not only with the outcome of the criminal trial and our assessment of the lawyer’s conduct, your opinions and beliefs do not constitute evidence. Sincerely.

Whether we got the complaint right or not is beside the point. The important point here is that unlike the complainant we did not make the matter personal.
If you have a concern about a lawyer, call the agency in your state that addresses these things. In Oregon a live person, often a lawyer when warranted, will discuss it with you. In every state there is an agency that handles lawyer complaints. Google lawyer ethics complaints for more information.

I will leave you with this: lawyers are known to use Latin from time to time. I already told you that *pro tem* is Latin for the judge needs a vacation. *Pro se* is Latin for representing yourself, or as we say this will be an easy win. But, my favorite Latin expression was one used by my boss at the Oregon State Bar. *Ipse dixit*, which means- because I said so. Very helpful when a judge asks what your authority is or if you are or think you are the boss.

FOR PRESENTATIONS IN OREGON:

Discuss impaired lawyer issues including SLAC, OAAP and OLAF. Suggest donations to OLAF if so inclined.

Thank you. I will be available to discuss any other questions or concerns you have. My hourly rate is $300.
# Chapter 5

**Lawyer Well-Being: Healthy Awareness of Mental Health and Substance Use Issues**

**Douglas Querin**  
Oregon Attorney Assistance Program  
Portland, Oregon

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**Lawyer Well-Being: Healthy Awareness of Mental Health and Substance Use Issues**

June 7, 2019
2:30 – 3:30 p.m.

Presentation By
Douglas S. Querin, JD, LPC, CADC-I
OAAP Attorney Counselor

I. Introduction

II. Overview of Presentation

III. Oregon Attorney Assistance Program (OAAP)
   A. Background.
   B. Principles and purposes.
   C. Services and resources.

IV. Lawyer Well-Being and Prior Research
   A. Thriving and dimensions of well-being.
   B. Professional demands and lawyer assistance programs (LAPs).
   C. Lawyer surveys in the past.

V. Recent Research
   A. COLLABORATION: American Bar Association (ABA) & Hazelden Betty Ford Foundation.
   B. PURPOSES: Assess major conditions affecting Lawyer Well-Being in U.S. (3x).
      i. Prevalence: “Problematic Substance (alcohol) Use” (i.e., at levels considered Hazardous, Harmful, and/or indicating Possible Dependence);
      ii. Prevalence: Depression, Anxiety, and Unhealthy Stress;
      iii. Prevalence: Treatment vs. Non-Treatment.
C. **THE NATIONAL SURVEY (2016).**
   i. 13,000 U.S. lawyers;
   ii. Participants anonymously answered personal and professional demographic questions & completed self-report *screening* instruments.

D. **STUDY FINDINGS: RATES OF PROBLEMATIC ALCOHOL USE.**
   i. Rates in U.S. Adult Population: 6%;
   ii. Rates among Physicians, reportedly: 15%
   iii. Rates among Lawyers (per study): 21%
   iv. Gender:
      a) Men 25.1%
      b) Women 15.5%.
   v. Practice Environments:
      a) Private firms: 23.4%;
      b) Government, public, or non-profit: 19.2%;
      c) Solo practitioners: 19.0%;
      d) In-house corporate or for-profit institutions: 17.8%.
   vi. Significant Correlations – Rates of Problematic Use were Correlated with:
      a) Years of practice/age (10-year increments).
         • Question: Do lawyers’ problematic alcohol use *rates* increase, decrease, or stay the same over time?
      b) Position/seniority in law firm (e.g., junior associate, senior associate, junior partner, senior partner).
         • Question: Do lawyers’ problematic alcohol use *rates* increase, decrease, or stay the same as position/seniority increases in firm?

E. **STUDY FINDINGS: RATES OF DEPRESSION, ANXIETY, UNHEALTHY STRESS.**
   i. Significant Levels of:
      a) Depression: 28%;
      b) Anxiety: 19%;
      c) Unhealthy Stress: 23%.
   ii. Gender:
      a) Men: Higher rates of Depression than women;
      b) Women: Higher rates of Anxiety & Unhealthy Stress than men;
   iii. Practice Environments:
      a) Solos – Highest levels of depression, anxiety, and stress;
      b) Private law firm lawyers – Next highest levels.
   iv. Significant Correlations (Depression, Anxiety, Stress):
      a) Lawyers’ Ages & Years of Practice:
         • Question: Do *rates* of depression, anxiety, and stress increase, decrease, or stay the same as time passes?
b) Lawyers’ position/seniority in law firm:
   - Question: Do rates of depression, anxiety, and stress increase, decrease, or stay the same as position/seniority increases?

c) Problem alcohol use

F. GETTING HELP: Many lawyers needing help, DO NOT seek it/get it. Common reasons:
   i. Stigma;
   ii. Fear of repercussions;
   iii. Privacy/confidentiality concerns;
   iv. Lack of knowledge/resources;
   v. Self-reliance/ “can handle it myself”;
   vi. Unaware that “problem” exists;
   vii. Denial.

   i. 15 Law schools; 3300 students;
   ii. Findings:
      a) 25% at risk for alcohol use disorder;
         - Only 4% received professional help for alcohol or drug issues;
      b) 17% screened positive for depression;
      c) 37% screened positive for anxiety;
      d) 42% reported thinking they needed help for mental health concerns;
         - At least ½ of this group did not seek/receive professional help;
      e) 50% of students surveyed reported they had a better chance of “getting admitted to the bar if health and substance use problems are hidden.”

H. THEREFORE: What the research tells us.
   i. Lawyers have significantly higher rates:
      a) Problematic alcohol use,
      b) Depression, anxiety, and unhealthy stress.
   ii. Our younger, less experienced lawyers are at Significant Risk, having even higher rates of problematic alcohol use & depression, anxiety, and stress than their older, more experienced peers;
   iii. Many lawyers needing help, do NOT seek it;
   iv. Law student studies show similar results.

VI. The Path Forward
A. RESPONSE TO RECENT STUDIES.
   i. Public
   ii. Professional:
      a) “To be a good lawyer, one has to be a healthy lawyer.”
      b) “This research suggests that the current state of lawyers’ health cannot support a profession dedicated to client service and dependent on the public trust”
      c) “...the goal of achieving increased lawyer well-being is within our collective reach.”
B. **TASK FORCE RECOMMENDATIONS.**
   i. **Action needed by all Stakeholders**, invested in the Profession’s well-being:
      a) Law firms and lawyers;
      b) Law schools and students;
      c) Bar admissions and regulatory bodies;
      d) Bar associations, state and local;
      e) Professional associations;
      f) Judiciary;
      g) Professional Liability Insurance Carriers;
      h) Lawyer assistance programs/resources.
   ii. **Expand educational outreach:***
      a) Signs & symptoms of conditions;
      b) Knowledge of resources and how to access;
      c) Effectiveness of treatment;
   iii. **Re-consider the role that alcohol and substance use play in the legal profession;**
   iv. **Create a culture of Well-Being within the legal profession.**

C. **FOCUS: De-stigmatize mental health/substance use conditions in the legal profession.**
   i. **Have open and candid discussions about conditions w/in profession;**
   ii. **Understand that behavioral health disorders are physical, biological, and genetic conditions (like diabetes/arthriti) --- they are not moral failings;**
   iii. **Understand that these conditions transcend all segments and boundaries of society and professions – they are part of the human condition;**
   iv. **Recognize that seeking help is a sign of strength, not a weakness;**
   v. **Have respected members of the legal profession speak openly about their own conditions and struggles; normalize them, rather than hide them;**
   vi. **Recognize that reducing stigma will increase help-seeking/treatment.**

D. **HELP A COLLEAGUE IN NEED: Reaching out to a colleague needing help.**
   i. **Doing nothing vs. Doing something – Have a conversation;**
   ii. **Share your concerns & observations;**
   iii. **Avoid judgment and confrontation;**
   iv. **Care, Compassion, and Candor;**
   v. **Don’t need to be a mental health expert; don’t diagnose;**
   vi. **Listen!;**
   vii. **Recognize: Helping is a process, not one-time event;**
   viii. **Utilize Oregon Attorney Assistance Program resources.**

E. **SELF-CARE: Attending to our own Well-Being.**
   i. **Improve our self-awareness; be alert to our own well-being issues;**
   ii. **Be Pro-Active; attend to all dimensions of well-being;**
   iii. **Stay Connected – family, friends, colleagues, etc.;**
   iv. **Practice healthy boundaries – learn to say “No” & take time for self-care;**
v. See Well-Being – Self-Assessment Check List (Appendix);
vi. Utilize Oregon Attorney Assistance Program resources.

F. COMMENTS.
   i. The elephant in the room;
   ii. A clarion call;
   iii. The horses may be out of the barn.

VII. Helping Colleagues ..... & ..... Helping Self: Recognize Red Flags

- Continuation of problematic behaviors despite adverse consequences;
- Legal problems (e.g., DUIs) related to substance use;
- Social or interpersonal problems (e.g., domestic troubles);
- High-risk behavior (e.g., driving at high speeds; driving while intoxicated);
- Neglecting major responsibilities (work, school, home, etc.);
- Difficulty controlling use of alcohol/drugs;
- Concerns expressed by family, friends, colleagues;
- Persistent intentions or unsuccessful attempts to change problematic behaviors and/or cut down or stop using alcohol/drugs;
- Failure to respond timely to colleagues, opposing counsel, and/or judges;
- High tolerance – having to drink/use more to achieve same desired effect;
- Withdrawal – physical/psychological effects from stopping use of alcohol (e.g., craving, hand tremors, etc.) or drugs (e.g., depression, anxiety, agitation, etc.);
- Isolation and/or reclusive behavior;
- Paralysis (by anxiety, fear, insecurity, etc.) in handling work/personal responsibilities;
- Unresponsiveness, unable to contact - No response to calls, emails, texts, etc.;
- Telephone message box full.
- Email/correspondence not opened, and/or not responded to;
- Procrastination and/or excessively passive behavior;
- Missed appointments; failure to follow through;
- Weak excuses for unavailability or neglectful conduct.
- Decline in cognitive functioning;
- Decline in personal hygiene or appearance;
- Significant memory problems;
- Confused thinking;
- Difficulty understanding issues/following instructions.
- Inappropriate/bizarre behavior;
- Paranoid, exaggerated suspicion or sense of persecution;
- Phone calls, emails, texts at odd hours (e.g., 2 a.m.).
- Stressful personal or family problems;
- Financial difficulties;
- Pending or potential criminal charges;
- Personal or family history of emotional or behavioral disorders;
• Excessive fear, anger, and/or delusional beliefs;
• Low frustration tolerance; highly emotionally reactive;
• Mood changes, extreme highs and lows;
• Difficulty responding to and bouncing back from adverse events;
• Talk or behavior suggesting loss of hope, intent to harm self, or desire to no longer be alive.

Oregon Attorney Assistance Program

_A Valuable & Confidential Resource for Oregon Attorneys, Judges, and Law Students_

503-226-1057  www.oaap.org

*****
Appendix
Common Signs and Symptoms of Problematic Substance Use, Depression, and Anxiety

- **Problematic Substance Use:**
  - Continuation of problematic substance use despite adverse consequences;
  - Legal problems;
  - Social or interpersonal problems (e.g., domestic troubles);
  - High risk behavior (e.g., driving at high speeds; driving drunk);
  - Neglecting major responsibilities at work, school, home;
  - Difficulty in controlling, or inability to control, substance use;
  - Taking substance in larger amounts/for longer periods than intended;
  - Persistent desire or unsuccessful attempts to cut down or stop using;
  - Withdrawal and Tolerance. *High tolerance* (having to drink/use more to achieve desired effects); signs of withdrawal in the absence of the substance (e.g., tremors, anxiety, nausea, lethargy, etc.);
  - Concerns expressed by family or others;
  - Denial or minimizing substance use problem.

- **Depression**
  - Prolonged and debilitating feelings of sadness, hopelessness, worthlessness, despair;
  - Feelings of hopelessness, pessimism;
  - Loss of interest in activities once enjoyable;
  - Difficulty focusing, concentrating, tracking, decision-making;
  - Changes in:
    - Energy levels (agitation or lethargy);
    - Sleep Habits (insomnia or sleeping too much);
    - Eating (eating too much or too little; losing or gaining weight);
  - Paralyzed from taking action in their self-interest; procrastination;
  - Can include recurrent thoughts of death or suicide.

- **Anxiety:**
  - Fight, flight, or freeze response is locked in the on-position;
    - Prolonged debilitating anxiety or worry;
    - Procrastination;
    - Irritability;
    - Prolonged disruption of sleep (inability to fall asleep/stay asleep);
    - Avoidance of situations;
    - Distress in social situations;
    - Obsessive or compulsive behavior;
    - Difficulty focusing, concentrating, tracking;
    - Difficulty self-regulating emotions (crying, irritability, anger, restlessness);
- Paralyzed from taking action in their self-interest;
- Panic attacks: The sudden onset of intense apprehension, fearfulness or terror. During these attacks, symptoms such as shortness of breath, heart palpitations, chest pains, chocking or smothering sensations and/or fear of “going crazy” or losing control.

**References and Resources**

  [https://journals.lww.com/journaladdictionmedicine/fulltext/2016/02000/The_Prevalence_of_Substance_Use_and_Other_Mental.8.aspx](https://journals.lww.com/journaladdictionmedicine/fulltext/2016/02000/The_Prevalence_of_Substance_Use_and_Other_Mental.8.aspx)

- OAAP inSIGHT Publication:  
  - National Study on Lawyer Substance Use and Mental Health, OAAP inSIGHT, June 2016.  

  [https://www.americanbar.org/groups/lawyer_assistance/research/colap_hazelden_lawyer_study/](https://www.americanbar.org/groups/lawyer_assistance/research/colap_hazelden_lawyer_study/)

  [https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/lawyer_well-being_toolkit_for_lawyers_legal_employers.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/lawyer_well-being_toolkit_for_lawyers_legal_employers.authcheckdam.pdf)


  [https://www.americanbar.org/groups/lawyer_assistance/research/law_student_survey/](https://www.americanbar.org/groups/lawyer_assistance/research/law_student_survey/)
Defining Lawyer Well-Being: A Multi-Dimensional Approach

Well-being cannot be defined just by the absence of illness but also encompasses a positive state of wellness. From a whole-health perspective, it can be viewed as a continuous process in which we work across multiple dimensions of wellness. The way we function in one dimension can enhance or impede the way we function in another dimension. The report of the National Task Force on Lawyer Well-Being identified six dimensions that make up full well-being for lawyers:

1. **Occupational**
   Cultivating personal satisfaction, growth, and enrichment in work; financial stability.

2. **Emotional**
   Recognizing the importance of emotions. Developing the ability to identify and manage our own emotions to support mental health, achieve goals, and inform decision-making. Seeking help for mental health when needed.

3. **Physical**
   Striving for regular physical activity, proper diet and nutrition, sufficient sleep, and recovery; minimizing the use of addictive substances. Seeking help for physical health when needed.

4. **Intellectual**
   Engaging in continuous learning and the pursuit of creative or intellectually challenging activities that foster ongoing development; monitoring cognitive wellness.

5. **Spiritual**
   Developing a sense of meaningfulness and purpose in all aspects of life.

6. **Social**
   Developing a sense of connection, belonging, and a well-developed support network while also contributing to our groups and communities.

Defining Lawyer Well-Being

A continuous process in which lawyers strive for thriving in each dimension of their lives:

- **Occupational**: Cultivating personal satisfaction, growth, and enrichment in work; financial stability.
- **Emotional**: Recognizing the importance of emotions. Developing the ability to identify and manage our own emotions to support mental health, achieve goals, and inform decision-making. Seeking help for mental health when needed.
- **Intellectual**: Engaging in continuous learning and the pursuit of creative or intellectually challenging activities that foster ongoing development; monitoring cognitive wellness.
- **Spiritual**: Developing a sense of meaningfulness and purpose in all aspects of life.
- **Physical**: Striving for regular physical activity, proper diet and nutrition, sufficient sleep, and recovery; minimizing the use of addictive substances. Seeking help for physical health when needed.
- **Social**: Developing a sense of connection, belonging, and a well-developed support network while also contributing to our groups and communities.

Reprinted from the ABA Well-Being Toolkit for Lawyers and Legal Employers, available from https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls_colap_well-being_toolkit_for_lawyers_legal_employers.authcheckdam.pdf
Well-Being – Self-Assessment

Check the activities/practices that you engage in regularly or fairly regularly:

Physical Self-Care:

☐ Eat regularly (e.g. breakfast & lunch)
☐ Eat healthfully
☐ Exercise, or go to the gym
☐ Lift weights
☐ Practice martial arts
☐ Get regular medical care for prevention
☐ Get medical care when needed
☐ Take time off when not feeling well
☐ Get massages or other body work
☐ Do physical activity that is fun for you
☐ Take time to be sexual
☐ Get enough sleep
☐ Wear clothes you like
☐ Take vacations
☐ Take day trips, or mini-vacations
☐ Get away from stressful technology such as pagers, faxes, telephones, e-mail
☐ Other:

Psychological Self-Care:

☐ Make time for self-reflection
☐ Go to see a psychotherapist or counselor for yourself
☐ Write in a journal
☐ Read literature unrelated to work
☐ Do something at which you are a beginner
☐ Take a step to decrease stress in your life
☐ Notice your inner experience - your dreams, thoughts, imagery, feelings
☐ Let others know different aspects of you; i.e., being transparent
☐ Engage your intelligence in a new area - go to an art museum, performance, sports event, exhibit, or other cultural event
☐ Practice receiving from others
☐ Be curious
☐ Say no to extra unnecessary responsibilities
☐ Spend time outdoors
**Emotional Self-Care:**

- Spend time with others whose company you enjoy
- Stay in contact with important people in your life
- Treat yourself kindly (supportive inner dialogue or self-talk)
- Feel proud of yourself
- Reread favorite books, review favorite movies
- Identify and seek out comforting activities, objects, people, relationships, places
- Allow yourself to cry
- Find things that make you laugh
- Care for a pet
- Play with children

**Spiritual Self-Care:**

- Make time for prayer, meditation, reflection
- Spend time in nature
- Participate in a spiritual gathering, community or group
- Am open to inspiration
- Cherish your optimism and hope
- Am aware of nontangible (nonmaterial) aspects of life
- Am open to mystery, to not knowing
- Identify what is meaningful to you and notice its place in your life
- Sing; play music
- Express gratitude
- Celebrate milestones with rituals that are meaningful to you
- Remember and memorialize loved ones who have died
- Nurture others
- Have awe-full experiences
- Contribute to or participate in causes you believe in
- Read inspirational literature
- Listen to inspiring music

**Workplace/Professional Self-Care:**

- Take time to eat lunch
- Take time to chat with co-workers
- Make time to complete tasks; i.e., plan ahead
Engage in projects or tasks that are exciting, growth-promoting, &/or rewarding for you

Healthy Boundaries: Set limits with clients, colleagues, bosses

Balance your caseload so no one day is "too much!"

 Arrange your workspace so it is comfortable and comforting

 Get regular supervision or consultation

 Negotiate for your needs

 Have a peer support group

(Adapted from Saakvitne, Pearlman, and Traumatic Stress Institute Staff, Transforming the Pain: A Workbook on Vicarious Traumatization, 1996)
Chapter 6

Presentation Slides: Mandatory Abuse Reporting for Oregon Lawyers

Linn Davis
Oregon State Bar
Tigard, Oregon
Mandatory Abuse Reporting for Oregon Lawyers

WITH THANKS TO

MARK JOHNSON ROBERTS FORMER
DEPUTY GENERAL COUNSEL
OREGON STATE BAR

AMBER A. HOLLISTER
GENERAL COUNSEL

Oregon Statutory Abuse Reporters
[summarized and condensed]

- Medical Professionals
- Audiologists and Therapists
- Police Officers, Firefighters, EMTs
- School and College Employees
- Health and Human Services Workers
- Care Providers and Legal Custodians
- Clergy and Mental Health Professionals
- Physical, Speech and Occupational Therapists
- Members of the Legislative Assembly
- Attorneys
Legislative Purpose
[example: elder abuse reporting]

“The Legislative Assembly finds that for the purpose of preventing abuse, safeguarding and enhancing the welfare of elderly persons, it is necessary and in the public interest to require mandatory reports and investigations of allegedly abused elderly persons.”
ORS 124.055

Three quarters of all child abuse reports come from mandatory reporters.

<table>
<thead>
<tr>
<th>Category</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Police</td>
<td>17%</td>
</tr>
<tr>
<td>School</td>
<td>20%</td>
</tr>
<tr>
<td>Medical</td>
<td>10%</td>
</tr>
<tr>
<td>Other mandated</td>
<td>30%</td>
</tr>
<tr>
<td>Parent/Self</td>
<td>6%</td>
</tr>
<tr>
<td>Other voluntary</td>
<td>17%</td>
</tr>
<tr>
<td>All voluntary</td>
<td>23%</td>
</tr>
</tbody>
</table>
Attorneys’ Abuse Reporting Duties

**ELDERS**

**CHILDREN**

MENTAL ILLNESS/DEVELOPMENTAL DISABILITY [ORS 430.765]

LONG-TERM CARE RESIDENT [ORS 441.640]

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**Your Abuse Reporting Duty**

You **must** report abuse if you have:

- **Contact** with an abuser or a victim, and
- **Reasonable cause** to believe that
- **A protected person**
- **Has Been abused**,

**UNLESS** an exception applies.

**This duty exists 24 hours a day, 7 days a week!**

**Following an employer’s policy is not enough!**
How to Report

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

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

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Report Should Include ...

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

Where does elder abuse occur?

- 66% at home
- 34% care facility
Brooke Astor

- Philanthropist
- Writer
- Beloved NYC Socialite
- Widow of Vincent Astor
- $200 million estate

778 Park Avenue
Chapter 6—Presentation Slides: Mandatory Abuse Reporting for Oregon Lawyers

What is Contact?

- A touching or meeting; association or relationship
- Need not be linked to abuse but there must be physical or associational contact
- Receiving information in a public meeting about someone is not sufficient (AG opinion)
- Telephone or email contact?
- Can be before or after the abuse or the disclosure

The Brooke Astor Story: Contact

- Surrounded by staff, nurses and family
- Beloved donor and board member
- Appears that her son was abusing her, neglecting her and taking her money, all along.
- Mrs. Astor Regrets chronicles her abuse based on her nurses’ diaries
What is Reasonable Cause?

- Any reasonable suspicion of abuse should be reported.
- Reasonable suspicion is more than a hunch.
- It requires an ability to point to articulable facts based on the totality of the circumstances.
- Your obligation to report does not depend upon whether abuse actually occurred.

Let the Experts Decide

- You do not need to investigate.
- OK to comment on injury or situation and observe.
- Your job is not to determine whether abuse occurred.
- Do you have a reasonable suspicion of abuse?
- Consider making a voluntary report (assuming no confidentiality issue).
- If the explanation does not suit the injury, make a report.
The Brooke Astor Story

- Mrs. Astor was diagnosed with Alzheimer’s and anemia
- Anthony “Tony” Marshall, her only son, was tasked with her care
- Anthony earned $450,000/yr to take care of her portfolio

Brooke Astor: Reasonable Cause?

- Phillip Marshall, Mrs. Astor’s grandson, sought a change in guardianship
- Phillip alleged that despite her great wealth Mrs. Astor was living in squalor and his father Anthony had reduced her necessary medication and doctor’s visits
Elder Abuse Defined—ORS 124.050(1)

- Financial Exploitation
- Abandonment or Neglect
- Verbal Abuse
- Willful infliction of physical pain or injury
- Any injury not caused by accident; any injury at variance with the explanation given for it.
- Sex Abuse
- Seclusion or Restraint

Warning Signs of Elder Abuse

- Unexplained injury or one that doesn’t fit the explanation given for it
- Elder not permitted to speak for themselves or without the presence of others.
- Being extremely withdrawn and non-communicative or non-responsive.
- Unpaid bills, overdue rent, utility shut-off notices
### 2015 Substantiated Elder Abuse

- **Financial**: 30%
- **Neglect**: 29%
- **Verbal**: 22%
- **Physical**: 13%
- **Sexual**: 2%
- **Other**: 4%

### The Brooke Astor Story: Consequences

- The jury convicted Anthony Marshall of one charge of grand larceny and Francis X. Morrissey Jr. of forgery.
- Both were sentenced to 1-3 years in prison.
- On February 10, 2010, Francis X. Morrissey Jr. was disbarred.
The Battered Child Syndrome


Foundation of child abuse as a diagnosis.

Also called Tardieu's syndrome; Caffey-Kempe syndrome.
Child Abuse Defined—ORS 419B.005

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

Warning Signs of Child Abuse

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

Types of Child Abuse Reported—2015

- Threatened Harm: 45%
- Physical Abuse: 39%
- Sexual Abuse: 6%
- Mental Injury: 8%
- Neglect: 2%
EXCEPTIONS TO REPORTING

Exception:
Certain Client Confidences

- **Attorney-Client Privileged** under ORS 40.225 (OEC 503)
- **Information communicated during representation that is detrimental to client** if disclosed (reconciles RPC 1.6 duty)
May I Report? Yes, if:
- Informed Consent
- Implied Authorization
- Client Intends to Commit Crime
- Prevent Death or Injury

Some examples
- Lawyer representing person charged with child abuse who admits past acts
- Lawyer representing person charged with child abuse who expresses intention to “pay back” child for speaking with prosecutor
Some examples

► Lawyer representing wife in divorce is told by wife of physical abuse by husband of their child while meeting in a crowded restaurant. Lawyer has met the husband.

► Lawyer representing court-appointed guardian of elderly person suspects guardian is neglecting elderly person based upon interaction with protected person

Exception: “Reasonable Discipline” [of a child!]

► “Abuse” does not include reasonable discipline unless the discipline results in one of the conditions [specifically defined to constitute abuse].”
### Exception: Duplicative Reports
[child abuse only]

- Report already made
  - OR
- Proceeding already pending
  - AND
- Reasonable belief the information is already known

### Exception: Spiritual Treatment
[for an elder!]

- Voluntary
- Through prayer
- Recognized church
- Duly accredited practitioner
- Reconciles “neglect” as not abuse
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