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Seminars

# Practicing Law in Oregon



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# PRACTICING LAW IN OREGON

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## SCHEDULE

### **Oregon Discovery—Rules and Conventions**

**45 minutes**

- ◆ Distinguishing federal and state practice in Oregon
- ◆ Pursuing records of parties and nonparties
- ◆ Usual timing and the practice for scheduling and then getting adjustments
- ◆ Getting public records and discovery with the government
- ◆ Local discovery for foreign action
- ◆ Court assistance in disputes

Ben Eder, *Thuemmel Uhle & Eder, Portland*

Kimberly Anne Stuart, *Assistant County Counsel, Washington County Counsel, Hillsboro*

### **Oregon Pleadings and Parties: Tips to Consider and Traps to Avoid**

**40 minutes**

- ◆ Pleadings that make Oregon different from other places
- ◆ Bringing parties into a case: know the rules
- ◆ Ultimate facts and defenses: how to assert them and what must be included
- ◆ Practical considerations in discovery and trial

Jovita Wang, *Richardson Wright LLP, Portland*

### **Depositions in Oregon**

**60 minutes**

- ◆ Oregon's written and unwritten rules governing depositions
- ◆ Using depositions at trial

Vanessa Kuchulis, *Miller Nash LLP, Portland*

### **The Disciplinary Process: Basics You Need to Know**

**123 minutes**

- ◆ What they do: Client Assistance Office, Disciplinary Counsel Office, and the State Professional Responsibility Board
- ◆ How to respond—a defense perspective
- ◆ Roundtable—common complaints, unique features in Oregon, negotiated outcomes, and recent cases

Moderator: Courtney Dippel, *Disciplinary Counsel's Office, Oregon State Bar, Tigard*

Nellie Barnard, *Holland & Knight, Portland*

Linn Davis, *Assistant General Counsel and CAO Manager, Oregon State Bar, Tigard*

Ankur Doshi, *Deputy General Counsel, TriMet, Portland*

### **Local Practice in the U.S. District Court for the District of Oregon**

**51 minutes**

- ◆ The importance of civility and professionalism
- ◆ Considerations during initial case filing
- ◆ Discovery disputes (minimize them)
- ◆ Summary judgment practice
- ◆ Trial practice

The Honorable Mustafa Kasubhai, *United States District Court for the District of Oregon, Eugene*

### **May It Please the Court—An Overview of the Oregon Court System**

**43 minutes**

The Honorable Xiomara Torres, *Multnomah County Circuit Court, Portland*

Lined area for writing.

## FACULTY

**Nellie Barnard**, *Holland & Knight, Portland*. Ms. Barnard focuses her practice on commercial litigation with a particular emphasis on legal ethics, risk management, and disciplinary defense. In her legal ethics practice, Ms. Barnard defends Oregon and Washington lawyers in attorney discipline matters, including on appeal, and assists lawyers and law firms at any point at which legal ethics issues intersect with litigation. Her commercial litigation experience includes representing clients in complex business disputes, consumer financial services litigation, and employment matters. She is a member of the Multnomah Bar Association Board of Directors, Oregon Women Lawyers, the Association of Professional Responsibility Lawyers, the Campaign for Equal Justice Associates Committee, and the Joyce A. Harpole Committee. Ms. Barnard is a frequent speaker on legal ethics. She is admitted to practice in Oregon and Washington. Ms. Barnard is the recipient of the 2021 Campaign for Equal Justice Associates Award.

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

**Courtney Dippel**, *Disciplinary Counsel's Office, Oregon State Bar, Tigard*. Ms. Dippel is Disciplinary Counsel for the Oregon State Bar. She previously was an Assistant Disciplinary Counsel for the Bar, where she tried formal disciplinary proceedings to completion. Before joining the bar, Ms. Dippel was in private practice for 15 years, handling commercial litigation on behalf of both plaintiffs and defendants.

**Ankur Doshi**, *Deputy General Counsel, TriMet, Portland*. Mr. Doshi is Deputy General Counsel for Employment Law and Labor Relations at TriMet, which provides public transportation services in the Portland metropolitan area.

**Ben Eder**, *Thuemmel Uhle & Eder, Portland*. Mr. Eder has tried over 100 DUII jury trials and won a major DUII case at the Oregon Supreme Court. He is the author of the chapter on Department of Motor Vehicle Hearings for the DUI Notebook, published by the Oregon Criminal Defense Lawyers Association. Mr. Eder is a member of the Multnomah Bar Association, the American Bar Association, the Oregon New Lawyers Division, the Oregon Criminal Defense Lawyers Association, and the Oregon State Bar Litigation Section. He is a frequent presenter on trial techniques. Mr. Eder is the 2011 recipient of the Oregon State Bar Membership Service Award.

**The Honorable Mustafa Kasubhai**, *United States District Court for the District of Oregon, Eugene*. Judge Kasubhai was appointed to the Lane County Circuit Court in 2007 by Governor Kulongoski and was reelected to another six-year term in 2014. He was selected to join the federal bench in 2018. Judge Kasubhai is the first Muslim-American to serve on the federal bench in the United States.

**Vanessa Kuchulis**, *Miller Nash LLP, Portland*. Ms. Kuchulis's practice focuses on construction defect litigation, real estate disputes, ADA defense, and commercial construction contract drafting. She represents clients in a wide range of industries that include education, technology, manufacturing, health care, and hospitality. Ms. Kuchulis is a member of the Oregon Asian Pacific American Bar Association.

**Kimberly Anne Stuart**, *Senior Assistant County Counsel, Washington County Counsel, Hillsboro*.

**The Honorable Xiomara Torres**, *Multnomah County Circuit Court, Portland*. Prior to taking the Multnomah County Circuit Court bench in May 2017, Judge Torres was a Senior Assistant Attorney General in the Oregon Department of Justice.

## FACULTY (Continued)

**Jovita Wang**, *Richardson Wright LLP, Portland*. Ms. Wang is director of the Multnomah Bar Association, Secretary of the Oregon Asian Pacific American Bar Association Foundation, Oregon State Bar Delegate to the ABA House of Delegates, Fellow of the American Bar Foundation, member of Oregon Women Lawyers, Associate Fellow of Litigation Counsel of America, and Leadership Advancement Fellow of the National Asian Pacific American Bar Association Class of 2018. She is admitted to practice in California, Oregon, and Washington.



# Chapter 1

# Oregon Discovery: Rules and Conventions

**BEN EDER**

Thuemmel Uhle & Eder  
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Assistant County Counsel  
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## I. Overview

### A. Introduction

Discovery is: (1) performance of the lawyer's independent duty to investigate imposed by Oregon's Rules of Professional Conduct, FRCP 11 and ORCP 17 and (2) the use of specific procedural tools to obtain information bearing on the case.

### B. Rules and Resources

1. State court. Oregon Rules of Civil Procedure (ORCP), Uniform Trial Court Rules (UTCRC), and Supplementary Local Rules (SLR) of each county circuit court
2. Federal court. Federal Rules of Civil Procedure (FRCP), Local Rules (LR) for the District of Oregon
3. Oregon State Bar publications. Federal Civil Litigation in Oregon, Civil Litigation Manual, Civil Pleading and Practice (generally not cited)
4. Treatises. Wright & Miller, FEDERAL PRACTICE & PROCEDURE, and Matthew Bender, MOORE'S FEDERAL PRACTICE (regularly cited to in both state and federal courts)

### C. Scope of Discovery

1. Under the Oregon rules, the scope of discovery extends to any matter, not privileged, that is relevant to the claim or defense of any party. Material sought need not be admissible if it is reasonably calculated to lead to the discovery of admissible evidence. ORCP 36 B(1).
2. Proportionality. In 2015, the federal rules were amended to now impose a proportionality standard. "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and *proportional to the needs of the case*." FRCP 26(b)(1). In determining whether something is proportional, the court should consider: (1) the importance of the issues at stake in the action, (2) the amount in controversy, (3) the parties' relative access to relevant information, (4) the parties' resources, (5) the importance of the discovery in resolving the issues, and (6) whether the burden or expense of the proposed discovery outweighs its likely benefit. *Id.* Similar to the Oregon rule, information within that scope of discovery need not be admissible in evidence to be discoverable. *Id.* See David Crump, *Goodbye, "Reasonably Calculated"; You're Replaced by "Proportionality": Deciphering the New Federal Scope of Discovery*, 23 GEO. MASON L. REV. 1093 (2016), for a discussion of the new proportionality standard.
3. In similar areas between Oregon rules and the federal rules, state courts will accept federal decisions as guidance. *Boon v. Boon*, 100 Or App 354, 357 n.2 (1990) (father had standing to quash subpoena served by mother on father's psychologist); *Vaughan v. Taylor*, 79 Or App 359, 363, *rev denied*, 301 Or 445 (1986) (subpoena as method to obtain discovery from non-party); *Southern Pacific v. Bryson*, 254 Or 478, 480 (1969) (early analysis of Oregon's

Rule 34 based on history of FRCP 43). When rules are similar, decisions of other states courts also provide “context.” *GPL Treatment Ltd. v. Louisiana-Pacific Corp.*, 323 Or 116, 124 (1996) (using decisions of other states courts to analyze provision of Uniform Commercial Code).

4. Attorney-client privilege is defined by the evidence rules and common law. See Oregon Evidence Code (“OEC”) 503 (ORS 40.225). In federal court, the federal common law of privilege takes precedence except with respect to claims and defenses governed by state law. FRE 501. Oregon’s rule may be somewhat distinguished by its lengthy definitions of “client” and “representative of the client” to the extent that “representative” may include, without limitation, any principals, officers, and directors of a corporate client. OEC 503(1)(d)(A). In recent cases, the rule is not inviolate. See *City of Portland v. Bartlett*, 304 Or App 580, 585-586 (2020) (interpreting Oregon public records statutes to require disclosure of documents more than 25 years old, notwithstanding attorney-client privilege).

5. The work product doctrine protects from disclosure materials prepared in anticipation of litigation. The highest degree of protection is given to the “mental impressions” of litigation counsel, but protection extends to work by or for a party or its representative or by a consultant/expert under the direction of the attorney that falls within the “anticipation of litigation” label. See *Hickman v. Taylor*, 329 US 495, 507 (1947) (seminal discussion of “work product”). The reference to work product in the federal and state rules is identical. See FRCP 26(b)(3); ORCP 36 B(3). For discussions in Oregon common law, see, for example, *State v. Riddle*, 330 Or 471 (2000) (discussion of work product under Oregon cases as applied to communications between expert and attorney); *Brink v. Multnomah County*, 224 Or 507 (1960) (same); and *United Pacific Ins. Co. v. Trachsel*, 83 Or App 401, 404, *rev denied* 303 Or 332 (1987) (court protected work of fire expert hired after litigation appeared likely). Under Oregon law, the work product extends to both written materials and work product that has not been reduced to writing. Kirkpatrick, OREGON EVIDENCE § 503.06[2] (2013).

#### **D. Planning and Balancing**

1. Know your case, all claims and defenses of the parties before drafting discovery. Jury instructions are very helpful.

2. Just call opposing counsel. Follow default response times or document agreements to the contrary!

3. The Golden Rule will not always be enforced by the courts, but it still lives in Oregon.

#### **E. Timing**

1. FRCP 6 and ORCP 10 control the computation of time. The federal rule is more detailed. Both rules instruct that the day the act is done is not counted in the computation of time. In addition, both rules provide that if the last day of the period falls on a Saturday, Sunday, or legal holiday, the period continues to run until the next business day.

2. Additional time for certain types of service. Under federal law, you add three days to the computation of time if you have served under Rule 5(b)(2)(C) (mail), (D)

(leaving with the clerk), or (F) (other means consented to). FRCP 6(d). Under Oregon law, you add three days to the computation of time if you have served by any method other than personal delivery. ORCP 10 B. **PRACTICE TIP:** Set dockets or ticker reminders on 29 days to avoid missing a response deadline in state or federal cases.

3. Responses must be timely, or risk waiving the opportunity to object or respond. Specific objections on each request, rather than blanket general objections, is a good practice.

## II. Discovery of Parties

### A. Requests for Production or Inspection

1. FRCP 34 and ORCP 43 are very nearly identical.

2. Federal requests may be delivered more than 21 days after service of the summons and complaint, at the earliest, and such request is considered to have been served at the first FRCP 26(f) conference. *See* FRCP 26(d)(2)(A); LR 26-1. The Oregon rule generally allows requests to be served in conjunction with or after service of the summons. ORCP 43 B.

3. Requests must be in writing; must describe material sought by item or by category and with reasonable particularity; and must specify a reasonable time, place, and manner for production and related acts. “Reasonably particular” is determined by the facts and circumstances of the case. *See, e.g.*, 8B Wright & Miller, FEDERAL PRACTICE AND PROCEDURE, § 2211 (3d ed.).

4. Do not file requests for production or responses in either state or federal court unless and until a request is in dispute. LR 34-1; ORCP 9 D.

5. The only reliable way to preserve objections is to make them in a written form, typically by a formal captioned document matching each request to the objections it raises. The Oregon rule does not impose a particular requirement for a writing, but the practice is to follow the federal-rule format – restating each request followed by appropriate objections. *See* LR 34-2.

6. The Oregon rule requires a response within 30 days of service of a request, except that a defendant cannot be required to respond earlier than 45 days after service of summons unless the court specifies a shorter term. ORCP 43 B(2). The parties may also agree in writing, or the court may order, a different response time.

7. Fed. R. Civ. P. 34(b)(2) requires a written response, within 30 days after the service of the request, or within 30 days after the parties’ first Rule 26(f) conference, if the request was served early pursuant to Rule 26(d)(2).

8. The Oregon rule provides that “a party shall serve a response that includes . . . a statement that, except as specifically objected to, any requested item within the party’s possession or custody is provided, or will be provided or made available within the time allowed and at the place and in the manner specified in the request[.]” ORCP 43 B(2); *but see Citizens’ Utility Bd. v. Public Utility Comm’n.*, 128 Or App 650, 657-58 (1994) (“[W]e agree . . . that

ORCP 43 B does not require the conclusion that [the responding party] waived the right to seek protection . . . by failing to seek protection sooner.”). The local federal rule is clearer and stricter: failure to object within the time fixed by the rules, or within the time the parties have agreed, constitutes a waiver of any objection. LR 26-5(a).

9. FRCP 26(e) imposes some duty to supplement responses. The Oregon rule indicates that “[a] party . . . is under a continuing duty during the pendency of the action to produce promptly any item responsive to the request and not objected to which comes into the party's possession, custody, or control.” ORCP 43 B(4).

## **B. Requests for Admission**

1. Governed by FRCP 36 and ORCP 45.

2. Distinctions between federal and Oregon rule:

a) In federal action, do not file requests or responses, though they may be used as exhibits at trial. LR 36-1. In state court, requests *and* responses must be filed with court (by exclusion from ORCP 9 D).

b) ORCP 45 F limits the number of requests to 30 without court order except for a reasonable number of additional requests for admission to establish the authenticity and admissibility of documents under the business documents exception of OEC 803(6). The federal rule imposes no such limit.

c) ORCP 45 A mandates specific language in the request warning of the import of failure to make a timely response.

d) In both federal and state practice, each matter on which an admission is requested must be separately set forth. ORCP 45 E provides the request must leave sufficient space for a response, and it is customary to follow this same format in federal court, although there is no analogous provision.

3. Requests for Admission can be useful, particularly in state court, to establish foundation for summary judgment and potential trial exhibits. Such documents must be attached to the requests for admission unless they have been or are otherwise furnished or made available for inspection and copying. FRCP 36(a)(2); ORCP 45 A.

4. ORCP 45 B follows FRCP 36(a)(3) in requiring that a written response be served within 30 days after service of the request unless the court shortens or extends the time. Failure to respond in a timely fashion results in an automatic admission of the matters contained in the request.

5. Requirements for substantive responses are the same in state and federal court. The answering party may admit, deny, or object to the request or may state that the matter is neither admitted nor denied. The party is further required to qualify an admission or denial if good faith so requires. In lieu of a response, a party may object to a requested admission, but

objections based upon ambiguous, unintelligible, or argumentative requests may be tested in court and are not favored.

6. If the court determines that an answer is insufficient, the court may impose money sanction, order the party to amend its answer, or order that the matter is deemed admitted. *See Asea Inc. v. Southern Pac. Transp. Co.*, 669 F2d 1242, 1245 (9th Cir 1981) (holding matter deemed admitted for insufficient answer).

7. Both federal and Oregon rules provide that if a party fails to admit the genuineness of a document or the truth of a matter, and the party making the request later establishes the genuineness or truth of the matter, the court may order the offending party to pay for the reasonable expenses, including attorney fees, of making that proof. *See, e.g. Elliot v. Progressive Halcyon Ins. Co.*, 222 Or App 586, 590 (2008) (upholding attorney fees award).

8. The subject matter of admissions under FRCP 36 and ORCP 45 are conclusively established for trial. A denial has been determined by the Oregon courts to have no evidentiary weight or effect. *See Bowers v. Winitzki*, 83 Or App 169, 173, n. 5 (1986).

### **C. Interrogatories (federal court only)**

1. Interrogatories are not authorized in state courts. However, they are widely used in federal cases. They may be used to identify trial witnesses, including expert witnesses. FRCP 26(a)(2). In certain circumstances, the facts known to or opinions held by an expert who has been retained but is not expected to testify may also be discovered. FRCP 26(b)(4)(B). Unless otherwise stipulated or ordered by the court, each party may only serve another party with 25 interrogatories, including discrete subparts. FRCP 33(a)(1).

2. Interrogatories, answers, and objections are not filed with the court unless the court directs a party to do so, or they become the subject of a motion. LR 33-1.

3. Local rules discourage lengthy boilerplate preambles and encourage conciseness and clarity. Broad, general interrogatories are not permitted. An opposing party may not be asked to “state all facts on which a contingency is based” or to generally “apply law to facts.” *See* LR 33-1(c) and (d).

4. Answers and objections must be served within 30 days after service of the interrogatories. Each question must be set forth in full before each answer or objection. Each objection must be followed by a statement of reasons. The answers must be made under oath and must be signed by the person giving the answers. Objections are to be signed by the attorney. FRCP 33(b); LR 33-2(a).

5. Interrogatories may be used as exhibits or evidence in support of a motion and, subject to the rules of evidence, may be introduced at trial. LR 33-1(b). Answers to interrogatories frequently play a key role in motions for summary judgment.

### III. Discovery of Nonparties

#### A. Subpoenas for documents or things

1. In federal and state cases, a subpoena is the method for obtaining discovery from a nonparty. A subpoena can be used to compel a nonparty to attend a deposition and/or to produce documents or tangible things. FRCP 45(a)(1)(C); ORCP 55 F(2), (3).

2. Service by mail of a subpoena is effective if the target consents in advance, but effective service always requires delivery of the appropriate witness fee with the subpoena. FRCP 45(b)(1); ORCP 55 D(1), (3)

3. For subpoenas seeking production of documents only (without attendance at a deposition), the Oregon rule requires service of the civil subpoena on each party at least seven (7) days before the subpoena is served on the target. ORCP 55 D(1). The target shall be given no less than 14 days to respond, in order to allow time for preserving objections and obtaining court assistance such as a motion to quash, if appropriate.

4. Both federal and Oregon rules require notice to all parties of discovery subpoenas, usually accomplished by service of a copy of the subpoena. Oregon rules require seven (7) days advance notice for subpoenas for production of documents only. Other parties are entitled to copies of production obtained, just as they would be entitled to attend a deposition.

5. Note that state rule has special provisions for discovery of health information at ORCP 55 H.

#### B. Interstate Discovery

1. Federal rule allows for service of a subpoena any place within the United States. FRCP 45(b). 28 USC 1783 governs services directed at a United States national or resident who is in a foreign country.

2. Practice in state actions pending in Oregon depends on the requirement of the state in which the discovery will occur. The state court will issue a commission or letters rogatory for discovery from a nonresident upon a proper motion, supported by an affidavit substantiating the need for the discovery. *See* ORCP 38 B and 55. Do not forget that Oregon rules authorizes service of subpoenas by mail so long as the target of service assents to service by that method. ORCP 55 D(3) and (4). Be sure to confirm that agreement for service in writing.

#### C. Public Records Requests

1. For requests directed to public bodies, *see* ORS 192.311-192.338. An attorney litigating against a public body may need to serve a copy of a records request on that public body. *See* ORS 192.314. Many government agencies take requests online.

2. The *Attorney General's Public Records and Meetings Manual*, available at [http://www.doj.state.or.us/pdf/public\\_records\\_and\\_meetings\\_manual.pdf](http://www.doj.state.or.us/pdf/public_records_and_meetings_manual.pdf), is a useful resource.



3. The procedural pathway governing requests and review of denials depends on the public body to which the request is directed. *See* ORS 192.411-192.431.

4. Federal documents may be requested under the Federal Freedom of Information Act (5 USC §552), with reference to specific agency records and inspection provisions set forth in the CFRs and agency guidelines.

#### **IV. Review of Major Distinctions Between Federal and State Court Practice**

##### **A. Initial disclosures**

While federal rule anticipates formal initial disclosures, the District of Oregon has a tradition of waiving this requirement. LR 26-2 allows the parties to waive the disclosures, and there is a form on the court’s website for documenting waiver. U.S. DISTRICT COURT: DISTRICT OF OREGON, Fed. R. Civ. P. 26(a) Discovery Agreement, available at <https://ord.uscourts.gov/index.php/filing-and-forms/forms/civil-forms>.

Except in certain actions, such as for a dissolution of marriage, there is no equivalent to initial disclosures for state actions. *See e.g.*, ORS 107.089.

##### **B. Interrogatories**

As noted earlier, this is an important tool in federal litigation that is not available in state actions.

##### **C. Time limits on the conduct of discovery**

In state court, as a general rule, once discovery commences, the only time limit on completing it is the reasonableness of the time left for a response. Local practice is evolving at the county level—even among individual judges and, particularly, for more complex cases—to call for work on a scheduling order. (Be sure to check each circuit court’s website for current local rules regarding scheduling orders, pretrial and trial judge assignments, and trial settings. A list of circuit court local rules is at: (<https://www.courts.oregon.gov/rules/Pages/slr.aspx>).

By contrast, the practice in federal court is to follow formal scheduling orders with default deadlines cutting off general discovery, dispositive motions, a subsequent cut-off for a period of expert discovery, joint alternative dispute resolution and staged pretrial submissions. Discovery requests must be propounded in time for the response to be due before the cut-off. Those deadlines can only be changed by court order pursuant to timely motions.

##### **D. Experts**

Pre-trial discovery of experts is generally allowed in federal actions; rarely in state actions absent agreement among the parties. Oregon courts repeatedly prohibit discovery of experts in the absence of such agreement. *See Stevens v. Czerniak*, 336 Or 392, 400-05 (2004); *Nielson v. Brown*, 232 Or 426 (1962); *Brink v. Multnomah County*, 224 Or 507 (1960) (seminal discussions of work product and expert discovery). This is colloquially referred to in Oregon as “trial by ambush.” *Hinchman v. UC Mkt., LLC*, 270 Or App 561, 569 (2015). However, recent

cases continue to erode the prohibition against expert discovery. *See Ransom v. Radiology Specialists of Northwest*, 363 Or 552, 567 (regarding a plaintiff's former treating radiologist's deposition, "under ORCP 36B, a participating expert can be asked any questions relevant to his or her direct involvement in the events at issue[.]" including present opinions of x-rays when radiologists were not asked to provide information regarding the content of any attorney-client privileged communications and evidentiary rules on attorney-client privilege did not apply); *Gwin v. Lynn*, 344 Or 65, 75 (2008) (allowing a party to depose a witness who is serving as an expert witness and a fact witness).

An issue may arise when a party seeks a pretrial (OEC 104) hearing on the admissibility of an opponent's expert testimony. Oregon appellate courts have not yet ruled on "the propriety of a motion for a Rule 104 hearing as a means of ascertaining expert testimony that otherwise is not discoverable under the Oregon Rules of Civil Procedure." *McFarlane v. Pony Exp. Courier Corp.*, 184 Or App 461 (2002).

During the time set aside by the scheduling order, FRCP 26(a)(2) anticipates that the discovery of experts will be initiated by an exchange of reports. The format of the report is determined by FRCP 26(a)(2)(B). Exchanges of records and depositions usually follow, but not always.

## **V. Getting Court Assistance**

### **A. Requirement to confer**

The parties to a discovery dispute have an obligation to confer before filing discovery motions in both state and federal courts. LR 7-1(a); UTCR 5.010(2)-(3). Motions will be rejected as a matter of course unless the first paragraph is a certificate of compliance with those rules. Failure to perform the duty may serve as a basis for outright denial of the motion, irrespective of its other merits.

### **B. Protecting confidential or privileged materials**

#### **1. Material confidential but not privileged**

Commercially sensitive and confidential information that is within the scope of discovery and does not fall within a recognized privilege cannot be withheld from production, but it may be entitled to protection limiting its dissemination. To that end, stipulated protective orders are routinely entered in state court. Even contested motions for protective orders are generally granted unless the restriction proposed is likely to impair the opposing party's use in some unfair fashion.

The local federal court, however, has a heightened bar for such orders. Entry of a protective order that restricts public access to such information will only be allowed on a detailed, particularized showing of need. *See Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F3d 1122 (9th Cir 2003) (holding that presumption favoring public access requires a particularized showing for confidentiality).

2. Material withheld on basis of privilege or work product

In order to protect privileged material, specific written objections need to be served on a timely basis.

In most cases, preparation of a log of items withheld will be required. The description needs to be sufficiently detailed to allow the challenging party to evaluate the claims of privilege. Be prepared for the court, either federal or state, to order *in camera* review for close calls. Unsubstantiated claims of privilege may draw sanctions in both federal and state courts.

It is always the burden of the party claiming privilege to establish the circumstances justifying the claim. This rule stands in contrast to the burden on motions to invade work product, where the moving party must show substantial need.

**C. Motions to Compel**

The moving party has the burden of establishing that the information being sought falls within the scope of discovery. *See e.g., Kahn v. Pony Express Courier Corp.*, 173 Or App 127, 133 (2001); *Frease v. Glazier*, 330 Or 364, 371 (2000) (moving party must show that exception to privilege applies to opposing party's material). *But see Jane Doe 130 v. Archdiocese of Portland in Oregon*, 717 FSupp2d 1120 (2010) (stating federal court position that burden on opposing/objecting party to show request beyond scope). Format of motions is essentially the same at both levels: the motion, memorandum, and supporting affidavits which lay out the sequence of discovery, describes efforts at resolution, and identify key supporting documents.

**D. Sanctions**

Authority exists in rules and case law for a wide range of sanctions in cases involving discovery abuse. Awards of expenses for motions to compel are very infrequent, but outright dismissals or judgment are not unheard of in cases where the record reflects prolonged failure to participate in discovery. *See e.g., Asato v. Dunn*, 206 Or App 753, 759 (2006) (affirming outright dismissal as discovery sanction). Remember that specific findings from the trial court are necessary to resolve factual disputes, preserve issues and justify sanctions imposed. *Peeples v. Lambert*, 345 Or 209, 216 (2008).

**VI. Discovery in Criminal Cases**

**A. Governing statutes**

The primary statutes governing discovery in criminal cases are ORS 135.805 through ORS 135.873. The discovery statutes now specifically encompass *Brady/Giglio* materials. See ORS 135.815(g). This should leave no doubt that the State must disclose any/all evidence that might be exculpatory regardless of if the Defense specifically requests it. But there is no reason why the Defense shouldn't make a broad request for discovery (see sample Discovery Request). The State can bill/charge for the discovery as can the defense for any costs related to discovery the State requests.

Certain information must be redacted before a defense attorney provides discovery materials to a defendant. *See* ORS 135.815(5)-(6).

### **B. Is It Discoverable?**

As stated above, all exculpatory evidence must be disclosed by the State to the Defense. Any written witness statements unless privileged (such as attorney client) are discoverable by either side if that witness is going to be called at trial. Any witness must be disclosed by their name and address/contact information. *See* ORS 135.835. The nature of the testimony does not need to be disclosed. *See State v. Clarke*, 106 Or App (1991). The defense must disclose a DMV recording at least seven days before the first trial setting if it is to be used at trial. ORS 813.324.

Certain things must be redacted such as victim contact information should not be sent to Defendant from Defense counsel's discovery. In a sex abuse case, a protective Order needs to be filed to receive alleged victim statements. *See* ORS 418.794.

Certain defenses and psychological reports must be disclosed under ORS 161.315.

### **C. Victims' rights provisions**

Oregon law provides that:

If contacted by the defense or any agent of the defense, the victim must be clearly informed by the defense or other contacting agent, either in person or in writing, of the identity and capacity of the person contacting the victim, that the victim does not have to talk to the defendant's attorney, or other agents of the defendant, or provide other discovery unless the victim wishes, and that the victim may have a district attorney, assistant attorney general or other attorney or advocate present during any interview or other contact.

ORS 135.970(2). For purposes of this rule, "victim" is defined broadly as "the person or persons who have suffered financial, social, psychological or physical harm as a result of a crime against the person or a third person." ORS 135.970(5). There are other aspects of this definition that apply to particular types of cases, so any attorney handling a criminal case in Oregon should review this section carefully.

### **D. Subpoenas**

Subpoenas in criminal cases are primarily governed by ORS 136.555-136.603. A subpoena may not be used for discovery. Where materials are sought, the default procedure is to subpoena the materials directly to the trial or hearing at which the subpoenaing party seeks to use them in evidence. If the attorney needs access to the materials ahead of time in order to be able to use them effectively, an order directing early production and copying may be sought. *See* ORS 136.580(2).

In *State v. Cartwright*, 173 Or. App. 59, 20 P.3d 223 (2001), *rev'd*, 336 Or. 408, 85 P.3d 305 (2004), the Oregon Court of Appeals set forth an analysis to govern motions for early production. This analysis largely tracked the federal standard as set forth in *United States v. Nixon*, 418 U.S. 683 (1974). The Oregon Supreme Court reversed the intermediate court, but this reversal was on separate procedural grounds. *See State v. Cartwright*, 336 Or. 408, 85 P.3d 305 (2004). Some Oregon trial courts continue to follow the framework set forth by the Court of Appeals, so attorneys should be familiar with that court's analysis.

Subpoena for Medical Records under ORS 136.583 can be a good tool to send medical records under seal to the court rather than having a live witness authenticate/lay a foundation for the records.

### **E. Remedies**

Most likely a discovery violation will result in a continuance or allow more time for the attorney to view the evidence if it does not prejudice the party. To justify exclusion, the Court noted that it must find the discovery violation was prejudicial and can't be cured by a continuance or jury instruction. *State v. Johansen*, 110 Or App 348 (1991) The Defense can ask for a mistrial. Jeopardy may attach if a mistrial is the only remedy possible, the official knew the conduct was improper and the prosecution was indifferent to a resulting mistrial/reversal under *State v. Kennedy*, 295 Or 260. Limited exclusion may be available if the State inadvertently destroys the evidence. *See State v. Zinzli*, 156 Or App 245 (1998).



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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF @@

STATE OF OREGON,

Plaintiff,

vs.

@@,

Defendant

No. @@

DEMAND FOR DISCOVERY,  
PRESERVATION OF EVIDENCE,  
CHALLENGE TO CRIMINAL HISTORY,  
REQUEST FOR SPEEDY TRIAL, AND  
RECIPROCAL DISCOVERY NOTICE

**I. DISCOVERY DEMAND**

The defendant hereby demands, pursuant to ORS 135.805–135.873, Rule 3.8 of the Oregon Rules of Professional Conduct, Article I, sections 1, 9, 10, 11 and 20 of the Oregon Constitution, and the 4th, 5th, 6th and 14th Amendments of the United States Constitution, that the @@ County District Attorney forthwith disclose the following material information within its possession or control, or which may at any time hereafter come into its possession or control either before or at the time of the trial in this case:

1. The names and addresses of persons intended to be called as witnesses at any stage of the trial, together with all written or recorded statements or memorandum of any oral statements of such persons, including all records of the district attorney or his staff which memorialize statements of any witness, including, but not limited to:
  - a. Audio or video recordings,

- 1 b. Records of electronic communications (including but not limited to electronic mail and  
2 text messages),  
3 c. Drafts or handwritten notes,  
4 d. Records of the District Attorney or his or her staff, or of any other person, which  
5 memorialize statements of any witness, and  
6 e. Police officers’ notebook entries.<sup>1</sup>  
7 f. Simply relying on the general statement that “the state reserves the right to call as a  
8 witness any person names . . . in any report” does not satisfy the State’s discovery  
9 obligations under ORS 135.815(l)(A).<sup>2</sup> The defendant specifically requests a complete  
10 list of witnesses whom the state “intends” to call at trial. This list should be disclosed as  
11 soon as practicable following the filing of an indictment or information. Refusal to  
12 provide this information will result in the defendant moving for exclusion of any  
13 applicable witnesses.

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17 <sup>1</sup> *State v. Johnson*, 210 OrApp 733, 742, 743, 152 P3d 962 (2007) (Without evidence of what is contained in a  
18 police officer’s notes, it is impossible to determine whether discovery statutes require production of the notes; a  
19 mere statement by a prosecutor that the officer memorialized what was in the notes into a report is insufficient in  
20 the absence of the notes themselves to exempt the notes from disclosure). To avoid a recess during trial for  
21 defense counsel to look at the notes, as required by *State v. Johnson*, we request that the prosecutor obtain the  
22 notes from the police as part of the normal routine of discovery compliance in order to avoid mid-trial disruptions  
23 that could lead to mistrials with potential double jeopardy repercussions.

24 <sup>2</sup> This is supported by a case from the Oregon Court of Appeals that—while addressing a different statute—  
provides guidance regarding the state’s responsibilities. In *State v. Chase*, 240 Or App 541 (2011), the court  
reversed a conviction based on the state’s failure to comply with OEC 803(18)(a)(b). That provision requires  
notice of the child hearsay statements that the prosecutor intends to offer at trial. The Chase court noted that: “the  
state notified the defendant of its intent to offer the statement: ‘2. [T]he foregoing and subsequent reports contain  
particulars of statements made by [the victim] that the State intends to offer[.]’” The defendant objected to the use  
of the child hearsay on the grounds that “the notice had merely referred to the discovery and had not identified  
particular statements.” [Emphasis added]. *Id.* The Court of Appeals with the defendant, “We conclude that the  
rule’s requirement that the proponent identify the particulars of the statement requires at a minimum that the state  
identify in its notice the substance of the statement sought to be introduced and also identify the witness or the  
means by which the statement would be introduced.” *Chase* at 546.

PAGE 2 DEFENDANT’S DEMAND FOR DISCOVERY

XXXXXX, Attorney at Law  
ADDRESS • PHONE • FAX • EMAIL



1 g. “Written or recorded statements or memoranda of any oral statements” includes  
2 statements made to representatives of the District Attorney and Victim’s Assistance  
3 Office.

4 2. Any written or recorded statements or memoranda of any oral statements made by the  
5 defendant, or made by a co-defendant if the trial is to be a joint one, including but not  
6 limited to:

7 a. Audio or video recordings,

8 b. Records of electronic communications (including but not limited to electronic mail and  
9 text messages),

10 c. Drafts or handwritten notes, and

11 d. Records of the District Attorney or his or her staff, or of any other person, which  
12 memorialize statements of any witness.

13 3. Any reports or statements of experts, made in connection with the particular case, including  
14 results of physical or mental examinations and of scientific tests, experiments, or  
15 comparisons which the State intends to offer in evidence at trial, and additionally:

16 a. All draft and final reports authored by, involving, or relating to any forensic analyst,  
17 expert witness, technician or scientist that relate in any way to this case;

18 b. All handwritten notes authored by, involving, or relating to any forensic analyst, expert  
19 witness, technician or scientist relating in any way to this case;

20 c. All written communication, and all records of or reflecting oral communications,  
21 involving or relating to any forensic analyst, expert witness, technician or scientist  
22 and/or such person’s actual or anticipated testimony in any proceeding related to this  
23 case;

24 PAGE 3 DEFENDANT’S DEMAND FOR DISCOVERY

XXXXXX, Attorney at Law  
ADDRESS • PHONE • FAX • EMAIL

- 1 d. All materials and information reflecting any training and/or education of any forensic  
2 analyst, expert witness, technician or scientist relating to any topic regarding which he  
3 or she has testified, or may or will testify, in this case;
- 4 e. All of such forensic analyst's, expert witness', technician's or scientist's training and  
5 educational materials relating to any topic regarding which he or she has testified, or  
6 may or will testify, in this case;
- 7 f. All references (including but not limited to standard operating procedures, manuals,  
8 textbooks, and articles) consulted by any forensic analyst, expert witness, technician or  
9 scientist in connection with any work relating to this case;
- 10 g. All materials and information relating to any statement by any person (including but not  
11 limited to the forensic analyst, expert witness, technician or scientist at issue) that  
12 qualifies, questions, disagrees with, criticizes, suggests alternatives to, or in any way  
13 contradicts (in whole or in part) any opinions or conclusions expressed at any time by  
14 any forensic analyst, expert witness, technician or scientist relating to this case (or any  
15 other case in which such person has testified or may testify on a related topic); or  
16 criticizes, questions, or suggests alternatives to any procedure, method or approach  
17 employed by such person in connection with this case (or any other case in which such  
18 person has testified or may testify on a related topic);
- 19 h. All materials and information that may undermine or cast doubt on any of the  
20 conclusions or opinions of any forensic analyst, expert witness, technician or scientist  
21 relating to this case;
- 22 i. All materials and information that may bear on the qualifications of any forensic  
23 analyst, expert witness, technician or scientist who has worked and/or testified or will  
24

1 work and/or testify in connection with this case (generally and/or with respect to issues  
2 specific to this case) and/or any bias, interest or motive on such person’s part, including  
3 but not limited to:

4 i. Any changes in or relating to such person’s duties;

5 ii. Any criticism or evaluation, by any person, relating to such person’s performance  
6 or qualifications;

7 iii. Any discipline or other personnel action relating to such person; and/or

8 iv. Any errors previously made by such person;

9 j. All materials evidencing, containing or reflecting any prior statements by any forensic  
10 analyst, expert witness, technician or scientist that differ in any way from any testimony  
11 such person has given or may or will give in this case, including but not limited to  
12 transcripts or recordings of prior testimony;

13 4. Any prior convictions of the defendant which the State plans to introduce, should the  
14 defendant testify or that would affect the determination of defendant’s criminal history for  
15 sentencing purposes, and any “prior bad acts” of the defendant that the prosecutor intends  
16 to use at trial.

17 5. Any books, papers, documents, photographs, or tangible objects:

18 a. Which the State intends to offer in evidence at the trial; or

19 b. Which were obtained from or belong to the defendant.

20 6. The occurrence of a search or seizure and any relevant material or information obtained  
21 thereby, the circumstances of the search and seizure, the circumstances of the acquisition of  
22 any specified statements from the defendant, and copies of any warrants.

- 1 7. The identity of a confidential informant when a failure to disclose would infringe on the  
2 constitutional rights of the defendant.
- 3 8. Any information compiled by the state or its agents regarding potential juror voting records  
4 or other background information of prospective jurors in this case. The defendant submits  
5 that inspection of these materials will assist in selecting an impartial jury and in ensuring  
6 fundamental fairness.
- 7 9. That the prosecutor make a specific and detailed effort to determine whether any  
8 government agency has any information that must be revealed pursuant to *Brady v.*  
9 *Maryland*, 373 US 83 (1963), including but not limited to, the following:
- 10 a. Any evidence, material or information that would tend to impeach the credibility of any  
11 person whom the government intends to call as a witness or any individual upon whom  
12 the prosecution has relied in the in the investigation and prosecution of its case.<sup>3</sup>
- 13 i. Any record of the witness’s arrest or conviction maintained and prepared by the  
14 FBI, DEA, other federal law enforcement agencies, the Oregon State Police, the  
15 State Bureau of Investigation, @@ County Sheriffs Office, or other national, state  
16 or local law enforcement agencies, and the State shall make a good faith effort to  
17 determine if such convictions have occurred. To show a good faith effort was made,  
18 the defendant requests a printout indicating that a CRISS/PROMIS/LEDS search  
19 was conducted.
- 20 ii. Any information and materials relating to any conduct or alleged conduct by any  
21 witness, whether or not related to this case, that could potentially lead to civil or  
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23 <sup>3</sup> See *Kyles v. Whitley*, 115 S Ct 155, 131 K Ed2 490 (1995) (The *Brady* obligation to disclose impeachment  
24 evidence extends to non-witnesses as well as witnesses); *US v. Bagley*, 473 US 667 (1985); *Mills v. Scully*, 653 F  
Supp 885 (SDNY 1987), *rev'd on other grounds*, 826 F 2d 1192 (2d Cir. 1987).

1 criminal liability or other adverse legal consequence (whether or not any  
2 complaints, cases, arrests, charges or formal proceedings have been initiated based  
3 on such conduct or alleged conduct), and any communication (whether or not  
4 related to writing) with any attorney, officer, or other representative of any  
5 governmental unit relating to such conduct.

6 iii. Any facts or allegations concerning criminal or other misconduct of the witness that  
7 is not reflected on his criminal record, including information in prior police reports,  
8 and any material information found in his or her probation file, or any pending  
9 criminal charge or investigation against the witness, or any business entity with  
10 which he is connected.<sup>4</sup>

11 iv. Any information relating to the witness's mental or physical history that tends to  
12 impair or reflect adversely on the reliability of the witness, including but not limited  
13 to, any information that would tend to affect the witness's motive to testify or  
14 ability to perceive, recall, or understand events.

15 v. Any statements made, written or recorded, by or of the witnesses referred or  
16 relating to any of the above-mentioned matters.

17 vi. Any information that tends to contradict the testimony that the prosecutor  
18 anticipated will be given by any of its witnesses.<sup>5</sup>

19 vii. Any information showing that the testimony was motivated in any degree by a  
20 personal animosity or feelings of revenge toward the defendant.<sup>6</sup>

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23 <sup>4</sup> See *United States v. Strifler*, 851 F2d 1197 (9th Cir. 1988), *cert. denied*, 489 US 1032 (1989).

<sup>5</sup> See *McDowell v. Dixon*, 858 F2d 945 (4th Cir. 1988), *cert. denied*, 489 US 1033 (1989) (state witness misidentified the defendant before trial and it should have been revealed).

24 <sup>6</sup> See, e.g., *State v. Brown*, 552 SW 2d 383 (Tenn. 1977).

1 viii. Any records in the possession of DHS, or other state agencies, that are required to  
2 be disclosed pursuant to *Brady* and *State v. Wood*.<sup>7</sup>

3 ix. All written, recorded or otherwise memorialized conversations between co-  
4 defendants in this case (or their attorneys) and the State which are required to be  
5 disclosed under 14th Amendment to the United States Constitution, *Brady*, Article  
6 I, Section 11 to the Oregon Constitution or other legal authority.

7 b. Any and all statements, testimony, memoranda, interviews, documents or  
8 summaries relating to this case, or any portion thereof, by any person, that  
9 contradict, in whole or in part, any statement (by that person or any other person)  
10 that the prosecutor intends to use or rely on in any manner in connection with the  
11 trial of this cause.<sup>8</sup>

12 c. All evidence that tends to minimize or negate the probative effect of the  
13 prosecutor's evidence of defendant's participation in the allegation set forth in the  
14 indictment.<sup>9</sup>

15 d. Any evidence, statement, or information in the possession of the prosecutor  
16 describing or relating to the conduct of the defendant that in any way refutes or is  
17 inconsistent with his participation in the alleged offenses.

18 i. Any written, recorded, or oral statements or comments made by witnesses or others  
19 to any person, including government agents and the grand jury, that are favorable to  
20 the defendant.

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23 <sup>7</sup> 112 OrApp 61 (1992).

<sup>8</sup> *Kyles v. Whitley*, 115 SCt 155, 131 L Ed2 490 (1995).

<sup>9</sup> *See United States ex rel. Smith v Fairman*, 769 F 2d 386 (7th Cir. 1985) (report revealed gun allegedly used  
24 by defendant was inoperable).

- 1           ii. Any written, recorded, or oral statements or comments of persons interviewed by  
2           the government in this matter who are not expected to be witnesses for the  
3           government at the trial;
- 4           iii. Any results, reports, and opinions obtained from examinations, tests, and  
5           experiments on physical items and evidence that indicate a lack of criminal  
6           involvement or otherwise favorable to the defendant;
- 7           iv. Any evidence, statement, or information that tends to contradict the testimony of  
8           the government anticipates will be given by any one of its witnesses;<sup>10</sup>
- 9           v. Any evidence relating to searches and seizures, electronic or otherwise, that would  
10          make any search or seizure illegal.
- 11          e. Any promises, agreements, or deals offered by the government concerning rewards,  
12          special treatment of immunity to witnesses or others involved in this case.<sup>11</sup>
- 13          f. Information and materials relating to any and all consideration or promises or  
14          suggestions of consideration given to or on behalf of any witness that the State may call  
15          at trial or expected or hoped for by such witness. By “consideration” Defendant refers  
16          to absolutely anything, whether bargained for or not, which arguably could be of value  
17          or use to a witness or to persons of concern to the witness, including, but not limited to,  
18          formal or informal, direct or indirect: leniency, favorable treatment or  
19          recommendations or other assistance with respect to any pending or potential criminal,  
20          parole, probation, pardon, clemency, civil, administrative or other dispute with the state  
21          or with any other authority or with any other parties; criminal or civil immunity grants;

23           <sup>10</sup> *United States v. Foster*, 874 F 2d 491 (8th Cir. 1988) (prosecutor failed to correct false testimony which  
24           was a violation of due process); *Brown v. Wainwright*, 785 F 2d 1457 (11th Cir. 1986).

<sup>11</sup> *Bagley v. United States*, 473 US 667 (1985).

1 payments of money, rewards or fees, witness fees and special witness fees, provision of  
2 food, transportation, legal services or other benefits; informer status of the witness; and  
3 anything else which arguably could reveal an interest, motive or bias in the witness in  
4 favor of the State against the defense or act as an inducement to testify or to color  
5 testimony.

6 g. Any written or oral statement or memorandum of any oral statement of any witness  
7 requesting and/or receiving any sort of benefit from the @@ County Victim's  
8 Assistance Office or State Department of Justice Crime Victim's Compensation Fund.  
9 Benefits include, but are not limited to: unemployment benefits, priority housing  
10 consideration, financial assistance, and request for immigration assistance (including  
11 eligibility for work permits, lawful permanent residence, and U and T visas).

12 h. Any written or oral statement and/or confession made by the defendant which is  
13 unknown to defense counsel.<sup>12</sup>

14 i. Any information about any eyewitness for whom the district attorney has a name and/or  
15 address but whom the district attorney does not intend to call.<sup>13</sup>

16 j. Any statement or testimony by an expert which would tend to corroborate the  
17 defendant's theory of defense.<sup>14</sup>

18 k. Any information which would tend to lessen the impact of the Sentencing Guidelines  
19 on the defendant in the event of a conviction, including but not limited to the role in the  
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23 <sup>12</sup> See *Prosecutor of Virgin Islands v. Martinez*, 780 F2d 302 (3d Cir. 1985).

24 <sup>13</sup> *Kyles v. Whitley*, 115 S Ct 155, 131 L Ed2 490 (1995); *United States v. Cadet*, 727 F2d 1453 (9th Cir. 1984).

<sup>14</sup> *People v. Johnson*, 38 Cal App 3d 228, 113 Cal Rptr 303 (1974).



1 offense, lesser quantities, ignorance of the true scope of any conspiracy, and any  
2 evidence of acceptance of responsibility.

3 1. Any information relating to @@'s criminal convictions, gang affiliation, or other  
4 crimes or wrongful acts that would be favorable to the defense.

5 10. With respect to any non-witness declarant whose statements the State intends to offer into  
6 evidence, all materials and/or information that would be encompassed by this motion if  
7 such declarant were a witness that the State intended to call at trial.

8 11. The defense demands that the District Attorney's Office disclose any information covered  
9 by that Office's disclosure obligations regardless of whether that information is presently in  
10 written or other tangible form.

11 12. The defense demands the submission to the Court, for in camera review, of any materials or  
12 other information as to which the District Attorney's Office contends that there is or may  
13 be any uncertainty regarding the Office's disclosure obligation. The defense further  
14 demands that any such materials or information that are not ultimately disclosed to the  
15 defense should be included in the record of this case and preserved for appellate review.

16 **II. PRESERVATION OF EVIDENCE**

17 The defendant requests the prosecution, police, and agencies of the prosecution to preserve  
18 any and all evidence in this case.

19 **III. CHALLENGE TO CRIMINAL HISTORY**

20 The defendant hereby gives notice of intent to challenge the defendant's criminal history as  
21 provided by the State pursuant to ORS 137.079(5)(c) and OAR 213-004-0013.

**IV. REQUEST FOR SPEEDY TRIAL**

Defendant hereby requests a speedy trial pursuant to ORS 135.147, the Oregon Constitution, and the United States Constitution.

**V. RECIPROCAL DISCOVERY**

The defendant reserves the right to offer photographs into evidence. The defendant invites the district attorney to view such evidence at any time after they are taken and developed. This evidence is available to be viewed at my office. The defendant reserves the right to call any other witness and offer any evidence that develops in the preparation of this case. The defendant will make this information available prior to trial, or at any earlier time if requested.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
ATTORNEY NAME OSB #  
Attorney for Defendant

AUTHORITIES:  
*Brady v. Maryland*, 373 US 83,83 S Ct 1194 (1963)  
ORS 133.733 to 133.736  
ORS 135.747  
ORS 135.805 to 135.873  
ORS 165.540  
*State v. Birchfield*, 342 OR 624 (2007)  
*State v. Gallup*, 108 Or App 508 (1991)  
*State v. Olson*, 79 Or App 302 (1986)  
*State v. Webber*, 85 Or App 347 (1987)  
*State v. Matthews*, 30 Or App 1133 (1977)  
United States Constitution, Amendments IV, V, VI, XIV  
Oregon Constitution, Article I, Sections 1,9,10, 11, 20

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**\* \* \* \* \* CERTIFICATE—TRUE COPY \* \* \* \* \***

I hereby certify that the foregoing copy of defendant's MOTION is a complete and exact copy of the original. I further certify that I caused to be served the foregoing MOTION on the following person(s), in the following manner on the date subscribed below:

o @@@ County District Attorney                      **E-FILED**  
   @@@     \_\_/\_\_/20\_\_

DATED: \_\_\_\_\_

\_\_\_\_\_  
Attorney Name, OSB # \_\_\_\_\_  
Attorney for Defendant



## Chapter 2

# Oregon Pleadings and Parties: Tips to Consider and Traps to Avoid

JOVITA WANG<sup>1</sup>

Richardson Wright LLP  
Portland, Oregon

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## I. INTRODUCTION

These materials are intended to provide you with basic resources regarding Oregon’s state court procedures for pleadings and parties. However, be forewarned: each county may also have local practices—some written and some not—that can trip you up. In addition to consulting the Oregon Rules of Civil Procedure (“ORCP”) and Uniform Trial Court Rules (“UTCRC”), the wise lawyer will also check the Supplemental Local Rules (“SLR”) for the county in which they plan to appear. Most rules can be accessed online through the Oregon Judicial Department at <http://www.courts.oregon.gov/OJD/rules/pages/index.aspx>. Many counties, such as Clackamas, Multnomah, and Washington, provide guidelines for civil motions on their website. Multnomah County Circuit Court also posts its Attorney Reference Manual as an aid.<sup>1</sup>

Check with the local bar organizations for local practice aides. For example, Clackamas County Bar Association has a “Lawyer Survival Guide” which provides detailed information about filing and practices in that county or the Multnomah Bar Association which has judicial profiles and county practice materials.

## II. DIFFERENCES—THE OREGON PLAINTIFF

While many states have adopted civil procedures that mirror those used by federal courts, Oregon has a long history of carefully preserving its own method of doing things. One of the areas where Oregon has withstood federalization is in its pleadings. The careful plaintiff will consider those differences before preparing and filing their complaint in Oregon.

### A. One Form of Action

ORCP 2 provides that there is only one form of action in Oregon, known as a civil action. Except as specifically identified in the rules, statutes, or Constitution, procedural distinctions between actions at law and suits in equity have been abolished in Oregon.

### B. Code Pleading Versus Notice Pleading

Oregon state courts require “code” or fact pleading that must contain a plain and concise statement of “ultimate facts” constituting a claim for relief without unnecessary repetition. ORCP 18A. As a result, claims or defenses must state ultimate facts to support the elements of each particular claim or defense. *Davis v. Tyee Industries, Inc.*, 295 Or 467, 476, 668 P2d 1186 (1983). With Oregon’s system, mechanisms are in place to frame, narrow, or broaden the ultimate facts alleged and to narrow the issues for discovery and trial. *See* ORCP 21D and E. It is the allegations contained in the pleadings that are used to measure relevance of particular evidence at trial. Thus, in the absence of amendment, evidence outside the scope of the issues pleaded may be excluded through the *doctrine of variance*. *Compare Smith v. Fred Meyer, Inc.*, 70 Or App 30, 687 P2d 1128 (1984). It has become common practice for judges in Oregon to summarize the pleadings rather than read them to the jury.

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<sup>1</sup> <https://www.courts.oregon.gov/courts/multnomah/go/Documents/ARM.pdf> is the link to the 2020 version.

By contrast, federal and other courts require “notice” pleading, which merely includes a short and plain statement showing that a pleader is entitled to relief. FRCP 8(a)(a). Since federal pleadings are designed to place a party on “notice” of a particular claim or defense, they can consist of a general summary of the position stated. Any further narrowing is more typically achieved through discovery and other procedural mechanisms.

The careful pleading of ultimate facts is best done through a simple detailed recitation of facts, which will withstand a motion attacking the complaint as redundant or frivolous. Conversely, it also requires more than mere notice of the claims being alleged to withstand a motion to make more definite and certain. Thus, there is a certain element of art to a properly alleged complaint that walks the fine line between both ends of the spectrum.

### C. Standards for Pleadings and Documents

**1. Pleadings Allowed.** ORCP 13 provides that the pleadings are the written statements by the parties of the facts constituting their respective claims and defenses. The only permissible pleadings include the complaint, answer, third-party complaint, and reply. An answer may also include a counterclaim against a plaintiff or a cross-claim against a defendant. Answers are necessary in response to cross-claims and third-party complaints. Replies are necessary to respond to counterclaims and to assert an affirmative defense to defenses asserted in an answer. ORCP 13B. Demurrers and pleas are not used. ORCP 13C.

**2. Substantive Requirements.** ORCP 16 contains several substantive requirements for pleadings filed in Oregon state court. The complaint must have a caption containing the title of the action, the name of the court, the case number, and a pleading designation in accordance with ORCP 13B. In the complaint, the title must include the names of all the parties. However, subsequent pleadings may abbreviate the title by stating the name of the first party on each side, “with an appropriate indication of other parties.” ORCP 16A. The case number, which is assigned when the complaint is filed, should be placed on all pleadings.

The pleading must consist of plain and concise statements in paragraphs that are consecutively numbered in Arabic numerals (i.e., 1, 2, 3, etc.). The contents of each paragraph, where possible, should be limited to stating a single set of circumstances. A paragraph number may then be referred to by number in all subsequent pleadings and may be adopted by reference in a different part of the same pleading. ORCP 16B and D.

Each separate claim or defense must be separately stated. Alternative theories of recovery are allowed as separate counts under the same claim. Even when a party is in doubt as to which of two factual statements is true, they may be pleaded in the alternative, so long as they can be verified in good faith as being consistent with ORCP 17, discussed below. ORCP 16C.

Any pleading that contains a claim for relief shall state the ultimate facts constituting that claim, without unnecessary repetition, and must include a demand for the relief called the *prayer*. The *prayer* for relief is the request for the relief to which plaintiff thinks it is entitled. The purpose of the prayer is to advise defendant of the precise nature of the demand, in order that the party may be prepared to meet it. *Kerschner v. Smith*, 121 Or 469, 473, 236 P 272 (1925), 121 Or 469, 256 P 195 (1927). The prayer is not part of the claim, although it may explain or qualify other parts of



the pleading. *Finch v. Miller*, 271 Or 271, 275, 531 P2d 892 (1975); *Green v. Cox*, 44 Or App 183, 186, 605 P2d 1198 (1980). If recovery of money or damages is sought, the amount thereof must be stated in the pleading. ORCP 18. However, the amount of a claim for noneconomic damages does not need to be specifically stated, inconsistent with the rule. *McKenzie v. Pacific Health & Life Ins. Co.*, 118 Or App 377, 382, 847 P2d 879 (1993), *rev dismissed*, 318 Or 476 (1994).

If attorney fees are being sought, the party must allege the basis for the award of fees, whether statutory or contractual in the pleading. ORCP 68 C(2)(a). If the statutory provision is not alleged, the allegation of a right to fees may still be considered sufficient if facts are alleged that would provide “a basis for an award of fees, the parties have been fairly alerted that attorney fees would be sought and no prejudice would result.” *Marc Nelson Oil Prods., Inc. v. Grim Logging Co., Inc.*, 199 Or App 73, 85, 110 P3d 120, *adh’d to as modified on recons*, 200 Or App 239 (2005) (internal citations omitted).

Prejudgment interest must be specifically pleaded, along with a factual basis for an award of prejudgment interest. *Emmert v. No Problem Harry, Inc.*, 222 Or App 151, 158, 192 P3d 844 (2008).

Keep in mind that pleadings are to be liberally construed, so as to disregard any error or defect that does not affect the substantive rights of the adverse party. ORCP 12. *Stringer v. Car Data Systems, Inc.*, 314 Or 576, 841 P2d 1183 (1992).

**3. Technical Requirements.** UTCR 2.010 contains detailed instructions for compliance with the technical requirements for pleadings in Oregon. Below is only a brief summary of some of the requirements. Lawyers and legal assistants should familiarize themselves with all provisions. Failure to comply with the requirements could result in a court clerk rejecting a pleading and returning it to the lawyer as unfiled or it being stricken. UTCR 1.090 (Sanctions). Such a result would be disastrous if the pleading was filed on the last day of a statute of limitations (“SOL”) or other deadline.<sup>2</sup>

**a. Title or Caption.** The title, or caption, is treated as a formal matter. Its purpose is to identify the parties with the claim and the court. *State ex rel. Brookfield Co. v. Mart*, 135 Or 603, 609, 283 P 23, 295 P 459 (1931). The caption should indicate the type of claim, such as “personal injury,” “breach of contract,” “injunctive relief,” etc. UTCR 2.010(11)(b).

The caption of the pleading must contain a statement of whether it is subject to mandatory arbitration. UTCR 13.060(3).

**b. Size and Appearance.** Except where designated by the court, all pleadings must be printed or typed on 8.5×11-inch paper that contains numbered lines on the left side. No font is specified, though Times New Roman, Arial, or Courier are common. Blanks in preprinted forms may be completed in handwriting, as may notations by the trial court administrator or a judge.

Printing should be double-spaced and with two to four inches left blank at the top of the first page. Subsequent pages must have a one-inch margin. The name of the document and page

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<sup>2</sup> It is also advisable to check if a statute of ultimate repose applies.

number, expressed in Arabic numerals, must appear at the bottom left side of each page, and the attorney or firm name and information, including facsimile and email (if any), must also appear within the document, frequently in the bottom right margin along with the attorney's bar number. Exhibits must be marked as such at the bottom right side with an Arabic numeral identifying the exhibit, as well as its page number. UTCR 2.010(2)–(10). The courts are required to accept documents printed on both sides of each sheet and encourage printing on recycled paper. ORS 7.250.

**c. *Subscription and Verification.*** Pleadings must be signed by at least one attorney of record who is an active member of the Oregon State Bar or, if a party is not represented by an attorney, by the party. ORCP 17A. The name of the party or attorney signing any pleading or motion must be typed or printed immediately below the signature, and the signatures must be dated. UTCR 2.010(6). While verifications of pleadings have generally been eliminated, there are some unique exceptions for specific statutory claims. The wise practitioner will consult the Oregon Revised Statutes for the type of claim being asserted.

**d. *Paragraphs.*** Claims and defenses must be made in paragraphs that are numbered consecutively in the center of the page with Arabic numerals and lowercase letters for any subparagraphs.

**4. *Special Pleading Rules.*** Oregon law provides numerous special pleading rules, some of which may be intuitive and some not. Likewise, some are matters of substance, and some procedural. The following is a brief summary of the highlights.

**a. *Conditions Precedent.*** In pleading the performance or occurrence of all conditions precedent, it is sufficient to generally allege that all conditions precedent have been performed or occurred. A denial of such occurrence, however, must be made specifically and with particularity, forcing the adverse party to establish the proof of such performance at trial. ORCP 20A.

**b. *Designation of Type of Claim.*** Although UTCR 2.010(11) requires the pleader to designate the type of claim, failure to correctly designate it may not be fatal. *Windle v. Flinn*, 196 Or 654, 664, 251 P2d 136 (1952); *Laird v. Frick*, 142 Or 639, 644, 18 P2d 1029 (1933).

**c. *Presumptions.*** Facts presumed by law need not be alleged. For example, it is unnecessary to allege that a contract within the statute of frauds is in writing when the making of the contract is alleged. *See, e.g., Ingerslev v. Goodman*, 116 Or 210, 216, 240 P 877 (1925); *Smith v. Jackson*, 97 Or 479, 482, 192 P 412 (1920). Similarly, where a corporation is a plaintiff, it is not necessary to allege the corporate existence or that the corporation has the capacity to sue; both are presumed. Rossman, *Plain and Concise Language*, 6 Or L Rev 293, 297 (1927). Presumptions can be a powerful ally in trial and are frequently overlooked. An extensive list of evidentiary presumptions is contained in ORS 40.135, Oregon Evidence Code (“OEC”) 311.

**d. *Judicial Notice.*** Facts judicially noticed need not be alleged. *Peters v. McKay*, 195 Or 412, 421, 238 P2d 225 (1951), *reh'g denied* 195 Or 412, 246 P2d 585 (1952); *Cameron v. Goree*, 182 Or 581, 599, 189 P2d 596 (1948) (courts take judicial notice of facts that form part of the common knowledge of people who possess average intelligence). However, the careful lawyer will allege facts over which there may be any doubt. Some examples of facts that may be judicially

noticed include corporate existence of cities and counties, the existence of ordinances, comprehensive plans, or enactment, incorporation of a city or county, or a private right derived by statute where the title and date of passage are alleged. ORCP 20D; ORCP 20C.

**e. *Matters of Record/Written Instruments.*** Oregon allows a party to allege something involving a document in one of three ways. They may: (i) summarize the material parts of the document in the body of the pleading; (ii) copy the material parts of the document into the pleading; or (iii) attach a copy of the document to the pleading as an exhibit and incorporate it by reference in the allegations. *Vaughn v. Spence*, 170 Or 440, 448–49, 133 P2d 242 (1943).

Oregon has “consistently adhered” to the above method of pleading. *Vaughn, supra*, 170 Or at 449. However, an exhibit cannot supply ultimate facts to establish a claim; those allegations must still be made in the complaint. Where a written instrument is relied upon as the foundation of a claim and it is set forth in full in the complaint or incorporated by reference, the written instrument prevails over the pleading for its purported legal effect. *Kelley v. Mallory*, 202 Or 690, 697, 277 P2d 767 (1954).

**f. *Compliance with the Statute of Limitations.*** It is not usually necessary for the plaintiff to allege facts showing compliance with any applicable SOL. Nevertheless, specific facts showing why the SOL is tolled or avoided must be pleaded if it would otherwise appear that the SOL had run. *Hewitt v. Thomas*, 210 Or 273, 276, 310 P2d 313 (1957); *Huycke v. Latourette*, 215 Or 173, 176, 332 P2d 606 (1958). In cases where the statute begins to run upon discovery, discovery must be pleaded. *Frohs v. Greene*, 253 Or 1, 7, 452 P2d 564 (1969).

**g. *Judgment or Other Determination of Court or Officer.*** In pleading a judgment or other determination of a court or officer with special jurisdiction, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation is controverted, the party pleading is bound to establish at trial the facts conferring jurisdiction. ORCP 20B.

**h. *Agency.*** Oregon does not require specific pleading of agency where a known agent executes a contract on behalf of the agent’s principal. It is sufficient to plead execution of the contract by the principal, allowing proof to be introduced at trial that the agent executed the contract. *Masters v. Walker*, 89 Or 526, 530, 174 P 1164 (1918). Similarly, ratification of a contract does not have to be alleged. *Scandinavian-American Bank v. Wentworth Lumber Co.*, 101 Or 151, 157, 199 P 624 (1921). Alleging that a principal executed the contract permits proof of execution of an agreement by an unauthorized agent and subsequent ratification by the principal. *Phillips v. Colfax Co.*, 195 Or 285, 292, 243 P2d 276, *reh’g denied* 195 Or 285, 245 P2d 898 (1952); *Levy v. Nevada-California-Oregon Ry.*, 81 Or 673, 675, 160 P 808 (1916). *See also Downs v. National Share Corp.*, 152 Or 546, 552, 55 P2d 27 (1936), regarding alternative methods for alleging agency. Likewise, agency need not be pleaded in a tort action against a corporation, as an allegation that the corporation committed the tort is proper. *Scibor v. Oregon-Washington R. & Nav. Co.*, 70 Or 116, 120, 140 P 629 (1914).

**i. *Libel, Slander, and Fraud.*** In an action for libel or slander, it is not necessary to allege extrinsic facts to show application to the plaintiff. It is sufficient to say that the same was

spoken or published about the plaintiff. If controverted, the plaintiff must establish at trial that it was published or spoken. ORCP 20E.

Certain causes of action, such as fraud must be alleged with greater particularity. The elements of actionable fraud consist of: (i) a representation; (ii) its falsity; (iii) its materiality; (iv) the speaker's knowledge of its falsity or ignorance of its truth; (v) their intent that it should be acted on by the person and in the manner reasonably contemplated; (vi) the hearer's ignorance of its falsity; (vii) their reliance on its truth; (viii) their right to rely thereon; and (ix) their consequent and proximate injury. To state a good cause of action, it is necessary that each and every one of the essential elements of fraud be alleged. *Musgrave v. Lucas*, 193 Or 401, 410, 238 P2d 780 (1951).

**j. Time and Place.** Only material aspects of time and place are necessary. When matters of quality and quantity are unimportant to a case, they do not need to be alleged as material facts. Within the bounds of ORCP 17, it is sufficient to allege that a certain event occurred “on or about” a certain date when the exact date is unknown.

**k. Statutory Duty of Damages.** Where a case rests on a statutory duty imposed on a class of persons, the complaint must contain facts bringing the defendant within the statutory class. *State Forester v. Obrist*, 237 Or 63, 390 P2d 333 (1964). Violation of a statutory duty may be alleged in general terms without pleading the exact language of the statute. *Moe v. Alsop*, 189 Or 59, 66, 216 P2d 686 (1950), *overruled in part in other grounds*, *Bay Creek Lumber & Mfg. Co. v. Cesla*, 213 Or 316, 320, 322 P2d 925, *reh'g denied* 213 Or 316, 324 P2d 244 (1958). Where aggravated damages are claimed under a statute, the statute should be recited in the complaint or the claim should be stated as being made under the terms of the statute. *Springer v. Jenkins*, 47 Or 502, 507, 84 P 479 (1906).

**l. Punitive Damages.** Oregon has special requirements for the pleading and recovery of punitive damages contained in ORS 31.725 et seq. Plaintiffs may not include a claim for punitive damages in their initial complaint. ORS 31.725(1) and (2). Instead, at any time after the pleading is filed, a party may move the court to allow amendment of the pleading in order to assert a claim for punitive damages. Both the moving and nonmoving parties may submit affidavits and documentation supporting or opposing a punitive damages claim. ORS 31.725(2).

Upon receipt of a motion to amend to add punitive damages, the court will conduct a hearing to determine if there are specific facts, supported by admissible evidence, to allow the punitive damages claim. The court decides the motion based upon a directed-verdict standard. ORS 31.725(3).

The party seeking punitive damages must prove “by clear and convincing evidence” that the party against whom punitive damages are sought “has acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others.” ORS 31.730(1). The court must issue its decision on the motion to amend a pleading to assert a claim for punitive damages within ten days after the hearing. If the court does not issue a decision within ten days, the motion is deemed denied. ORS 31.725(5). Discovery of evidence of a defendant's ability to pay is not allowed unless and until a motion to amend is allowed. ORS 31.725(6).

The distribution of a punitive damages award may affect whether it is worth alleging. The Department of Justice Criminal Injuries Compensation Account receives 60% of the award, while the prevailing party receives only 30%, no more than 20% of which may be paid to the prevailing party's attorney. 10% is payable to the Attorney General for deposit in the State Court Facilities and Security Account. ORS 31.735. Specific notification and payment procedures apply, not the least of which is a requirement that the prevailing party provide notice in writing of the judgment to the Department of Justice Crime Victims' Assistance Section in Salem, Oregon, within five days after the entry of the verdict or judgment. ORS 31.735(3).

**m. *Information and Belief.*** If a party is without knowledge or information sufficient to form a belief as to the truth of an allegation, the party may allege so, which will have the same effect as a denial. ORCP 19A.

**n. *Recitals and Negative Pregnants.*** No allegation in a pleading is held insufficient merely because it is pled by way of a recital rather than alleged directly. Likewise, no denial is treated as an admission because it contains a negative pregnant. ORCP 20G. Nevertheless, allegations by way of recital rather than direct allegations are not encouraged. The most common example of a recital is an allegation introduced by a "whereas" or an allegation introduced with "by reasons of." See *Graham v. Corvallis & Eastern R. Co.*, 71 Or 477, 142 P 774 (1914).

**o. *Fictitious Parties and Unknown Persons.*** When you do not know the name of an opposing party, it may be designated by any name, with the pleadings amended to substitute the true name once it is known. ORCP 20H. However, a pleading should explain why an unknown "Jane Doe" party cannot be specifically identified. When heirs of a deceased are unknown, they may be designated as "unknown heirs." ORCP 20I. See also ORCP 20J regarding unknown persons when trying to determine an adverse claim, estate, lien, or interest in property. Be wary when the SOL is close, as notice must be received by the proper party.

#### **D. Prerequisites for Certain Claims**

A thorough discussion of statutes of limitations and service requirements is beyond the scope of this presentation. Nevertheless, close attention should be paid to the SOL applicable to the type of claims and relief requested. Although based on the same transaction or occurrence, different claims or theories may be subject to different statutes of limitation. A lawyer's characterization of the claim does not necessarily determine which SOL will apply. *Securities-Intermountain, Inc. v. Sunset Fuel Co.*, 289 Or 243, 611 P2d 1158 (1980).

More importantly, certain types of claims may contain additional demand or notice requirements. A few examples are included below.

**1. *Oregon Tort Claims.*** No action may be maintained arising out of any act or omission of a public body or its agents unless notice of the claim is given as required by ORS 30.275. When a person injured is a minor, incompetent, or otherwise unable to give the notice, the deadline for the notice is tolled up to a *maximum of only 90 days* (basically a 270-days' notice period). Otherwise, notice must be given within 180 days after the alleged loss or injury, or within one year if the claim is for wrongful death.

**2. Insurance Policies—Proof of Claim.** Most insurance policies require notice from the insured of any loss or claim in order to activate the insurer’s responsibilities under the policy. *See* ORS 742.061 (proof of claim required to start claim for attorney fees); *American Star Ins. Co. v. Allstate Ins. Co.*, 12 Or App 553, 558, 508 P2d 244 (1973) (notice over 2.5 years after the accident did not satisfy notice requirement).

**3. Conversion.** In order to state a claim for conversion in certain circumstances, the party claiming rightful ownership must demand the return of the property and have been refused. *See Daniels v. Foster & Kleiser*, 95 Or 502, 507, 187 P 627 (1920).

**4. Shareholder’s Derivative Action.** In most cases, a shareholder may not pursue an action on behalf of the corporation unless the corporate officers and directors have refused to take the action in response to the shareholder’s demand. *See Browning v. C & C Plywood Corp.*, 248 Or 574, 434 P2d 339 (1967).

**5. Attorney Fees.** Certain claims for personal injury under ORS 20.080, and breach of contract under ORS 20.082, where the prayer is for less than \$10,000 may substantively qualify for recovery of attorney fees, but only where a demand is sent to the defendant at least 30 days before commencement of the tort action and 20 days before commencement of the contract action, along with other statutory requirements.

**6. Complaint against Certain Professionals.** For any claim asserted against a design professional that arises out of the provision of services within the course and scope of the registered/licensed activities (usually in the construction defect context), the filing attorney must certify that the attorney has consulted a design professional with similar credentials who is qualified, available, and willing to testify to admissible facts and opinions sufficient to create a question of fact as to the liability of the design professional. ORS 31.300. Similarly, for any claim of professional negligence against a real estate licensee within the course and scope of the registered/licensed activities, the claimant's attorney must certify that the attorney has consulted a real estate licensee who is qualified, available, and willing to testify to admissible facts and opinions sufficient to create a question of fact as to the liability of the real estate licensee when filing. ORS 31.350.

## **E. Choosing the Correct Parties**

### **1. Capacity.**

**a. Governmental Units.** The United States, the State of Oregon, municipal corporations, counties, and certain specified public agencies, commissions, boards, departments, and corporations may commence proceedings in Oregon courts.

**b. Corporations.** Foreign corporations may sue in Oregon, but where a foreign corporation is “transacting business” in Oregon and has not obtained a certificate of authority, it cannot maintain an action. ORS 60.704(1). However, even where a foreign corporation has not obtained the necessary certification, it can still be sued. ORS 60.704(5).

Where a corporation is dissolved, it still may have an action prosecuted in its corporate name; a dissolved domestic corporation may be sued on a cause of action arising prior to

dissolution if the action is commenced within five years. ORS 60.644(2)(c). Whether a dissolved foreign corporation is subject to suit depends upon the laws of its domicile.

**c. *Partnerships and Unincorporated Associations.*** A limited partnership may sue or be sued as an entity. Any partnership or unincorporated association may sue in any name that it has assumed and be sued by any name that it has assumed or by which it is known. ORCP 26B.

**d. *Minors and Incapacitated Persons.*** ORCP 27 places restrictions on when a party who is a minor or incapacitated may appear. Minors who are a party to an action must appear by a conservator or guardian. If they do not have one, the court will, under some conditions, appoint one. ORCP 27A. Incapacitated persons must also appear by or through a conservator or guardian. If they do not have one, the court will, under some conditions, appoint one. ORCP 27B.

Note. it is required that the state or a party that is not a natural person (such as a corporation) appear by an attorney unless otherwise specifically provided by law. ORS 9.320.

**2. *Permissive Joinder.*** ORCP 28 provides the conditions under which parties may be joined in an action. All persons may join as plaintiffs in an action if they assert any right to relief jointly, severally or in the alternative in respect to or arising out of the same transaction or occurrence and if a common question of fact or law will arise in the action. A party need not be interested in obtaining or defending against all the relief demanded. ORCP 28A. Separate trials may also be sought where justice so requires. ORCP 28B. Judgment may be entered for one or more of the parties according to their respective rights to relief or to their liabilities. ORCP 28A.

**3. *Compulsory Joinder.*** ORCP 29 applies to compulsory joinder. When a party is needed for just adjudication and is subject to service of process, it is to be joined if feasible under the standards identified in ORCP 29A. When a necessary party cannot be made a party, the court must determine whether the action can equitably continue or should be dismissed under the standards identified in ORCP 29B.

A person who is subject to service must be joined as a party if: (a) in that person's absence, complete relief cannot be accorded among those already parties; or (b) that person claims an interest relating to the subject of the action and is so situated that the disposition in the person's absence may: (i) as a practical matter, impair or impede the person's ability to protect that interest; or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of their claimed interest. ORCP 29A. Where a necessary party has not been joined and can be joined, the court shall order that the person be made a party. Where the person should join the action as a plaintiff but refuses to do so, that person must be made a defendant, the reason being stated in the complaint.

**4. *Misjoinder or Nonjoinder of Parties.*** ORCP 30 provides that parties may be dropped or added by order of the court on motion of any party or on the court's own initiative at any stage of the proceeding and on such terms as are just. The rule further provides that any claim may be severed and proceeded with separately. Misjoinder of parties is not grounds for dismissal of an action.

**5. *Substitution of Parties.*** ORCP 34 provides the procedure for substitution of parties, whether resulting from death, disability, or some other issue relating to a party.

Substitution will allow the action to proceed with the substitute party. The rules provide that an action may be continued upon death of a plaintiff, if the claim survives, by substituting the personal representative or successor in interest upon motion to the court within one year. ORCP 34D. On motion, the court may also substitute a guardian, conservator, or successor in interest within one year after disability of a party. ORCP 34C. Additional time and procedural limitations apply to other substitutions.

**6. Real Party in Interest.** ORCP 26A requires that every action be prosecuted in the name of the real party in interest. The real party in interest is the person or entity that has the right to enforce the claim. The rule is designed to protect the defendant from being harassed later for the same claim for relief. *Verret v. Leagjeld*, 263 Or 112, 501 P2d 780 (1972). Certain persons and entities, such as executors, administrators, bailees, or trustees, may sue in another party's name without that other party being joined. ORCP 26A. Insurers frequently are allowed to sue in the name of their insured through use of a loan receipt that maintains the insured's interest in the matter. Failure to join a real party in interest will not result in immediate dismissal of the action. Instead, the real party in interest is given a reasonable time to ratify, join, or substitute into the action. ORCP 26A.

**Use of pseudonym.** If a party wishes to commence and litigate a case under a name other than their true name, a motion seeking leave to proceed under a pseudonym is appropriate. ORCP 16B. It will be the litigant's responsibility to establish a basis to be granted leave to proceed using a pseudonym.

## **F. Choosing Where to File**

**1. State Versus Federal Court.** While this presentation is focused on state court procedures, the wise lawyer will not overlook whether to file his or her action in federal court if all other things are equal. Obviously, some actions involving federal questions may only be maintained in federal court. Conversely, some actions, due to the amount in controversy or the absence of diversity, must be pursued in state court. When either court would have jurisdiction, considerations should be given to a number of factors that could have a dramatic effect on the ultimate result.

**a. Federal Court Pros.** Federal judges have law clerks and cases are immediately assigned to a judge. The rules and court practices are more specified. Many attorneys believe summary judgment is more likely to be granted by federal judges who have more resources to review briefs and write opinions. Judges are used to seeing attorneys from all over the state. There is no "trial by ambush."

**b. Federal Court Cons.** Some practitioners complain that federal court interferes with lawyers "trying their cases." Rules and procedures control most aspects of a case, including disclosures, pretrial conferences, scheduling orders, time limitations for depositions, and evidence. While those procedures can force parties to look at their case more quickly, they also tend to significantly increase litigation costs. And there is no "trial by ambush."

**c. State Court Pros.** State court is less expensive, and there tends to be more flexibility in how cases are prepared and tried. Depending on the county, some courts virtually leave the



parties alone until just before trial. Some cases are subject to nonbinding arbitration. Some courts implement and enforce a fast-track system in which trials go within 12 months from filing; other counties do not. No disclosure or deposition of expert witnesses; no interrogatories, i.e., “trial by ambush.”

Note, to obtain some of the above benefits of federal court, a case may be able to be designated as a complex case under UTCR 7.030. By doing so, the case will be assigned to a judge to oversee, and the parties generally have more flexibility on the trial date.

**d. State Court Cons.** Judges tend to have less time to spend on a particular matter. Budgetary restrictions can impede availability of judges for trial of civil matters. Some cases are subject to nonbinding arbitration. Some counties will not set over trial dates due to fast-track rule. There is no disclosure of or deposition of experts so you are faced with “trial by ambush.”

On that related note, depending on the legal issue, a party opposing summary judgment may avoid summary judgment by providing “an affidavit or a declaration of the party’s attorney stating that an unnamed, qualified expert has been retained who is available and willing to testify to admissible facts or opinions” and, by doing so, create “a question of fact...sufficient to controvert the allegations of the moving party and an adequate basis for the court to deny the motion.” ORCP 47 E.

**2. Venue.** Once the decision is made to file in state court, a plaintiff must then determine the appropriate venue. If a contract is involved, the choice may already have been specified in the document. Depending on the type of case, venue may exist in several different counties. *See* ORS 14.030 et seq. With many exceptions, venue generally exists in the county where the cause of action arose or at least one of the defendants resides. Corporations are typically deemed to be a resident of any county where they conduct regular, sustained business.

If a choice is available, consideration should then be given to strategic factors such as distance for the client and lawyers, local customs and procedures, and the relative nature of typical jurors in each county.

## **G. Commencing the Action**

ORCP 3 provides that, “other than for purposes of statutes of limitations,” an action is commenced by filing a complaint with the clerk of the court.

**1. Commencement Within the SOL.** ORS 12.010 and 12.020 generally regulate commencement for the purposes of determining whether an action was commenced before expiration of a particular SOL. For those purposes, commencement does not occur until the complaint is filed *and* the summons and complaint are served on a particular defendant.

**2. Relation Back.** Oregon subscribes to a unique “relation back” system for determining commencement that allows for additional time to serve a defendant. Pursuant to ORS 12.020(2), if the complaint is filed within the time allowed by the applicable SOL, service of the summons and complaint within 60 days of the filing date allows the service to “relate back” to the date of filing. Thus, the action is deemed to have been commenced on the date of filing. *Beware:* The relation back only applies within 60 days of the filing date, not the SOL. Many attorneys have

filed well before the SOL expired but failed to serve within 60 days thereafter and before the SOL expired. As a result, the action was not deemed commenced.

**3. Time.** Except as governed by ORS 174.120, ORCP 10 provides important information on how time periods are calculated in Oregon. Specifically, the date of the act, event, or default from which the period of time begins to run is not included, but the last day is included unless it falls on a Saturday, Sunday, or legal holiday. In that event, the time period runs until the next day that is not a Saturday, Sunday, or legal holiday. *See also* ORS 187.010 and 187.020 for a list of legal holidays.

When the period of time prescribed or allowed is less than seven days, then intermediate Saturdays, Sundays, and legal holidays are not included in the computation of time. When the time is more than seven days, all days within the period are counted. ORCP 10A.

Except with regard to service of summons, additional time may be allowed when a party is served with documents by mail, e-mail, fax, or electronic service. If the party served is required to do some act within a prescribed period after service of a notice or other paper on that party, then three days are added to the response period when service is made by mail, e-mail, fax, or electronic service. ORCP 10C.

**4. Filing fee.** Be sure to pay the filing fee under ORS 21.160(1), which is based on a graduated scale of claimed damages. ORS 21.100.

### III. DIFFERENCES—THE OREGON DEFENDANT

Many of the rules and procedures discussed with regard to the Oregon plaintiff also apply to the Oregon defendant. To avoid undue repetition, only the differences are highlighted. An answer or responsive pleading is due with 30 days after service of the summons. If service is by publication, then the answer or responsive pleading is due within 30 days from the date of first publication. ORCP 7C.

#### A. General Considerations

**1. Tender of Defense.** The process of tendering the defense of a matter is a procedure through which a party gives notice of a pending action to another party from whom indemnity may be sought. The party tendering the defense typically demands defense of, or participation in, the action. Tenders of defense are based upon principles of collateral estoppel and the law of indemnity.

Where a claim is covered under an indemnity agreement, or the allegations of the complaint, without amendment, state a claim within the terms of the indemnity agreement, the indemnitor has a duty to defend the indemnitee. *St. Paul Fire & Marine Ins. Co. v. Crosetti Bros., Inc.*, 256 Or 576, 475 P2d 69 (1970). The tender of defense may be based upon express indemnity agreements, such as insurance policies, contracts, and warranties, or through implied indemnity, such as that arising out of a relationship between the parties.

Before tendering the defense of the matter, thought should be given to several strategic considerations, specifically:

- a. Is indemnitor able to respond to a judgment?
- b. What is the caliber of the defense that the indemnitor would provide?
- c. Is the indemnitor obliged to defend all claims or just some of the claims asserted?
- d. Would acceptance of the defense with reservation of rights as to ultimate responsibility for a judgment be acceptable?

The tender of defense must be given within a “reasonable time.” Notice immediately before trial is generally not sufficient.

**2. Extensions of Time.** Local custom and practice is to grant defendants an extension of time upon request. Where defense counsel has insufficient time to prepare an appropriate response to a claim, it is common practice to ask opposing counsel for an extension of time in which to appear or respond. Professional courtesy dictates that a reasonable extension be given whenever possible. However, any agreement concerning the extension of time to respond to a claim should be memorialized in writing. Where the SOL is expired, or rapidly approaching, it is also common practice for a plaintiff to request confirmation that there are no service or SOL defenses that will be raised. In that manner, it is less likely that a plaintiff will be prejudiced by the extension.

Most lawyers will automatically write to plaintiff’s counsel informing them of their representation of a particular defendant, stating that they intend to appear and requesting that they be given at least 10 days’ notice of any intent to apply for default. Doing so requires that defense counsel receive notice before a motion for default is filed. ORS 69 B(2).

**3. Removal to Federal Court.** Immediately upon receipt of the complaint, counsel should determine whether the case is removable to federal court pursuant to 28 USC §1441(a) (diversity of citizenship) or 28 USC §1441(b) (federal question). Petition for removal of a civil action must be filed within 30 days after the defendant receives a copy of the initial pleading or a service of summons. 28 USC §1446(b).

There are a number of procedural “snafus” associated with removal, and considerable care should be taken in analyzing these issues, particularly in multiple-party cases. For example, a removal petition filed 29 days after the moving defendant was served but 42 days after the first defendant was served was held not to be timely filed. *See Balestrieri v. Bell Asbestos Mines, Ltd.*, 544 F Supp 528 (ED Pa 1982).

Moreover, where a jury trial is requested before removal, or if the procedure of the court in which the case was originally filed does not require express demand for jury trial (like Oregon), demand is not required after removal unless specifically directed by the court. Otherwise, the petitioner has 14 days after filing the petition for removal in which to demand a jury trial; a nonpetitioner has 14 days after being served with notice of removal. FRCP 81(c).

**B. Motions to Consider**

Generally, motions against a complaint must be filed within the time allowed for a party to appear and defend under ORCP 7C. If a motion is filed, it may not file its answer until the issues raised in the motion are resolved. ORCP 21A.

Several motions are available under ORCP 21, including motions to dismiss a particular claim or the entire complaint for various reasons, motions to strike sham, frivolous, or irrelevant pleadings, motions to strike a complaint containing more than one claim not separately stated, or motions to make the allegations more definite and certain.

In the past, a great deal of money was spent by lawyers filing and responding to Rule 21 motions. A wise defendant will carefully consider whether it is strategically better to file motions to clean up a complaint or to simply allow the allegations to stand as pleaded. In addition to the economic considerations, filing such motions frequently serve to educate the plaintiff and improve the claims. Many experienced litigators feel that the use of pretrial motions only educates the opponent as to the opponent's weaknesses. Others take the "first door out" approach and are of the view that the use of pretrial motions encourages settlements and the early disposition of cases. The expense associated with pretrial motion practice should be discussed with the client, and the ultimate decision should be that of the client.

Keep in mind the deadlines imposed under UTCR 5.030, which generally allows an opposing party to file a written memorandum in response to any motion (besides motions for summary judgment) not later than 14 days from the date of service or the date of filing of the motion, whichever is later. A reply memorandum, if any, must be filed within 7 days of the service or filing of the responding memorandum, whichever is later.

**C. Defenses That Must Be Raised or Waived**

Certain defenses may be raised either by motion or by answer. ORCP 21G(1) provides that defenses of lack of jurisdiction over a person, another action pending, insufficiency of summons or process, or insufficiency of service are waived if not included in an ORCP motion or a responsive pleading. No amendment is allowed to raise those defenses.

ORCP 21G(2) provides that other defenses may be raised by amendment if leave of court is obtained and the party did not know, and could not have reasonably known, that the defense existed. Those defenses include legal capacity to sue, real party in interest, and that the action was not commenced within the time allowed by statute.

Under ORCP 21G(3), defenses for failure to state ultimate facts constituting a claim, failure to join an indispensable party, or an objection of failure to state a legal defense to a claim may be made in a pleading permitted under ORCP 13B, in a motion for judgment on the pleadings, or at trial on the merits. However, the wise practitioner will not wait until that time to pursue such a motion. Finally, a defense that the court lacks jurisdiction over the subject matter may be made at any time.

**D. Filing the Answer**

**1. Admissions.** ORCP 19A requires a defendant to admit or deny the allegations upon which the adverse party relies. Where a defendant admits a fact in the answer, that admission relieves the plaintiff from proving that allegation at trial. *Owen v. Bradley*, 231 Or 94, 100, 371 P2d 966 (1962). However, an admission may be waived where the case is tried as if the admitted fact were still at issue. ORCP 23B. An admission in the pleadings of one defendant is not admissible against a codefendant, especially when the interests of the defendants are adverse to one another. *Hyatt v. Johnson*, 204 Or 469, 477, 284 P2d 358 (1955).

**2. Denials.** ORCP 19A also requires a party to state in short and plain terms the party's defenses to each claim asserted. If a party lacks sufficient knowledge or information sufficient to form a belief as to the truth of the matter alleged, then it must so state, and doing so will have the effect of a denial. Denials must fairly meet the substance of the allegations denied. The pleader must admit as much of an allegation as is true and deny the remainder. Thus, an entire allegation may not be denied simply because part of it is not true. That portion that is true must be admitted. ORCP 19A.

A general denial is permissible only when the pleader intends in good faith to controvert every allegation of the pleading. Allegations to which a response is required, other than the amount of damages, are deemed admitted if not denied. If no responsive pleading is required, the allegations will be treated as denied or avoided. ORCP 19C. Other issues sometimes arise as to certain types of denials, as follows.

**a. *The Negative Pregnant.*** A denial that does not completely respond to an allegation and therefore implies that the allegation may be partly true is known as a “negative pregnant.” ORCP 20G provides that no denial shall be treated as an admission on the ground that it contains a negative pregnant.

**b. *Evasive Denial.*** A denial must “fairly” meet the substance of the allegations denied. ORCP 19A. A refusal to admit or deny allegations may result in the allegations being admitted. ORCP 19C.

**c. *Argumentative Denial.*** An argumentative denial is an allegation by the responding party that could not be true if the plaintiff's allegations were true. Under the traditional rule, an argumentative denial was regarded as not denying anything and therefore admitting the allegation in the plaintiff's complaint. *See Loveland v. Warner*, 103 Or 638, 204 P 622, *reh'g denied* 103 Or 638, 206 P 298 (1922) (the insertion of a clause pretending to admit a fact not pleaded in the complaint is not proper, raises no issue, is not capable of being denied, and should not be tolerated).

**3. Defenses.** All defenses must be stated separately. ORCP 16B. Alternative and inconsistent defenses are permissible and often tactically wise, though it may also be more effective to decide on a single defense before the time of trial. One should plead partial as well as complete defenses. Mitigation of damages is an example of a partial defense that, to be relied upon, generally must be pleaded. *Kirby v. Snow*, 252 Or 592, 595, 451 P2d 866 (1969). Partial defenses should be pleaded as such, or one risks having them treated as a complete defense.

**4. Affirmative Defenses.** In responding to a preceding pleading, a party shall set forth any matter constituting an avoidance or affirmative defense. ORCP 19B. Any fact that does not directly controvert a fact necessary to be established by the claimant is a new matter and must be pleaded as an affirmative defense. *Hubbard v. Olsen-Roe Transfer Co.*, 110 Or 618, 626, 224 P 636 (1924). If doubt exists as to the admissibility of evidence of any defensive matter under a denial, it is appropriate to set it forth as an affirmative defense. However, the party asserting an affirmative defense will generally bear the burden of proof on that issue.

Certain matters must be set forth affirmatively, including accord and satisfaction, arbitration and award, assumption of risk, comparative or contributory negligence, duress, estoppel, failure of consideration, fraud, illegality, laches, payment, release, res judicata, statute of frauds, statute of limitation, unconstitutionality, and waiver. A nonexhaustive list of other affirmative defenses not listed in the rules include mistake, adhesion, impossibility, incompetency, failure to mitigate, and setoff or recoupment.

Ordinarily, the party alleging the defense must prove it. While the burden of proof shifts to the plaintiff when a defendant raises a matter as an affirmative defense that could equally be proven under a denial, a defendant cannot take advantage of that rule where it assumes the burden of proof on an issue. Thus, when affirmatively controverting an issue that may be part of the plaintiff's burden of proof, the defendant should specifically deny that, by so pleading, it is admitting that it is assuming the burden of proof. That position should be clearly stated in the pleading so that a trial or an appellate court cannot cite reliance on the pleadings as a rationale for imposing the burden of proof on the defendant.

**a. *Effect of Failure to Plead Affirmative Defense.*** Failure to plead an affirmative defense in the first responsive pleading may result in a waiver, and the party failing to plead the defense may not be permitted to introduce evidence in support of the defense. ORCP 23B.

**b. *Joinder of Affirmative Defense.*** A party is permitted to assert as many affirmative defenses as it may have. ORCP 19B, 21A. If more than one affirmative defense is pleaded, each must be set forth separately. ORCP 16B. Defenses may also be inconsistent. ORCP 16C. When one is in doubt as to which of several statements of fact is true, statements may be alleged in the alternative. However, inconsistent statements of fact within the pleader's knowledge are improper. *See* ORCP 17C.

## **E. Counterclaims, Cross-Claims, and Third-Party Claims**

**1. Counterclaims.** A counterclaim is a claim by the defendant against the plaintiff that is asserted in the answer. ORCP 13B. A defendant may assert as many counterclaims, both legal and equitable, that the defendant may have against the plaintiff. ORCP 22A(1). Oregon generally does not require compulsory counterclaims. *Burlington Northern Inc. v. Lester*, 48 Or App 579, 583, 617 P2d 906 (1980). However, when a counterclaim is based upon facts common with any affirmative defenses asserted by the defendant, or where only part of the counterclaim is asserted, the doctrine of res judicata or collateral estoppel might preclude subsequent litigation in a separate proceeding. Thus, some counterclaims may be compulsory even though Oregon's counterclaim rule only mentions permissive counterclaims.

Note that if there is a basis to recover attorney fees, it has been the practice to assert a right to attorney fees as a counterclaim instead of an affirmative defense.

**2. Cross-Claims.** When an action is against two or more defendants, any defendant may allege in its answer a cross-claim against any other defendant. A cross-claim must: (a) arise out of the transaction or occurrence that is the subject matter of the complaint; or (b) relate to any property that is the subject matter of the original action. ORCP 22B(1). A cross-claim may include a claim for indemnity or contribution. ORCP 22B(2).

Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the joinder rules. ORCP 22D(1). The joinder rules should not be confused with the rules allowing third-party complaints. *Compare* ORCP 22C. Oregon rules contain a special joinder provision relating to counterclaims that is not found in the federal rules. ORCP 22D(2) provides that a defendant in an action on a contract brought by an assignee may join all or any as persons liable for attorney fees under ORS 20.097 (maker and plaintiff/assignee both liable to defendant for attorney fees if the defendant prevails in contract action and contract provides for recovery of such fees). The Oregon rules provide that a party joined under ORCP 22D is to be treated as a defendant for purposes of service of summons and time to answer under ORCP 7. ORCP 22D(3). If a cross-claim seeks relief against another defendant, it must be served on that defendant, even though that party is in default for the party's failure to appear and defend. ORCP 22 B(3).

The deadline to answer a cross-claim or any motion directed against a cross-claim is 30 days from the date of service. ORCP 15A.

**3. Third-Party Complaint.** After the commencement of an action, a defending party, as a third-party plaintiff, may file and serve a complaint against a person not then a party to the action as a third-party defendant, alleging that the person is or may be liable to the defending party for all or part of the plaintiff's claim against it. The third-party defendant, in turn, can then raise defenses, counterclaims, or cross-claims just like any other party. ORCP 22C. Where a counterclaim is asserted against a plaintiff, the plaintiff also may cause a third party to be brought into the action. ORCP 22C(2).

ORCP 22C(1) requires that a defending party, as a third-party plaintiff, must commence a third-party action not later than 90 days after service of the plaintiff's summons and complaint on the defending party. Otherwise, it must obtain agreement of parties who have appeared and leave of court. Although some circuit court judges have ruled that the court has the power to grant leave to file third-party actions without regard to whether the other parties to the action agree, this appears to be contrary to the express language of ORCP 22C(1). The careful lawyer will decide whether to file a third-party claim as soon as possible after the complaint is served.

## IV. GENERAL CONSIDERATIONS

### A. Amended and Supplemental Pleadings

**1. Amendment as a Matter of Course.** ORCP 23A allows a party to amend its pleading once as a matter of course at any time before a responsive pleading is served, or, if no

response is permitted, the amendment must be filed within 20 days after the pleading to be amended is served.

**2. Amendment by Leave of Court Before Trial.** Where a party cannot amend as a matter of course, it must obtain leave of court or written consent of the adverse party before it can amend its pleading. “[L]eave shall be freely given when justice so requires.” ORCP 23A. Review of a trial court’s decision to deny leave to amend is for abuse of discretion. *Quillen v. Roseburg Forest Products, Inc.*, 159 Or App 6, 10, 976 P2d 91 (1999). Thus, beware of last-minute motions to amend filed by the opposing party. Note that some defenses ordinarily waived if not raised can be raised by amended pleading under certain limited circumstances. ORCP 21G(2).

An order granting leave to amend should be obtained prior to filing and serving the amended pleading. Once the order is entered, the pleading can be filed. The pleading should be filed and served after the order is entered. A proposed pleading should be filed with a motion to amend. However, the proposed pleading does not become an “official” pleading unless so ordered by the court.

**3. Amendments After Motion.** After a motion to dismiss, a motion to strike an entire pleading, or a motion for judgment on the pleadings has been granted, the court may, upon such terms as may be proper, allow a party to amend its pleading. ORCP 25A. Where a court orders that part of the pleading be stricken or where the pleading, or a part of it, is to be made more definite and certain, the pleading must be amended pursuant to ORCP 23D. *See* ORCP 25A.

**4. Amendments After Commencement of Trial.** Where issues not raised by the pleadings are not objected to at trial, they will be treated in all respects as if they had been raised in the pleadings. On motion of any party at any time, even after judgment, the pleadings may be amended to conform to the evidence and to raise such issues. However, failure to amend does not affect the outcome of the trial on those issues. If evidence is objected to as not being within the scope of the pleadings, the court may allow the pleadings to be amended if the merits of the action will be advanced and the objecting party cannot demonstrate prejudice. ORCP 23B. In some circumstances, a court may grant a continuance to enable the objecting party to meet the new evidence. ORCP 23B.

**5. Relation Back of Amendments.** Whenever a claim or defense asserted in an amended pleading arises out of the conduct, transactions, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. ORCP 23C.

An amendment changing the party against whom a claim is asserted relates back if the conditions described above are satisfied and, within the statute of limitations, the new party: (1) had notice of the action so it will not be prejudiced in its defense; and (2) knew, or should have known, that, but for a mistake concerning the identity of the proper party, the action would have been brought against the new party. ORCP 23C.

**6. Procedure for Amendments.** Under ORCP 23D, where a pleading is amended before trial, a new “amended” pleading is filed, labeled as such. Occasionally, an amendment may be made by deletions or interlineation in the original pleading. ORCP 23D. An amended pleading



must be complete in itself, without reference to the preceding pleading or amendments by the party. ORCP 23D. Once an original pleading has been amended, the original pleading no longer is operative for the action. Nevertheless, it may still serve as evidence or an admission. Whenever an amended pleading is filed, it must be served on all parties who are not in default. A default judgment may be entered in accordance with the original pleading served upon any party who is in default or against whom a default has already been entered. However, the amended pleading need not be served on such parties in default unless that pleading asks for additional relief against them. ORCP 23A.

**7. Response to Amendments.** Unless the court orders otherwise, a party must respond to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amendment, whichever is longer. ORCP 15C.

## **B. Interpleader**

ORCP 31A provides that persons having claims against the plaintiff may be joined as defendants and be required to interplead when their claims are such that the plaintiff is or may be exposed to multiple liability. A defendant exposed to similar liability may obtain such interpleader by way of a cross-claim or counterclaim. It is not grounds for objection that the claims do not have a common origin or that they are adverse to and independent of one another. It is also not grounds for objection that the plaintiff alleges that it is not liable in whole or in part to any or all of the claimants.

ORCP 31B provides that any property or amount involved as to which the plaintiff admits liability may, upon order of the court, be deposited with the court “or otherwise preserved, or secured by bond in an amount sufficient to assure payment of the liability admitted.” Once that is done, the court may enjoin all the parties before it from pursuing any other action regarding the subject matter of the interpleader action. Following a hearing, the court may order the plaintiff discharged from liability “as to the property deposited or secured” before determining the rights of the claimants.

Interpleader is often considered as a possibility when an insurer is faced with multiple claims against an insured that exceed the amount of a liability policy. In theory, interpleading the policy limits would allow the insurer to avoid incurring defense costs on the claims. However, in practice, doing so without first obtaining a release for an insured could expose the insurer to allegations of bad faith in leaving its insured unprotected.

## **C. Ethical Considerations—ORCP 17**

In form, ORCP 17 is similar to its federal counterpart, FRCP 11. In practice, however, it is infrequently necessary or imposed by Oregon judges. Fortunately, Oregon’s collegiality has avoided a flood of Rule 17 sanction motions except when they are well-deserved.

**1. Sanctions for Improper Pleading/Certification to the Court.** ORCP 17 is somewhat similar to FRCP 11 in requiring certain certifications to the court by signing pleadings, motions, and other papers. Sanctions are available for violations of these rules. An attorney or party signing a pleading certifies that:

- a. The statements are based upon reasonable knowledge, information, or belief, formed after making reasonable inquiry under the circumstances;
- b. The pleading is not made for an improper purpose, such as delay or a needless increase in the cost of litigation;
- c. The legal positions taken are “warranted by existing law or by a non-frivolous argument for the extension, modification or reversal of existing law or the establishment of new law;” and
- d. The allegations or denials are supported by the evidence.

Any allegations or denials that the party or attorney does not wish to certify as supported by the evidence must be “specifically identified.” The party or attorney’s signature constitutes a reasonable belief that an allegation so identified will be supported by the evidence after further investigation and a denial so identified is reasonably based upon a lack of information or belief. ORCP 17C.

ORCP 17(D) also provides that, in the event a pleading or motion is signed in violation of the rule, the court may, upon motion or its own initiative, impose sanctions on the party or the attorney. Sanctions under ORCP 17 are limited to amounts sufficient to reimburse the moving party for attorney fees, including fees for bringing the motion. ORCP 17(D)(4). ORCP 17 sanctions may also include amounts sufficient to deter future false certifications. ORCP 17(D)(4). However, sanctions sufficient to deter future false certification must be based “upon clear and convincing evidence of wanton misconduct.” ORCP 17(D)(4).

**2. Asserting a Claim in Bad Faith.** ORS 20.105 provides for an award of attorney fees for disobeying a court order or other misconduct. It requires a court to award reasonable attorney fees to a party against whom a claim, defense, or ground for appeal or review is asserted, if that party is a prevailing party in the proceeding and to be paid by the party asserting the claim, defense, or ground, upon a finding by the court that the party willfully disobeyed a court order or that there was no objectively reasonable basis for asserting the claim, defense, or ground for appeal.

These rules and statutes impose a definite moral and professional obligation upon the attorney. An attorney should not rely solely on information provided by the client if the attorney can obtain or verify the facts through other sources with reasonable diligence. Thus, whenever possible, an attorney should investigate the merits of a client’s case before filing. If the attorney decides that an action lacks merit, the attorney should advise the client promptly before filing. If the case has already been filed, the attorney should get the client’s consent to dismiss or seek leave to withdraw. Counsel should always be mindful of potential personal liability for improperly bringing or continuing an action.

Practicing Law in  
Oregon:  
Tips to Consider and Traps  
to Avoid

OREGON STATE BAR  
CLE SEMINARS

DECEMBER 21, 2020

PRESENTED BY

JOVITA WANG  
RICHARDSON WRIGHT LLP

Richardson  
Wright

ATTORNEYS AT LAW

How to Avoid Hearing...  
*“You’re Not Around These Parts, Are You?”*

What makes Oregon special...

- From the **Plaintiff’s** perspective
- From the **Defendant’s** perspective

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## Local Practices to Consult

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- Oregon Rules of Civil Procedure (ORCP)
- Uniform Trial Court Rules (UTCRC)
- Supplemental Local Rules (SLR)



## Code Pleading

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## Requirements of Code Pleading

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Plain and concise statement of “ultimate facts” constituting a claim for relief without unnecessary repetition. ORCP 18 A.

## What are ultimate facts?

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- Must support the elements of each particular claim or defense. But cannot be mere recitation of elements.
- An ultimate fact is somewhere between a general allegation and a specific evidentiary allegation that describes an event or thing having a legal consequence.
- Facts must be pled fairly specifically.
- Avoid conclusory statements.

## Which is Code Compliant?

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Defendant was negligently operating his vehicle when he struck plaintiff and caused plaintiff injuries.

Vs.

Defendant was operating a vehicle on a public road at an excessive rate of speed under the circumstances when he struck plaintiff.



## Which Pleadings?

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- Complaint
- Answer
- Third-Party Complaint
- Reply



## Examples of what needs to be included...

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- If attorney fees are being sought, the party must allege the basis for the award of fees, whether statutory or contractual in the pleading. ORCP 68 C(2)(a).
- Prejudgment interest must be specifically pleaded, along with a factual basis for an award of prejudgment interest.
- If seeking monetary damages, amount sought must be stated.



## The Prayer...

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IS NOT PART OF THE CLAIM.



## But keep in mind....

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Pleadings are to be liberally construed, so as to disregard any error or defect that does not affect the substantive rights of the adverse party. ORCP 12.



## Seeking Punitive Damages...

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Oregon has special requirements for the pleading and recovery of punitive damages contained in [ORS 31.725 et seq.](#) Plaintiffs may not include a claim for punitive damages in their initial complaint. [ORS 31.725\(1\)](#) and [\(2\)](#). Instead, at any time after the pleading is filed, a party may move the court to allow amendment of the pleading in order to assert a claim for punitive damages. Both the moving and nonmoving parties may submit affidavits and documentation supporting or opposing a punitive damages claim. [ORS 31.725\(2\)](#).





## Some interesting pre-requisites

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**Oregon Tort Claims.** No action may be maintained arising out of any act or omission of a public body or its agents unless notice of the claim is given as required by [ORS 30.275](#). When a person injured is a minor, incompetent, or otherwise unable to give the notice, the deadline for the notice is tolled up to a maximum of only 90 days (basically a 270–days’ notice period). Otherwise, notice must be given within 180 days after the alleged loss or injury, or within one year if the claim is for wrongful death.



## Some interesting pre-requisites – cont’d

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**Attorney Fees.** Certain claims for personal injury under [ORS 20.080](#), and breach of contract under [ORS 20.082](#), where the prayer is for less than \$10,000 may substantively qualify for recovery of attorney fees, but only where a demand is sent to the defendant at least 30 days before commencement of the tort action and 20 days before commencement of the contract action, along with other statutory requirements.



## Some interesting pre-requisites – cont'd

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### **Complaint against Certain Professionals.**

- Design professionals
- Real estate professionals



## Some interesting pre-requisites – cont'd

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### **Corporations:**

- If transacting business in Oregon, must obtain a certificate of authority before maintaining an action...but
- Can still be sued





## When does an action commence?

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- Commencement does not occur until the complaint is filed and the summons and complaint are served on a particular defendant.
- ORS 12.010 and 12.020.

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## Relation Back

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If complaint is filed within the time allowed by the applicable SOL, service of the summons and complaint within 60 days of the filing date allows the service to “relate back” to the date of filing. Thus, the action is deemed to have been commenced on the date of filing.

Beware: The relation back only applies within 60 days of the filing date, not the SOL. [ORS 12.020\(2\)](#).



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## Pay the Fees...

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- ORS 21.160(1) – Filing fees based on the amount claimed
- ORS 21.200, where motion fees and responses apply to
  - Motion for summary judgment (MSJ)
  - Motion notwithstanding the verdict
  - Motion for new trial
  - Motion for relief from judgment
  - Motion for preliminary injunction
  - Motion seeking contempt of court



## Timing Considerations for the Defendant

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Lawyers will typically write to plaintiff's counsel informing them of their representation of a particular defendant, stating that they intend to appear and requesting that they be given at least 10 days' notice of any intent to apply for default. Doing so requires that defense counsel receive notice before a motion for default is filed. **ORCP 69 B(2)**.





## Motions Practice

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### ORCP 21:

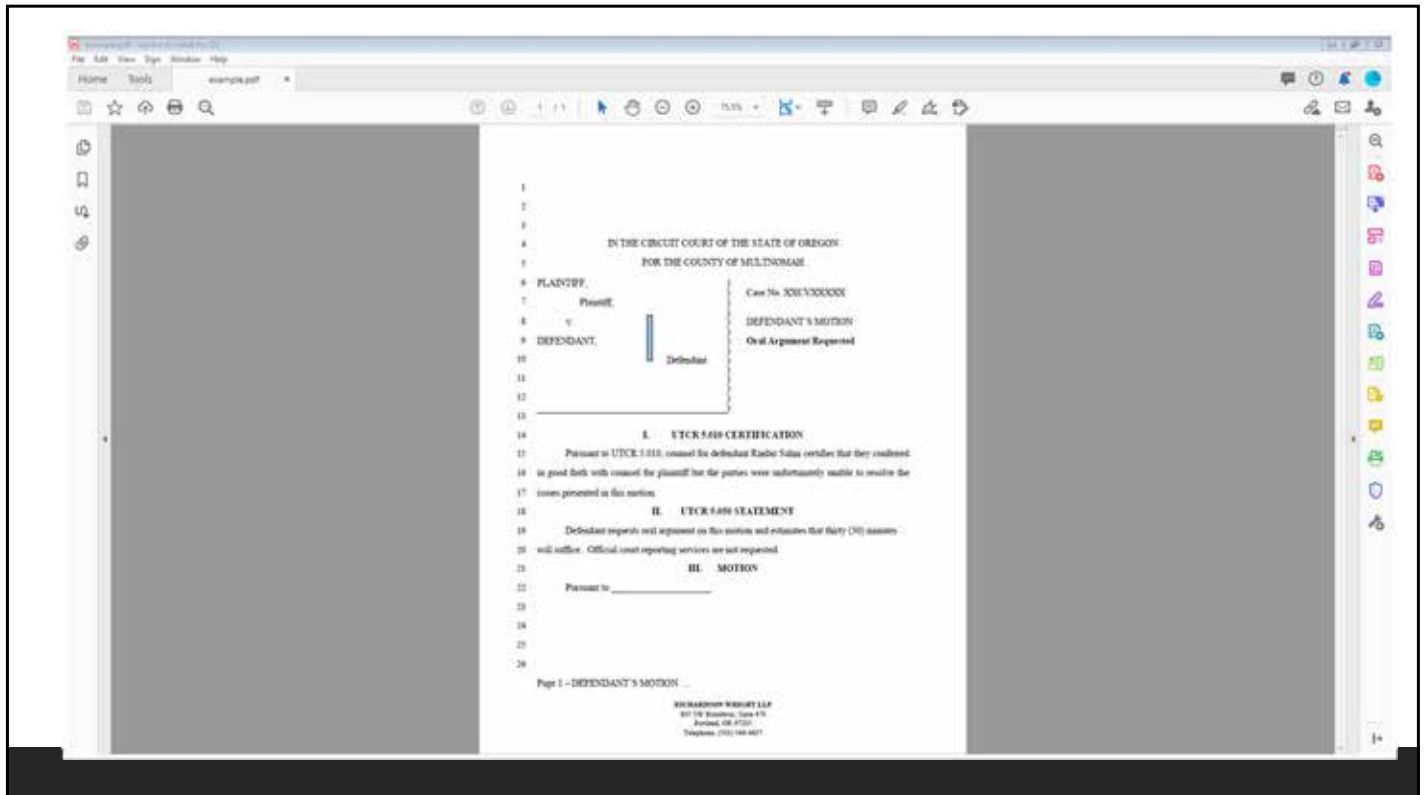
Examples include

- Motions to dismiss a particular claim or the entire complaint for various reasons;
- Motions to strike sham, frivolous, or irrelevant pleadings
- Motions to strike a complaint containing more than one claim not separately stated; or
- Motions to make the allegations more definite and certain.



# Conferral

Don't forget to make a good faith effort to confer. [UTCRC 5.010](#) (must confer under ORCP 21, 23, 36-46 except a motion to dismiss for failure to state a claim/lack of jurisdiction).



## Responding to a Complaint

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- A denial.
- A statement that the party lacks knowledge or information sufficient to form a belief about the allegation's truth, which has the effect of a denial.
- An admission.



## Denials...

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- ORCP 19A requires a party to state in short and plain terms the party's defenses to each claim asserted.
- The pleader must admit as much of an allegation as is true and deny the remainder.
- A general denial is permissible only when the pleader intends in good faith to controvert every allegation of the pleading.
- Allegations to which a response is required, other than the amount of damages, are deemed admitted if not denied.



# Defenses

---

Check ORCP 19B for a list of defenses, including affirmative defenses.

*E.g.*

- Estoppel
- Laches
- Statute of Frauds
- Statute of Limitations
- Waiver
- Issue preclusion



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# Other pleadings

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- Counterclaims.
  - Response is Reply
- Cross-Claims.
  - Response is an Answer
- Third-Party Complaint.
  - Response is an Answer

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# Amendments

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- As a matter of course
- By leave of Court
- Written consent of adverse party



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# Ethical Considerations

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- ORCP 17
- ORS 20.105

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## Strategy on where to file...

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Federal Courts

v.

State Courts



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## Federal Court

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- Specific Timelines & Requirements
- Assigned Judges with Law Clerks
- No “trial by ambush.”
- Cost



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## State/Circuit Court

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- Flexibility
- Cost
- Trial by Ambush.
- Budgetary restrictions
- Favors procrastinators more



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## Resources

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1. <https://www.courts.oregon.gov/Pages/default.aspx>
2. <https://www.courts.oregon.gov/courts/multnomah/go/Documents/ARM.pdf>
3. <https://www.courts.oregon.gov/courts/clackamas/resources/Pages/default.aspx>
4. [https://www.courts.oregon.gov/courts/clackamas/programs-services/Documents/Motion Practice Guidelines Final Draft June 2019.pdf](https://www.courts.oregon.gov/courts/clackamas/programs-services/Documents/Motion_Practice_Guidelines_Final_Draft_June_2019.pdf)
5. <https://www.courts.oregon.gov/courts/washington/programs-services/Pages/MotPnlStmt.aspx>
6. [https://www.courts.oregon.gov/courts/multnomah/go/CivilMotionPanel/CV\\_CivilMotionPanelStatementOfConsensus.pdf](https://www.courts.oregon.gov/courts/multnomah/go/CivilMotionPanel/CV_CivilMotionPanelStatementOfConsensus.pdf)
7. <https://www.osbar.org/members/localbars.asp>
8. Oregon Bar Books

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## TL;DR

- CHECK THE LOCAL RULES
- CHECK THE LOCAL GUIDELINES
- CODE PLEADING – ultimate facts

# THANK YOU!

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## Chapter 3

# Presentation Slides: Depositions in Oregon

**VANESSA KUCHULIS**  
Miller Nash LLP  
Portland, Oregon





# Depositions in Oregon

Oregon State Bar, Practicing Law in Oregon  
Webcast CLE

Presented by

**Vanessa T. Kuchulis**

Miller Nash Graham & Dunn LLP

December 22, 2020

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## Overview

- The Basics
- Taking a Deposition
- Defending a Deposition

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## I. The Basics

### A. What is it?

1. Discovery and trial tool.
2. Special types
  - a) Corporate.
  - b) Perpetuation
  - c) Deposition by written questions
  - d) Foreign depositions

## I. The Basics

### B. Why do it?

1. Reasons to take a deposition
2. Reasons not to take a deposition

### C. How to do it

1. Rules
  - a) FRCP 27-32, LR 27 - 30
  - b) ORCP 37-41, UTCR 5.130, 5.140

## I. The Basics

### C. How to do it

#### 2. Other sources of info

##### a) Civil Motion Panel Statements of Consensus

#### C. Depositions

1. Attendance of Experts – Attendance of an expert at a deposition has generally been allowed, but has been reviewed on a case-by-case basis upon the motion of a party.
2. Attendance of Others – Persons other than the parties and their lawyers are generally not allowed to attend a deposition. Upon a showing of need, exceptions have been granted.
3. Out-of-State Parties – A non-resident plaintiff is normally required to appear at plaintiff's expense in Oregon for depositions. Upon a showing of undue burden or expense, the court has ordered, among other things, that plaintiff's deposition occur by telephone with a follow-up

## I. The Basics

### C. How to do it

#### 2. Other sources of info

##### b) Multnomah Bar Association Deposition Guidelines

#### MULTNOMAH COUNTY DEPOSITION GUIDELINES Presented by the Multnomah Bar Association Court Liaison Committee.

The attorneys and judges of Multnomah County have asked for clarification of local deposition practice. These guidelines are the result of a collaboration between the bench and bar, and are designed to provide uniformity and thereby reduce disputes during discovery depositions. No attempt is made to cover every potential area of dispute; instead, the intent is to cover the majority of avoidable problems arising during discovery depositions.

**SCOPE OF DEPOSITION.** ORCP 36B(1) provides that any matter not privileged may be inquired into during deposition if reasonably calculated to lead to admissible evidence. If unreasonable or bad faith deposition techniques are being used, the deposition may be suspended briefly, and a motion to limit pursuant to ORCP 39E may be made and heard by an available judge.

**OBJECTIONS.** ORCP 39D(3) creates a mechanism so that the attorney whose question is objected to may accept the objection as an invitation to correct an alleged defect in the question; rejection of the invitation may result in exclusion of the question and answer at trial. Attorneys should not state anything more than the legal grounds for the objection to preserve the record, and objection should be made without comment to avoid contamination of the answers of the witness. Argument in response to the objection is neither necessary nor desirable.

**INSTRUCTIONS NOT TO ANSWER.** The only basis for an instruction not to answer a question reasonably calculated to lead to the discovery of admissible evidence is in response to an attempt by the attorney taking the deposition to inquire into an area of privacy right, privilege, an area protected by the constitution, statute, work product, or questioning amounting to harassment of the witness. Any other objection to inquiry, such as lack of foundation, competence, asked and answered, etc., can be preserved with recitation of a brief objection.

## I. The Basics

### C. How to do it

#### 2. Other sources of info

##### c) Oregon State Bar Books

- 1) Look to for detail on how to take deposition of parties out of state or in foreign countries
- 2) Subpoenaing non-party witnesses.
- 3) Protective orders

## I. The Basics

### C. How to do it

#### 3. When

- a) Scheduling
- b) Notice
- c) Length of deposition
- d) After proper preparation

## II. Taking a Deposition

### A. Preparation

1. Know the facts
2. Know the law
3. Will you need an expert to help you prepare?  
Review pleadings
4. Exhibits

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## II. Taking a Deposition

### B. Make an Outline

5. Outline the Examination
  - a) By topic
  - b) By legal elements of claims/defenses
  - c) Chronological
  - d) Be flexible - ability to shift questioning could garner more honest answers if you catch the witness off balance.
  - e) Focus general to specific

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## II. Taking a Deposition

### C. The examination

1. Attitude/ Mindset
2. Preliminaries
  - a) Establish baseline of understanding of oath, use of deposition.
  - b) Establish competency (i.e. not impaired).
  - c) Ask what they did to prepare, who they talked with, what documents they reviewed.

## II. Taking a Deposition

### C. The examination

3. General guidance
  - a) Broad discovery questions to get info
    - 1) who, what, when, where, why
    - 2) LISTEN LISTEN LISTEN
  - b) Watch facial reactions to documents, photos
  - c) Ask short questions. Break long questions up into multiple questions.
  - d) Don't use double negatives.

## II. Taking a Deposition

### C. The examination

#### 4. Using exhibits

- a) Describe what's being presented and get confirmation of authenticity.
- b) Identify by Bates Number, or page number if premarked, to ensure questioner and witness are literally on same page, and to ensure a juror reviewing the transcript later will know what the document is, not just hear number.

## II. Taking a Deposition

### C. The examination

#### 5. Types of questions

- a) Background
- b) Summarizing questions
- c) Open questions
- d) Closed/leading questions

## II. Taking a Deposition

### C. The examination

#### 6. Tips for getting better answers

- a) Watch for absolutes
  - 1) Example: A: "I was the only person asked to stay late." Follow up Q: how many people were in the office when you were asked to stay? A: "just me."
  - 2) Drill down for specifics.
- b) Equivocal answers – if "I don't recall" ask what they do remember; set parameters.
- c) Confronting an evasive witness
  - 1) The law requires you to answer.
  - 2) Rephrase the question.

## II. Taking a Deposition

### C. The examination

#### 7. When to stop

- a) When you have all the answers you need for (1) your dispositive motion; (2) to know you need to settle



## III. Defending a Deposition

### A. Preparing the witness

1. Explain procedure, potential uses of deposition
2. Instruct them not to bring anything with them.
3. Instruct them what to wear
4. General tips – see article
5. Witness Dos and Don'ts

## III. Defending a Deposition

### B. Objections

1. Preserve your objections, but use them judiciously.
2. See deposition guidance in civil motion panel statements of consensus on form of objections.
3. Typical objections
  - a) Compound
  - b) Calls for speculation
  - c) Calls for legal conclusion
  - d) Too ambiguous
  - e) Asked and answered
  - f) NOT hearsay, irrelevant,

## III. Defending a Deposition

### B. Objections

#### 4. Dealing with harassing questions

- a) Keep everything on the record
- b) Call the judge
- c) Before you call the judge remind opposing counsel that attorney fees may be awarded to losing party (LR 30-6)

## III. Defending a Deposition

### C. Cross

1. Cross if you need something corrected or clarified for the record.

### D. Read and sign

1. If you don't reserve the right to read and sign you waive it. FRCP 30(e)

**Thank you!**

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# Chapter 4

## The Disciplinary Process: Basics You Need to Know

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Disciplinary Counsel's Office  
Oregon State Bar  
Tigard, Oregon

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## Attorney Discipline in Oregon

Courtney C. Dippel

### Introduction

Oregon’s attorney discipline system is designed to protect the public while assuring due process for both complainants and respondent lawyers. The system provides accessibility to information for the parties as well as interested members of the public, and seeks appropriate outcomes, taking into consideration the Oregon Supreme Court’s case law, other precedent, and the individual circumstances of the matter at hand. It is administered by a professional staff that works in conjunction with volunteers who perform legal analysis and decision-making functions that are essential to the system’s success. Lawyers who are the subject of complaints may be represented by counsel at any point in the process.

While many aspects of Oregon’s system are common to other jurisdictions’ processes, in some respects Oregon is either unique or in the minority in its approach. For example, because the Oregon State Bar (OSB) is subject to public records laws,<sup>1</sup> its discipline system is open to the public from the inception of a disciplinary inquiry about a lawyer. A member of the public who asks whether a lawyer has been the subject of any grievances can be provided information about not only matters for which the lawyer has been disciplined, but also matters that have been dismissed.<sup>2</sup> This is in stark contrast to the vast majority of states, which maintain confidentiality to some level of their process – typically, with the filing a formal proceeding. Additionally, while many states have a private reprimand as an available sanction, Oregon does not. Moreover, Oregon is one of only a handful of states in which disbarment is permanent.<sup>3</sup>

Oregon’s Bar Rules of Procedure governing its disciplinary process were originally enacted in 1984. These rules, often referred to as “the BRs,” established the creation of a professional staff dedicated to investigation and prosecution of attorney complaints in the form of Disciplinary Counsel’s Office (DCO) working in tandem with a constellation of volunteer groups with different functions. DCO’s staff includes eight lawyers, a paralegal, an investigator, an office manager, and three legal secretaries (one of whom also monitors diversions, probations, and conditional admissions). With a limited ability to make autonomous decisions about investigatory matters, DCO advises the **State Professional Responsibility Board (SPRB)** in seeking authority to pursue a formal proceeding, and obtaining authority to resolve any matter not dismissed during the initial investigatory stage.<sup>4</sup> The SPRB also provides authority regarding whether to appeal a trial panel decision.

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<sup>1</sup> BR 1.7(b); BR 2.10(f). All references to the Bar Rules of Procedure herein are to the rules effective January 26, 2021.

<sup>2</sup> Records pertaining to matters dismissed by the Client Attorney Assistance office are maintained for a period of three years from the date of dismissal. Records pertaining to matters dismissed by the Disciplinary Counsel are maintained for a period of ten years from the date of dismissal.

<sup>3</sup> BR 6.1(d).

<sup>4</sup> BR 2.6(c)(1).

In 2003, the Client Assistance Office (CAO) was established within the General Counsel's office to handle intake of complaints. CAO is staffed with three lawyers and two support staff.

### **CAO Review**

When correspondence is received by the OSB that complains about an Oregon lawyer, it is routed to CAO where one of the CAO attorneys reviews it. There is no standing requirement, meaning that any person may complain about a lawyer's conduct. While it is often a former client, it can also be an opposing counsel, an opposing party, another lawyer, a judge, or a concerned citizen who reads a news article regarding a lawyer. CAO lawyers may make telephonic inquiries and seek additional information in writing from either the complainant or the attorney before determining whether to dismiss the matter or refer it to DCO. If, either on the face of the complaint or after investigation, there is "sufficient evidence to support a reasonable belief that misconduct may have occurred," the matter will be referred to DCO.<sup>5</sup> Both the complainant and the lawyer who is the subject of the complaint (the respondent) are notified of the outcome. The complainant can appeal a dismissal decision to the OSB's General Counsel.<sup>6</sup> General Counsel either affirms the dismissal or refers the matter to DCO. The respondent cannot appeal the decision to refer the matter to DCO.

### **DCO Investigation**

DCO receives between 200 and 300 referrals from the CAO annually, which constitutes the bulk of its investigatory caseload. Trust account overdraft notifications from financial institutions, indicating that an instrument drawn on a lawyer's trust account has been dishonored, are sent directly to DCO and typically range between 60 and 100 annually. DCO may receive referrals from the Client Security Fund Committee when it pays on a claim against a lawyer and it is determined that the conduct at issue has not previously been investigated as potential professional misconduct.

DCO also receives notifications when an Oregon lawyer who is licensed elsewhere has been disciplined by another jurisdiction, in which case a reciprocal discipline proceeding will be commenced. Occasionally, DCO also learns from a prosecutor, criminal defense lawyer, judge, a self-report by the lawyer,<sup>7</sup> or through other publicity, that an Oregon lawyer has been convicted of a crime that potentially subjects the lawyer to discipline. DCO has the ability to open investigations in the absence of a written complaint,<sup>8</sup> which may happen because a lawyer has pled guilty to a crime, has been judicially declared not competent, or is the subject of publicity about circumstances or events that, if true, may implicate the Oregon

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<sup>5</sup> BR 2.5(b)(2).

<sup>6</sup> BR 2.5(c).

<sup>7</sup> A lawyer is not mandated to self-report criminal convictions; however, because in certain circumstances DCO is mandated to seek an immediate suspension of a convicted lawyer's license, it is not uncommon for lawyers or their criminal defense counsel to report convictions.

<sup>8</sup> BR 2.7.



Rules of Professional Conduct. DCO opens 15 to 30 files on its own initiative each year.

DCO's investigation is typically commenced with a letter to the respondent attorney which will include copies of any materials received from the complainant that the lawyer may not have received while the matter was pending in CAO. However, DCO may initially seek more detailed information or documents from the complainant before inquiring of the lawyer regarding what happened. The respondent will be asked to provide a response to anything raised by the complainant. In addition, the DCO lawyer will have precise questions that may narrow the issues posed. The letter to the respondent may also seek documents, such as a copy of the lawyer's file regarding the representation, copies of any fee agreement, and records pertaining to the receipt and handling of funds received from the client for fees and expenses. A lawyer's failure to respond to a DCO request for information can be a basis for discipline<sup>9</sup> and may result in a proceeding under BR 7.1 that seeks a suspension of the lawyer's license pending receipt of that response.

Respondent lawyers have a duty of candor in answering DCO's questions. If a lawyer makes a knowingly false statement of fact to DCO during its investigation, that may constitute a basis of discipline, even if the Bar does not charge the lawyer with violating any other rules of professional conduct. *In re Nisley*, 365 Or 793, 453 P3d 529 (2019).

In determining whether to dismiss a complaint or seek authority to file a formal proceeding, DCO determines whether there is probable cause to believe misconduct has occurred.<sup>10</sup> As an alternative to seeking probable cause from the SPRB, the investigating DCO attorney may offer diversion to a respondent.<sup>11</sup>

A DCO decision to dismiss is communicated to the complainant and the respondent in the form of a letter explaining DCO's rationale for dismissing the complaint. The complainant can appeal the dismissal decision to the SPRB.<sup>12</sup> DCO must obtain authority from the SPRB for any other alternative, which could include issuance of a letter of admonition, referring the matter to the State Lawyers Assistance Committee (SLAC), or filing a formal proceeding charging the respondent lawyer with specific violations of the Oregon Rules of Professional Conduct or Oregon statutes.

### **The SPRB's Role**

The SPRB is a statewide body of 8 lawyers, representing the seven Bar regions in staggered four-year terms, and 2 public members, all of whom are nominated by the Board of

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<sup>9</sup> RPC 8.1(a)(2).

<sup>10</sup> BR 2.6(b).

<sup>11</sup> A diversion agreement permits a lawyer to participate in a contractual remedial program for a defined period of time not to exceed 24 months. If the diversion is successfully completed, the complaint that prompted the diversion will be dismissed. A diversion does not constitute prior discipline.

<sup>12</sup> BR 2.3(c)(1).

Governors (BOG) and appointed by the Supreme Court.<sup>13</sup> The SPRB's initial task is deciding whether a formal proceeding should be filed. For all complaints not dismissed by DCO during its initial investigation, the SPRB functions as the client body on behalf of the OSB for purposes of authorizing formal disciplinary charges, negotiating and authorizing settlement, and deciding whether to appeal or cross-appeal outcomes of disciplinary actions. The SPRB also reviews complainant appeals of DCO dismissals and requests for reconsideration submitted by respondents seeking to reverse or modify the SPRB's earlier decision to authorize a formal proceeding.

The SPRB meets approximately every six weeks. Its meetings are not open to the public as the principal purpose of the meetings is consultation with its lawyer, DCO. Neither complainants nor respondents or their respective counsel are afforded in-person access to the SPRB on matters before it. In advance of each meeting, SPRB members receive an agenda that includes materials pertaining to each matter under review. In addition, each member will be assigned one or more specific matters being discussed, together with the complete file pertaining to that matter. That member will report on the matter at the meeting and make a recommendation to either concur with or depart from the department's recommendation. For most matters in investigation that DCO is bringing to the SPRB for consideration, staff will be seeking authority to file a formal complaint and perhaps settlement authority. At times, there are circumstances in which dismissal might be the recommended and/or appropriate outcome. As cases proceed and settlement negotiations undertaken, cases will be brought back to the SPRB for authority regarding settlement.

While the initial investigation determines whether there is probable cause to believe that misconduct has occurred, the Bar's burden of proof in disciplinary proceedings is clear and convincing evidence.<sup>14</sup> On occasion, the SPRB may conclude that, although probable cause might exist that a lawyer committed professional misconduct, this burden of proof cannot be met and dismiss the matter at the investigatory stage. Other times, a dismissal may come about because a respondent successfully argues that the vote to authorize a formal proceeding should be rescinded based upon newly discovered evidence or the application of case law not previously considered.<sup>15</sup>

The SPRB also has the discretion to dismiss a complaint if, considering the facts and circumstances as a whole, the dismissal would further the interests of justice and would not be harmful to the interests of clients or the public. The factors to be considered in determining whether this option is appropriate include the attorney's mental state, whether the misconduct is an isolated event or part of a pattern of misconduct, whether potential or actual injury was caused by the attorney's misconduct, whether the attorney fully cooperated in the investigation, and whether the attorney has been previously admonished or disciplined for misconduct.<sup>16</sup> DCO communicates the SPRB's decisions to the complainant and the

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<sup>13</sup> BR 2.3(a).

<sup>14</sup> BR 5.2.

<sup>15</sup> BR 2.6(d)(2) sets forth the circumstances under which the SPRB may rescind a decision to file a formal complaint.

<sup>16</sup> BR 2.6(e)(3).

respondent.

The SPRB has the discretion to reconsider a prior decisions based upon newly discovered evidence upon a majority vote. Rescission of a vote to authorize a formal proceeding may be made when good cause exists, defined as either new evidence that clearly would have affected the decision to file the formal complaint or the application of legal authority not previously known to the SPRB that demonstrates the decision to file was erroneous.<sup>17</sup>

Another alternative available to the SPRB is referral of the attorney to the State Lawyer's Assistance Committee (SLAC), a statewide committee with powers and responsibilities that have little parallel in other jurisdictions. Lawyers impaired in their ability to competently represent their clients due to substance use or mental health issues may be candidates for a SLAC referral. Lawyers referred to SLAC are mandated to cooperate with what SLAC recommends,<sup>18</sup> which might include a combination of treatment, counseling, random drug or alcohol screens, participation in a twelve-step type program, or regular meetings with an attorney monitor. At times, SLAC may refer a lawyer to DCO if the lawyer has failed to comply with SLAC's requirements. At that point, the lawyer may be subject to discipline for the noncooperation with SLAC. As a separate matter, if the lawyer has become incapable of handling his/her/their practice, DCO may seek an involuntary transfer of that lawyer to inactive status – one of the special proceedings discussed further below.

### **Formal Complaints**

Once authorized by the SPRB, DCO files formal complaints with the Disciplinary Board Clerk and may incorporate several individual matters in a single proceeding, reciting as to each a succinct description of the acts or omissions of the lawyer and an identification of the disciplinary rules alleged to be violated.<sup>19</sup> A respondent has 14 days in which to file a response after being served.<sup>20</sup> The response cannot be a general denial; it must address the allegations made in the formal complaint.<sup>21</sup> Amendments of both the complaint and the response are permitted, subject to any time constraints that may be imposed as a pretrial matter by the Disciplinary Board Adjudicator.<sup>22</sup>

Seventy-five to eighty percent of cases that are authorized for prosecution are resolved without a trial. For cases that involve minor misconduct for which the facts are fully developed at an early stage, DCO may seek settlement authority from the SPRB at the same time it authorizes a formal proceeding. Other cases require further discovery once the proceeding has been filed in order for both sides to have a better understanding of a likely outcome,

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<sup>17</sup> BR 2.6(e)(2).

<sup>18</sup> RPC 8.1(c).

<sup>19</sup> BR 4.1(c).

<sup>20</sup> BR 4.3(a).

<sup>21</sup> BR 4.3(c).

<sup>22</sup> BR 4.4(b).

which will positively impact the ability to obtain a negotiated resolution. Discovery may include depositions, document production, issuance of subpoenas, and usage of requests for admission.

In assessing an appropriate sanction for settlement purposes, the SPRB looks to the *ABA Standards for Imposing Lawyer Sanctions* (ABA Standards) and to existing Oregon precedent for comparable misconduct. The ABA Standards establish a framework for analyzing the misconduct in relation to the available sanctions, taking into account which ethical duty is violated, the lawyer’s mental state, the actual or potential injury caused by the lawyer’s misconduct, and the existence of aggravating and mitigating circumstances.

### **Role of the Disciplinary Board**

Cases tried are heard by a three-member panel of the Disciplinary Board (“trial panel”), consisting of the Adjudicator who is appointed by the Supreme Court, along with one lawyer and one public member from the region where the respondent practices. Members of the Disciplinary Board are appointed by the Supreme Court<sup>23</sup> on the basis of geographical region. They serve three-year terms and may be reappointed. Lawyer members must have been admitted to practice in Oregon at least three years prior to their appointment. Each region includes a number of non-attorney members, the total number of which differs in different regions, because the number of Disciplinary Board members varies depending on the size of the lawyer population in their region.

With regards to the Adjudicator, that position was established effective January 1, 2018. The Adjudicator is appointed by the Supreme Court who chairs every trial panel in which he/she/they is not disqualified for cause or otherwise unavailable and preside over various special proceedings. The Adjudicator rules on any pre-trial matters, all evidentiary issues at trial, writes the trial panel opinion (assuming it is unanimous or he/she/they are in the majority) and presides over certain special proceedings as provided for the in the Bar Rules of Procedure.

Once assigned to a formal proceeding that is scheduled for hearing, trial panels are provided with a trial memorandum seven days before the hearing that sets forth the contested issues and applicable legal authority. Evidence is taken without strict adherence to the rules of evidence and, in most instances, includes not only evidence as to the factual allegations in the formal complaint, but any evidence offered regarding the appropriate sanction.<sup>24</sup> Hearings are court-reported so that a transcript can be produced in the event of an appeal. The panel is required to issue a written opinion within twenty-eight days of conclusion of the hearing, the settlement of the transcript, or the filing of post-hearing briefs, if any.

Unlike the SPRB, the Disciplinary Board cannot issue an admonition. Although

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<sup>23</sup> BR 2.4(a).

<sup>24</sup> BR 5.1, 5.7.

imposition of a stayed suspension is an available sanction,<sup>25</sup> the Supreme Court has disfavored its imposition, stating that it will not force the parties into a probation that has not been mutually agreed upon.<sup>26</sup> Like the SPRB, the Disciplinary Board looks to the ABA Standards and to existing Oregon case law in determining the appropriate sanction in cases where misconduct is found.

### **Appeals**

Either the Bar or the respondent may appeal a Disciplinary Board decision. The deadline for giving notice of seeking the Oregon Supreme Court's review of a trial panel opinion is 30 days after the Disciplinary Board Clerk has acknowledged receipt of the trial panel opinion. The SPRB determines whether an appeal or cross-appeal will be filed on behalf of the Bar. DCO files appellate briefs and argues the cases before the Supreme Court, which reviews disciplinary matters *de novo*, with the ability to adopt, modify, or reject the Disciplinary Board's decision, in whole or in part. In a typical year, the Oregon Supreme Court will issue four to six disciplinary opinions.

### **Special Proceedings**

There are several other types of proceedings in which DCO is the moving party. For example, in circumstances where the lawyer's continued practice will or is likely to result in substantial harm to any person or the public at large, DCO may petition the Adjudicator to secure an interim suspension of the lawyer's license pending adjudication of formal disciplinary charges.<sup>27</sup> This remedy might be sought when, for example, DCO has evidence that a lawyer has stolen or dishonestly converted client funds, engaged in serious criminal conduct, such as forgery or other felonies, or has abandoned his/her/their practice. In conjunction with seeking an interim suspension, it may also be necessary or advisable to seek the appointment of a custodian to take over the lawyer's practice in order to protect the interests of other clients. DCO may pursue an interim suspension at any time when it has evidence sufficient to establish probable cause of one or more rules of professional conduct or the Bar Act, and reasonably believes that clients or others will suffer immediate and irreparable harm by the attorney's continued practice.

Another circumstance that calls for a rapid response is when a lawyer appears to be incapacitated, either as a result of an adjudication, the entry of an order in a protective proceeding seeking the appointment of a fiduciary, or the lawyer is disabled from continuing to practice law by reason of a personality disorder, mental infirmity or illness, diminished capacity, or addiction to drugs, narcotics or intoxicants. In that circumstance, the Bar can file a petition with the Oregon Supreme Court, seeking that the lawyer be placed on involuntary inactive status, or seeking a determination as to the lawyer's fitness to practice.<sup>28</sup> The court may

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<sup>25</sup> BR 6.1(a)(iv).

<sup>26</sup> See *In re Obert*, 336 Or 640, 89 P3d 1173 (2004).

<sup>27</sup> BR 3.1.

<sup>28</sup> BR 3.2.

either act on the petition itself, or refer the matter to the Adjudicator to hear the petition and act with all the powers of the court. As in the case of an adjudication of incapacity,<sup>29</sup> the court may ultimately enter an order placing the lawyer on an involuntary inactive status. Any disciplinary proceeding that may be pending at the time a lawyer is placed on involuntary inactive status is held in abeyance until further order of the court.<sup>30</sup>

Specific procedures apply when a lawyer is convicted in any jurisdiction of a misdemeanor that may involve moral turpitude or a felony. In this setting, a “conviction” occurs upon the entry of a plea of guilty or no contest or upon the entry of a finding or verdict of guilty.<sup>31</sup> DCO will determine whether to seek an immediate suspension based upon the conviction. DCO can petition for an interlocutory suspension based upon the conviction if it has been determined that immediate and irreparable harm to the attorney’s clients or the public is likely to result if a suspension is not ordered. In such situations, DCO petitions the Disciplinary Board, providing copies of the documents that evidence the conviction, and requests that the lawyer be suspended. The lawyer is notified and has 14 days to submit any written material the lawyer wishes the board to consider in determining whether to suspend the lawyer.<sup>32</sup> If the lawyer answers and opposes the suspension, the matter proceeds to a hearing before the Adjudicator.<sup>33</sup> Once the Adjudicator issues his/her/their opinion, either side may appeal the decision to the Supreme Court.<sup>34</sup>

An Oregon lawyer licensed in another jurisdiction who receives notice that a disciplinary proceeding has been commenced against the lawyer in any other jurisdiction is required to report that occurrence in writing to DCO within 30 days of receiving notice of the event.<sup>35</sup> Often, DCO learns of the issuance of a disciplinary judgment against an Oregon lawyer directly from the other state because that state is aware of the dual licensure. For purposes of reciprocal discipline, a plea of no contest, a stipulation for discipline, or a resignation while formal charges are pending are considered a judgment or order of discipline.<sup>36</sup>

DCO will determine what sanction should be sought against the lawyer based upon the other jurisdiction’s discipline. The attorney can raise a due process argument about the other jurisdiction’s procedure or make an argument as to why he or she should not be disciplined; the lawyer cannot re-litigate the facts underlying the other state’s disciplinary judgment.<sup>37</sup> The Adjudicator will make the initial determination of whether the matter can be decided based upon the pleadings or an evidentiary hearing should take place. A rebuttable presumption exists that would impose a sanction equivalent, to the extent

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<sup>29</sup> BR 3.2(a)(1).

<sup>30</sup> BR 3.2(c)(4).

<sup>31</sup> BR 3.4(a).

<sup>32</sup> BR 3.4(b).

<sup>33</sup> BR 3.4(d).

<sup>34</sup> BR 3.4(i).

<sup>35</sup> RPC 8.1(b).

<sup>36</sup> BR 3.5(a).

<sup>37</sup> BR 3.5(c).

reasonably practicable, to the sanction imposed in the other jurisdiction; however, DCO may give notice of an intention to seek more with a justification for such a request; and, on appeal, the Oregon Supreme Court retains discretion to impose what the court deems appropriate.

### Reinstatements

When a lawyer's license is suspended for any reason, he or she must go through a reinstatement process the extensiveness of which varies depending upon the length of and reason for the suspension. For any disciplinary suspension exceeding six months in length, formal reinstatement is required.<sup>38</sup> The lawyer, in that circumstance, carries the burden of establishing that he/she/they have good moral character and general fitness to practice law and that the resumption of the practice of law will not be detrimental to the administration of justice or the public interest.<sup>39</sup> The reinstatement application itself seeks information pertaining to any history of litigation, criminal conduct, and the lawyer's general fitness. DCO will do both background checks and follow up on any issues raised by the application. Notice of the filing of the application is posted on the OSB website for a period of 30 days.<sup>40</sup> At the conclusion of that investigation, a recommendation in favor or against reinstatement is made to the Bar's Chief Executive Officer. When the recommendation is not favorable, it is referred to the OSB Board of Governors, which votes whether to recommend in favor or against reinstatement to the Oregon Supreme Court.<sup>41</sup> When the recommendation is that reinstatement should be denied, the applicant may petition the court within 28 days to review the matter.<sup>42</sup> The court may refer the petition to the Disciplinary Board for a character and fitness hearing.<sup>43</sup>

If the court refers the matter to the Disciplinary Board for a character and fitness hearing, the Bar files a statement of objections regarding the applicant's reinstatement.<sup>44</sup>

At a hearing, the applicant carries the ultimate burden of proof to establish good moral character and general fitness to practice law; but the Bar initially has the burden of producing evidence in support of its position that the applicant should not be readmitted to the practice of law.<sup>45</sup>

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<sup>38</sup> BR 8.1. Informal reinstatement pursuant to BR 8.2 pertains to shorter periods of disciplinary suspension and various types of suspension that are not disciplinary – such as a failure to pay Bar dues or to comply with MCLE requirements.

<sup>39</sup> BR 8.1(b).

<sup>40</sup> BR 8.1(e).

<sup>41</sup> BR 8.1(e).

<sup>42</sup> BR 8.8(a).

<sup>43</sup> BR 8.8(b).

<sup>44</sup> BR 8.9.

<sup>45</sup> BR 8.12, BR 8.13.





**365 Or. 793  
453 P.3d 529**

**IN RE Complaint as to the CONDUCT OF Eric J. NISLEY, OSB No. 951049, Respondent.**

**SC S066100**

**Supreme Court of Oregon, En Banc.**

**Argued and submitted May 6, 2019.  
December 12, 2019**

Lawrence Matasar, Lawrence Matasar, PC, Portland, argued the cause and filed the briefs for respondent.

Susan R. Cournoyer, Assistant Disciplinary Counsel, Tigard, argued the cause and filed the brief for the Oregon State Bar.

PER CURIAM

[365 Or. 794]

In this lawyer disciplinary proceeding, the Oregon State Bar alleged that respondent knowingly made six false and material statements to the Bar during an investigation into possible misconduct, in violation of Rule of Professional Conduct (RPC) 8.1(a)(1). A trial panel determined that respondent had made one such false statement, and it imposed a one-month suspension. Respondent requested review and seeks dismissal; the Bar counters that it proved all its allegations and requests a six-month suspension. On *de novo* review, we conclude that respondent made four false statements, and we suspend him from the practice of law for 60 days.

## I. FACTS AND PROCEDURAL BACKGROUND

Respondent is the District Attorney (DA) for Wasco County, having served since 1999. In 2014, he initiated an investigation involving potentially unlawful conduct by one or more county officials, including the county's then-finance manager, Morris. Respondent later was accused by the county's counsel of violating a conflict of interest rule in connection

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with that investigation. In responding to an ensuing Bar inquiry, respondent made six statements that the Bar later alleged had been false. Although the Bar's false statement allegations—not the earlier-reported conflict—of—interest accusation—are at issue here, a description of the underlying events that led to the statements is necessary to put them in context. We take the facts set out below from the record.

### A. *Underlying Events*

The first underlying event occurred in 2011 and had involved inappropriate conduct by respondent toward Morris. At that time, respondent was serving as both Wasco County Counsel and DA. While he and Morris were attending a conference, they had gathered with others in the evening in a hotel lounge. Respondent—who was very intoxicated—directly propositioned Morris, and she refused. Respondent passed out shortly thereafter. He was embarrassed about the incident and apologized to Morris not long afterwards, and she accepted his apology. Morris told her supervisor, Stone,

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who was the county's Administrative Officer, about the incident, but she declined the opportunity to pursue any action. The record otherwise does not reflect any further activity in connection with that incident, although Morris stated in an affidavit that, since then, respondent had engaged in other nonsexual, "but intimidating," behavior toward her, without elaboration. Respondent and Morris both continued to work for the county, in the same building.

The second underlying event involved an investigation that respondent initiated three years later, in his capacity as DA, again involving Morris.<sup>1</sup> In 2014, a local official asked respondent to check into a disbursement of county funds that Morris had made—specifically, two cash payments totaling \$360 made to an intern, Davila, which Morris had treated as permissible advance salary draws. Unbeknownst to the inquiring official, or to respondent until much later, the payments apparently had been expressly authorized at the time by Stone. And, as will be seen, a key aspect of the parties' dispute involves the extent to which respondent focused on Morris during the investigation.

When initially told about the cash payments, respondent commented to the inquiring official that Morris would not have made them without Stone's authorization. He nonetheless thought that the payments were problematic, and, because the conduct involved another county official, he asked the Oregon State Police (OSP) to investigate. In doing so, he stated that an apparent unlawful loan of county funds—possibly amounting to official misconduct—had been made by Morris to Davila, with no mention of Stone. Shortly thereafter, in an effort to preserve evidence, respondent secured a subpoena *duces tecum* that granted him access to a large number of emails between Stone and others, including Morris and Davila.

OSP referred respondent to the Oregon Department of Justice (DOJ), and respondent then submitted a similar investigation request to DOJ. DOJ's memorializing intake form and case note stated that respondent had requested

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"the investigation \*\*\* of \*\*\* Morris";<sup>2</sup> mentioned no other county official; and noted a possible statutory violation. DOJ opened a case in December and assigned an investigator, Culley, and an Assistant Attorney General, Benson. Based generally on the nature of respondent's initial request, DOJ's intake form identified Morris as the "subject."

Culley began contacting witnesses, and Stone sent him documentation, spoke with him by phone, and was interviewed by him and Benson. Stone's documentation showed that Morris recently had explained the cash payments to him as permissible salary draws under the county employees' union bargaining agreement. Stone also told Culley that cash advances were a local practice and that he was not concerned about the allegations. And, Stone told Culley and Benson about the

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2011 incident between respondent and Morris, and he commented that respondent's current actions were "axe grinding" against her. Culley and Benson also interviewed Morris, who similarly relied on the bargaining agreement to support the payments. By the end of their witness interviews, Culley and Benson tentatively concluded that the bargaining agreement had permitted the payments and that no improper conduct had occurred. DOJ did not generate a report for a few months, however.

In the meantime, respondent had become increasingly frustrated at the progress and quality of the DOJ investigation, and, beginning in January 2015, he began contacting DOJ with some frequency. In many of those communications, he asked about the status of the "Morris" case—which, as noted, is what DOJ had named its case file based on his initial inquiry. In one email, he wrote that Morris was "in

charge of all the County's finances and appears to have committed a crime"; in others, he wrote that this was a "very serious matter[, involving] not simply an employee draw [but] an illegal loan of taxpayer's funds," and that he was "very concerned" about Morris's conduct and the fact that she continued to work as finance manager with limited oversight. In one of those emails, he also wrote that Morris

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appeared to be concealing information from elected officials; in another, he forwarded information about an earlier cash payment that she apparently had made to a different employee; in yet another, he noted a finding of "discrepancies in the county's cash fund." He also suggested additional persons to interview and stated that, if DOJ declined to investigate, he would do so. After one phone call with respondent, Benson noted that he "wants us to prosecute" Morris. From DOJ's perspective, respondent was exclusively focused on Morris as a wrongdoer.

In February, Benson told respondent that DOJ had determined that it did not appear that DOJ would be able to press criminal charges, citing the bargaining agreement and DOJ's interview information. Respondent disagreed, and he also thought the agreement had not covered an intern, such as Davila. He therefore wrote to Benson's supervisor, Tuttle, in early March, stating that he would complete the investigation locally and requesting that DOJ send its documentation to him.

Later in March, Culley issued a report that concluded that nothing supported the allegation that Morris had committed a crime by disbursing funds under the bargaining agreement.<sup>3</sup> That report identified Morris as a "subject" and Stone as a "witness." Also, Benson wrote a declination of prosecution letter to respondent, explaining that the cash payments had been "legal" under the bargaining agreement and generally mentioning Stone's apparent approval. At this juncture—given the nature of all respondent's communications with DOJ—Culley, Benson, and Tuttle all understood respondent's sole focus in the investigation to have been on Morris, not on Stone or anyone else, and they also thought that respondent wanted them to prosecute Morris.

DOJ then turned its materials over to respondent. When respondent reviewed Culley's report, he concluded that Culley had been biased toward Morris, and he sent Benson an email to that effect. He also decided to interview Davila, which DOJ had not done. That ensuing interview uncovered

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information that was both new and significant to respondent: Davila told him that Stone expressly had approved the cash payments contemporaneously with Morris making them. Respondent thought that that information actually exonerated Morris because she had acted with Stone's permission; he also thought that it implicated Stone.

Meanwhile, Morris had found it difficult to work in the same building as respondent. She discussed her discomfort with lawyers representing the county, who in turn learned about the earlier 2011 incident between Morris and respondent. Concerned that Morris might take action against the county, the Wasco County Counsel, Timmons, asked

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DOJ for its investigatory materials. Tuttle asked respondent for permission to release them, but he initially declined, citing his ongoing investigation. That communication appears to have occurred before he interviewed Davila.

In May, Timmons sent a second materials request to DOJ, and Tuttle again asked respondent whether Morris was still under investigation. Respondent answered that he had not yet completed his work, but

also that "Morris is actually not the suspect in this matter." He elaborated that, following his interview with Davila, Morris had been absolved of wrongdoing. Tuttle responded that she was surprised to hear him deny that Morris was the "suspect" because, in his communications with DOJ, he had focused solely on Morris.

Respondent decided to seek outside review as to whether he should pursue criminal charges arising from the cash payments. In June, he prepared summary materials—which focused on Stone's role in authorizing the payments and his own assessment that the bargaining agreement had not applied—and sent them to another DA for review. That DA agreed with respondent that the payments had not been proper and that the bargaining agreement had not covered Davila. He further recommended, however, against prosecuting Morris or Stone. Respondent thereafter closed his file.

#### *B. Bar's Investigation and Alleged False Statements*

Meanwhile, in May 2015, Timmons had complained to the Bar's Client Assistance Office (CAO). Among other, unrelated allegations, he asserted that respondent had initiated a

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"retaliatory" investigation against Morris, which had involved a "personal interest" conflict of interest under RPC 1.7(a)(2), in light of the 2011 incident.<sup>4</sup> The CAO assessed that Timmons's allegations might have implicated RPC 1.7(a)(2) and also RPC 3.1 (prohibiting frivolous proceedings or actions), and it asked respondent to respond, focusing on those rules and his "alleged retaliatory investigation."

Over the next 10 months, the CAO and, later, the Bar's Disciplinary Counsel Office (DCO), engaged in further written communications with respondent. Respondent wrote four letters to the Bar, two through counsel (both to the CAO), and two while representing himself (both to the DCO). The Bar alleges that, in his first three letters written over a four-month period, respondent knowingly made six false statements that were material to the Bar's investigation. We provide greater detail about those six statements later in this opinion; they can be summarized as follows: (1) Morris had not been the "target" of any investigation, and respondent never had seen her as the "target" (three statements); (2) Morris never had been the "subject" of the investigation (one statement); and (3) respondent had requested a "general investigation" about the cash payments, and his concern had been completing that investigation to determine who had authorized them (two statements).

#### *C. Complaint and Trial Panel Proceeding*

The Bar filed a formal complaint that briefly described the 2011 incident; respondent's investigation of the cash payments, including the nature of his representations to others (particularly DOJ staff) about Morris; and the nature of Timmons's complaint accusing respondent of initiating and pursuing a retaliatory investigation against Morris that had posed a conflict of interest. The Bar alleged that, in response to its inquiries, respondent had denied that he had had any personal-interest conflict related to the investigation "because, he claimed, he had not targeted

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Morris in his investigation" and, in support of that theory, had made the six alleged false statements. The Bar further alleged that each statement had been both false and material to its inquiry, and had been knowingly made, in violation of RPC 8.1(a)(1).<sup>5</sup>

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The matter proceeded to a hearing before a trial panel of the Disciplinary Board. Respondent was represented by counsel;<sup>6</sup> neither Morris nor Stone testified.

In assessing the evidence, the trial panel evaluated respondent's alleged false statements in the three categories identified above: his denials that Morris had been a "target"; his denial that she had been a "subject"; and his assertions about the nature of his investigation. The panel also framed the inquiry in the context of Timmons's initial complaint to the Bar—that is, Timmons had accused respondent of initiating a "retaliatory" investigation against Morris, and respondent thus had responded within that framing, denying that he had acted with any retaliatory motive.

The trial panel addressed the retaliation issue first and found that respondent had not retaliated against Morris; instead, his investigation had been legitimate and nonretaliatory. Turning to the three "target" statements, the panel determined that those statements should be understood to mean that respondent had not "targeted" Morris—that is, he had not viewed her as a "target in retaliation" when he initiated and pursued the investigation. It followed, in the panel's view, that the Bar did not prove that those three statements had been false when made.

The trial panel also determined that the Bar had not proved that respondent's statements about the nature of the investigation had been false. In support, the panel cited respondent's legitimate interest, as the county's DA, in investigating a seemingly improper loan involving county funds and evidence in the record showing how his approach to the investigation had been consistent with his statements.

[365 Or. 801]

The trial panel did determine, however, that respondent knowingly had made a false, material statement when he told the Bar that Morris never had been the "subject" of the investigation. In the panel's view, because the investigation had focused on Morris, she necessarily had been its "subject." For that violation of RPC 8.1(a)(1), the panel imposed a one-month suspension. As noted, both parties seek *de novo* review. See BR 10.6 (setting that standard).

## II. ANALYSIS OF MISCONDUCT ALLEGATIONS

### A. RPC 8.1(a)(1) and Parties' Arguments

RPC 8.1(a)(1) provides that a lawyer, "in connection with a disciplinary matter," shall not "knowingly make a false statement of material fact." The Bar must prove its allegations by clear and convincing evidence, BR 5.2, meaning that the truth of facts asserted is "highly probable," *In re Cohen*, 316 Or. 657, 659, 853 P.2d 286 (1993).

The parties' key dispute involves what respondent meant when he denied that Morris had been a "target" or "subject" of the investigation, and otherwise stated that he had intended to initiate and complete a general investigation into the propriety of, and responsibility for, the cash payments. Respondent contends that the Bar has failed to provide consistent and satisfactory definitions of "target" and "subject," and that it has used those terms—as well as "potential target," "potential subject," "suspect," and "potential suspect"—interchangeably throughout the proceedings. It follows, he argues, that the Bar has failed to prove that his statements were unambiguous or, more importantly, false. The Bar, by contrast, is not as concerned with specific definitions of the identified words; instead, it argues that respondent's focus all along had been Morris and that his statements all sought to create a materially false narrative in responding to the Bar's inquiries about possible misconduct involving a conflict of interest.

### B. Analytical Framework

We begin by clarifying the nature of our inquiry under RPC 8.1(a)(1). That rule was adopted in 2005 as part of the then-new Oregon Rules of Professional Conduct. The

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former Oregon Code of Professional Responsibility had no companion rule for false

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statements made in connection with a disciplinary matter; instead, such statements were addressed under the general "misrepresentation" rule or other similar rules. See *former* DR 1-102(A)(3), now RPC 8.4(a)(3) (professional misconduct to engage in conduct involving misrepresentation that reflects adversely on the lawyer's fitness to practice law); Oregon Rules of Professional Conduct, Rule 8.1, Comparison to Oregon Code at 32 (2019) (new RPC 8.1(a)(1) replaced *former* DR 1-101, which prohibited false statements during the admission process, "but is broader" because the new rule also applies to any "disciplinary matter");<sup>7</sup> see also, e.g., *In re Worth*, 336 Or. 256, 271-73, 82 P.3d 605 (2003) (evaluating false statement to Bar during investigation under *former* DR 1-102(A)(3)); *In re Huffman*, 331 Or. 209, 13 P.3d 994 (2000) (evaluating false statements to Bar's investigator under *former* DR 1-103(C) (lawyer must respond "fully and truthfully" to Bar's inquiries)).

This court has not yet specifically analyzed a misconduct allegation under RPC 8.1(a)(1).<sup>8</sup> However, the parties appear to agree—as do we—that we should apply the same analysis that we would apply to a false statement allegation under the "misrepresentation" rule, RPC 8.4(a)(3).<sup>9</sup> See generally *In re Merkel*, 341 Or. 142, 151-52, 138 P.3d 847 (2006) (alleged false statement to Bar during investigation analyzed under *former* DR 1-102(A)(3), along with alleged misrepresentation made to opposing counsel). When evaluating an affirmative misrepresentation allegation, this court must answer the following questions: (1) whether the statement at issue was false when it was made; (2) if so, whether the lawyer knew that it was false at that time; (3) if so, whether

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the statement was material and whether the lawyer knew that, as well. See *In re Fitzhenry*, 343 Or. 86, 104, 162 P.3d 260 (2007) (applying that analysis under *former* DR 1-102 (A)(3)); *In re Brandt/Griffin*, 331 Or. 113, 139-41, 10 P.3d 906 (2000) (same, in case applying *former* DR 1-102(A)(3) to false statement made during Bar investigation); *In re Gustafson*, 327 Or. 636, 648-49, 968 P.2d 367 (1998) (explaining knowledge and materiality inquiries). A statement is material if it would or could have influenced the decision-making process significantly—specifically in the context of RPC 8.1 (a)(1), whether it would or could have influenced the Bar in its decision-making about a disciplinary matter. See generally *In re Eadie*, 333 Or. 42, 53, 36 P.3d 468 (2001) (stating general standard); see also *Worth*, 336 Or. at 273, 82 P.3d 605 (misrepresentation to Bar could have affected evaluation of misconduct allegations); *Brandt/Griffin*, 331 Or. at 141, 10 P.3d 906 (misstatements were material to Bar's inquiry because they affected the assessment whether to formally investigate).

This case primarily concerns the first question set out above: whether the six statements that respondent made to the Bar were false when he made them. It also presents a question about the potentially ambiguous nature of words that respondent used, specifically, "target" and "subject." As discussed next, our case law provides a framework for analyzing allegedly false, but ambiguous statements.

The key case is *Merkel*, 341 Or. 142, 138 P.3d 847. There, a lawyer had written to opposing counsel that an arbitrator had "cleared" having certain witnesses testify by telephone. In fact, the arbitrator had told the lawyer that telephone testimony was permissible, so long as opposing counsel did not object. *Id.* at 145, 138 P.3d 847. The Bar

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alleged a violation under the misrepresentation rule, *former* DR 1-102(A)(3), arguing that the lawyer had knowingly created the false impression that "the issue was a 'fait accompli.'" *Id.* at 149, 138 P.3d 847. This court explained that the word "cleared," as the lawyer had used it, was ambiguous because it

could have been understood in more than one way: either the arbitrator had authorized the telephone testimony (as the Bar had argued), or the arbitrator had been amenable to telephone testimony, but had not expressly authorized it (as the lawyer had argued). The court then explained that the lawyer's statement must be

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viewed in the context in which it had been made and that, in examining the evidence, the court may consider the relative strength of the competing inferences that the ambiguous word ("cleared") could have created. *Id.* ; see also *In re Phelps*, 306 Or. 508, 513, 760 P.2d 1331 (1988) (Bar may satisfy its burden in proving misconduct if the court draws necessary supporting inferences from the evidence). Further, in determining which of two competing inferences the lawyer likely had intended to convey, the court may examine all the circumstances surrounding the statement. *Merkel*, 341 Or. at 150, 138 P.3d 847. Ultimately, a majority of the court concluded that the record did not support the inference on which the Bar had relied—that the lawyer knowingly had conveyed to opposing counsel that the arbitrator had authorized the telephone testimony. *Id.* at 150-51, 138 P.3d 847.<sup>10</sup>

Applying that framework here, we first identify the competing inferences that could be drawn from respondent's alleged false statements, namely his statements denying that Morris had been a "target" or a "subject" of the investigation. Respondent asserts that he used those words in a narrow way—primarily, with "target" meaning that he had not been *retaliating* against Morris (*i.e.*, he had not "targeted" her), and "subject" meaning a person likely to have committed criminal conduct *after* the assessment of facts gathered during an investigation (*i.e.*, not a person merely involved in the underlying facts of a potential crime). It follows, he continues, that his statements were true, because the record shows that (1) he had not initiated any retaliatory investigation against Morris; and; (2) once all the investigatory facts had been gathered and assessed, it had become clear that she had engaged in no wrongdoing. Respondent also argues that, although Morris's *conduct* was a subject of investigation, she *herself* was not its focus, and so all his

[365 Or. 805]

statements—including those about the general nature of the investigation—were true.

The Bar disagrees that respondent's statements had sought to counter the notion of any "retaliatory" investigation or otherwise utilize narrow definitions of "target" or "subject." Instead, the Bar asserts, respondent intended more colloquial, and interchangeable, meanings of those words, intending to convey (falsely) that Morris had not been the focus of the investigation at all. His underlying goal, the Bar continues, was to deflect the Bar's attention away from his focus on Morris, which in turn would have undercut any theory that he might have had a personal-interest conflict.

To determine the intended meaning of respondent's statements, we must assess the strengths of the competing inferences just summarized, by examining each statement, the context in which each statement was made, and other relevant evidence in the record. *Merkel*, 341 Or. at 149-51, 138 P.3d 847 ; see also *In re Lawrence*, 337 Or. 450, 469, 98 P.3d 366 (2004) (rejecting lawyer's proposed meaning of her statement as implausible, based on evidence in the record). We then must determine whether the Bar proved—by clear and convincing evidence—whether each statement was knowingly false

[453 P.3d 537]

and material when respondent made it. As explained below, we conclude that the Bar proved its allegations as to four of the statements.

### C. Evaluation of Alleged False Statements

#### 1. Initial accusation and inquiry, and respondent's first letter

We begin by reiterating the nature of Timmons's initial complaint to the Bar. He recounted details of the 2011 incident and alleged that, since then, respondent had engaged in what Morris had characterized as "intimidating behavior toward her in retaliation for her refusal [of his proposition of her] and her reporting of the incident to [her supervisor, Stone]."<sup>11</sup> He then wrote that, in Morris's view, the investigation of the cash payments had been "retaliatory." Finally,

[365 Or. 806]

he surmised that the described conduct had amounted to a personal-interest conflict under RPC 1.7(a)(2), defined as the existence of a "significant risk" that the representation of a client (here, the county) would be "materially limited by \*\*\* a personal interest of the lawyer[.]"

In its own initial letter to respondent, the CAO asked him to address the "alleged retaliatory investigation" against Morris as well as RPC 1.7(a)(2) and also RPC 3.1 (prohibiting frivolous proceedings or actions). That is, the CAO's first communication with respondent framed the key inquiry as whether respondent had engaged in a "retaliatory investigation" that had violated conflict—of—interest or meritless—claim rules.

Consistently with that framing, respondent's first letter included a section entitled, "[Respondent] Did Not Open a Retaliatory Investigation Against Ms. Morris." There, he wrote that he had opened an investigation into the potential misuse of public funds and learned through that investigation that Stone had approved the cash payments. He then described the DOJ referral and recounted that DOJ had interviewed Stone, concluded that the bargaining agreement had permitted the payments, and closed its investigation. He next explained his continued investigation, including confirming that the bargaining agreement had not covered Davila. He wrote that "[t]he focus of the investigation was the misuse of public funds generally and [ ] Stone in particular[.]" and that he never had sought an interview of Morris. In concluding that section's factual summary, he made the first alleged false statement:

"[Respondent] never saw Ms. Morris as a target of the investigation and, in fact, believes Ms. Morris is not responsible for any impropriety regarding the [cash payments] because Mr. Stone (and not Ms. Morris) authorized them."

In a later section analyzing the conflict—of—interest rule, respondent reiterated that Timmons had accused him of "retaliation"; he then made the second alleged false statement:

"The simple answer to Mr. Timmons'[s] contention is that Ms. Morris was never the subject of [respondent's] investigation."

[365 Or. 807]

He followed that sentence with specific examples about the investigation's "scope," purporting to show how Morris had not been the subject—including the earlier subpoena *duces tecum* that had focused on Stone and the fact that he never had interviewed Morris.

We understand much of respondent's first letter to argue that the investigation, *in fact*, had not been retaliatory—which was understandable, given that Timmons had asserted as much and the CAO had framed its initial inquiry in that manner. Respondent's proffered meaning of his first statement—that he never had seen Morris as a "target" *in retaliation*—logically fits within that framing. As noted, his first statement appeared at the end of the factual summary of a section of his letter entitled, "[Respondent] Did Not Open a Retaliatory Investigation Against Ms. Morris[.]" *i.e.*, asserting that he *in fact* had not



initiated and pursued a retaliatory investigation. In that context, respondent plausibly used the word "target" to mean that he had neither "targeted" nor sought to retaliate against Morris. We acknowledge, as the Bar

[453 P.3d 538]

points out, that other aspects of respondent's first letter arguably support the Bar's argument that "target" actually meant "focus."<sup>12</sup> But we do not think that that contrary inference—when viewed in the context of the first statement—is supported by clear and convincing evidence.<sup>13</sup>

[365 Or. 808]

We reach a different conclusion as to respondent's second statement—that the "simple answer" to Timmons's "retaliation" contention was that Morris "was never the subject" of respondent's investigation. Notably, respondent offered that statement to make a different point from his first statement: rather than trying to show that the investigation *in fact* had not been retaliatory against Morris, his second statement was offered to show the investigation *could not have been* retaliatory because Morris never had been its subject. As noted earlier, he proffers the inference that he had used "subject" in the narrow sense—meaning a person whom an investigation reveals has likely committed a crime. As to Morris, he asserts that her *conduct* in making the cash payments had been the focus of the investigation, but she herself never had become its "subject" because the investigation ultimately exonerated her, and his denial in that regard therefore had been true. The Bar counters with a different inference: In denying that Morris ever had been the "subject," respondent meant to convey that his investigation never had focused on Morris at all (such that no conflict of interest could have existed).

The context surrounding respondent's second statement supports the Bar's proffered inference, not respondent's. As noted, immediately after making that statement, respondent pointed to the "scope" of his investigation, describing a subpoena focused on Stone and no interview of Morris. That supporting explanation shows that, rather than seeking to clarify that he simply had not uncovered sufficient evidence to establish that Morris likely had committed a crime, respondent was trying to deflect the Bar's attention away from his focus on Morris as the potential wrongdoer. Relatedly, earlier, his letter had created the false impression that he had learned shortly after initiating the investigation that Stone had approved the cash payments—thereby suggesting that Stone, not Morris, had been identified as responsible from early on. In fact, he did not learn about Stone's express, contemporaneous approval until after the DOJ investigation had ended. In sum, the context surrounding respondent's second statement supports the inference that, in denying that Morris had been the "subject" of the investigation, he had intended to convey that she had not been its focus (and,

[365 Or. 809]

therefore, that the investigation could not have been retaliatory, thus implicating the conflict—of—interest rule).

The record also shows that respondent's second statement was false, and knowingly so, when made: During the investigation—and certainly throughout DOJ's involvement—respondent had presented Morris, and no one else, as the focus and potential wrongdoer. As described, he initially mentioned only Morris (specifically, her conduct) to DOJ, even though he earlier had commented that she would not have made the

[453 P.3d 539]

cash payments without Stone's approval. Then, in multiple communications with DOJ, he inquired about the status of the case in a way that focused on Morris and, more importantly, suggested a sense of urgency about her personally: that she may have engaged in financial malfeasance; that she was still

handling county funds; that she had made a similar cash payment in the past; and that she appeared to be concealing information from officials. That is, in addition to Morris's conduct being a focus of the investigation, Morris herself was the exclusive focus of respondent's communications with DOJ, respecting both its investigation and potential identification of a wrongdoer. Respondent's sole focus on Morris continued right up to the point when he learned from Davila that Stone expressly and contemporaneously had authorized the payments.

We additionally conclude that respondent's second statement was material to the Bar's inquiry: If he had been forthcoming about his continuing focus on Morris, that would have affected the Bar's assessment whether the investigation had been retaliatory and, relatedly, whether he had a conflict of interest. And, we agree with the Bar that respondent knew that the issue was significant to the Bar's inquiry. See *generally Lawrence*, 337 Or. at 470, 98 P.3d 366 (from surrounding facts, lawyer had to have known that her misrepresentation by omission had been essential to Bar's assessment whether she had engaged in misconduct); *Worth*, 336 Or. at 273, 82 P.3d 605 (to similar effect).<sup>14</sup>

[365 Or. 810]

## 2. Respondent's second letter

After the CAO received respondent's first letter, it also received additional communications from Timmons, again suggesting that Morris had been a "subject" of the investigation and that a conflict of interest had existed. The CAO asked respondent to address those concerns, and he sent a second letter, through counsel. At the beginning of a section under the heading, "Ms. Morris was not the 'subject' of a criminal investigation," respondent made the third statement that the Bar alleges was false:

"As we explained in our [first letter], [respondent] did not consider Ms. Morris the target of any investigation."

We observe initially that the context for respondent's second letter was different from his first: While much of his first letter had attempted to counter Timmons's accusation that his investigation of Morris *in fact* had been retaliatory, his second letter responded to the Bar's specific question whether Morris had been "a subject" of his investigation—because, if so, his investigation *could* have been retaliatory and thus could have implicated the conflict—of—interest rule. In responding to that specific question, after stating initially that he had not considered Morris a "target," respondent made factual assertions to the following effect: (1) Morris's conduct—specifically, the propriety of the cash payments—but not Morris herself, had been the subject of his investigation; (2) respondent had thought from the outset that she would not have made the payments without Stone's approval and never suspected her of wrongdoing; (3) Stone's acknowledgment of the payments to DOJ showed that Morris had not engaged in unlawful activity; and (4) respondent's focus following the DOJ investigation had been on the applicability of the bargaining agreement, the propriety of the payments generally, and Stone's approval of them. Respondent then denied having taken any steps "to focus the investigation on [ ] Morris" and wrote that, although the investigation prudently had assessed her involvement, "that [did] not mean she was a target—let alone a target for allegedly retaliatory purposes based on something that had happened years before."

[365 Or. 811]

When respondent's second letter is read in its entirety, it is apparent that he intended to convey to the Bar in his third statement that Morris herself had not been the focus of the investigation. Most notably, he again asserted an early belief that Morris

[453 P.3d 540]

would not have acted without Stone's approval, and he again presented a timeline suggesting that he had concluded relatively early on that Morris had not acted unlawfully, when, in fact, he did not draw that conclusion until after DOJ had closed its investigation. We also think his concluding statement to be significant—that the fact that the investigation had assessed Morris's involvement "[did] not mean she was a target—let alone a target for allegedly retaliatory purposes \*\*\*." That statement shows that respondent himself understood that the word "target" could carry two different meanings—both a focus of the investigation and a target in retaliation. That context supports the Bar's proffered inference of what respondent meant in his alleged third false statement: He intended to convey that Morris had not been the focus of his investigation, rather than simply conveying that she had not been a target in retaliation. As explained earlier, the record established that that statement had been false, and, also for reasons discussed earlier, the record further establishes that it had been material to the Bar's inquiry and knowingly made.

### 3. Respondent's third letter

After receiving respondent's second letter, the CAO referred the matter to the DCO, which sought additional information from DOJ. Tuttle provided documentation of six communications between DOJ and respondent, the thrust of which was that—contrary to some of the narrative in his earlier letters—respondent in fact had continually highlighted Morris, and no one else, to DOJ as the focus of the investigation and likely wrongdoer. The CAO sent that documentation to respondent's counsel and requested a response, including as to the discrepancy between respondent's earlier statement that he never had seen Morris as a target and documents showing that he had wanted DOJ to investigate Morris. At some point, respondent became unrepresented, and so he sent the third letter in his own behalf.

[365 Or. 812]

At the outset of his third letter, under the heading, "I did not view Ms. Morris as the target of the investigation," respondent wrote that he had not "target[ed]" Morris and reiterated his initial thought that she would not have made the cash payments without Stone's approval. He then made the fourth alleged false statement:

"[In asking OSP and DOJ to investigate,] [m]y plan was to ask for a general investigation surrounding two seemingly improper loans of public funds."

He added that he had mentioned Morris in his referrals because she had been the person who had made the payments, and he explained that he referred in emails with DOJ to the "Morris case" because that is what DOJ had named the investigation.

Later in his third letter, under the heading, "Verbiage in eMails \*\*\* Does Not Establish Retaliatory Investigation," respondent explained that his communications with DOJ had been motivated by his frustration with the investigation, namely, DOJ's lack of action and its reading of the bargaining agreement. Citing emails in which he had said that Morris "appears to have committed a crime" and that he was concerned about her conduct as finance manager, he made the fifth alleged false statement (emphasized wording):

"In hindsight, I can understand how someone would infer that I saw her as a suspect, but I know what was in my mind at the time[,] and it was *concern about completing this investigation and determining who was responsible for authorizing the improper loans .*"

(Emphasis added.)

Finally, near the end of his third letter, respondent made his sixth and final alleged false statement:

"Ms. Morris was in the stream of an investigation, and was not the target."

He concluded by stating that, although the investigation had involved Morris, "[t]his does not equate to me thinking [that she] was the 'target' of the investigation—I did not have enough information to form an opinion as to who might be the 'target.' "

[365 Or. 813]

We begin with the two "nature of the investigation" statements (fourth and fifth statements). Unlike the three statements already addressed, respondent's fourth and

[453 P.3d 541]

fifth statements do not require that we assess competing inferences; rather, the question is simply whether the Bar proved that those statements were false when made.

As to respondent's fourth statement—that, in asking OSP and DOJ to investigate, he had planned to ask for "a general investigation surrounding two seemingly improper loans of public funds"—the Bar's evidence falls short. It is true that respondent mentioned Morris (and no other official) in both referrals, and that he identified the payments as a potential "unlawful loan." As he argues, though, Morris was the person who made the payments, and he had limited information available at the time about the surrounding circumstances. No supporting evidence supports the notion that—at the time when he made the referrals—he sought to focus on Morris personally, to the exclusion of anyone else, as opposed to investigating her conduct in making the payments to determine whether the payments had been authorized or otherwise permissible.

We reach a contrary conclusion as to respondent's fifth statement—that, in the early 2015 timeframe when he repeatedly communicated with DOJ, his concern had been to complete the investigation and determine who was responsible. As recounted earlier, many of respondent's communications were focused exclusively on Morris, in a way that demonstrated that he sought to convey to DOJ that she alone had engaged in wrongdoing. And, respondent had told DOJ that Culley's report showed bias toward Morris, again showing respondent's focus on Morris as a wrongdoer. Although we do not disagree with respondent that he *also* may have been concerned with completing the investigation and finalizing any assessment about who was responsible, the Bar presented clear and convincing evidence that he had sought to focus DOJ's attention on Morris.<sup>15</sup> And, as

[365 Or. 814]

described earlier, his statement was knowing and material to the Bar's inquiry.

Finally, respondent's sixth statement again used the word "target"—that Morris had been "in the stream of an investigation, [but] was not the target." The surrounding context shows that he did not intend, in that statement, to mean "target in retaliation." Rather, he immediately clarified what he meant, characterizing a "target" as a person about whom sufficient information has been gathered for a decision-maker to assess that the person is, or likely is, the wrongdoer in a given situation.

As to whether his "stream of an investigation, [but] not the target" statement was false, respondent contended that Morris had not been the "target" under his definition. On the one hand, it was not false to say that sufficient information had not pointed to Morris as a wrongdoer. On the other hand, though, by the end of the DOJ investigation, respondent had repeatedly sent DOJ communications that focused on Morris, and no one else, as a wrongdoer. Notably, earlier in his third letter, he wrote that—at the point in time when he had been frustrated with the DOJ investigation—he did "not recall focusing on [ ] Morris's conduct in a singular fashion[.]" and he did not believe that she would have acted without her supervisor's authorization. The difficulty for respondent, though, is that the facts at that juncture did not

bear out either proposition: to the contrary, those aspects of his letter support the Bar's contention that, when respondent ultimately concluded his letter by stating that Morris had been "in the stream of an investigation, [but] was not the target[,]" he intended to falsely convey to the Bar that he had not singularly focused on Morris, when, in fact, he had. As with the other false statements, that statement was knowingly made and material to the Bar's inquiry.

#### D. Summary

In sum, we conclude that the Bar proved that respondent violated BR 8.1(a)(1) —which it charged as a single violation—when he knowingly made four statements to the Bar, in three separate letters over a four-month period, that were false and material to the

[453 P.3d 542]

Bar's inquiry. We turn to the question of the appropriate sanction.

[365 Or. 815]

### III. SANCTION

In determining the appropriate sanction, we refer to the American Bar Association's *Standards for Imposing Lawyer Sanctions* (1991) (amended 1992) (ABA Standards), for guidance. *Lawrence*, 337 Or. at 470, 98 P.3d 366. We first identify the duty violated, respondent's mental state, and the injury caused. *Id.* at 471, 98 P.3d 366. We next assess the appropriate preliminary sanction and determine whether aggravating or mitigating circumstances affect our preliminary assessment. *Id.* Finally, we evaluate applicable case law. *Id.* As noted earlier, the trial panel imposed a one-month suspension (for one false statement); the Bar argues for a six-month suspension (based on six false statements). We conclude, as explained below, that a 60-day suspension is appropriate.

As to the duty violated, when respondent made false statements to the Bar in connection with a disciplinary matter, he violated his duty as a professional to cooperate completely and truthfully within a disciplinary investigation. ABA Standard 7.2; *Lawrence*, 337 Or. at 471, 98 P.3d 366.

As to mental state, we have concluded that, in making four false statements, respondent acted knowingly. See ABA Standards at 7 (act is knowing if engaged in with the "conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result").

As to injury, we agree with the Bar that a lawyer can cause injury to the lawyer disciplinary system when the lawyer is not candid during the investigatory process. See *Lawrence*, 337 Or. at 472, 98 P.3d 366 (lawyer caused injury to the profession when she failed to be truthful with the Bar). In this case, although the Bar ultimately obtained clarifying information from DOJ, it would not have had to do so had respondent been forthcoming in his responses—in that scenario, the Bar more readily could have assessed the validity of Timmons's accusation that respondent had initiated a retaliatory investigation that posed a conflict of interest.

The ABA Standards suggest that the appropriate preliminary sanction is a suspension. See ABA Standard

[365 Or. 816]

7.0 (suspension is appropriate when a lawyer "knowingly engages in conduct that is a violation of a duty owed to the profession").

Turning to aggravating and mitigating circumstances, we agree with the Bar that the following aggravating factors apply: selfish motive, in that respondent sought to avoid any potential negative effects of the Bar’s investigation, ABA Standard 9.22(b); and substantial experience in the practice of law, ABA Standard 9.22(i). We also agree that respondent engaged in a pattern of misconduct, ABA Standard 9.22(c), in that he made multiple false statements over a period of time, although we note that his false statements were essentially repetitive of the same points.<sup>16</sup> The only mitigating factor is no prior record of discipline, ABA Standard 9.32(a).

Finally, we examine our case law. The Bar cites *In re Miles*, 324 Or. 218, 222-23, 923 P.2d 1219 (1996), and related cases, in which this court has emphasized the seriousness with which it views the failure of a lawyer to cooperate with a disciplinary investigation. In *Miles*, the court imposed a 120-day suspension on a lawyer who had failed to respond to the Bar’s inquiries. See also *In re Parker*, 330 Or. 541, 551, 9 P.3d 107 (2000) (failure to cooperate, standing alone, is a serious ethical violation). While the concept of cooperation

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has some applicability here, both *Miles* and *Parker* concerned an utter failure to cooperate, as opposed to cooperation that involved false statements. The court’s discussion in those cases thus does not squarely address the same type of misconduct that occurred here. See

[365 Or. 817]

*Miles*, 324 Or. at 222-23, 923 P.2d 1219 (discussing impact of failure to respond on disciplinary system).<sup>17</sup>

Nonetheless, other cases involving misrepresentations during the disciplinary process do suggest that a suspension is appropriate. Unlike this case, though, other cases also have involved underlying misconduct, resulting in longer suspensions or even disbarment. See, e.g., *Lawrence*, 337 Or. 450, 98 P.3d 366 (90-day suspension for lawyer who concealed details of her contact with alleged victim from both the trial court and the Bar); *Worth*, 336 Or. 256, 82 P.3d 605 (90-day suspension for lawyer who made false statement during Bar investigation but also had neglected client matters and failed to return client property); *Huffman*, 331 Or. 209, 13 P.3d 994 (two-year suspension for lawyer who made false statements about his assets to Bar investigator; lawyer also made misrepresentation in filing motions to waive or defer filing fees and transcript costs); *Brandt/Griffin*, 331 Or. 113, 10 P.3d 906 (12- and 13-month suspensions for lawyers who misrepresented an underlying fact to the Bar, but also failed to avoid making misrepresentations to client, had lack of candor in dealings with client, and failed to avoid conflicts of interest); *In re Leonhardt*, 324 Or. 498, 930 P.2d 844 (1997) (disbarment imposed on former DA convicted of crimes, who also abused grand jury process and made misrepresentations to court, Bar, and others).

Here, the Bar proved only false statements during the Bar’s investigation, not underlying misconduct. Notably, though, respondents misconduct involved making multiple false statements, sent in three responses to an escalating inquiry over an extended period of time. And, although the Bar narrowed its own inquiry in that time—from asking whether respondent had engaged in a retaliatory investigation to asking about the nature of his focus on Morris during the DOJ investigation—respondent essentially repeated the

[365 Or. 818]

same false responses, demonstrating a continuing obstinance toward the Bar’s inquiry.

In making four false statements during the Bar’s investigation, respondent contravened expectations for lawyer conduct, as well as his obligation to the legal profession to respond truthfully during a

disciplinary inquiry. See *In re Hiller*, 298 Or. 526, 534, 694 P.2d 540 (1985) ("A person must be able to trust a lawyer's word[,] as the lawyer should expect his [or her] word to be understood, without having to search for equivocation, hidden meanings, deliberate half-truths or camouflaged escape hatches."). We conclude that the appropriate sanction is a 60-day suspension.

Respondent is suspended from the practice of law for 60 days, commencing 60 days from the date of filing of this decision.

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Notes:

<sup>1</sup> Respondent also continued as the Wasco County Counsel until late 2014.

<sup>2</sup> The intake form and case note also said that respondent had requested the "prosecution" of Morris, but he denies having requested any "prosecution," and no clear and convincing evidence counters that denial.

<sup>3</sup> The report further stated that "[a]ny suggestion that funding the payroll draws in cash is a crime was not supported by this investigation."

<sup>4</sup> Timmons specifically wrote that, since the 2011 incident, Morris perceived that respondent had engaged in intimidating behavior toward her, in retaliation for her rebuffing his proposition and reporting the incident to her supervisor. As discussed later, the trial panel determined that the Bar had not proved that any "retaliatory" investigation had occurred.

<sup>5</sup> The Bar did not allege any violation of the rules pertaining to conflicts of interest or frivolous proceedings.

<sup>6</sup> Respondent's lawyer at the hearing was not the same lawyer who had submitted his first two response letters.

<sup>7</sup> See [https://www.osbar.org/\\_docs/rulesregs/orpc.pdf](https://www.osbar.org/_docs/rulesregs/orpc.pdf) (accessed Dec. 5, 2019).

<sup>8</sup> We have summarily decided two cases in which the Bar alleged violations of RPC 8.1(a)(1) (among other rules), but neither case required any specific analysis. See *In re Kirchoff*, 361 Or. 712, 721, 399 P.3d 453 (2017) (court summarily agreed with trial panel that all allegations had been proved); *In re Roller*, 361 Or. 234, 390 P.3d 1045 (2017) (lawyer did not file opening brief on review).

<sup>9</sup> RPC 8.4(a)(3) provides that "[i]t is professional misconduct for a lawyer to \*\*\* engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law[.]" We note that the final element of that rule—that the conduct reflects adversely on fitness to practice—does not apply to a violation alleged under RPC 8.1(a)(1).

<sup>10</sup> Respondent reads *Merkel* for the proposition that the Bar *cannot* establish misconduct based on ambiguous statements; the Bar similarly cites *Merkel* as holding that misrepresentation *cannot* be established when an ambiguous statement is subject to two equally credible interpretations. Those characterizations are not quite on the mark. More precisely, under *Merkel*, we must evaluate an ambiguous statement by identifying the competing inferred meanings and then determining whether the Bar has proved by clear and convincing evidence that the lawyer intended the Bar's proffered meaning, based on the surrounding context and other evidence in the record. 341 Or. at 149-51, 138 P.3d 847.

<sup>11</sup> As noted, Morris did not testify at the hearing, and the record does not clearly and convincingly show that respondent had engaged in any specific "intimidating behavior" toward her, in the manner described in Timmons's letter.

<sup>12</sup> The Bar emphasizes that respondent made his first statement as part of recounting the investigation in a manner that deflected any focus on Morris. By contrast, in a different part of his letter, he specifically countered Timmons's "retaliation" accusation, pointing out factors tending to show why the 2011 incident had not been retaliatory.

<sup>13</sup> The trial panel similarly concluded that "target" should be understood to mean "target in retaliation"—that is, to deny that respondent in fact had retaliated against Morris. It went on to determine that none of respondent's "target" statements had been false because respondent, in fact, had not initiated and pursued a retaliatory investigation against Morris. We need not take that second analytical step, in light of the Bar's arguments on review. Specifically, the Bar focuses on its proffered meaning of respondent's first statement (which we have rejected) and otherwise emphasizes that it need not prove whether respondent initiated a retaliatory investigation because it never charged him with misconduct of that nature.

We also depart from the trial panel's approach of treating all three of respondent's "target" statements collectively (and all meaning "target in retaliation"). Although we have determined that the Bar failed to prove that respondent's first "target" statement did *not* mean "target in retaliation," we assess his subsequent "target" statements differently.

<sup>14</sup> That is not to say that, had respondent been forthright about his continued focus on Morris, the Bar necessarily would have determined that the investigation *had* been retaliatory. However, accurate information would have allowed the Bar to assess more readily the nature of respondent's focus on Morris and, given that, whether it bore any connection to the 2011 incident, as Timmons had alleged.

<sup>15</sup> We disagree with the trial panel's assessment that respondent's fifth statement could have been false only if respondent had a hidden retaliatory motive beyond the investigation—that is, that the investigation was actually not a "general investigation" but, instead, had been intended to retaliate against Morris.

<sup>16</sup> We decline to apply the following additional aggravating factors urged by the Bar: deceptive practices during the disciplinary process, ABA Standard 9.22(f), and refusal to acknowledge the wrongful nature of misconduct, ABA Standard 9.22(g). The substance of the allegation against respondent is that he acted in a deceptive manner during the disciplinary process and, inferentially, that he refused to acknowledge the wrongful nature of his misconduct in that matter. Thus, considerations arising from those factors are inherent in our determination that he violated RPC 8.1(a)(1). See *In re Maurer*, 364 Or. 190, 204, 431 P.3d 410 (2018) ("wrongful nature of conduct" factor does not apply to lawyers seeking to defend themselves against charges; by contrast, it may apply when a lawyer admits the Bar's factual allegations in nearly all material respects but continues to claim that the conduct was not blameworthy or detrimental).

<sup>17</sup> The Bar also cites cases involving the execution of false documentation. See *In re Wyllie*, 327 Or. 175, 957 P.2d 1222 (1998) (two-year suspension; lawyer had misrepresented his CLE activities in an MCLE report and then lied to the Bar about it); *In re Jacob*, 318 Or. 10, 860 P.2d 811 (1993) (disbarment; lawyer had presented fabricated documents to Bar in response to inquiry); *In re Brown*, 298 Or. 285, 692 P.2d 107 (1984) (two-year suspension; lawyer had knowingly prepared and had client sign a false affidavit, to persuade Bar to drop its investigation). The misconduct involved in those cases does not provide a useful analogy to respondent's false statements in this case.



**367 Or. 236  
476 P.3d 942**

**IN RE Complaint as to the CONDUCT OF Christopher K. SKAGEN, OSB No. 911020, Respondent.**

**SC S066706**

**Supreme Court of Oregon, En Banc.**

**Argued and submitted September 16, 2020.  
November 19, 2020**

Christopher K. Skagen, Wellington, New Zealand, argued the cause and filed the brief on behalf of respondent.

Susan R. Cournoyer, Assistant Disciplinary Counsel, Tigard, argued the cause and filed the briefs on behalf of the Oregon State Bar.

PER CURIAM

[367 Or. 237]

This is a reciprocal discipline review proceeding conducted under Oregon State Bar Rule of Procedure (BR) 3.5. Respondent, Christopher K. Skagen, was licensed to practice law in New Zealand and in Oregon during the years relevant to this proceeding. He was struck from New Zealand's Roll of Barristers and Solicitors by the High Court of New Zealand Wellington Registry (High Court) in August 2016 based on misconduct respecting two clients and his significant disciplinary history. That action was the equivalent of disbarment in Oregon. The Oregon State Bar (the Bar) then petitioned the Bar's Disciplinary Board for reciprocal disbarment, alleging that respondent's misconduct in New Zealand constituted multiple violations of the Oregon Rules of Professional Conduct (RPC). A trial panel of the Disciplinary Board was convened, and the matter went to a hearing in January 2019. The trial panel issued an opinion, concluding that respondent should be reciprocally disbarred in Oregon as

[476 P.3d 944]

a result of his misconduct in New Zealand. Respondent now appeals that decision, which we review *de novo*. ORS 9.536(2) ; BR 10.6. For the reasons set out below, we agree with the trial panel's decision that respondent should now be disbarred in Oregon.

## I. FACTS

### A. Oregon Bar Admission and Prior Oregon Discipline

On *de novo* review, the court finds the following facts. Respondent went to law school in New Zealand but moved to Oregon shortly after graduating. He was admitted to practice law in Oregon in 1991. In the years following, respondent was subject to disciplinary proceedings twice in Oregon. In 2006, he was suspended from the practice of law for one year for failing to maintain unearned fees in trust, failing to account for client funds in his possession, failing to maintain an interest-bearing trust account, engaging in conduct prejudicial to the administration of justice, and failing to cooperate with the Bar's investigation into his conduct.<sup>1</sup> *In re Skagen*, 342 Or. 183, 149 P.3d 1171 (2006).

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In 2008, a trial panel in Oregon found that respondent had committed 22 client trust fund violations in 20 different client matters over a one-year period; the violations were based on his failures to deposit and maintain in trust unearned fees paid in advance. The trial panel suspended respondent from the practice of law for 18 months for that misconduct.<sup>2</sup> *In re Skagen*, 22 D.B. Rptr. 292 (2008).

*B. Reciprocal Discipline in New Zealand*

Respondent moved to New Zealand during the pendency of the second Oregon disciplinary proceeding. In 2008, respondent was subject to reciprocal censure in New Zealand based on the 2006 Oregon discipline matter, and the New Zealand Law Society (equivalent to the Bar in the United States) ordered him to pay approximately NZ\$8,000 in costs. In 2010, respondent applied to renew his membership in the Law Society. Because he had not paid the cost award, he was required to enter into an agreement to make payments on that obligation in the amount of NZ\$150 per month as a condition of his license renewal. He then began practicing law in New Zealand. He made only one of the required monthly payments, but he continued to practice law.

*C. Licensing and Client Representation in New Zealand*

Respondent practiced as a barrister in New Zealand from 2010 to 2011. In February 2011, respondent was retained by client E to represent him in a divorce proceeding. Respondent met with E and advised E that he would charge a lump sum for the work and that E would need to see a solicitor—known as an instructing solicitor—before signing the retainer contract.<sup>3</sup> Following that meeting, respondent sent E an invoice and his terms of engagement. The invoice set out the scope of the work to be performed and required an initial payment in the amount of NZ\$4,100, which was to be half the total fee ultimately due. E paid that amount, and

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respondent deposited it in his private account. The terms of engagement specified that the instructing solicitor would be Kevin Smith. When respondent and E met with Smith, however, they learned that Smith had already discussed the matter with E's wife and, therefore, could not act as E's instructing solicitor. Respondent and E dispute what happened next. E averred that respondent did not answer his emails after that meeting, while respondent claimed that he explained to E that he would have to find a new instructing solicitor before respondent could perform any legal services for him and then did not hear from E again. In any case, E hired another firm to represent him in the matter and, in March 2011, E's new lawyer sent respondent a letter advising respondent

[476 P.3d 945]

that E wished to terminate the representation. That letter also demanded that respondent release E's file, provide an itemized bill for costs and work performed, and refund the unearned part of the fee that E had paid him. Respondent initially promised to repay the fee in full but ultimately informed E that he could not do so because of his precarious financial position. He did not refund the unearned fee.

In April 2011, the New Zealand Law Society Lawyers Complaint Service sent respondent a letter reminding him that he had not fulfilled his obligation to make monthly payments on the 2008 costs award as a condition of his license renewal. The letter noted that licenses must be renewed by July 1, and it warned respondent that, under New Zealand's disciplinary rules, the Law Society may take into account a lawyer's failure to pay when determining whether a lawyer is a "fit and proper person" to hold a license. The letter demanded payment of the entire amount due by May 5, 2011. Respondent did not respond.

In a second letter, dated June 23, 2011, the New Zealand Law Society Fitness for Practice Committee informed respondent that it provisionally had concluded that his failure to respond or to pay constituted "reasonable grounds for declining to renew" his license; it invited him to submit a response.

On June 29, 2011, respondent submitted a response claiming not to have received the first letter and asserting

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that he had failed to pay the amount he owed because he had decided "to place business growth above [his] responsibility to pay [the amount owed] and did not consult the Law Society about that decision." He further explained that he did not believe that nonpayment rendered him unfit as a practitioner and that a finding of unfitness would devastate his prospects for continuing his life as a lawyer. He offered to begin paying NZ\$300 per month beginning in July 2011.

The Fitness Committee responded that it would need to be provided with further financial information, such as bank statements, to satisfy itself that respondent would be able to pay NZ\$300 monthly. Respondent refused to provide that information.

Meanwhile, in May 2011, respondent was hired by client W to represent him in an ongoing divorce proceeding. Respondent sent W the terms of engagement and an invoice for NZ\$6,900, and W paid him that day. Solicitor Smith instructed respondent (that is, provided the referral). Respondent participated in a telephone conference with the court on W's case on June 9, 2011. The court ordered W to provide and serve an affidavit in the case. Respondent sent W an email on June 21 advising the client that he would need more information for an affidavit and that W would need to provide "disclosure to the other side." However, he did not inform W of the date for providing disclosure, nor did he set a time for them to discuss the matter. W provided some information to respondent by email, but he later averred that he did not know what was required of him or when the next hearing would be.

Respondent's license lapsed as of July 1, 2011. The New Zealand Law Society gave respondent until July 19 to pay the amount owed on the cost award and to apply for renewal of the license, which required payment of a fee of NZ\$1,426. Respondent submitted a renewal application, but he did not pay any of the fees or costs.<sup>4</sup>

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Respondent did not inform W that his license had lapsed. He did, however, inform Solicitor Smith of that fact in mid-July. Respondent also told Smith that he had prepared the affidavit required by the court and due before a July 21 hearing. Smith refused to permit respondent to file the affidavit. Instead, Smith asked respondent to immediately return all outstanding client files to him, which respondent did. Smith reported to the court and opposing counsel on July 20 that respondent's license had lapsed and that W would need time to obtain alternative counsel. The court conducted a telephone conference on July 21, at the conclusion of which the court ordered W to pay costs of

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NZ\$800 for the failure to timely file the affidavit. The court advised W to seek to recover that cost award from respondent. Thereafter, W spoke to respondent by telephone; respondent told W that he could not pay the NZ\$800 or refund even part of the NZ\$6,900 advance fee, because he was "broke."

*D. New Zealand Disciplinary Proceedings*

*1. Investigation and charges by the New Zealand standards committee*

Clients E and W complained to the New Zealand Law Society about respondent's conduct, and the Wellington Branch Standards Committee (Standards Committee) was charged with investigating the complaints and deciding whether to bring formal charges. Respondent was informed of and participated in the investigation. The Standards Committee investigator requested documents relevant to the complaints, including, among other things, various financial records. Respondent provided some of the requested documents, but he declined to provide his financial records. The Standards Committee invited respondent to submit any materials he wanted the committee to consider in deciding whether the case should be forwarded to the New Zealand Lawyers and Conveyancers Disciplinary Tribunal (Disciplinary Tribunal or tribunal).

In June 2013, the Standards Committee charged respondent with 12 rule violations related to the two client complaints and to his failure to cooperate with the Standards

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Committee investigation.<sup>5</sup> The charges were accompanied by five affidavits, including affidavits from clients E and W and the investigator, as well as a "Bundle of Documents"—documents relevant to the investigation—which included, among other things, correspondence between respondent and E and W and their new lawyers, respondent's written responses to the complaints and to the investigator, notices of hearings before the Standards Committee, and notices of determinations of the Standards Committee.

Respondent had returned to the United States in February 2013 without updating his contact information. As a result, the authorities could not find or serve him with the charges and supporting documents. In October 2013, respondent was served by substitute electronic service (by email). Respondent acknowledged receiving that substitute service and filed a response in November 2014. The matter then came before the Disciplinary Tribunal.

*2 Proceedings before the New Zealand Disciplinary Tribunal*

In January 2014, the Disciplinary Tribunal conducted a telephone conference to discuss procedures for the hearing. Respondent stated that he would not be returning to New Zealand and, therefore, would not be able to participate in person at the hearing. The chair of the Disciplinary Tribunal informed respondent that he would be required to appear personally if he wished to participate in the hearing and that the hearing would go forward without him if he were not present. The Disciplinary Tribunal's counsel then proposed that the parties proceed on the written record because there did not appear to be any material facts in dispute or credibility determinations to be made. As the tribunal's counsel later testified in the Oregon disciplinary proceeding, respondent seemed receptive to that idea, and the chair set the matter for hearing on that basis. Respondent did not file a motion or application for permission to appear remotely, nor did he request to reschedule the hearing until a time when he could be present. Respondent and the Standards Committee each provided written submissions, and the Disciplinary Tribunal conducted a brief hearing in November 2014. The Disciplinary Tribunal

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considered the charges against respondent and both parties' submissions under a "balance of probabilities" standard of proof. New Zealand Lawyers and Conveyancers Act (NZLCA) 2006 § 241. On December 9, 2014, it issued an opinion finding that the Standards Committee had proved all the charged disciplinary rule violations, and it struck respondent from the Roll.

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### 3. *Appeal to the New Zealand High Court*

Respondent appealed the Disciplinary Tribunal decision to the High Court in January 2015. Under the applicable statute, the High Court hears appeals in disciplinary proceedings as a rehearing; parties are permitted to introduce new evidence and make new arguments. NZLCA § 253(3). The High Court reaches its own decision on the merits and owes no deference to the Disciplinary Tribunal's findings. It may confirm, reverse, or modify the Disciplinary Tribunal's decision. NZLCA § 253(4).

Respondent submitted multiple pleadings to the High Court addressing various issues. He also submitted new evidence, including affidavits concerning, among other things, his health, residency, and financial condition. During the pendency of the appeal, respondent returned to New Zealand.

In January 2016, the parties submitted briefs on the merits. In his written submissions, respondent challenged the Disciplinary Tribunal's conclusion that his conduct violated the disciplinary rules. In addition, he claimed that the Disciplinary Tribunal had deprived him of "natural justice"—which, the parties agree, is essentially equivalent to due process in this country—in three ways: (1) by denying him the opportunity to appear at the hearing by telephone; (2) by failing to consider his challenge to one of the Disciplinary Tribunal panel members; and (3) by considering the issue of the appropriate sanction notwithstanding that he had not briefed that matter in his written submissions. At a substantive hearing on respondent's appeal, at which respondent was present and participated, the High Court discussed respondent's natural justice arguments

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and later permitted the parties to submit further affidavits. Both respondent and the Standards Committee availed themselves of that option.

The High Court issued its decision in August 2016. It considered the entire record, including the additional evidence that respondent had submitted on appeal, and it addressed respondent's natural justice arguments. The High Court dismissed five of the charges against respondent but found him guilty on the remaining six charges (the 12th having earlier been dismissed). Specifically, the High Court determined that respondent had violated the New Zealand disciplinary rules with respect to client E by accepting instructions directly from the client and not from an instructing solicitor, by failing to act in a timely and competent manner, and by failing to repay monies due the client at the termination of representation. With respect to client W, the High Court determined that respondent violated the New Zealand disciplinary rules by failing to act in a timely and competent manner, and by failing to repay monies due the client at the termination of representation. In addition, the High Court determined that respondent violated the New Zealand disciplinary rules by failing to allow a Law Society investigator to examine his financial accounts during the investigation into his misconduct.<sup>6</sup> Based on those violations and respondent's disciplinary record,<sup>7</sup> the High Court affirmed the sanction that respondent should be stricken from the Roll.

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The High Court also rejected respondent's natural justice arguments. As an initial matter, it concluded that the parties' written submissions did not demonstrate that there

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had been a need for the Disciplinary Tribunal to conduct an evidentiary hearing; they did not identify any evidentiary issues that were disputed in that tribunal. And, in any case, respondent had not

challenged the proposal to submit evidence on the written record and argue the law in written submissions.

Turning to the specifics of respondent's three natural justice claims, the High Court first found that the Disciplinary Tribunal should have exercised its discretion to allow respondent to appear at the hearing telephonically, due to his financial condition. However, the High Court also found that respondent was given an opportunity to have that matter reviewed after filing his written submissions with the tribunal, but he did not raise the issue again and, instead, acquiesced to and participated in the process that the tribunal had established. For that reason, the High Court concluded, respondent suffered no violation of his right to be heard.

The High Court also rejected respondent's argument that he had been denied natural justice when the Disciplinary Tribunal failed to consider his challenge to the impartiality of one of the panel members. The High Court noted that, while respondent had stated in an email that he was "uncomfortable" with one member of the panel, he had never filed a motion challenging that member's participation or otherwise pursued that concern before the Disciplinary Tribunal, and he did not identify the failure to address his discomfort with the panel member as a ground for appeal.

Finally, the High Court agreed with respondent that the Disciplinary Tribunal should not have considered the issue of the appropriate sanction without permitting respondent to file further submissions on that subject after it found him guilty of misconduct. Nevertheless, the High Court rejected respondent's argument that he was therefore deprived of natural justice, because respondent had had a full opportunity to present evidence and arguments respecting the appropriate sanction on appeal. As noted,

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respondent submitted to the High Court, among other things, detailed medical evidence and arguments relating to the earlier Oregon disciplinary decisions. The High Court observed that those were the matters that respondent had argued that he would have put forward to the Disciplinary Tribunal on the question of the appropriate sanction. And, the High Court continued, it had considered all of the new evidence and arguments that respondent had submitted to it and, notwithstanding that evidence, it concluded that "the essential concerns about [respondent's] conduct [were] covered by the charges [that] were upheld \*\*\* [and that the] Tribunal was correct to find that overall [respondent's] conduct was dishonourable." The High Court, therefore, found that it was appropriate to strike respondent from the Roll.

Respondent thereafter filed two separate applications for recall of the High Court's judgment. The High Court dismissed the applications.

#### *E. Current Oregon Disciplinary Proceedings*

As discussed, the Bar was made aware of the imposition of discipline in New Zealand and initiated a reciprocal discipline proceeding in Oregon. Based on the High Court's findings of violations of the New Zealand disciplinary rules, the Bar alleged that respondent's misconduct violated the following Rules of Professional Conduct: RPC 1.3 (neglect of a legal matter); RPC 1.4(a) (failure to keep a client reasonably informed about the status of a matter); RPC 1.4(b) (failure to explain a matter to the extent necessary to permit a client to make informed decisions about the representation); RPC 1.5(a) (charging or collecting an excessive fee); RPC 1.15-1(d) (failure to account for or return client funds in his possession); RPC 1.16(d) (failure to fulfill duties upon termination of representation); RPC 5.5(a) (practicing law in violation of the regulations of the profession); RPC 8.1(a)(4) (failure to respond to inquiries by a disciplinary authority); and RPC 8.4(a)(4) (engaging in conduct prejudicial to the administration of justice).<sup>8</sup>

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As noted, a trial panel of the Disciplinary Board was convened, and the matter went to a hearing in January 2019. The trial panel issued an opinion, rejecting respondent's arguments that he was not afforded due process in the New Zealand proceeding and concluding that respondent should be reciprocally disbarred in Oregon as a result of his misconduct in New Zealand. Respondent now seeks review of the trial panel's decision.

## II. ANALYSIS

### A. *Applicability of BR 3.5*

As a preliminary matter, respondent contends that this court does not have authority under BR 3.5 to impose reciprocal discipline, because a foreign country is not a "jurisdiction" within the meaning of that word in BR 3.5(a) and, therefore, the New Zealand decision striking him from the Roll is not a "judgment, order, or determination of discipline" within the meaning of that phrase in BR 3.5(a) and (b). We therefore begin with that issue before turning to consider respondent's challenges to the trial panel's decision.

BR 3.5 provides, in part:

"(a) Petition; Notice to Answer. Upon learning that an attorney has been disciplined for misconduct in another jurisdiction not predicated upon a prior discipline of the attorney pursuant to these rules, Disciplinary Counsel shall file with the Disciplinary Board Clerk a petition seeking reciprocal discipline of the attorney. The petition shall include a copy of the judgment, order, or determination of discipline in the other jurisdiction; may be supported by other documents or affidavits; and shall contain a recommendation as to the imposition of discipline in Oregon, based on the discipline in the jurisdiction whose action is reported, and such other information as the Bar deems appropriate. \* \* \*

"(b) Order of Judgment; Sufficient Evidence of Misconduct; Rebuttable Presumption. A copy of the judgment, order, or determination of discipline shall be sufficient evidence for the purposes of this rule that the attorney committed the misconduct on which the other jurisdiction's discipline was based. There is a rebuttable presumption that the sanction to be imposed shall be equivalent, to the

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extent reasonably practicable, to the sanction imposed in the other jurisdiction."

In support of his argument that the New Zealand judgment striking him from the Roll cannot be a basis for discipline in Oregon, respondent points to two cases: *Small v. United States*, 544 U.S. 385, 125 S. Ct. 1752, 161 L. Ed. 2d 651 (2005), and *In re Wilde*, 68 A.3d 749 (DC 2013). Respondent argues that, under those cases, the plain meaning of "jurisdiction" refers only to domestic state and federal jurisdictions, and if the Bar Rules of Procedure were intended to apply to disciplinary judgments from foreign jurisdictions, the rules would say so explicitly. That argument is unpersuasive.

BR 3.5 applies to discipline for misconduct in "another jurisdiction" and requires the Bar to provide a copy of the determination of discipline from the "other jurisdiction." The Bar Rules do not define or limit the scope of the word "jurisdiction" in BR 3.5 to only those jurisdictions within the United States. Moreover, respondent points to nothing in the text, the context, or the history of the adoption of BR 3.5 that suggests any reason to interpret that rule to apply only to judgments issued by American courts.

In addition, the cases that respondent cites are inapposite and do not assist him. Both cases involve under-lying criminal convictions entered against persons outside the United States. In *Small*, the United States Supreme Court considered whether a conviction in a foreign country can be a predicate crime for a felon in possession of a firearm charge under a federal criminal statute. The Court considered the meaning of the phrase "convicted in any court" in 18 USC § 922(g)(1), which makes it a crime for a person who has been "convicted in any court of a crime punishable by imprisonment for a term exceeding one year" to possess any firearm. The Court held that, for purposes of that criminal statute, the phrase "convicted in any court" encompasses only domestic, not foreign, convictions. *Small*, 544 U.S. at 386, 125 S.Ct. 1752. Similarly, in *In re Wilde*, the District of

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Columbia Court of Appeals considered the meaning of the phrase "conviction of a crime" in a District of Columbia disciplinary rule that provided for disbarment of lawyers convicted of crimes

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of moral turpitude. The court interpreted the word "conviction" to apply only to domestic convictions, because foreign convictions differ from domestic convictions in such important ways that it was appropriate to assume that if the rule were intended to apply to foreign convictions it would say so. 68 A.3d at 758.

Respondent argues that, notwithstanding the fact that neither case was concerned with the meaning of the word "jurisdiction" in a disciplinary rules context or addressed reciprocal discipline, they nonetheless are instructive because "disciplinary proceedings in a foreign country \* \* \* bring characteristics of criminal convictions in the same manner that criminal convictions in Oregon can result in disbarment." That argument is not well taken. First, as this court has stated, lawyer discipline proceedings are not criminal prosecutions, *In re Sanai*, 360 Or. 497, 530, 383 P.3d 821 (2016) (so stating); see also ORS 9.529 (bar proceedings are *sui generis*; they are within this court's inherent power to control, and they are neither civil nor criminal in nature), and neither disbarment nor any other sanction is criminal punishment. *In re Sassor*, 299 Or. 720, 728, 705 P.2d 736 (1985) ("Suspension or permanent disbarment for violations of the Disciplinary Rules is not a form of punishment for criminal conduct or moral turpitude. Its purpose is to protect the public from incompetent, dishonest, or irresponsible professional behavior."). Second, in both *Small* and *Wilde*, the decisions turned at least in part on the courts' concern that foreign convictions may be based on conduct that our domestic laws would permit or punish less severely or that would be inconsistent with an American understanding of fairness. *Small*, 544 U.S. at 389-90, 125 S.Ct. 1752; *Wilde*, 68 A.3d at 756. No such concern exists in reciprocal discipline proceedings, because BR 3.5 ensures that the conduct for which the lawyer was disciplined in the other jurisdiction was conduct that would subject a lawyer to discipline in Oregon. BR 3.5(c)(2). Moreover, under BR 3.5, reciprocal discipline can be imposed only if the lawyer was afforded due process in the other jurisdiction. BR 3.5(c)(1). For those reasons, we conclude that the Oregon Rules of Professional Conduct provide for reciprocal discipline based on a determination of discipline against an Oregon lawyer who has

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committed professional misconduct in another jurisdiction, whether that other jurisdiction is foreign or domestic, so long as the requirements for reciprocal discipline are met.

### B. Regulatory Framework

We turn now to a brief description of those requirements and our process for determining whether to impose reciprocal discipline. In a reciprocal discipline proceeding, the order of discipline is "sufficient evidence \* \* \* that the attorney committed the misconduct on which the other jurisdiction's discipline



was based." BR 3.5(b). For that reason, the Oregon disciplinary proceeding may not be used to challenge the factual findings of the foreign jurisdiction. *Sanai*, 360 Or. at 500, 383 P.3d 821. Instead, this court's decision whether to impose reciprocal discipline turns on three questions: (1) whether the procedure in the jurisdiction that disciplined the lawyer "was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process," (2) whether the conduct for which the lawyer was disciplined in the other jurisdiction is conduct that should subject the lawyer to discipline here in Oregon, and (3) whether imposing the same sanction that the other jurisdiction imposed would result in "grave injustice or be offensive to public policy." BR 3.5(c). It is the lawyer's burden to prove that due process was not afforded him or her in the other jurisdiction. BR 3.5(e).

### C. Respondent's Due Process Arguments

Respondent argues that he was denied due process in the New Zealand proceeding in seven ways. Several of those arguments pertain to events that occurred before the Disciplinary Tribunal. As we have discussed, respondent appealed the decision of the Disciplinary Tribunal to the High Court. Respondent participated fully in the proceedings

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before the High Court. Further, the High Court permitted the parties to submit additional evidence and arguments, and it considered the matter *de novo*.<sup>9</sup> Therefore, any

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deficiencies in the process before the Disciplinary Tribunal were cured by the subsequent proceeding before the High Court, and respondent does not dispute that he received a full rehearing, with the opportunity to present additional evidence and argument, in that court. For that reason, we reject those arguments without discussion.

Respondent makes two arguments that merit brief examination. As we shall explain, however, neither argument is well taken.

First, respondent argues that he was deprived of due process in the New Zealand proceeding because the New Zealand courts use a "balance of probabilities" standard of proof, whereas Oregon courts use the higher "clear and convincing" evidence standard of proof. At oral argument in this matter, however, respondent conceded that Oregon courts are under no constitutional mandate to use a clear and convincing evidence standard of proof as opposed to any lesser standard of proof. And, in fact, this court routinely imposes reciprocal discipline in cases where the other jurisdiction sanctioned a lawyer based on a standard less than clear and convincing evidence.<sup>10</sup>

Second, respondent argues that the New Zealand rules of professional responsibility are unreasonably vague,

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insofar as, for example, they permit discipline on a finding of misconduct, which is defined as conduct "that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable." NZLCA 2006 § 7(1)(a)(i). Respondent's argument ignores the fact that the High Court found that respondent committed six violations of the New Zealand Lawyers and Conveyancers Act, involving three separate and specific provisions of that law, which the High Court quoted and discussed in its opinion, and it imposed discipline on that basis. Therefore, the fact that the New Zealand disciplinary rules include some terms that, on their face, may appear vague, does not persuade us that, as a whole, the New Zealand attorney discipline system does not provide lawyers with notice of what is expected.

As is evident from the foregoing, we conclude that respondent has not met his burden to establish that he was deprived of due process in the New Zealand proceedings leading to his disbarment.

*D. The Oregon Charges and the Appropriate Sanction*

As we have explained, the High Court found that respondent violated the New Zealand

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rules of professional conduct by commencing work for client E without proper authority and, in both the client E and the client W matters, by failing to complete the representation and then refusing to return unearned fees. The High Court also found that respondent failed to cooperate with disciplinary authorities in the investigation into his misconduct. The Bar alleged and the trial panel found that that misconduct in New Zealand also violated the following Oregon Rules of Professional Conduct: RPC 1.3 (neglect of a legal matter); RPC 1.4(a) (failure to keep a client reasonably informed about the status of a matter); RPC 1.4(b) (failure to explain a matter to permit client to make informed decisions regarding the representation); RPC 1.5(a) (charging an excessive fee); RPC 1.15-1(d) (failure to account for client funds); RPC 1.16(d) (failure upon termination to take steps to protect client interests, including refunding unearned portions of fees paid in advance); RPC 5.5(a) (practicing law in violation of the regulations of the profession); RPC 8.1(a)(2) (knowing failure to respond to lawful demand for information from a

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disciplinary authority); and RPC 8.4(a)(4) (engaging in conduct prejudicial to the administration of justice).

Respondent asserts, without elaboration, that his misconduct in New Zealand violated only two Oregon disciplinary rules, RPC 1.4(a) and RPC 8.1(a)(2), and that those two violations are insufficient to justify disbaring him in Oregon. We agree with the Bar and the trial panel that respondent's conduct in New Zealand would violate the Rules of Professional Conduct as set out above. We turn, therefore, to consider the appropriate sanction for respondent's misconduct. In so doing, we keep in mind the final consideration required by BR 3.5 : whether imposing the same sanction that the other jurisdiction imposed would result in "grave injustice or be offensive to public policy." BR 3.5(c)(3).

In reciprocal discipline cases, this court has an independent obligation to determine the appropriate sanction based on this state's disciplinary rules. *Sanai*, 360 Or. at 538, 383 P.3d 821. In so doing, we refer first to the American Bar Association's *Standards for Imposing Lawyer Sanctions* (1991) (amended 1992) (ABA Standards) for guidance. *In re Walton*, 352 Or. 548, 555, 287 P.3d 1098 (2012). Under the framework established by the ABA Standards, we first consider the duty violated, the accused's mental state, and the actual or potential injury caused by the accused's misconduct. ABA Standard 3.0. Next, we consider any aggravating and mitigating circumstances. *Sanai*, 360 Or. at 538, 383 P.3d 821. Finally, we consider the appropriate sanction in light of this court's case law. *Id* .

Respondent violated his duties of diligence and competence to both clients E and W. By collecting fees for work he did not perform, practicing law in violation of New Zealand law and regulations, and failing to cooperate with the Standards Committee investigation, respondent violated duties owed to the legal profession. Further, the record of the New Zealand proceeding demonstrates that respondent acted knowingly or intentionally with respect to each of the violations. And respondent's conduct resulted in actual injury to both client E and client W, who were never refunded the advance fees they paid for services that respondent did not perform. Client W also was forced to pay a NZ\$800 cost assessment arising out of respondent's failure to submit a required affidavit.

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Based on the disciplinary violations that we have found and our conclusions respecting the duties violated, respondent's mental state, and the injuries caused by respondent's misconduct, the presumptive sanction under the ABA Standards is disbarment. That is, disbarment is generally appropriate when a lawyer either knowingly fails to perform services for a client and causes serious or potentially serious injury, or engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury. ABA Standard 4.41(b), (c). In addition, disbarment is generally appropriate when a lawyer has been suspended for the same or similar misconduct, and intentionally or knowingly engages in further acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession. ABA Standard 8.1(b).

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We next consider the existence of aggravating or mitigating circumstances that may affect our sanction determination.

We find several aggravating circumstances that are relevant to our determination. First, respondent has a significant history of similar disciplinary offenses. ABA Standard 9.22(a). As discussed, respondent was suspended in 2006 for one year for failing to deposit and maintain client funds in trust, failing to maintain complete records of client funds in his possession and to render appropriate accountings of those funds, failing to maintain an interest-bearing trust account, engaging in conduct prejudicial to the administration of justice, and failing to respond fully and truthfully to inquiries from, and comply with reasonable requests of, an investigatory authority. *Skagen*, 342 Or. 183, 149 P.3d 1171. Again in 2008, respondent was suspended for 18 months by a Disciplinary Board trial panel for failing to keep sufficient records of client funds in his possession and failing to deposit and maintain in trust unearned fees paid in advance. *Skagen*, 22 D.B. Rptr. 292. And in 2012, respondent was subject to discipline in New Zealand; he was censured, required to reduce his fee, and ordered to pay compensation and costs for failure to complete discovery in a proper manner in a matter.

In addition we find that, in failing to return unearned fees to clients E and W, respondent acted

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with a selfish motive. ABA Standard 9.22(b). And we find that respondent has engaged in a pattern of misconduct, ABA Standard 9.22(c), and that he has committed multiple offenses, ABA Standard 9.22(d).

We also find that respondent has refused to acknowledge the wrongfulness of his conduct. ABA Standard 9.22(g). For one example, in the New Zealand proceeding, after initially admitting that he was required to repay client E the fees he had paid in advance, he later argued to the Disciplinary Tribunal that E had breached the retainer agreement and therefore repayment was not required. The High Court found that taking such a position was "disingenuous and dishonest," and, in the terms used in the applicable statute, "disgraceful and dishonourable." And in this proceeding, respondent has refused to concede that his misconduct in New Zealand violated several similar Oregon disciplinary rules, and he continues to maintain that he is and always has been entitled to disobey requests from disciplinary authorities for his financial records.

Finally, respondent has substantial experience in the practice of law. ABA Standard 9.22(i).

The record reflects only one mitigating factor: respondent's disbarment in New Zealand constitutes the imposition of another sanction for the misconduct. ABA Standard 9.32(k). On balance, the aggravating factors outweigh the sole mitigating factor and support a determination to disbar respondent.

Turning to Oregon case law, we observe that this court has disbarred lawyers whose collective misconduct demonstrated disregard for clients, professional obligations, and the disciplinary rules. It

has "ordered disbarment for conduct that otherwise would justify a long suspension when the accused has a history of misconduct that has resulted in prior disciplinary sanctions." *In re Paulson*, 346 Or. 676, 722, 216 P.3d 859 (2009), *adh'd. to as modified on recons.*, 347 Or. 529, 225 P.3d 41 (2010). The court has disbarred lawyers for engaging in a pattern of misrepresentation, neglect, and failure to act on behalf of clients. *E.g.*, *In re Sousa*, 323 Or. 137, 146-47, 915 P.2d 408 (1996). And it has disbarred

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lawyers who neglect clients' cases and refuse to cooperate with regulatory authorities after already having been disciplined for the same or similar misconduct. *In re Bourcier*, 325 Or. 429, 436-37, 939 P.2d 604 (1997). Those cases also support a determination to disbar respondent.

After considering the ABA Standards and our case law, we conclude that the misconduct for which respondent was struck from the Roll in New Zealand warrants disbarment in Oregon. We also find nothing in the record to suggest that disbaring respondent "would result in grave injustice or be offensive to public policy." BR 3.5(c)(3). We therefore hold that respondent should be

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disbarred as a reciprocal sanction for his misconduct in New Zealand.

Respondent is disbarred.

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Notes:

<sup>1</sup> The misconduct leading to the 2006 discipline took place from 2000 to 2002.

<sup>2</sup> The misconduct leading to the 2008 discipline took place in 2005, before this court's decision in the earlier matter, which factored into the trial panel's sanction determination.

<sup>3</sup> In New Zealand, a barrister may not represent a client without an instruction—or referral—from a solicitor.

<sup>4</sup> In August 2011, the New Zealand Law Society informed respondent that it had declined to renew his license, stating that it found his nonpayment of costs "disgraceful and dishonourable," which is grounds for discipline in New Zealand.

<sup>5</sup> One of the charges was later dismissed.

<sup>6</sup> In the client E matter, the High Court found that respondent committed one violation of Rule 14.4 of the NZLCA (Conduct and Client Care Rules) 2008 (prohibiting barrister sole from accepting instructions to act for another person other than from a person licensed to act as a barrister and solicitor) and two violations of Rule 3 of the NZLCA (Conduct and Client Care Rules) (requiring lawyer to act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care). In the client W matter, the High Court found that respondent had committed two violations of Rule 3. In the ensuing investigation into respondent's misconduct, the High Court also found that respondent violated Regulation 34(a) of the NZLCA (Trust Account Regulations) 2008, which requires a lawyer to permit an investigator to examine records and accounts.

<sup>7</sup> The High Court considered the two Oregon disciplinary proceedings discussed above, as well as a third disciplinary proceeding in New Zealand in 2012. That matter arose out of respondent's failure to

complete discovery in a proper manner in a matter in 2011. For that misconduct, respondent was censured, required to reduce his fee, and ordered to pay compensation and costs.

<sup>8</sup> The Bar also initially alleged that respondent's misconduct in New Zealand violated ORS 9.160(1), but it has abandoned that argument in this court.

<sup>9</sup> The High Court also observed that certain of respondent's "natural justice" arguments pertaining to events before the Disciplinary Tribunal were unpreserved or asserted alleged violations of his clients' rights and not his own. In addition, we note that one of respondent's claimed due process violations is based on his contention that he was not given adequate notice that his license would not be renewed. We reject that contention. As recounted above, when respondent renewed his license in 2010, he did so subject to the condition that he make monthly payments on the costs assessed in 2008. Despite that condition, respondent made only one payment. Then, in April and June 2011, the Law Society sent respondent letters reminding him that all licenses had to be renewed by July 1 and that it could take his failure to make the payments into account when determining whether to renew his license. Nevertheless, respondent still did not make the payments. He allowed his license to lapse on July 1. The Law Society told respondent that, in order to renew his license, he would need to pay the overdue cost award and the renewal fee. Although respondent submitted a renewal application, he failed to pay both the cost award and the renewal fee. We conclude that respondent had more than sufficient notice of what he needed to do to renew his license.

<sup>10</sup> For example, in *Sanai*, this court imposed reciprocal discipline on a lawyer whom the Washington Supreme Court had disbarred. *Sanai*, 360 Or. at 543, 383 P.3d 821. In Washington, lawyer misconduct must be proved by "a clear preponderance of the evidence." Washington State Court Rules, Rule for Enforcement of Lawyer Conduct 10.14(b). Likewise, this court imposed a reciprocal suspension on a lawyer who had entered into a stipulation for discipline in Washington in *In re Page*, 326 Or. 572, 955 P.2d 239 (1998). And in *In re Devers*, 317 Or. 261, 263, 855 P.2d 617 (1993), the court reciprocally suspended a lawyer after he was suspended for unethical conduct in Michigan. In Michigan, lawyer misconduct must be established by a preponderance of the evidence. Michigan Court Rule 9.115(J)(3).



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**IN RE Complaint as to the CONDUCT OF Sandy N. WEBB OSB No. 086527, Respondent.**

**SC S064798**

**Supreme Court of Oregon.**

**Argued and submitted November 9, 2017.  
May 24, 2018**

Kevin Keaney, Portland, argued the cause and filed the briefs on behalf of Respondent.

Susan R. Cournoyer, Assistant Disciplinary Counsel, Tigard, argued the cause and filed the briefs on behalf of the Oregon State Bar.

Before Balmer, Chief Justice, and Kistler, Walters, Nakamoto, Flynn, Duncan, and Nelson, Justices.\*

PER CURIAM

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In this lawyer discipline proceeding, the Oregon State Bar charged respondent<sup>1</sup> with multiple violations of the Rules of Professional Conduct (RPC) based on her mishandling of client funds, including violating RPC 8.4(a)(3) (conduct involving dishonesty) by knowingly converting client funds. A trial panel of the Disciplinary Board conducted a hearing and determined that respondent had committed all of the charged violations. Although this court has repeatedly imposed disbarment as the presumptive sanction for a lawyer who converts client funds, the trial panel determined that mitigating factors, in particular respondent's mental disabilities, supported imposing a two-year suspension from the practice of law.

The Bar seeks review of the trial panel's sanction determination, urging this court to impose a sanction of disbarment. Respondent, for her part, does not challenge the trial panel's determinations that she committed the charged violations in the ways alleged, but she urges this court to affirm the trial panel's decision that suspension is the appropriate sanction in this case. For the reasons that follow, we affirm the trial panel's determination that the respondent committed all of the charged violations, and we conclude that the appropriate sanction is disbarment.

#### I. FACTS

Respondent was admitted to practice law in Maryland and Pennsylvania in 2000. She moved to Oregon and was admitted to the Oregon Bar in 2008. From 2011 to 2015, respondent was a solo practitioner, handling many matters for which she represented clients on a contingent-fee basis. Respondent was solely responsible for bookkeeping and managing her client trust account. In the spring of 2014, respondent found herself in financial trouble. In June, her landlord agreed to forbear collecting rent for six months and, in August 2014, respondent stopped regularly paying

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her employees their full wages. The disciplinary charges arise out of respondent's mishandling of client funds between August 2014 and January 2015.

*A. The Brown Matter*

Respondent represented Brown and negotiated a settlement in which the opposing party agreed to pay Brown \$6,000. On August 28, 2014, Brown emailed respondent, emphasizing that she urgently needed her portion of the settlement funds and asking why it was taking so long for the other side to pay. Respondent initially responded, falsely, that the settlement check had not yet been delivered. At the end of the day, however, respondent sent an email to Brown reporting that she had received and "just" deposited the check. In fact, respondent had deposited the \$6,000 check into her client trust account the day before those emails, and, by the time that respondent reported having deposited Brown's check, most of the funds from that deposit had been used to

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honor three outstanding checks that had been written on respondent's client trust account. The following day, August 29, a fourth check was paid from trust account funds, bringing the balance of the account to \$44.31. Also on August 29, respondent sent an email to Brown, claiming that the Bar would not allow her to disburse any of the \$6,000 until she received approval from the bank, likely some time the following week.

In mid-September 2014, Brown again contacted respondent to ask when she would receive her portion of the settlement. Respondent claimed, on September 18, that Brown's check had been sent out in the mail days earlier, but she prepared Brown for the possibility that the check might not arrive, offering to "place a stop check on the one mailed and walk into a local branch and deposit" a new check in Brown's account. Ultimately, on September 22, respondent wrote Brown a trust account check for \$3,590. By then, respondent had made three new deposits of funds from other sources, bringing her trust account back to a level that was almost, but not quite, sufficient to cover the check that she wrote to Brown. The bank, nevertheless, honored the check and sent respondent a notice that she had overdrawn her trust account by \$70.73.

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Respondent deposited \$80 of her own money into the trust account and, when asked to explain the overdraft to the Bar, claimed that she "accidentally wrote the client check for \$3590 instead of \$3509 as was appropriate." However, calculations that respondent had written on a copy of her fee agreement with Brown listed a total due to Brown of \$3,590. Moreover, when respondent provided the Bar with an account statement to support her claim that fees and costs left only \$3,509 due to Brown, respondent listed fees for service and filing Brown's case that were \$66 more than the actual service and filing fees.

*B. The McCarty Matter*

On November 3, 2014, respondent deposited into her trust account a \$70,000 settlement check that she had received on behalf of McCarty, of which McCarty was to receive \$44,000. When respondent deposited the McCarty settlement check in her trust account, it brought the account balance to \$70,303. The day of that deposit, respondent disbursed \$45,000 of the trust account funds to herself for her own personal and office expenses and paid another creditor \$260, immediately reducing the trust account balance to \$25,043. By November 14, respondent had also withdrawn an additional \$24,443 of the trust account funds to pay two other clients settlement distributions that she had owed them since at least July 2014, as well as other expenses. Thus, respondent spent all but \$297 of McCarty's settlement proceeds to pay other clients, her creditors, and herself.

On December 8, 2014, notwithstanding having depleted the trust account of McCarty's settlement funds, respondent wrote a check to McCarty for \$44,000 from the trust account. When McCarty deposited the check, it was dishonored for insufficient funds, and McCarty paid a \$35 overdraft fee.



McCarty immediately called respondent, who falsely claimed that the bank had made an error and said that she would look into it and fix it.

*C. The Godier Matter*

On December 11, 2014, respondent received and deposited into her client trust account a check for \$100,000, paid in settlement to Godier by one of two defendants in a

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case that was going to trial the following month. Of that \$100,000, \$52,000 was due to Godier after accounting for attorney fees and expenses. The day that respondent deposited Godier's check, however, respondent used trust account funds to pay McCarty \$44,030—McCarty's share of the settlement plus reimbursement for the overdraft fee that McCarty had paid. Respondent also made two other withdrawals of trust account funds, which she described in her records as "law offices withdrawals"—one for \$35,510, and one for \$15,010. The deposit and those withdrawals left a balance of \$6,080 in respondent's trust account, and respondent disbursed \$6,000 to Godier.

On the first day of Godier's trial against the non-settling codefendant, January 12, 2015, respondent wrote a check to Godier on the trust account for \$46,000, the remainder of the settlement funds due to Godier. At the

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time when respondent wrote that check, there was only about \$1,300 in her trust account, and the \$46,000 check to Godier was dishonored for insufficient funds. Respondent made false excuses to Godier and told him to redeposit the check. He did so, but the check was dishonored again on January 15. Godier by then had overdrawn his own checking account and was desperate for his settlement funds. Respondent's husband mailed Godier \$1,000 in cash, but respondent never paid Godier the \$46,000 that she owed him from the settlement. Godier eventually applied to the Bar's Client Security Fund (CSF) for help, and CSF paid him \$46,000. Respondent has since agreed that she will reimburse CSF for the amount paid to Godier.

*D. Respondent's Mental Health*

In the middle of the Godier trial, on January 14, 2015, respondent was involved in a one-car accident and was diagnosed with a concussion. Several days later, respondent was admitted to the hospital complaining that she was "overwhelmed with life" and had been experiencing suicidal thoughts for the preceding two weeks. Health care professionals hospitalized respondent for four days out of concern that she presented a suicide risk and discharged respondent with a diagnosis of major depressive disorder. She attended an outpatient treatment program for impaired professionals

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through March 2015, during which she received a diagnosis of major depressive disorder as well as Post Traumatic Stress Disorder (PTSD). In May 2015, respondent was living in Maryland and began therapy with psychologist Dr. Kronfli, who also diagnosed major depressive disorder and PTSD.

Respondent told her various mental health providers that she had suffered from untreated PTSD since experiencing a traumatic event as a young adolescent. At the disciplinary hearing, respondent testified that she had also been very strongly affected by the terrorist attacks of September 11, 2001, because she had been a student in Washington, D.C. at that time and could see the smoke from the attack on the Pentagon. Respondent testified that she always struggled around the anniversary of the attacks

and that, beginning around September 11, 2014, she suffered symptoms of her depression and PTSD that were triggered both by her memories of the terrorist attack and by her financial difficulties.

Kronfli continued to treat respondent for her psychiatric conditions through the time of the disciplinary hearing in September 2016, and respondent relied on his testimony at the hearing. Kronfli testified that, based on respondent's report in January 2015 that she was "overwhelmed with life," her symptoms of depression "had gotten to a point where she did not have \* \* \* the appropriate amount of coping tools" to deal with the "stressors that she was experiencing at that time which would make it very hard for her to function in her job." He explained that, if respondent was under an "overwhelming amount of stress," then the symptoms of her untreated mental conditions likely "caused her enough distress to perhaps influence or cause her to do something that she normally would not have done" if she were managing her stressors "in an appropriate or adaptive way."

The Bar offered testimony from another psychologist, Dr. Warford, who reviewed respondent's treatment records but did not examine her. Warford testified that respondent's records showed inconsistencies that caused him to question whether she was impaired. For example, Warford explained that a cognitive assessment that respondent took in March 2015 showed a profile "essentially within normal range, with no overt evidence of depression, anxiety or anything

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that would suggest a psychotic disorder." This is not the profile that Warford would have expected to see in a person who had recently been suffering from a major depressive disorder.

## II. DISCIPLINARY VIOLATIONS

The Rules of Professional Conduct impose significant restrictions on how lawyers must keep and manage client funds. RPC 1.15-1. For example, RPC 1.15-1(a) provides, in part:

"A lawyer shall hold property of clients or third persons that is in a lawyer's possession separate from the lawyer's own

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property. Funds, including advances for costs and expenses and escrow and other funds held for another, shall be kept in a separate 'Lawyer Trust Account' maintained in the jurisdiction where the lawyer's office is situated."

Lawyers are prohibited from depositing "the lawyer's own funds in a lawyer trust account," except for the "sole purpose of paying bank service charges or meeting minimum balance requirements on that account," and "only in an amount necessary for those purposes." RPC 1.15-1(b). Any fees or expenses that have been paid in advance must be deposited into the lawyer trust account and may "be withdrawn by the lawyer only as fees are earned or expenses incurred, unless the fee is denominated as 'earned on receipt,' 'nonrefundable' or similar terms and complies with Rule 1.5(c)(3)." RPC 1.15-1(c). In addition, a lawyer "shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive." RPC 1.15-1(d). Based on different aspects of the conduct described above, the Bar charged respondent with three causes of complaint:

- (1) Based on respondent depositing her own funds to her lawyer trust account after Brown's check created an overdraft, the Bar charged respondent with violating RPC 1.15-1(b) (improper deposit of lawyer's own funds into trust account);

(2) Based on respondent's mishandling of the settlement funds for McCarty and Godier, the Bar charged respondent with violating RPC 1.15-1(a) (failure to keep separate client property) and RPC 1.15-1(c)

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(withdrawal of client funds before they are earned); and

(3) Based on respondent's misuse of Godier's settlement funds and the fact that his check was never honored, the Bar charged respondent with violating RPC 1.15-1(d) (failure to promptly deliver funds that a client is entitled to receive) and RPC 8.4(a)(3) (conduct involving dishonesty).<sup>2</sup>

The trial panel determined that respondent committed each of the charged violations and that she acted knowingly and intentionally in doing so. As noted, respondent does not challenge those determinations. We have reviewed the record *de novo* and agree with the trial panel that the Bar proved the violations by clear and convincing evidence. See ORS 9.536(2) (providing that, "[w]hen a matter is before the Supreme Court for review, the court shall consider the matter *de novo*"; BR 10.6 (same) ); BR 5.2 (Bar must establish misconduct by clear and convincing evidence).

### III. APPROPRIATE SANCTION

The dispute in this case focuses on the appropriate sanction for respondent's violations of the disciplinary rules. The Bar contends that disbarment is the only appropriate sanction given the nature of respondent's violations. Respondent contends, however, that the trial panel correctly imposed a lesser sanction based on the presence of several mitigating factors. Most significantly, respondent contends that she suffered from untreated PTSD and major depressive disorder that began to affect her around September 11, 2014, to the point that she "could not conform her behavior to the RPC during the period September 2014 through January

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2015," and that impairment of that magnitude justifies a departure from the presumptive sanction of disbarment.

#### A. Framework for Determining Appropriate Sanction

In considering the appropriate sanction, this court follows the analytical framework set out in the American Bar Association's

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*Standards for Imposing Lawyer Sanctions* (1991) (amended 1992) (ABA Standards). *In re Herman*, 357 Or. 273, 289, 348 P.3d 1125 (2015). Under that framework, the court first considers three factors that point us to a preliminary determination of the appropriate sanction: (1) the ethical duty violated; (2) the respondent's mental state at the time of the misconduct; and (3) the potential or actual injury caused by the respondent's misconduct. *Id.* ; ABA Standard 3.0. Next, we consider whether any aggravating or mitigating circumstances are relevant to our determination of the appropriate sanction. Finally, we determine the appropriate sanction in light of this court's case law. *Herman*, 357 Or. at 289, 348 P.3d 1125.

## B. Presumptively Appropriate Sanction

Although the parties' arguments focus on the fourth factor—aggravating or mitigating circumstances—we begin by briefly addressing the first three factors, which point to a preliminary determination that the appropriate sanction is disbarment.

### 1. Ethical Duty Violated

With respect to the ethical duty violated, we have determined that respondent engaged in conduct involving dishonesty, in violation of RPC 8.4(a)(3), by knowingly and intentionally converting to respondent's own use funds that belonged to her client Godier. See *In re Peterson*, 348 Or. at 335, 232 P.3d 940 (explaining that "dishonesty," within the meaning of RPC 8.4(a)(3), includes knowingly and intentionally converting client funds to the lawyer's use). We have also determined that respondent violated RPC 1.15-1(a) (failure to safeguard and keep separate client property); RPC 1.15-1(c) (withdrawal of client funds before they are earned); and RPC 1.15-1(d) (failure to promptly deliver funds that a client is entitled to receive), by failing to maintain McCarty and Godier's client money in trust, using McCarty and Godier's client money

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to pay her business and personal expenses, and failing to promptly deliver to Godier the money due to him. Finally, we have determined that respondent deposited money in her client trust account for a prohibited purpose, in violation of RPC 1.15-1(b). In committing those violations, respondent violated the duty that she owed to her clients to preserve their client property and the duty that she owed to the public to maintain personal integrity. ABA Standards at 5; ABA Standard 4.1; ABA Standard 5.1.

### 2. Respondent's Mental State

As noted above, we agree with the trial panel's determination that respondent acted intentionally, meaning that respondent acted with the " 'conscious objective to accomplish a particular result.' " See, e.g., *In re Paulson*, 346 Or. 676, 713, 216 P.3d 859 (2009), *adh'd to as modified on recons.*, 347 Or. 529, 225 P.3d 41 (2010) (quoting ABA Standards at 7). Indeed, we have emphasized that intent is the "distinguishing characteristic" of a misuse of client funds that rises to the level of "conversion involving dishonesty under RPC 8.4(a)(3)." *In re Peterson*, 348 Or. at 341 n. 5, 232 P.3d 940<sup>3</sup>; see also *In re Phelps*, 306 Or. 508, 512, 760 P.2d 1331 (1988) ("A lawyer may remove money from a trust account \* \* \* before intentionally appropriating that money for the lawyer's own purposes \* \* \* but removal of money from a trust account does not necessarily constitute an intentional misappropriation."). Respondent does not dispute that she acted with the conscious objective to use her client's money for her own purposes, *i.e.*, that she acted intentionally, and the Bar has established by clear and convincing evidence that she acted intentionally.

### 3. Injury to Clients

Respondent's violations caused potential injury, as well as actual injury, to her clients. As explained, respondent took money that she was holding in trust for her clients and used it for other purposes. Respondent's violations involved her improper and dishonest use of funds that her

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clients had entrusted to her. Although the bank honored the check to Brown, despite insufficient funds in the

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account to do so, the bank refused to honor the checks that respondent wrote to disburse funds to both McCarty and Godier, forcing both to wait unnecessarily to receive the money due to them and exposing both to the risk of never recovering that money. Indeed, McCarty received her money only because the settlement money for Godier arrived to cover McCarty's check, but respondent never paid Godier the funds due to him.

#### 4. *Disbarment is the presumptively appropriate sanction*

Drawing together the factors of duty, mental state, and injury, and before examining aggravating and mitigating factors, under both the ABA Standards and this court's case law, disbarment is the presumptively appropriate sanction. Respondent conceded at the disciplinary hearing that she deposited money in her client trust account for an improper purpose, that she was not honest with Godier regarding his settlement funds or the check that she wrote to him, that she commingled funds by writing the check to McCarty using Godier's settlement funds, and that she dishonestly converted Godier's funds.

The ABA Standards provide, "[d]isbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client." ABA Standard 4.11. Disbarment also is generally appropriate in cases when a lawyer has engaged in "intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice." ABA Standard 5.11(b). Finally, under the ABA Standards, disbarment is generally appropriate when a lawyer has knowingly engaged in conduct that violates a professional duty, if the lawyer does so "with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system." ABA Standard 7.1. All of those considerations apply to respondent's intentional misuse of McCarty's settlement funds and intentional conversion of Godier's funds.

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Moreover, this court often has stated that even a single act of intentional conversion of client funds presumptively warrants disbarment. *In re Pierson*, 280 Or. 513, 518, 571 P.2d 907 (1977) ("a single conversion by a lawyer to his own use of his client's funds will result in permanent disbarment"); *In re Donovan*, 327 Or. 76, 81, 957 P.2d 575 (1998) (same). We have found, and respondent does not dispute, that she intentionally converted Godier's client funds. Thus, under the ABA Standards and this court's case law, disbarment is the presumptive sanction.

#### C. *No Relevant Mitigating Factors*<sup>4</sup>

Although recognizing that disbarment is the presumptively appropriate sanction for respondent's violations, the trial panel recommended that respondent only should be suspended from the practice of law for two years. The trial panel primarily based that reduced sanction on its conclusion that respondent's depression and PTSD were a mitigating factor under ABA Standard 9.32(i).

ABA Standard 9.32(i) is part of a generally applicable list of mitigating factors "that may justify a reduction in the degree of discipline to be imposed." ABA Standard 9.31. It provides that a "mental disability or chemical dependency including alcoholism or drug abuse" is a mitigating factor when:

"(1) there is medical evidence that the respondent is affected by a chemical dependency or mental disability ;

"(2) the chemical dependency or mental disability caused the misconduct;

"(3) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and

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"(4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely."

ABA Standard 9.32(i).

The Bar raises two main challenges to the trial panel's reliance on ABA Standard 9.32(i). First, the Bar contends that, when a lawyer has knowingly misappropriated client funds for the lawyer's own use, a mental disability or chemical dependency is irrelevant to the sanction determination unless the impairment caused the lawyer's misconduct by preventing the lawyer from acting intentionally. As a second, alternative, argument, the Bar contends that respondent has failed to prove that mental disability was even a "substantial contributing cause" of her intentional misconduct and, thus, failed to establish the existence of the mitigating factor described in ABA Standard 9.32(i). We ultimately conclude that respondent has not proved the elements of ABA Standard 9.32(i), and we approve a sanction of disbarment on that basis. But we first briefly discuss the Bar's argument that our case law categorically requires disbarment for respondent's conduct.

#### 1. *Impairment as possible mitigation in past cases*

The Bar is correct that some of our cases have used nearly categorical terms when describing disbarment as the sanction for a lawyer who intentionally converts client funds for another use. See *e.g.*, *Phelps*, 306 Or. at 520, 760 P.2d 1331 ("A lawyer may suffer all the claimed disabilities and may have the greatest of attributes, but if he or she steals funds from a client, the sanction is disbarment."); see also *In re Laury*, 300 Or. 65, 74, 77, 706 P.2d 935 (1985) (rejecting proposal that lesser sanction was appropriate because lawyer's alcoholism was "a disease and it [was] his illness from that disease that [had] caused his defalcations"). Other cases have suggested that, when a lawyer misappropriates client funds for the lawyer's own purposes, evidence of impairment is relevant only to the question of whether the lawyer acted intentionally, and not to mitigation. See, *e.g.*, *In re Eads*, 303 Or. 111, 124, 734 P.2d 340 (1987).

The lawyer in *Eads* misappropriated client funds but "presented the opinion of a psychologist to the effect that the [lawyer] would not have acted as he did were he

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not dependent on drugs." *Id.* He urged this court to conclude that the impairment prevented him from acting intentionally but also, alternatively, that the impairment was a mitigating factor that justified a less severe sanction. The court's analysis suggests that it viewed the evidence of impairment as relevant only to the issue of intent. In rejecting the lawyer's request for a sanction less severe than disbarment, the court emphasized that "[a]n addiction can at some level be the cause of many misdeeds" but that, if the impairment does not interfere with the lawyer's ability to act intentionally, the connection is "too attenuated" to justify a reduced sanction for misconduct as serious as the intentional misappropriation of client funds. *Id.* at 124, 734 P.2d 340.

Our cases since *Eads* have generally adhered to that line of reasoning. For example, in *In re Martin*, 328 Or. 177, 193, 970 P.2d 638 (1998), a lawyer who misappropriated client funds urged this court to conclude that his mental conditions, including depression and PTSD, justified a sanction short of disbarment. We declined to do so, explaining that:

"we already have found that the accused's mental condition did not impair his ability to appreciate the wrongfulness of his conduct so as [to] preclude a finding that he intentionally misappropriated client funds. As we stated in *In re Phelps*, 'a lawyer may suffer all the

claimed disabilities and may have the greatest of attributes, but if he or she steals funds from a client, the sanction is disbarment.' 306 Or. at 520 [760 P.2d 1331]. The same is true here."

See also *In re Maroney*, 324 Or. 457, 462, 927 P.2d 90 (1996) (concluding that a sanction of disbarment was appropriate for a lawyer who intentionally misappropriated client funds, despite the presence of several mitigating factors, including that the lawyer was experiencing personal and emotional problems at the time of the misconduct). The Bar concludes that those cases establish, in essence, an irrebuttable presumption that disbarment

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is the appropriate sanction when a lawyer knowingly and intentionally converts a client's funds.

Respondent argues that our framework for determining the appropriate sanction according to the ABA Standards requires us always to consider whether mitigating

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factors justify a lesser sanction, even if we consistently have concluded that disbarment remains the appropriate sanction for the intentional conversion of client funds. See *In re Binns*, 322 Or. 584, 596, 597, 910 P.2d 382 (1996) (considering aggravating and mitigating circumstances before concluding that "disbarment is the appropriate sanction" for lawyer who intentionally used \$2,500 of client funds for purpose to which client had not agreed). In other words, respondent views our case law as establishing a very strong, but theoretically surmountable, presumption that disbarment is the appropriate sanction for a lawyer who intentionally converts client funds to the lawyer's own use. Respondent contends that a mental disability that meets the requirements of ABA Standard 9.32(i) is a particularly significant mitigating factor and should justify a reduced sanction, even for the intentional conversion of client funds.

## 2. Impairment as possible mitigation in this case

Ultimately, however, we need not decide whether there may be circumstances under which a disability that satisfies ABA Standard 9.32(i) would overcome the strong presumption that disbarment is the appropriate sanction for the intentional conversion of client funds. The question is theoretical, because respondent has not demonstrated that her mental disability satisfies ABA Standard 9.32(i).<sup>5</sup> Specifically, even assuming that respondent demonstrated some of the elements necessary to establish the existence of the mitigating factor described in 9.32(i), we are not persuaded that respondent has proved that a mental disability caused her misconduct.

### a. Causation under ABA Standard 9.32(i)

Under ABA Standard 9.32(i), mental disability or chemical dependency is a mitigating factor only when "the

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chemical dependency or mental disability caused the misconduct." The Bar contends that respondent failed to prove causation because she failed to prove that her disability deprived her of "the ability to appreciate the wrongfulness" of intentionally misappropriating client funds. The Bar relies on *Martin*, in which we used that phrase. 328 Or. at 190, 970 P.2d 638. Respondent concedes that she remained able to appreciate the wrongfulness of her conduct, but she contends that causation under ABA Standard 9.32(i) is satisfied if she was impaired to the extent that "she could not conform her behavior"

to what she knew to be "the right thing." That theory of causation aligns with the trial panel's view of causation—that respondent's "misconduct would not have occurred absent the mental disability."<sup>6</sup>

Our cases suggest that whether a mental disability or chemical dependency can "cause" a lawyer's misconduct may depend upon the type of misconduct. For example, in the context of a negligent violation, we have applied ABA Standard 9.32(i) when the lawyer's depression "greatly contributed to his

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misconduct" by diminishing "his ability to function." *In re Cohen*, 330 Or. 489, 503, 8 P.3d 953 (2000). In the context of "knowing" misconduct, which consisted of disregarding a court order to pay child support, we suggested that the lawyer's mental disability may have "caused" the misconduct because, "at least to some degree, that disability affected his ability to gain or maintain employment and hampered his ability to pay child support," although we determined that the lawyer failed to establish the other elements necessary to rely on ABA Standard 9.32(i). *In re Chase*, 339 Or. 452, 460, 121 P.3d 1160 (2005).

As the Bar emphasizes, however, in the context of intentional misconduct, we have demanded a more rigorous connection to establish that a disability caused the

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misconduct. In *In re Murdock*, we concluded that the lawyer failed to demonstrate that his chemical dependence "caused" him to intentionally embezzle fees from his law firm, as required for ABA Standard 9.32(i), because, "at all times material to this proceeding, the accused was capable of recognizing right from wrong." *In re Murdock*, 328 Or. 18, 29-30, 968 P.2d 1270 (1998). It is simply more difficult to explain what it means for impairment to cause an intentional act than it is to explain how impairment could cause a lawyer to neglect a legal matter or to be unable to fulfill an obligation. Nevertheless, it is plausible that an impaired lawyer could demonstrate that the impairment caused the lawyer to engage in intentional misconduct if, as the trial panel reasoned, the lawyer would have been able to conform his or her conduct and refrain from engaging in the intentional misconduct "absent the mental disability."

b. Respondent did not prove causation

We are not persuaded, however, that respondent proved that she would have refrained from intentionally misusing client funds absent mental disability. Although respondent cites "the essence of Dr. Kronfli's opinion" to support her argument that mental disability made her unable to "conform her behavior to the right thing," that is a general interpretation of Kronfli's opinion. Kronfli testified that, in his opinion, respondent was impaired in her ability to practice law during the month of January 2015. He also offered the opinion that "it's possible that leading up to the January 2015 incident" respondent's "ability to practice law and keep her firm functioning appropriately began to diminish." Kronfli emphasized that he was not asserting that respondent's PTSD or depression caused her actions. Rather, the strongest opinion that Kronfli could offer was that "it's quite possible [respondent's] actions are because she did not have enough adaptive coping mechanisms." He explained that, "if she was under an overwhelming amount of stress," then symptoms of her mental disability were "likely to have caused her enough distress to *perhaps* influence or cause her to do something that she normally would not have done" if she had been managing her stress "in an appropriate or adaptive way." (Emphasis added.) Kronfli candidly acknowledged, however, that he had no information on which to base

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an opinion about respondent's level of impairment before January 2015, except for respondent's report to him that "things had been building up." In fact, Kronfli was unwilling to commit to an opinion regarding respondent's level of impairment prior to "early January" 2015. Given how major depressive disorder is diagnosed, Kronfli testified, respondent's symptoms were occurring in the two weeks prior to her hospital admission, which "would put it in early January."

The relevant time period for respondent's misconduct began months before January 2015, and we are not persuaded by this record that, during the relevant time period, respondent was suffering from mental disability so severe that it prevented her from making the decisions that she knew to be correct and consistent with her obligations under the RPC. Warford testified that, if a person is suffering from depression severe enough to cause indecision and poor thinking, the person will also be suffering from poor reasoning and that those deficits will be apparent in multiple areas of life, not just one. Kronfli also appeared to equate the level of disability that could produce a lack of adequate coping mechanisms with the level of disability that would cause impaired ability to practice law, generally. Yet numerous

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witnesses testified that respondent showed no evidence of thinking or reasoning deficits during the period of time in which she was engaging in the misconduct relating to her client trust accounts. Three members of respondent's office staff, as well as her landlord, all of whom observed respondent regularly and frequently during that period, testified that there had been nothing unusual in respondent's behavior, speech, or demeanor. Respondent's part-time legal assistant testified that respondent had not seemed agitated or overly stressed during the relevant time period. Her landlord, who is also a lawyer, observed that respondent had never displayed any sign of disorientation, agitation, or sadness, and he testified that respondent's recollection and knowledge of legal issues was "impressive." Moreover, respondent's client Godier, who spent considerable time with respondent preparing for his trial in December 2014 and January 2015, testified that, during that time, respondent appeared prepared, capable, professional, on-task, focused and confident, even on the day that she arrived late to trial because of the car accident.

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We also are not persuaded that any disability that respondent may have been experiencing caused her to do something that she otherwise "would not have done." Respondent claims that mental impairment caused her to misappropriate McCarty's settlement funds in November and Godier's settlement funds in December, but her misconduct followed a pattern that began much earlier, and even respondent does not contend that she was suffering from mental illness symptoms before early September 2014.

Although respondent was not charged with misappropriating any client funds before McCarty's, the evidence shows that as early as Spring 2014 she was already engaged in a pattern of misusing her client trust account—using settlement funds from each new client to pay other clients whose funds earlier had been misused for other purposes. For example, when Brown's settlement check arrived on August 27, 2014, those funds were immediately disbursed for other purposes. Similarly, the funds from McCarty's settlement were used to pay two other clients, whose own settlement funds had been deposited and spent for other purposes some time before August 1. When asked by Bar disciplinary counsel to explain why she failed to hold the funds for the two clients who were paid with McCarty's funds, respondent did not deny acting intentionally—she wrote, instead, that there were reasons both clients wanted to wait to receive their funds, so "therefore no delay in making payments."

Moreover, there is evidence that, as early as February 2014, respondent was improperly using the funds in her client trust account. Respondent's landlord testified that, in February 2014, respondent asked for a loan of \$7,000 because she had written a trust account check and did not think the account funds were sufficient to cover it. Because the landlord "knew the significance of overdrawing a client trust account," he loaned respondent the money. Not long after that loan, however, three checks written

on respondent's client trust account were dishonored for insufficient funds in March and April 2014, and respondent's conduct came to the Bar's attention.

Although the Bar accepted respondent's explanation that those checks were dishonored because of an accounting

[363 Or. 61]

error, and although the Bar did not charge respondent with misappropriating Brown's funds, the pattern is too similar to ignore. For the months of November and December 2014, respondent admits intentionally misusing client funds but claims that she did so only because mental disability prevented her from "conforming her conduct"; but, as early as March 2014, she was also misusing client funds and claiming accounting errors or, worse, suggesting that she had no obligation to preserve client funds for the client. That respondent was unable to honor her obligation to preserve client trust funds before the alleged onset of her mental impairment, casts grave doubt on her claim that she would have honored her obligation with respect to McCarty's and Godier's funds but for impairment.

In short, we are not persuaded that respondent suffered from a mental disorder that impaired her functioning in a way that can be considered a cause of her intentional

[418 P.3d 13]

misconduct. No mitigating factor justifies a reduction from the presumptive sanction of disbarment.<sup>7</sup>

Respondent is disbarred.

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Notes:

\* Landau, J., retired December 31, 2017, and did not participate in the decision of this case.

<sup>1</sup> Amendments to the Oregon State Bar Rules of Procedure, which took effect January 1, 2018, use the term "respondent" to refer to the attorney who is charged with misconduct. See, e.g., BR 1.1(x). Although trial panel was appointed on or before December 31, 2017, and therefore the amendments do not apply to this disciplinary proceeding, we use the new terminology throughout this opinion.

<sup>2</sup> RPC 8.4(a)(3) provides:

"(a) It is professional misconduct for a lawyer to:

" \* \* \* \* \*

"(3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law."

Conduct that violates RPC 8.4(a)(3) includes the "knowing conversion of client property, such as client funds" if the lawyer "exhibited the requisite intent such that the conversion constituted 'conduct involving dishonesty.'" *In re Peterson*, 348 Or. 325, 334-35, 232 P.3d 940 (2010) (some internal quotation marks omitted).

<sup>3</sup> As we emphasized in *Peterson*, "[b]ecause an actor who mistakenly believes that his or her conduct is legal still can commit conversion, not all conversions implicate the prohibition in RPC 8.4(a)(3) against "conduct involving dishonesty." 348 Or. at 335, 232 P.3d 940.

<sup>4</sup> The Bar urges this court to conclude that the circumstances of respondent's conduct support various aggravating factors, which the trial panel failed to consider. We need not prolong the opinion with a discussion of aggravating factors, however; because the presumptive sanction is disbarment, and because we ultimately conclude that disbarment is the appropriate sanction, a discussion of aggravating factors would not change the outcome.

<sup>5</sup> Respondent expressly conceded that it is her burden to prove the existence of the mitigating factor. That concession is consistent with this court's discussion of the evidence in other cases involving ABA Standard 9.32(i). See *In re Murdock*, 328 Or. 18, 30, 968 P.2d 1270 (1998) (rejecting mitigating factor because lawyer had not "demonstrated that his chemical dependence 'caused' the misconduct"); *In re McDonough*, 336 Or. 36, 45, 77 P.3d 306 (2003) (concluding that chemical dependency was not an applicable mitigating factor, in part because the lawyer had "not established that he has accomplished a meaningful and sustained recovery from his alcohol dependency").

<sup>6</sup> In adopting respondent's "unable to conform her conduct" standard for causation, the trial panel relied entirely on Commentary to ABA Standard 9.32 that was included in the 1992 version of the Standards. As of 2012, however, that Commentary is no longer part of the ABA Standards. 107—ADOPTED—Reaffirms ABA Standards for Imposing Lawyer Sanctions, *available at* [https://www.americanbar.org/news/abanews/aba-news-archives/2013/08/107\\_-\\_adopted\\_-\\_reaf.html](https://www.americanbar.org/news/abanews/aba-news-archives/2013/08/107_-_adopted_-_reaf.html) (accessed May 16, 2018) (reporting that American Bar Association reaffirmed the "black letter" of the ABA Standards, but "rescind[ed] its adoption of the Commentary thereto").

<sup>7</sup> The trial panel rejected the accused's invocation of several other allegedly mitigating factors as unfounded or unsupported by the record. We agree with the trial panel's assessment, and further discussion will not benefit the bench or bar. The trial panel also identified two other mitigating factors—that respondent had a cooperative attitude toward the disciplinary proceedings, ABA Standard 9.32(e), and that she expressed remorse, ABA Standard 9.32(l). Although we agree that respondent proved those factors, they do not overcome the strong presumption that disbarment is the appropriate sanction in this case.



# Chapter 5

## Local Practice in the District of Oregon<sup>1</sup>

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<sup>1</sup>Prepared for *Practicing Law in Oregon*, OSB CLE, June 22, 2017.



## Helpful Resources

1. District Court's Website: [www.ord.uscourts.gov](http://www.ord.uscourts.gov).
2. Information for Attorneys:
  - E-Filing.
  - Local Rules.
  - Forms (including the stipulated protective orders, mentioned below).
  - Practice Tips.
  - Court Fees.
3. Online CM/ECF User Manual: <https://ord.uscourts.gov/index.php/cm-ecf-user-manual-all?tmpl=component&print=1>
  - Instructions for e-filing.
4. OSB Legal Publications: *Federal Civil Litigation in Oregon* (but last updated in 2009). Available at [osbar.org](http://osbar.org).
  - General reference manual for various areas of state and federal law.

## Case Filing and Initial Conferences

### 1. Divisions

- a. Portland, Eugene, Pendleton, and Medford.
- b. Identify the division where "divisional venue" lies in the caption of the complaint.
- c. "Divisional venue" means the division of the court in which:
  - i. A substantial part of the events or omissions giving rise to the claim occurred; or
  - ii. A substantial part of the property that is the subject of the action is situated. LR 3-2.

### 2. Electronic Filing

- a. "Case initiating documents" must be filed electronically with the court, unless the attorney is not a "registered user." LR 5-1.
- b. Counsel must file a civil cover sheet, form JS-44. LR 3-4, Practice Tip 1.
- c. Checking the JURY DEMAND box on the JS-44 Civil Cover Sheet **does not** constitute a valid jury demand under LR 38 or Fed R Civ P 38(b). LR 3-4, Practice Tip 2.
- d. The words DEMAND FOR JURY TRIAL must be included on the last line of the document title of any jury demand filed under Fed R Civ P 38(b). LR 38-1.
- e. Filing deadline is 11:59 p.m. LR 5-3.

### 3. Service of Pleadings

- a. Service of pleadings is complete upon the transmission of the "Notice of Electronic Filing." LR 5-4.
- b. **Rule Change: Removal of additional 3-days response time for electronic service:** There have been some recent amendments to the FRCP, FRAP, and local district court rules in Oregon as noted below.
  - 1) **Fed R Civ P 6(d) is amended** to remove service by electronic means under Rule 5(b)(2)(E) from the modes of service that allow three added days to act after being served.
  - 2) **Fed R App P 26(c) is amended** to remove service by electronic means under Rule 25(c)(1)(D) from the modes of service that allow three added days to act after being served.
  - 3) **As of March 1, 2017 USDC of Oregon has amended Local Rule 6** as follows: "Local Rule 6 has been eliminated due to amendments to Fed. R. Civ. P. 6(d). Under amended Fed. R. Civ. P. 6(d), **three days will no longer be added to the response when service is by electronic means.**"

### 4. Scheduling Orders

- a. Opposing parties must hold an initial conference of counsel under Fed R Civ P 26(f) for discovery planning within 30 days after all defendants file a responsive pleading or motion under Fed R Civ P 12. LR 26.1.
- b. After the conference of counsel, the lawyers must contact the assigned judge's courtroom deputy to set a Fed R Civ P 16(b) scheduling and planning conference. LR 16.2.
- c. At the Rule 16(b) conference, lawyers must be prepared to discuss their discovery plan to the court. LR 16-2.
- d. Following the scheduling and planning conference, the court will typically issue an order setting deadlines for completing discovery, filing dispositive motions, exchanging expert witness disclosure reports, and other pretrial filings.
- e. Once the schedule is set, the parties cannot stipulate to extend any deadline in the court's discovery and scheduling orders. LR 29.1. If a party wants to modify these deadlines, the lawyer must show:
  - i. Good cause why the deadlines should be modified;
  - ii. Effective prior use of time;
  - iii. A suggested new date for the deadline in question; and
  - iv. An assessment of the effect of the proposed extension on other existing deadlines, settings, or schedules. LR 16.3(a).



**5. December 1, 2015 Rule Amendments Intended to Speed Up Cases:**

- a. Under amended Fed R Civ P 4(m): the court must dismiss an action if the complaint is not served within 90 days, shortening the period from the old rule, which allowed 120 days to serve a complaint.
- b. Revised Fed R Civ P 16(b)(2) shortens the period to issue a case management order to 90 days (the old rule provided for 120 days).
  - i. Rule 16(b)(3) was amended to add preservation of documents and lists topics that judges may address in their case management orders.
  - ii. Rule 16(b)(3)(B)(v) was amended to encourage pre-motion conferences for discovery disputes and allows a case management order to require that: "... before moving for an order relating to discovery, the movant must request a conference with the court." This amendment is intended to decrease the amount of time spent on discovery motions.

**Discovery**

**1. Initial Disclosures**

- a. Initial disclosures can generally be waived by the parties. LR 26-2.
- b. Protocols for Employment Cases: In initial discovery for employment cases alleging adverse actions:
  - i. Plaintiff and defendant must disclose certain information and produce certain documents related to the employment relationship and termination. LR 26-7:
- c. E-Discovery in Patent Cases: A model order streamlines the discovery of electronically stored information in patent cases (link provided in the online version of LR 26-6).
  - i. The model order can be modified if the parties agree or one party shows good cause.
  - ii. The model order generally excludes metadata and limits e-mail production to specific issues, custodians, and search terms.
  - iii. Inadvertent production of privileged documents under the model order does not waive the privilege.

**2. 2015 Rule Change: New Proportionality Rule**

- a. Amended Fed R Civ P 26(b)(1) adds language that party is entitled to discovery that is relevant to claims and defenses and "proportional to the needs of the case . . . "
  - i. Factors considered in determining whether discovery request is "proportional" to needs of the case:
    - a. The importance of the issues at stake in the case;
    - b. The amount in controversy;

- c. The parties' relative access to relevant information;
  - d. The parties' resources;
  - e. The importance of the discovery in resolving the issues; and
  - f. Whether the expense of the proposed discovery outweighs the likely benefit.
- b. Amended Fed R Civ P 34(b)(2): changes the rule to require party responding to discovery request to:
- i. state objection "with specificity";
  - ii. state specifically when material will be made available; and
  - iii. state clearly if materials are being withheld on the basis of an objection.

### **3. Sanctions for Failure to Preserve Electronically Stored Information.**

#### **a. Amendments to Fed R Civ P 37(e):**

- i. The rule has been re-written to place limits on spoliation sanctions (but does not address trigger of duty to preserve or the scope of that duty).
- ii. Amended to permit curative measures upon finding of prejudice.
- iii. Amended to permit adverse inference instruction, dismissal, or default only upon a finding that the party who failed to preserve did so "with the intent to deprive another party of the information's use in the litigation."

### **4. Protective Orders**

- a. The District of Oregon provides two form stipulated protective orders:
  - i. The first-tier protective order includes only a "confidential" designation.
  - ii. The second-tier protective order includes a "confidential" and "attorneys' eyes only" designation. LR 26-4 (Practice Tip)
- b. The court recommends that you use one of these protective orders unless you have a very good reason to modify them.

### **5. Motions**

- a. All motions, other than motions for temporary restraining orders, must contain the certification that the parties conferred and attempted to resolve the dispute, as required by LR 7.1.
  - i. Practice Tip 1 LR 7-1: The conferral requirements of LR 7-1 are broader than those established in Fed R Civ P 37(a)(1), which deals only with motions to compel discovery.
- b. The moving party in a discovery motion may not file a reply, unless specifically directed to do so by the court. LR 26-3(c).
- c. Parties may contact the assigned judge to set a telephone conference to resolve any discovery problems. LR 26.3(f).

## 6. Motions to Compel

- a) Motions to compel are subject to the requirements of LR 26-3 related to motion title, word-count or page limits, replies, calendaring, pre-filing conferences, and certifications of conferral. LR 37-1.
- b) If the judge included a requirement in the case management order pursuant to Fed R Civ P 16(b)(3)(B) that the parties must have a court conference before filing a motion to compel, the moving party must request this conference with the Court by contacting the judge's courtroom deputy. Practice Tip LR 26-3.
- c) Time limits to comply with motions to compel: unless otherwise directed by the court, the party against whom an order to compel has been entered must comply with the order within 14 days after the order is entered. LR 37-2.

## 7. Stipulations

- a. Parties cannot agree to extend any deadlines established by the case scheduling order; any filing deadline established by the court, the local rules, or the federal rules; any court-scheduled conference; the pretrial order date; or the trial date. LR 29.1. Only a court order can alter these deadlines.

## Motions for Summary Judgment

1. Parties must support factual positions with citations to the record. LR 56-1(a).
  - a. The parties no longer need to file a separate concise statement of material fact.
2. Parties may assert evidentiary objections in a response or reply memorandum; it is not necessary to file a separate motion to strike. LR 56-1(b).
  - a. If the nonmoving party makes an evidentiary objection in the response memorandum, the moving party may address the objection in its reply. The nonmoving party cannot file any additional briefing on its evidentiary objection. LR 56-1(b).
  - b. If the moving party raises an evidentiary objection in its reply, the nonmoving party has seven days to address the objection in a surreply. The moving party cannot file any additional briefing on its evidentiary objection. LR 56-1(b).
3. Motions for summary judgment are subject to the conferral requirement and certification provisions of LR 7.1, as are evidentiary objections raised in a response or reply memorandum. LR 7.1 and 56-1(b).

## Trial

1. Parties must submit a proposed pretrial order, unless the parties consent otherwise, subject to the court's approval. LR 16-5. It should contain:
  - a. The nature of the action;
  - b. Whether the trial will be by jury or not;
  - c. All agreed facts and disputed facts;

- d. A statement of each claim/defense;
  - e. Amendments to the pleadings.
2. Magistrate judges may conduct trial if the parties consent and may be able to set earlier and firmer trial dates. LR 73-1 and LR 73-2. Parties are encouraged to consent to magistrates.

### **Professionalism**

1. Statement of Professionalism must be adhered to by all attorneys admitted to practice in the District of Oregon. LR 83-7.
  - a. The Statement of Professionalism sets forth 14 "general guidelines" for practice.
2. Counsel must notify the court if, for example, counsel is suspended/disbarred by any court or is convicted of a felony. LR 83-6.
3. Counsel must cooperate and be courteous with each other in all phases of litigation. The court can impose sanctions if it finds that counsel has been unreasonable in not accommodating the legitimate requests of opposing counsel. The court can also consider the lack of cooperation in attorney fee awards. LR 83-8.

## The 4 Major Changes to the Federal Rules of Civil Procedure Effective Dec. 1, 2015

Gregory P. Joseph\*

1. **Narrower Scope of Discovery.** Discovery is confined to matters (i) “relevant to any party’s claim or defense” and (ii) “proportional to the needs of the case.” (Rule 26(b)(1))
  - **Reasonably-Calculated Language Deleted.** The sentence formerly providing that “*Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence*” has been deleted, with the note that it was never intended to define the scope of discovery. (It was originally added in 1946 to solve a specific problem — parties were objecting in depositions to relevant questions on the ground that the answers would not be admissible at trial — but took on a life of its own over the years.)
2. **Early Rule 34 Requests.** Requests for production or inspection may be served within 21 days of the service of the summons and complaint (i) by any party on the served defendant and (ii) by the served defendant on the plaintiff or any other served party (which could include third-party defendants or additional counterclaim defendants whom the defendant has promptly served). (Rule 26(d)(2)(A))
  - These requests are considered served at the time of the Rule 26(f) conference. (Rule 26(d)(2)(B))
3. **Responses to Rule 34 Requests.** No more boilerplate objections or vague pledges.
  - **Specific Objections.** The response to each item of a Rule 34 request must “state with specificity the grounds for objecting to the request, including the reasons” (Rule 34(b)(2)(B))
  - **Specific Deadline for Production.** Production must be completed “no later than the time for inspection specified in the request or another reasonable time specified in the response” (Rule 34(b)(2)(B)) Determining “another reasonable time” could be challenging, especially if the Rule 34 request is made early, under Rule 26(d)(2)(A). Amendment of responses is likely to become common.
  - **Specificity as to Whether Production Is Being Withheld.** “An objection must state whether any responsive materials are being withheld on the basis of the objection.” (Rule 34(b)(2)(C)) Until the responding party is familiar with the universe of responsive materials, this may be unknowable. Initial responses may have to recite either the responding party’s belief as to whether materials are likely to be withheld or that it is uncertain whether materials will be withheld—and then supplemented in a timely fashion once the fact is determined.

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\* Past President, American College of Trial Lawyers; past Chair, ABA Section of Litigation; past member, Advisory Committee on the Federal Rules of Evidence; President, Supreme Court Historical Society; author, *SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE* (5th ed. 2013); *CIVIL RICO: A DEFINITIVE GUIDE* (4th ed. 2015); *MODERN VISUAL EVIDENCE* (Supp. 2015); member, Editorial Board, *MOORE’S FEDERAL PRACTICE* (3d ed. 1995-).

#### 4. Spoliation of Electronically-Stored Information.

- No sanctions may issue against a party for spoliation of ESI unless all 4 of the following criteria are satisfied: (i) the ESI should have been preserved; (ii) it is lost; (iii) the party failed to take reasonable steps to preserve it; and (iv) it cannot be restored or replaced. (Rule 37(e))
- If all four of these criteria are satisfied:
  - Plus one more—prejudice—then the court “may order measures no greater than necessary to cure the prejudice.” (Rule 37(e)(1)) These measures cannot include the penalties identified in subdivision (e)(2) (presuming the lost information was unfavorable to the spoliator; an adverse inference instruction; a default judgment, or dismissal).
  - Plus a different one—that the spoliator “acted with the intent to deprive another party of the information’s use in the litigation”—then, regardless of prejudice, the court may presume the lost information was unfavorable to the spoliator or issue an adverse inference instruction, a default judgment, or dismissal. (Rule 37(e)(2)) Note: (i) prejudice need not be shown, and (ii) intent may be a jury issue under Fed. R. Evid. 104.
- Rule 37(e) applies only to spoliation of ESI, not tangible evidence. In five Circuits (1st, 2d, 6th, 9th and sometimes D.C.), negligence will continue to suffice for the imposition of severe sanctions for spoliation of tangible evidence.
- Rule 37(e) applies only to “a party,” not third-party spoliators (*e.g.*, subpoena recipients).

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# Chapter 6

## Oregon's Judicial Branch<sup>1</sup>

THE HONORABLE DAVID BREWER  
Oregon Supreme Court  
Salem, Oregon

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<sup>1</sup> Prepared for *Practicing Law in Oregon*, OSB CLE, June 22, 2017.

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## OREGON SUPREME COURT

**Website:** <http://courts.oregon.gov/Supreme/>

**Address:** Supreme Court Bldg., 1163 State St., Salem 97301-2563

**Records and Case Information:** 503-986-5555; Oregon Relay 711

**Fax:** 503-986-5560

**Staff Directory from Oregon.gov:** <http://dasapp.oregon.gov/statephonebook/display.asp?agency=19800&division=00010>

The Supreme Court of Oregon has seven justices, elected by nonpartisan, statewide ballot, to serve six-year terms. Justices elected to the Supreme Court must be United States citizens, members of the Oregon State Bar and residents of Oregon for at least three years. The court has its offices and courtroom in the Supreme Court Building one block east of the State Capitol in Salem. The members of the court elect one of their number to serve as chief justice for a six-year term.

### **Powers and Authority**

The Supreme Court was created, and its role largely defined, by Article VII of the Oregon Constitution, as amended. It is primarily a court of review in that it reviews the decisions of the Court of Appeals in selected cases. The Supreme Court usually selects cases with significant legal issues calling for interpretation of laws or legal principles affecting many citizens and institutions of society. When the Supreme Court decides not to review a Court of Appeals case, the Court of Appeals' decision becomes final. In addition to its discretionary review function, the Supreme Court hears direct appeals in death penalty, lawyer and judicial discipline, and Oregon Tax Court cases. It may accept original jurisdiction in mandamus, quo warranto and habeas corpus proceedings. It also reviews ballot measure titles, prison siting disputes, reapportionment of legislative districts, and legal questions on Oregon law referred by federal courts.

### **Administrative Authority**

The chief justice is the administrative head of the Judicial Department and, as such, exercises administrative authority over and supervises the appellate, circuit and tax courts. The chief justice makes rules and issues orders to carry out necessary duties and requires appropriate reports from judges and other officers and employees of the courts. As head of the Judicial Department, the chief justice appoints the chief judge of the Court of Appeals and the presiding judges of all state trial courts from the judges elected to those courts. The chief justice adopts certain rules and regulations respecting procedures for state courts. The chief justice also supervises a statewide plan for budgeting, accounting and fiscal management of the judicial department.

The chief justice and the Supreme Court have the authority to appoint lawyers, elected judges and retired judges to serve in temporary judicial assignments.

### **Admission and Discipline of Lawyers and Judges**

The Supreme Court has responsibility for admitting lawyers to practice law in Oregon and the power to reprimand, suspend or disbar lawyers whose actions have been investigated and prosecuted by the Oregon State Bar. In admitting lawyers, the Supreme Court acts on the recommendation of the Board of Bar Examiners, which conducts examinations for lawyer

applicants each February and July and which screens applicants for character and fitness to practice law. The Supreme Court appoints at least 14 members to the Board of Bar Examiners. The board includes two “public” members who are not lawyers. The Supreme Court also has the power to censure, suspend or remove judges after investigation and recommendation by the Commission on Judicial Fitness and Disability.

### **OREGON COURT OF APPEALS**

**Website:** <http://courts.oregon.gov/COA/>

**Address:** Supreme Court Bldg., 1163 State St., Salem 97301-2563

**Records and Case Information:** 503-986-5555; Oregon Relay 771

**Fax:** 503-986-5865

**Staff Directory from Oregon.gov:** <http://dasapp.oregon.gov/statephonebook/display.asp?agency=19800&division=00020>

Created in 1969 as a five-judge court, the Court of Appeals was expanded to six judges in 1973 and to ten in 1977. The 2012 House Bill 4026B amended ORS 2.540 to increase the number of Court of Appeals judges from 10 to 13. The bill provides that the new positions become operative on October 1, 2013, and that they should be filled by gubernatorial appointment. The judges, otherwise elected on a statewide, nonpartisan basis for six-year terms, must be United States citizens, members of the Oregon State Bar and qualified electors of their county of residence. The chief justice of the Supreme Court appoints a chief judge from among the judges of the Court of Appeals.

Court of Appeals judges have their offices in the Justice Building in Salem and usually hear cases in the courtroom of the Supreme Court Building. The court ordinarily sits in panels of three judges. The Supreme Court has authority to appoint a Supreme Court justice, a circuit court judge or an Oregon Tax Court judge to serve as a judge pro tempore of the Court of Appeals. The 1997 Legislature created an appellate mediation program called the Appellate Settlement Conference Program; see ORS 2.560(3).

#### **Jurisdiction**

The Court of Appeals has jurisdiction to review appeals of most civil and criminal cases and most state administrative agency actions. The exceptions are appeals in death penalty, lawyer and judicial disciplinary, and Oregon Tax Court cases, which go directly to the Oregon Supreme Court.

#### **Reviews and Decisions**

A party aggrieved by a decision of the Court of Appeals may petition the Supreme Court for review within 35 days after the Court of Appeals issues its decision. The Supreme Court determines whether to review the case. The Supreme Court allows a petition for review whenever at least one fewer than a majority of the Supreme Court judges participating vote to allow it.

### **OREGON TAX COURT**

**Website:** <http://courts.oregon.gov/Tax/>

**Address:** Robertson Bldg., 1241 State St., 4th Floor, Salem 97301-2563

**Phone:** 503-986-5645; TTY: 503-986-5651

**Fax:** 503-986-5507

**Staff Directory from Oregon.gov:** <http://dasapp.oregon.gov/statephonebook/display.asp?agency=19800&division=00030>

The Oregon Tax Court has exclusive, statewide jurisdiction in all questions of law or fact arising under state tax laws, including income taxes, corporate excise taxes, property taxes, timber taxes, cigarette taxes, local budget law and property tax limitations.

### **Magistrate Division**

**Address:** Robertson Bldg., 1241 State St., 3rd Floor, Salem 97301-2563

**Phone:** 503-986-5650

The Oregon Tax Court consists of two divisions: the Magistrate Division and the Regular Division. The judge of the Oregon Tax Court appoints a presiding magistrate and one or more other magistrates to serve in the Magistrate Division.

Trials in the Magistrate Division are informal proceedings. Statutory rules of evidence do not apply, and the trials are not reported. The proceedings may be conducted by telephone or in person. A taxpayer may be represented by a lawyer, public accountant, real estate broker or appraiser.

The filing fee is \$240. All decisions of the magistrates may be appealed to the Regular Division of the Oregon Tax Court.

### **Regular Division**

Appeals from the Magistrate Division are made directly to the Regular Division of the Oregon Tax Court. The judge of the Oregon Tax Court presides over trials in the Regular Division. The Regular Division is comparable to a circuit court and exercises equivalent powers. All trials are before the judge only (no jury) and are reported. The parties may either represent themselves or be represented by an attorney. Appeals from the judge's decision are made directly to the Oregon Supreme Court. The filing fee is \$240.

The judge serves a six-year term and is elected on the statewide, nonpartisan judicial ballot.

## **OREGON CIRCUIT COURTS**

**Website:** <http://courts.oregon.gov/OJD/courts/circuit/index.page?>

**Circuit Court Judges Phone Directory from Oregon.gov:** <http://dasapp.oregon.gov/statephonebook/display.asp?agency=19800&division=00150>

The circuit courts are the state trial courts of general jurisdiction. The circuit courts have juvenile jurisdiction in all counties except Gilliam, Morrow, Sherman and Wheeler, where the county court exercises juvenile jurisdiction except for termination of parental rights proceedings, over which the circuit courts have exclusive jurisdiction. The circuit courts also exercise jurisdiction in probate, adoptions, guardianship and conservatorship cases in all counties except Gilliam, Grant, Harney, Malheur, Sherman and Wheeler.

Circuit court judges are elected on a nonpartisan ballot for a term of six years. They must be citizens of the United States, members of the Oregon State Bar, residents of Oregon for at least three years and residents of their judicial district for at least one year (except Multnomah County judges, who may reside within ten miles of the county). Since January 1, 2007, there are 173 circuit

judges serving the 36 Oregon counties. The circuit judges are grouped in 27 geographical areas called judicial districts. Multnomah County district has 38 circuit judges; Lane, 15; Marion, 14; Washington, 14; Clackamas, 11; Jackson, 9; Deschutes, 7; Coos-Curry, 6; four districts have five judges, three districts have four judges, six districts have three judges, three districts have two judges and three districts have one judge.

To expedite judicial business, the chief justice of the Supreme Court may assign any circuit judge to sit in any judicial district in the state.