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Seminars

# 2022 Business Law Update



*Cosponsored by the Business Law Section*

Wednesday, November 2, 2022

9 a.m.–12:10 p.m.

3 General CLE credits (ID 93918)

Thursday, November 3, 2022

9 a.m.–1:20 p.m.

3 General CLE credits and 1 Ethics credit  
(ID 93919)

## 2022 BUSINESS LAW UPDATE

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## SCHEDULE

Wednesday, November 2, 2022

### 9:00 Cautionary Advice Related to Securities for Business Attorneys

- ◆ Basics of: exemption to registration and adequate disclosure/avoiding material misrepresentations
- ◆ Broker-dealer exemption considerations
- ◆ Oregon securities liability for attorneys

Daniel Keppler, *Foster Garvey PC, Portland*

Charmin Shiely, *Schwabe Williamson & Wyatt PC, Portland*

### 10:00 Transition

### 10:05 Upcoming LLC Legislation: A Legislative Preview of Oregon's Version of the Revised Uniform Limited Liability Company Act

- ◆ Background of Oregon Law Commission's LLC Modernization Work Group
- ◆ Overview of the Revised Uniform Limited Liability Company Act (RULLCA)
- ◆ Comparison of RULLCA to Oregon's Current LLC Act
- ◆ Next steps in the legislative process

Michael Walker, *Samuels Yoelin Kantor LLP, Portland*

### 11:05 Transition

### 11:10 Employment Law Updates for Business Lawyers

Employment law is a fast-changing area that impacts every business sector. If your clients have employees, they have employment law issues. Join members of the Markowitz Herbold employment team to learn about recent changes to the law that could impact your advice to your business clients, including pay equity, noncompetition, and nonsolicitation agreements.

Laura Salerno Owens, *Markowitz Herbold PC, Portland*

Kathryn Roberts, *Markowitz Herbold PC, Portland*

### 12:10 Adjourn

Thursday, November 3, 2022

### 9:00 2022/2023 Intellectual Property Updates for Business Lawyers

- ◆ The alphabet soup of intellectual property agencies and how they differ
- ◆ New initiatives from a variety of organizations designed to incentivize diverse participation
- ◆ Common details that will trigger your need to consider intellectual property protections
- ◆ Easy ways to protect your clients

Melissa Jaffe, *Law Offices of Melissa B. Jaffe PC, Portland*

### 10:00 Transition

### 10:05 Tax Update

- ◆ Tax issues coming out of the Inflation Reduction Act
- ◆ Brief update on Oregon state and local taxes
- ◆ Other federal, state, and local hot topics and proposals

Dan Eller, *Schwabe Williamson & Wyatt PC, Portland*

Alee Soleimanpour, *Schwabe Williamson & Wyatt PC, Portland*

## SCHEDULE (Continued)

### 11:05 Break

### 11:15 A Few of Our Favorite Things Business Lawyers Should Know About Bankruptcy

- ◆ Overview of the different types of bankruptcy filings
- ◆ Pre-bankruptcy issues for debtors and creditors to consider
- ◆ Opportunities that bankruptcy presents to businesses
- ◆ What the automatic stay is and how to make sure your client doesn't violate it

Danny Newman, *Tonkon Torp LLP, Portland*

Ava Schoen, *Tonkon Torp LLP, Portland*

### 12:15 Transition

### 12:20 Ethics in the Age of Social Media: The Dos and Don'ts in and out of Client Disputes

Lawyers use social media every day, for personal use, to look up clients, to investigate jurors, and to market their legal services. There is no denying the benefits in using it—but there is risk as well. This presentation reviews cases and ethics opinions to explore the dos and don'ts of using social media.

Amber Bevacqua-Lynott, *Buchalter PC, Portland*

### 1:20 Adjourn

## FACULTY

**Amber Bevacqua-Lynott**, *Buchalter, Portland*. Ms. Bevacqua-Lynott provides guidance and legal representation to attorneys, licensed professionals, and other business clients, including firms and in-house legal departments. Her practice centers on legal ethics, risk management, and discipline defense. She acts as outside counsel to clients in a variety of industries. In addition, Ms. Bevacqua-Lynott represents lawyers, students, and other professionals in front of regulatory authorities and bar associations on licensing, admissions, reinstatement, reciprocity, character and fitness, consumer protection, unauthorized practice of law, and disciplinary matters. She regularly presents seminars on ethics issues.

**Dan Eller**, *Schwabe Williamson & Wyatt PC, Portland*. Mr. Eller assists clients with tax and business law issues in both transactions and controversies. He has litigated cases before both the United States Tax Court and the Oregon Tax Court. Since the enactment of Oregon's Corporate Activity Tax in 2019, Mr. Eller has been at the forefront of its implementation and regularly presents on the topic. He also is an Adjunct Professor at Lewis and Clark Law School and an Adjunct Instructor in the School of Business Administration at Portland State University. Mr. Eller is admitted to practice in Oregon and Washington and before the United States Tax Court and United States Supreme Court.

**Melissa Jaffe**, *Law Offices of Melissa B. Jaffe PC, Portland*. Ms. Jaffe's practice focuses on intellectual property strategy, counsel, negotiations, and drafting. She is a member of the Oregon State Bar Business Law Section Executive Committee, the King County [Washington] Women Lawyers Executive Committee, and the Washington Women Lawyers Executive Committee. She is admitted to practice in California, Washington, and Oregon.

**Daniel Keppler**, *Foster Garvey PC, Portland*. As Foster Garvey's general counsel, Mr. Keppler oversees and implements the firm's professional responsibility, client intake, and risk management programs. He advises and educates the firm's attorneys and staff on legal ethics and best practices. He also occasionally counsels professional and institutional clients on risk management issues, particularly involving securities liability and professional liability. In his prior role as a litigator, he handled securities litigation, legal malpractice defense, and complex business litigation. Mr. Keppler is a member and past chair of the Oregon State Bar Securities Regulation Section and a member of the Business Law Section, Business Litigation Section, Litigation Section, Appellate Practice Section, and Constitutional Law Section. He is admitted to practice in Oregon and Washington.

**Danny Newman**, *Tonkon Torp LLP, Portland*. Mr. Newman focuses his work in the firm's Bankruptcy & Reorganization and Government Solutions Practice Groups. He also previously co-taught a negotiations seminar as an adjunct professor at Gonzaga Law and at South Texas College of Law Houston. He maintains an active pro bono practice, including forming and advising nonprofit clients, representing immigrants seeking asylum or special status, and pursuing civil rights claims. He is admitted to practice in Oregon and Texas.

**Kathryn Roberts**, *Markowitz Herbold PC, Portland*. Ms. Roberts specializes in legal research, analysis, and drafting, with a substantive focus on commercial litigation and labor and employment law. She also has extensive experience in all stages of civil discovery, investigations, motion practice, and trial preparation. She is a member of the Multnomah Bar Association CLE Committee.

## FACULTY (Continued)

**Laura Salerno Owens**, *Markowitz Herbold PC, Portland*. Ms. Salerno Owens is a trial lawyer who represents clients in a variety of employment law issues and business matters. She has significant experience in state and federal courts, mediations, and arbitrations. She has given more than 100 presentations on various topics, including general employment law, anti-discrimination and harassment, social media in the workplace, and pay equity. She is the recipient of the 2013 Oregon State Bar New Lawyers Division Member Services Award the 2012 Oregon State Bar New Lawyers Division Volunteer of the Year Award, and the 2012 American Bar Association Young Lawyers Division National Service to the Bar Award.

**Ava Schoen**, *Tonkon Torp LLP, Portland*. Ms. Schoen's practice focuses on Chapter 11 corporate reorganizations and debtor-creditor law, as well as commercial litigation. Ms. Schoen is a member of the Turnaround Management Association, the Multnomah Bar Association the Oregon Association of Defense Counsel, Oregon Women Lawyers, and the Oregon State Bar Debtor-Creditor Section, Business Litigation Section, and Litigation Section. She is admitted to practice in Oregon and New York.

**Charmin Shiely**, *Schwabe Williamson & Wyatt PC, Portland*. Ms. Shiely acts as lead counsel to prominent businesses in a number of industries, including real estate development and senior housing. She also assists clients with structuring equity and executive compensation and business transition. She is a member of the NAIOP Commercial Real Estate Development Association Membership Committee, the Commercial Real Estate Women (CREW) Forecast Breakfast Committee, and the Oregon State Bar Business Law Section Executive Committee. Ms. Shiely is admitted to practice in Oregon and Washington.

**Alee Soleimanpour**, *Schwabe Williamson & Wyatt PC, Portland*. Mr. Soleimanpour helps clients navigate complicated business and tax issues on the federal, state, and local level. He has advised clients on the implementation of Oregon's Corporate Activity Tax and its effect on their businesses since its implementation in 2019, and he has authored a number of articles on CAT developments from both the Oregon Department of Revenue and the Oregon Legislature. He is admitted to practice in Oregon and Washington and before the United States Tax Court. Mr. Soleimanpour holds an LL.M. in Taxation from New York University School of Law.

**Michael Walker**, *Samuels Yoelin Kantor LLP, Portland*. Mr. Walker advises businesses and individuals in a broad range of business, tax, and estate planning issues. He is a member of the American Bar Association, the Estate Planning Council of Portland board, the Oregon Law Commission, the Oregon State Bar Business Law Section Executive Committee, the Multnomah Bar Association, and the Portland Estate Planning Council Annual Seminar Committee. He has authored articles and presented on topics including business and estate planning, limited liability companies, taxation, digital assets, and 1031 exchanges. He is licensed to practice law in both Oregon and Washington and is also admitted to practice before the United States Tax Court.

# Chapter 1A

## Securities Liability for Transactional Lawyers Under the Oregon and Washington Blue Sky Laws

DANIEL KEPPLER  
Foster Garvey PC  
Portland, Oregon

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## Securities Liability for Transactional Lawyers Under the Oregon and Washington Blue Sky Laws

Daniel L. Keppler\*  
Foster Garvey PC

### I. Why should I care as a transactional lawyer?

Oregon courts hold that a **lawyer** who prepares documents in a transaction with investors may be liable for participating in or material aiding the unlawful sale of securities to those investors—even **if the lawyer didn't know about the unlawful conduct.** ☹️

*Prince v. Brydon*, 307 Or. 146, 149, 764 P.2d 1370 (1988) (discussing liability under ORS 59.115(3)).

- The only consolation is that the lawyer can avoid liability by proving that the lawyer “did not know, and, in the **exercise of reasonable care, could not have known**, of the existence of facts on which the liability is based.” ORS 59.115(3) (emphasis added).

But proving this “negative” is difficult. And maybe hasn't happened in an Oregon trial court in recent history. 🌟

Meanwhile, Washington is better for lawyers, but equally dangerous for business clients seeking an infusion of capital from investors. 😊☹️

- In October 2019, the Washington Supreme Court held that disgruntled investors need not establish “reliance” on a false statement or misleading omission to establish liability against the issuer or seller of securities. *Fed. Home Loan Bank of Seattle v. Credit Suisse Sec. (USA) LLC*, 194 Wn. 2d 253, 261, 449 P.3d 1019 (2019).

So it's better to avoid the risk of securities liability altogether . . . .

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**\* All commentary, suggestions, and snarky quips contained in these materials constitute the opinions solely of the author and are not intended to create a standard of care, insurmountable defense, or safe harbor from securities claims.**

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## II. Does my client's deal involve the sale of a security in Oregon?

### A. What is a security?

- All-encompassing definition in ORS 59.015 (19).
- The usual stuff: stocks, bonds, notes.
  - **Beware:** stock sale of a small business is a sale of securities.
  - Asset sales of a business may avoid securities problems.

#### ❖ Wait . . . did you say notes?

- Promissory notes are often securities.
- *See Lahn v. Vaisbort*, 276 Or. App. 468, 369 P.3d 85 (2016) (holding that promissory notes in private loans could be securities).
- Certain commercial loans or mortgage loans **might** not be securities if Oregon adopted the federal “family resemblance test” under *Reves v. Ernst & Young*, 494 U.S. 56, 63–64, 110 S.Ct. 945, 108 L.Ed.2d 47 (1990) (involving the federal Securities Exchange Act).
- May also meet the definition of investment contracts.

#### ❖ Catchall: “investment contracts” are defined as securities.

- Four-part test for investment contracts:
  - (1) **investment** of money (or money's worth)
  - (2) in a **common enterprise**,
  - (3) with the **expectations of a profit**,
  - (4) to be made through the **management and control of others**.
- *Pratt v. Kross*, 276 Or. 483, 497, 555 P.2d 765 (1976) (holding that limited partnership interest was a security); *see also Computer Concepts, Inc. v. Brandt*, 310 Or. 706, 714–15, 801 P.2d 800 (1990) (discussing contours of *Pratt* test).



- Some common investment contracts:
    - **Limited Liability Company** membership interests — especially in a manager-managed LLC, but can be any LLC that meets the *Pratt* test.
    - **Limited Partnerships** — or any partnership that meets the *Pratt* test.
    - **Tenant-in-Common** or other joint ownership interests in real estate. See *Bergquist v. Int'l Realty, Ltd.*, 272 Or. 416, 427, 537 P.2d 553 (1975) (undivided fractional interests in a sale and leaseback transaction was investment contract).
    - **Other jointly-owned assets, e.g., a racehorse!** *Marshall v. Harris*, 276 Or. 447, 455, 555 P.2d 756 (1976) (sale of a fractional interest in a racehorse is an investment contract).
  - **Bottom Line:** Any real estate or business deal with *passive investors* who aren't actively managing the business may involve a sale of securities.
- B. What is a “sale” of a security in Oregon?**
- Includes virtually any “disposition” of a security for value.
  - *Towery v. Lucas*, 128 Or. App. 555, 560, 876 P.2d 814, 817 (1994) (“disposition of” stock in settlement agreement constituted a sale of security).
  - See definition in ORS 59.015 (17)(a).
- C. When does Oregon Securities Law apply to a sale?**
- An offer to sell is made in or directed to Oregon.
  - An offer to buy is made and accepted in Oregon.
  - The offer to sell or buy originates in Oregon.
  - The offer to buy or sell is communicated in Oregon.
  - See ORS 59.335 and 59.345.
- Practically **any Oregon connection is enough** to trigger liability under Oregon Securities Law. See, e.g., *Houston v. Seward & Kissel, LLP*, 2008 WL 818745, U.S. Dist. LEXIS 23914 (S.D.N.Y. 2008) (applying Oregon securities liability provisions in New York case against New York law firm).



### III. What makes the sale of a security actionable in Oregon?

#### A. Untrue Statements and Misleading Omissions

- The most common seller liability allegation in Oregon securities litigation. ORS 59.115 (1)(b).
- Security sold “by means of” untrue statement of material fact.
- Or “by means of” omission to state a material fact necessary to make statements made not misleading (i.e. half-truths). See *Ciuffitelli v. Deloitte & Touche LLP*, 2017 WL 2927481 at \*20 (D. Or. Apr. 10, 2017) (discussing “by means of” requirement).
- Purchaser must prove they didn’t know the truth.
  - But investors need not prove they relied on the untrue statement of material fact or misleading omission. See *Everts v. Holtmann*, 64 Or. App. 145, 152 (1983).
  - Bad intent or “scienter” does not seem to be required for this type of violation. See *State ex rel. Oregon State Treasurer v. Marsh & McLennan Companies, Inc.*, 269 Or. App. 31, 47–48 (2015).
- Seller has burden to prove affirmative defense that the person did not know, and in the exercise of reasonable care could not have known, of the untruth or omission.

#### B. “Classic” Securities Fraud

- To employ any devise, scheme or artifice to defraud.
- To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.
- ORS 59.115 (1)(b) and ORS 59.135 (1) and (3).
- Note: Fraud claims may also be asserted under ORS 59.137, which can be more difficult to prove in Oregon. See *State v. Marsh & McLennan Companies, Inc.*, 353 Or. 1, 13, 292 P.3d 525, 531 (2012) (requiring proof of reliance); *State ex rel. Oregon State Treasurer v. Marsh & McLennan Companies, Inc.*, 269 Or. App. 31, 50, 346 P.3d 504 (2015) (requiring proof of scienter).



### C. Technical violation of the Oregon Securities Law

- Failure to register or to qualify for registration exemption
  - ORS 59.115 (1)(a). See *also* ORS 59.055 (1) requiring registration of securities or exemption from registration.
  - Registration unrealistic in many small business deals.
  - Commonly-used exemptions:
    - **Accredited investors** under Oregon law—
      - individual or joint **net worth** with spouse, exceeds **\$1,000,000**, excluding the value of the natural investor's primary residence, **or**
      - **individual income in excess of \$200,000** in each of the two most recent years or **joint income with spouse in excess of \$300,000** in each of those years and has a reasonable expectation of reaching the same income level in the current year.
      - **No public advertising/solicitation.**
      - See ORS 59.035 (5); OAR 441-035-0010.
      - See *also* 15 USC § 77b (15).
    - **Under 10 Purchasers of securities**
      - For last 12 months.
      - No commissions or remuneration for sale.
      - No public advertising.
      - ORS 59.035 (12).
    - **Federal exemptions may also apply** for example:
      - 17 CFR § 230.506(b) (SEC Regulation D, Rule 506(b))
      - 35 or fewer unaccredited investors
      - Unlimited accredited investors
      - No public advertising
      - Plus other compliance stuff.
      - See *also* 17 CFR 230.506 (c) (Rule 506(c) accredited investor exemption requirements).
  - **Exemption analysis is even more complicated than this.** — **WARNING: Do not try this at home!** Get help from experienced securities counsel.
- Other technical violations, e.g, unlicensed brokers. ORS 59.115 (1)(a); ORS 59.165 (1).

#### IV. Statutory Damages for Seller Liability

- Amount investor paid for security minus amount received on security — sometimes called a rescissory remedy.  
*In other words:* a \$5 million investment deal = \$5 million base damages. ORS 59.115 (2).
- Plus interest at 9% or at the rate stated in the security — whichever is higher.
- Plus discretionary court-awarded attorney fees. ORS 59.115 (10).
  - **Bottom line:** The investors get their money back plus a whole lot of interest and their attorney fees.

#### V. Nonseller Liability in Oregon— *The really Scary Part.* ☠

These “nonsellers” are **jointly and severally liable** with **and to same extent as the seller** of securities under ORS 59.115 (3):

- Any person who directly or indirectly controlled the seller.
- Every partner, LLC manager, officer, director, or person who occupied a similar role.
- **Any Person who participated or materially aided** in the sale — including professionals just doing their jobs such as:
  - **Attorneys**
    - Especially if lawyer prepared prospectus, private placement memorandum, offering circular or similar offering documents. *See Prince*, 307 Or. at 148 (preparing partnership agreement and offering circular sufficient to give rise to liability for materially aiding).
  - ❖ **Don’t like it? Stay North of the Columbia River:**
    - *Compare* Washington vs. Oregon securities law:
      - *Hines v. Data Line Sys., Inc.*, 114 Wn. 2d 127, 150, 787 P.2d 8 (1990) (affirming **summary judgment in favor of law firm** that prepared offering documents). — Lawyers win! 😊
      - *Ainslie v. Spolyar*, 144 Or. App. 134, 145, 926 P.2d 822, 828 (1996) (affirming **summary judgment in favor of investors against lawyer** who prepared securities documents) — Lawyer loses. (Ouch!) ☹



- Doubtful whether mere business formation and basic entity documentation materially aids in the sale of securities — but there are no safe harbors.
- It's going to be a case-by-case analysis of the importance of the attorney's work to the transaction. *Prince*, 307 Or. at 149 ("it is a drafter's knowledge, judgment, and assertions reflected in the contents of the documents that are 'material' to the sale.").
- Accountants
  - Preparation of financial projections or pro formas provided to investors probably increases risk of liability for material aiding.
  - Under certain circumstances, audits, assurance, or maybe tax work could materially aid securities sale.
  - *See, e.g., Ciuffitelli v. Deloitte & Touche LLP*, 2018 WL 456873, 2018 U.S. Dist. LEXIS 163237 (D. Or. Aug. 1, 2018) ("clean audits" allegedly enabled seller of securities to attract investors).
- Brokers / Finders
  - Recommending or promoting investment is risky.
  - Bringing in investors is probably enough, but depends on circumstances.
- Financial Advisors
  - Recommending or promoting investment is risky.
  - Bringing in investors is probably enough, but depends on circumstances.
- Banks / Financial Institutions
  - Loans or lines of credit to facilitate investor financing may be risky.
  - Doubtful whether merely acting as a lender or custodian materially aids in security.
  - Recommending investments to customers is probably risky.
- Note: Nonsellers can also be liable in securities fraud claims brought under ORS 59.137. But in contrast with ORS 59.115 (3), to prove material aiding liability, the investor must prove that the person **materially aided in *the violation*** of the anti-fraud provisions of ORS 59.135 (i.e. not merely materially aid in *the sale* of securities).



## VI. Affirmative Defenses under the Oregon Securities Law

### A. “Due diligence” defense to nonseller liability:

“[E]very person who participates or materially aids in the sale is also liable jointly and severally with and to the same extent as the seller, **unless the nonseller sustains the burden of proof that the nonseller did not know, and, in the exercise of reasonable care, could not have known, of the existence of facts on which the liability is based.**” ORS 59.115(3). This means:

- The nonsellers must prove **they could not have known** about bad facts giving rise to investor liability.
- For lawyers, this can be difficult if the lawyer has a close relationship with the client and knowledge of the business.
- Also requires the nonseller to **prove a negative** “could not have known.”
- This must be evaluated on a case-by-case basis.

### B. Statutes of Limitation Defense

- For claims alleging untrue statements, material omissions or securities fraud under ORS 59.115 (1)(b) (or under ORS 59.137): **three years from the sale of securities or two years from discovery** of the facts giving rise to liability. ORS 59.115 (6). *See also Anderson v. Carden*, 146 Or. App. 675, 934 P.2d 562 (1997) (construing earlier version of the statute of limitation).
- For registration or other technical violations, the statute of limitations for private rights of action is three years from the sale. ORS 59.115 (6).



## VII. Washington Securities Liability

### A. What Counts as a Security?

- Broad, laundry-list definition in RCW 21.20.005 (17)(a).
- Can include promissory notes, especially noncommercial notes. See *State v. Pedersen*, 122 Wn. App. 759, 770, 95 P.3d 385, 391 (2004); *State v. Argo*, 81 Wn. App. 552, 563, 915 P.2d 1103 (1996).
- Courts look at substance over form and economic realities of transaction. *Cellular Engineering, Ltd. v. O'Neill*, 118 Wn. 2d 16, 24–25, 820 P.2d 941, 946 (1991); *Ito Int'l Corp. v. Prescott, Inc.*, 83 Wn. App. 282, 290, 921 P.2d 566 (1996).
- Includes catchall test for “**investment contracts**” which requires 3-part showing: (1) investment of money; (2) common enterprise; and (3) expectation of profits from efforts of others. *Cellular Engineering*, 118 Wn. 2d at 26-32.

### B. Seller or Offeror Liability – RCW 21.20.430 (1)

- **Fraud, Untrue Statement, Misleading Omission**
  - Liability created under anti-fraud statute, RCW 21.20.010 and made actionable under RCW 21.20.430 (1).
  - To recover against the seller of a security a plaintiff must prove: **(1) a fraudulent or deceitful act (2) committed in connection with the offer, sale or purchase of any security.** *Kinney v. Cook*, 159 Wn. 2d 837, 842, 154 P.3d 206, 209–10 (2007).
  - There appears to be little distinction in proving different types of securities fraud, untrue statements of material fact, or misleading omissions under RCW 21.20.010.
  - A misrepresented fact or misleading omission is **material** if it significantly altered the “total mix” of information available to a **reasonable investor**. *Guarino v. Interactive Objects, Inc.*, 122 Wn. App. 95, 114, 86 P.3d 1175, 1185 (2004).
  - **No proof of scienter** (bad intent) is required. *Kittilson v. Ford*, 93 Wn. 2d 223, 227, 608 P.2d 264 (1980).



- **No proof of loss causation** is required *Hines v. Data Line Sys., Inc.*, 114 Wn. 2d 127, 134–35, 787 P.2d 8, 12 (1990).
- **And as of October 2019, no proof of reliance** on the fraud, untrue statement, or misleading omission is required. *Fed. Home Loan Bank of Seattle v. Credit Suisse Sec. (USA) LLC*, 194 Wn. 2d 253, 261, 449 P.3d 1019 (2019).
  - **Bottom Line:** If *anything* in the offering documents is inaccurate or if a promoter misstates any important fact, disgruntled investors can recover – even though they didn’t rely on the inaccuracy or misstatement.
- **Registration Violations / Failure to Qualify for Exemption**
  - Failure to register or qualify for exemption as required under RCW 21.20.140 and is actionable under the liability provision, RCW 21.20.430.
  - See *Christgard, Inc. v. Christensen*, 29 Wn. App. 18, 26, 627 P.2d 136 (1981) (discussing liability statutes).

### C. Who can be liable under Washington’s Securities Statute?

- “Seller” Liability— Expansive definition of who is a Seller
  - “Any person, who offers or sells a security . . .” RCW 21.40.430
  - This includes any person whose actions were “a **substantial contributive factor**” in securities transaction. *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wn. 2d 107, 131–32, 744 P.2d 1032 (1987), *amended*, 109 Wn. 2d 107, 750 P.2d 254 (1988).
  - “**Substantial contributive factor**” involves three amorphous considerations: “(1) the number of other factors which contribute to the sale and the extent of the effect which they have in producing it; (2) whether the defendant’s conduct has created a force or series of forces which are in continuous and active operation up to the time of the sale, or has created a situation harmless unless acted upon by other forces for which



the actor is not responsible; and (3) lapse of time.”

*Haberman*, 109 Wn. 2d at 131–32. *Huh?*

➤ **Bottom Line:** Anybody who is involved in promoting or facilitating the sale of securities could be a “Seller.”

- ❖ **The Good News: A law firm preparing offering documents**, without more, does not meet the “substantial contributive factor” test and is not a seller. *Hines v. Data Line Sys., Inc.*, 114 Wn. 2d 127, 150, 787 P.2d 8 (1990). 😊
  - See also *Miroznick v. Sensney, Davis & McCormick*, 658 F. Supp. 932, 944 (W.D. Wash 1986) (holding that lawyer who wrote opinion letters for public bonds in the infamous WWPS (whoops!) project not liable under statute).
- Other “nonsellers” can be jointly and severally liable with the seller under RCW 21.20.430 (3):
  - People who control the seller.
  - Every person who occupies a **partner, officer, director** similar status or performs a similar function for the seller.
  - Every **employee** of the seller who **materially aids in the transaction**.
  - Every **broker-dealer or salesperson** who materially aids in the transaction.
  - Due diligence affirmative defense: no liability if the “sustains the burden of proof that he or she did not know, and in the exercise of reasonable care could not have known, of the existence of the facts” supporting seller liability.
  - Contrasts with Oregon, where **any person** who participates or materially aids the sale of securities is jointly and severally liable for the seller’s violation. ORS 59.115(3).

#### D. What are the Remedies for an Unlawful Sale?

- Rescission—if plaintiff still owns the security
  - Plaintiff tenders it and recover the purchase price.
  - Plus 8% statutory interest.
  - Plus attorney fees and costs.
  - Less any amounts received on security.
  - RCW 21.20.430 (1); *Go2net, Inc. v. Freeyellow.Com, Inc.*, 158 Wn. 2d 247, 253–54, 143 P.3d 590 (2006).
- Damages—if plaintiff no longer owns the security
  - Value of the security when plaintiff disposed of it, measured as difference between acquisition price and resale price. *Garretson v. Red-Co, Inc.*, 9 Wn. App. 923, 929, 516 P.2d 1039 (1973).
  - Plus 8% interest
  - Plus attorney fees.
  - RCW 21.20.430(1).

#### E. Defenses under Washington Securities Statute

- **Due Diligence Defense** – liability for nonseller can be avoided if defendant “sustains the burden of proof that he or she did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist.” RCW 21.20.430 (3).
- **Statute of Limitations**
  - Longer of 3 years from sale or 3 years from discovery of violation. RCW 21.20.430 (4)(b).
  - Begins to run when plaintiff discovers fraudulent activities or would have with exercise of reasonable care. *In re Metro. Sec. Litig.*, 532 F. Supp. 2d 1260, 1299–300 (E.D. Wash. 2007) *Douglass v. Stanger*, 101 Wn. App. 243, 254–55, 2 P.3d 998 (2000).



- **Carve Out for Public or Municipal Security Offerings**
  - A public employee, agent or similar person who materially aids in an unlawful sale of securities is liable only if the plaintiff establishes scienter (bad motive) on the part of the defendant.
  - This protection does not apply to bond counsel or underwriters.
  - RCW 21.20.430(7).

### **VIII. What can I do as a transactional lawyer to manage these risks?**

- ❖ The remainder of this outline contains tips and general suggestions, but they are not “litigation tested” or supported by specific legal authorities:
  - Unfortunately, there are no safe harbors — and no established best practices and no clear standards, especially in Oregon
    - Even if your legal work is perfect, you can still be sued and taken to trial in Oregon under ORS 59.115 (3).
    - Securities law is not for beginners — get securities law advice if you have a deal involving investors.
    - Don’t assume you will be protected from claims by the accredited investor exemption.
    - If the deal loses money, disgruntled investors and their lawyers may take advantage of any minor problem they can find with the deal or with the offering documents and allege a material misrepresentation or misleading omission.
  - Choose your transactions carefully:
    - Avoid deals involving passive investors if possible.
    - Ideally, all people putting in money should have a role in management of the business.
    - Refer out cases involving passive investors to securities counsel.



- Stay away from the financing part of a transaction — try to limit your role to non-financing aspects of the transaction, e.g., just the transfer of real estate.
  - Avoid deals that seem unlikely to succeed or are poorly conceived.
  - Beware of deals that depend heavily on existing market conditions, market bubbles, or overly optimistic views of reality.
  - Consider having a business or investment consultant or similar professional conduct an analysis of the deal.
  - Avoid deals involving investors using self-directed IRAs or that rely heavily on tax avoidance strategies.
  - Be skeptical of businesses lacking in financial controls.
- Choose your clients carefully:
- Good business clients should have a solid business plan and financial controls in place.
  - Avoid clients who will oversell or puff about their project.
  - Emphasize the need for transparency with investors.
  - Beware of clients who intend to solicit investors from their religious congregation or social organization in which trust among members is unquestioned.
- Try to persuade your client to choose investors carefully:
- Ideally private placement investors should be wealthy, accredited, experienced, cognizant of risks, and maybe even represented by their own counsel before investing.
  - Avoid investors who plan to invest their retirement savings, are inexperienced, uneducated, or vulnerable.
  - Avoid investors who will place unearned trust in promoters regardless of the merits of the business idea, business strategy, or business risks.
- Tips for preparing offering documents and disclosures:
- ❖ **Reminder:** These are not safe harbors, standards of care or best practices — they are only suggestions that are untested in litigation. Every situation requires judgment and a fact-specific approach.



- Don't do securities offering documents unless you know what you are doing. In Oregon, you are taking on a lot of risk. Bring in an experienced securities lawyer.
- Assume your documents will be scrutinized for accuracy and completeness in litigation by counsel representing the investors as plaintiffs.
- Don't become a promoter or seller inadvertently by meeting with or communicating with potential investors.
- Avoid having the offering circular or private placement memo that reads like a marketing brochure — it should be a candid risk disclosure document.
- Avoid having your name or your law firm's name appear in the offering circular or private placement memo.
- Try to identify all obvious and nonobvious investment and business risk factors. Consider adding risk factors that are specific to this particular deal.
- Beware of forms and boilerplate—they likely will not protect you.
- Consider using a detailed questionnaire or other method to discover and disclose potentially “bad facts” including any black marks against your clients.
- Consider using management (client) representation letters or similar documents for having your clients “sign off” on all disclosures and certify that they cannot think of any other risks or material matters to disclose.
- Consider having a business financial or investment professional analyze the deal and potential risks.
- Recommend your client use financial projections or pro formas that are conservative, realistic, and based on the most reliable information available.
- If possible, try to make sure at least two registration exemptions apply.
- Make sure you are adequately insured.



**About the Presenter:**

Dan Keppler is an attorney in the Portland office of Foster Garvey PC.

His practice includes business litigation, appeals, legal malpractice defense, class actions, and regulatory investigations. He also counsels professional and institutional clients on risk management issues.

# Securities Liability For Transactional Lawyers

*The Blues of Oregon's Blue Sky Law*

**Dan Keppler**



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Garvey

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WASHINGTON, D.C.

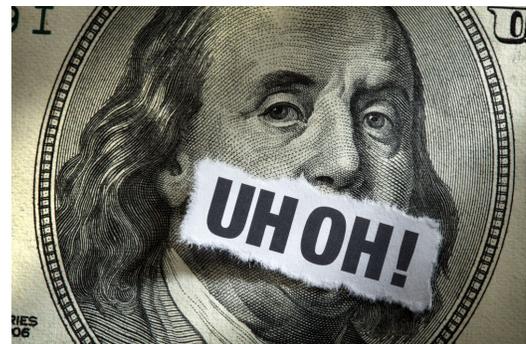
NEW YORK

SPOKANE

BEIJING

## YOU can be liable under Oregon Securities Law:

- For materially aiding your client's unlawful sale of a security.
- Even if you didn't know about the facts that made the sale unlawful.



## Hypothetical deal



**Chad Cheatham**  
Developer of Cheatham  
& Howe



**Sophomoric Station, LLC**  
Mixed use apartments and  
retail near a college campus



**Drew Dino**  
Longtime lawyer



**Annette Able**  
New lawyer

## Investors in Sophomoric Station



**Landra Rover**  
\$20,000  
Marketing Director  
for project  
Gets LLC interest



**Hank Howe**  
\$120,000 loan  
Gets promissory  
note



**Claire Coder**  
\$1.2 million  
Gets LLC  
interest



**Slim Lorde**  
\$800,000 swap  
Gets tenant-in-  
common interest  
(1031 exchange)

## What does Chad tell investors?

- “I have all the land use approvals I need.”
- “I have signed a deal with the anchor tenant, Moondoe’s Coffee.”



## What does Chad forget to mention?

- Land use approvals being appealed.
- Moondoe’s Coffee lease is conditional.



## What the lawyers did:



**Drew Dino**

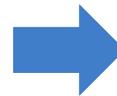
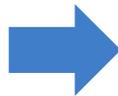
Initial meetings with Chad, then retires.



**Annette Able**

Promissory Note  
LLC Agreement  
TIC Agreement  
Offering Brochure

## What happens to Sophomoric Station LLC?



## Three key questions for liability:



1. Was this a sale of a **security**?
2. Is the **seller** liable for an unlawful sale?
3. Are the **non-sellers** liable for participating or materially aiding the sale?

## What is a security?

Definition in ORS 59.015 (19)

The usual Wall Street stuff:  
stocks, bonds, options, notes



## Wait, did you say notes?

- Notes are securities.
- See *Lahn v. Vaisport*.
- Federal law has an exception for garden variety bank loans.
- Private investor loans are securities, e.g.



**Hank Howe**  
\$120,000 loan



## Investment Contracts under *Pratt* test:

1. **Investment of money** or money's worth
2. In a **common enterprise**
3. With **expectation of profit**
4. Obtained through **management or control of others.**

See *Computer Concepts v. Brandt*.



## Common investment contracts

- Limited Partnerships (LPs)
- LLC interests: Claire Coder's, but maybe not Landra Rover's.
- TIC interests: Slim Lorde's.



**Claire Coder**

\$1.2 million



**Landra Rover**

\$20,000



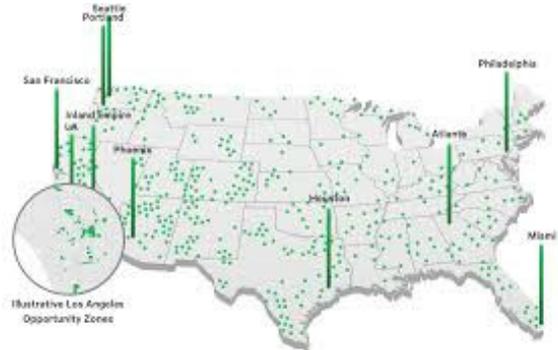
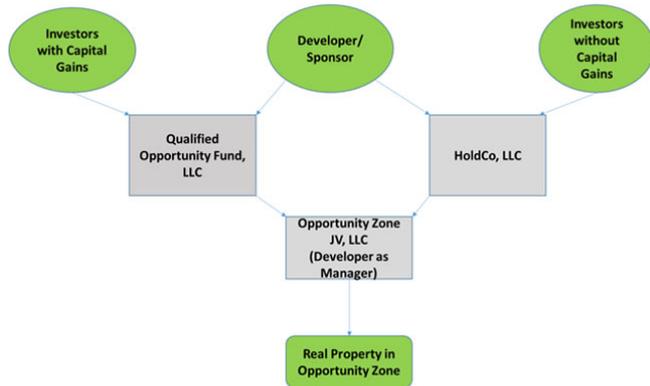
**Slim Lorde**

\$800,000 swap

## Real estate developments



## Opportunity Zone investments



## Racehorses



## Legal cannabis operations



## Three forms of seller liability in ORS 59.115 (1):

1. Technical violation, e.g. failure to register or qualify for exemption.



2. “Classic” fraud under ORS 59.135.

3. Sold by means of **untrue statement of material fact or misleading omission.**



## Untrue statements of material fact

- Materiality is objective: what would reasonable investor want to know?
- Do not need to prove reliance or scienter for untrue statement liability.
- Chad's statement about land use approval.



## Misleading omissions

- Security sold “by means of” omission to state a material fact necessary to make statements made not misleading under circumstances.
- Half-truth.
- Chad's statement: made a deal with Moondoe's coffee when there was a unfulfilled condition.



## Statutory damages for seller liability

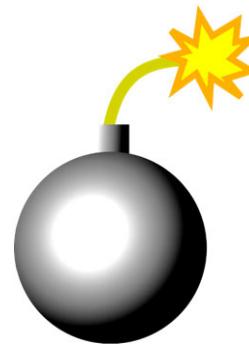
- Amount of investment, minus any gains on investment.
- Plus interest at 9% statutory rate or higher.
- Plus attorney fees.



## Non-seller Liability

- Liable non-seller is liable to the same extent as the Seller.
- Joint and several liability.

ORS 59.115(3)



## Three kinds of Non-seller Liability

1. Control Persons.
2. Directors, Officers, Managers.



3. **Any person who “participates or materially aids”**  
in the **sale** of securities.

ORS 59.115(3)

## Participates or materially aids in the sale

- Lawyer preparing documents supporting the sale, especially those used by investors.
- Does not require knowledge of seller’s conduct.

See *Prince v. Brydon*



## “Due Diligence” Affirmative Defense

The non-seller did not know and, in the exercise of reasonable care, **could not have known**, of the existence of facts on which the seller’s liability is based.



## Who materially aided sale of securities?



**Drew Dino**



**Annette Able**

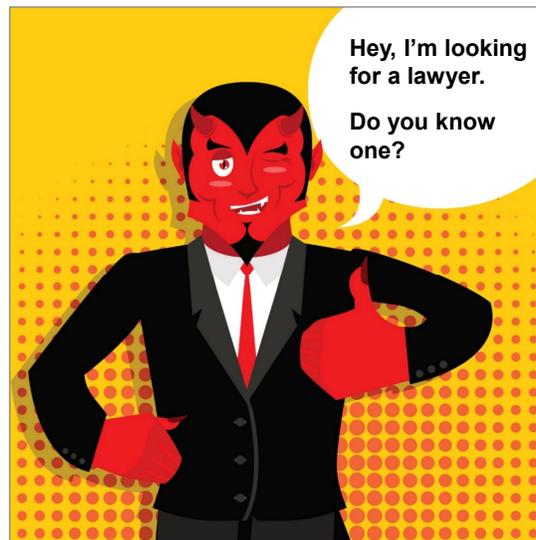
What can YOU do?



Understand your risk.



## Choose your clients carefully.



## Choose your deals carefully.



## Choose your partners and associates carefully.



## Questions?



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# Chapter 1B

## Broker-Dealer Issues in Private Placement Offerings

**CHARMIN SHIELY**  
Schwabe Williamson & Wyatt PC  
Portland, Oregon

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## Broker-Dealer Issues in Private Placement Offerings

When structuring a private placement offering, it is important to consider not only the applicable exemption from registration for the offering under state and federal securities law, but also whether each of the persons engaged in the offering are either registered as broker-dealers or exempt from such registration. Both federal and state securities laws require persons who are engaged in the business of effecting transactions in securities to be registered (licensed), unless there is an applicable exemption to registration (licensing). According to the Securities and Exchange Commission (“SEC”), activities giving rise to a potential broker-dealer registration requirement can include, among others, finding investors for the private placement offering or engaging in important roles in connection with the offer and sale of securities—including soliciting, negotiation, or executing a securities transaction.<sup>1</sup>

### *Dispelling the “Finder” Myth*

A word of warning: many clients will try to convince you that it is acceptable for them to pay an unregistered “finder” to solicit investors for a private placement offering under the theory that “everyone does it, so it must be ok.” In fact, the use of unregistered “finders” appears to be widespread. However, the SEC has spoken frequently on this issue and has articulated various factors that are typical of broker activity where the person would need to be registered.<sup>2</sup> The SEC has also stated that “the federal securities laws require that an individual who solicits investments in return for transaction-based compensation be registered as a broker”<sup>3</sup> and has brought many actions based on that premise.<sup>4</sup> Arrangements to pay unregistered broker-dealers have been found to be unlawful and void.<sup>5</sup> Issuers who engage unregistered brokers violate the Securities Exchange Act of 1934 (the “Exchange Act”) and face potential civil and/or criminal penalties for aiding and abetting liability.<sup>6</sup> Moreover, the failure to disclose the engagement of an unregistered broker in connection with an offering may be deemed a Rule 10b-5<sup>7</sup> violation giving investors a rescission right.<sup>8</sup>

The SEC has issued narrow no-action letters permitting finders to be unregistered who introduce investors to issuers, without further involvement in discussions between the issuer and investors and without giving advice on the investment structure or suitability, in exchange for compensation that is not tied to the success of the transaction.<sup>9</sup> Given the potential for a finder to cross the narrow line into

<sup>1</sup> Guide to Broker-Dealer Registration, U.S. Securities and Exchange Commission, Division of Trading and Markets (April 2008), available at <https://www.sec.gov/reportspubs/investor-publications/divisionsmarketregbdguidehtm.html> [hereinafter SEC Guide to Broker-Dealer Registration].

<sup>2</sup> See *id.*; Eric R. Smith, *Finders and Unregistered Broker-Dealers*, Venable Insights (May 14, 2018), <https://www.venable.com/insights/publications/2015/12/finders-and-unregistered-brokerdealers> (listing factors: (i) participating in discussions and negotiations with issuer and potential investors; (ii) assisting in structuring transactions; (iii) transaction-based compensation; (iv) pre-screening investors; (v) pre-selling the issuance to gauge interest; (vi) assisting with sales; (vii) providing advice regarding value of securities; (viii) locating issuers on behalf of investors; (ix) soliciting new clients; (x) disseminating quotes; (xi) actively finding investors; (xii) sending private placement memoranda, subscriptions documents and due diligence materials; (xiii) advising on portfolio allocations to accommodate an investment; (xiv) providing analyses of potential investments; and (xv) providing potential investors with confidential information identifying other investors and their capital commitments).

<sup>3</sup> *In the Matter of Ranieri Partners LLC & Donald W. Phillips, Respondents*, Release No. 3563 (Mar. 8, 2013); *In the Matter of William M. Stephens, Respondent.*, Release No. 30417 (Mar. 8, 2013).

<sup>4</sup> See *Brumberg, Mackey & Wall, PLC*, SEC No-Action Letter (May 17, 2010).

<sup>5</sup> See The Securities and Exchange Act of 1934 § 29(b), 15 U.S.C. § 78cc(b) (contracts are void if made in violation of the Exchange Act).

<sup>6</sup> See Securities and Exchange Act of 1934 § 20(e) (SEC may impose aiding and abetting liability on any person that knowingly and recklessly provides substantial assistance in violation of the Exchange Act).

<sup>7</sup> 17 C.F.R. § 240.10b-5. It is unlawful to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading. Commentators have suggested that failure to properly complete the Form D regarding Sales Compensation may give rise to a Rule 10b-5 violation.

<sup>8</sup> See The Securities Act of 1933 § 12(2), 15 U.S.C. § 771(a)(2); Securities and Exchange Act of 1934 § 29(b); *Reg'l Props., Inc. v. Fin. & Real Estate Consulting Co.*, 678 F.2d 552, 558 (5th Cir. 1982) (“[I]t must be considered as settled that section 29(b), by implication, does provide a private, equitable cause of action for rescission or similar relief.”) (citations omitted); see *Berkeley Inv. Grp., Ltd. v. Colkitt*, 455 F.3d 195, 205–08 (3d Cir. 2006).

<sup>9</sup> Paul Anka, SEC No-Action Letter (July 24, 1991).

activities that require registration, it is perilous for issuers and finders to rely on these no-action letter precedents. The SEC has indicated that a person who engages on multiple occasions in accepting fees for introductions is probably engaging in the business of selling securities and required to register as a broker-dealer.<sup>10</sup> As such, an issuer should be wary of anyone offering to sell introductions to investors, as that person may have offered such service in the past.

Recognizing the difficulty small businesses face in raising capital, the SEC issued a proposal in October 2020 for a limited finder's exemption to the broker registration requirements for "finders" who assist issuers with raising capital in private markets from accredited investors.<sup>11</sup> The proposed rule has not been adopted by the SEC and it appears unlikely that there will be any further action with respect to the proposal. The failure of the proposed rule reinforces the existing scheme which prohibits unregistered finders, as discussed below.

### **Federal Law**

Section 15(a)(1) of the Exchange Act generally makes it unlawful for any broker or dealer to "induce or attempt to induce the purchase or sale of any security" unless registered under the Exchange Act. A "broker" means any person engaged in the business of effecting transactions in securities for the account of others<sup>12</sup> and a "dealer" means any person engaged in the business of buying and selling securities for such person's own account.<sup>13</sup> Issuers are neither brokers nor dealers if their activities do not go beyond selling their own securities. However, this so-called "issuer's exemption" does not apply to the personnel of a company who routinely engage in the business of effecting securities transactions for the company or related companies.<sup>14</sup> For such individuals, the analysis involves determining whether their activities are sufficiently limited in scope or frequency that they would not be deemed to be engaged in the business of effecting transactions in securities. The SEC adopted Rule 3a4-1 as a non-exclusive safe harbor under which persons associated with an issuer who participate in sales of that issuer's securities will not be considered to be acting as "brokers" and therefore would not be required to register under Section 15 of the Exchange Act.<sup>15</sup> Rule 3a4-1 provides a safe harbor for associated persons of an issuer from being deemed a "broker" if certain requirements are met.<sup>16</sup> An "associated person" means a natural person who is a partner, officer, director or employee of (i) the issuer; (ii) a corporate general partner of a limited partnership that is the issuer; (iii) a company or partnership that controls, is controlled by, or is under common control with, the issuer; or (iv) an investment advisor registered under the Investment Advisers Act of 1940 to an investment company registered under the Investment Company Act of 1940 which is an issuer. It should be noted that this exemption would not cover unaffiliated third party "finders."

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<sup>10</sup> See Gregory C. Yadley, *Notable by Their Absence: Finders and Other Financial Intermediaries in Small Business Capital Formation* (U.S. Securities and Exchange Commission Advisory Committee on Small and Emerging Businesses, June 3, 2015).

<sup>11</sup> Notice of Proposed Exemptive Order Granting Conditional Exemption from Broker Registration Requirement of Section 15(a) of the Securities Exchange Act of 1934 for Certain Activities of Finders, Exchange Act Release No. 34-90112 (October 7, 2020).

<sup>12</sup> The Securities Exchange Act of 1934 §3(a)(4).

<sup>13</sup> The Securities Exchange Act of 1934 §3(a)(5)(A).

<sup>14</sup> SEC Guide to Broker-Dealer Registration § II D, ¶ 5.

<sup>15</sup> Persons Deemed Not To Be Brokers, 50 FR 27940-01 [hereinafter SEC Release No. 22172].

<sup>16</sup> 17 C.F.R. § 240.3a4-1.

### Rule 3a4-1 Associated Person of Issuer Safe Harbor

The preliminary requirements of Rule 3a4-1 require that the associated person:

- (1) is not subject to a statutory disqualification as defined in Section 3(a)(39) of the Exchange Act at the time of participation;<sup>17</sup>
- (2) is not compensated in connection with participation by the payment of commissions or other remunerations based either directly or indirectly on transactions in securities;<sup>18</sup>
- (3) is not at the time of participation an associated person of a broker or dealer; and
- (4) meets the conditions of any one of paragraphs (a)(4)(i), (ii), or (iii) of the Rule.

This fourth requirement provides alternative methods of satisfying the safe-harbor. The paragraph (a)(4)(i) alternative is generally not relevant to a private-placement analysis.<sup>19</sup> The alternative under paragraph a(4)(ii) is referred to as the “Active Solicitation” and the alternative under paragraph a(4)(iii) is referred to as the “Passive Solicitation” for purposes of this discussion, although the SEC’s release referred to them as the “Second Alternative” and “Third Alternative,” respectively. Associated persons who intend to engage in active, oral solicitation of prospective investors should satisfy the requirements under the Active Solicitation safe harbor, while associated persons who will not proactively engage with prospective investors but otherwise are involved in preparing the solicitation materials and administrative handling of the offering may qualify under the Passive Solicitation safe harbor.

#### *Active Solicitation Safe-Harbor*

Under the Active Solicitation safe harbor,<sup>20</sup> the associated person:

- (A) primarily performs, or is intended primarily to perform at the end of the offering, substantial duties for or on behalf of the issuer otherwise than in connection with transactions in the securities;
- (B) was not a broker or dealer, or an associated person of a broker or dealer, within the preceding 12 months; and
- (C) does not participate in selling an offering of securities for any issuer more than once every 12 months (other than in reliance on paragraphs (a)(4)(i) or (a)(4)(iii)).

This last mentioned requirement potentially poses the most difficulty for certain associated persons of an issuer to qualify under the Active Solicitation safe harbor. Where an issuer and/or its subsidiaries or affiliates engage in more than one offering within a 12 month period, the individual may

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<sup>17</sup> “Statutory disqualification” as defined in Section 3(a)(39) of the Securities Exchange Act, in summary, refers to disciplinary actions related to any self-regulatory organization, broker or dealer registration, registrations under the Commodity Exchange Act, foreign financial regulatory authorities, or subject to any felony within ten years of date of filing an application.

<sup>18</sup> In the SEC’s release of the final rule (SEC Release No. 22172) it notes “in determining whether a particular compensation arrangement involving the payment of bonuses would not be permissible under the Rule, the following factors may be relevant: (1) When the offering commences and concludes; (2) when the bonus is paid; (3) when it is determined that a bonus will be paid; (4) when associated persons are informed of the issuer’s intention to pay bonus; and (5) whether the bonus paid to particular associate persons varies with their success in selling the issuer’s securities.”

<sup>19</sup> 17 C.F.R. § 240.3a4-1(a)(4)(i). This alternative provides an exemption if the offer and sales are: (i) limited to certain types of purchases (e.g. registered broker or dealer, registered investment company, insurance company, financial institutions, (ii) involve certain exempt securities under the Securities Act, (iii) pursuant to a plan submitted to vote of security holders for a merger or exchange, or (iv) pursuant to a bonus, profit sharing, stock incentive or similar plan for employees.

<sup>20</sup> 17 C.F.R. § 240.3a4-1(a)(4)(ii).

actively engage in soliciting investors more frequently than permitted under this safe harbor. The Passive Solicitation safe harbor may present a viable alternative in a subsequent offering within the twelve month period, provided the associated person is able to adhere to the strict limitations.

### ***Passive Solicitation Safe-Harbor***

Under the Passive Solicitation Safe-Harbor,<sup>21</sup> the associated person must restrict participation to any one or more of the following activities:

(A) preparing any written communication or delivering such communication through the mails or other means that does not involve oral solicitation by the associated person of a potential purchaser; provided, however, that the content of such communication is approved by a partner, officer or director of the issuer;

(B) responding to inquiries of a potential purchaser in a communication initiated by the potential purchaser; provided, however, that the content of such responses are limited to information contained in a registration statement filed under the Securities Act of 1933 or other offering document; or

(C) performing ministerial and clerical work involved in effecting any transaction.

In adhering to limits under the Passive Solicitation safe harbor, the associated person should not communicate orally with potential investors regarding the offering other than in response to their inquiries and then only if the content of the responses is in the private placement memorandum. The associated person should not make oral introductions of potential investors for purposes of the offering, mention the offering in conversations with potential investors, or call potential investors to discuss the offering. The mere fact of an investor inquiry does not justify additional telephone contact beyond the contact necessary to respond to the customer inquiry.

### **Oregon Law**

Under Oregon Revised Statutes (“ORS”) 59.165, “it is unlawful for any person to transact business in this state as a broker-dealer or salesperson unless the person is licensed under the Oregon securities laws.” “‘Broker-dealer’ means a person who engages, all or part of the time, in effecting transactions in securities for the account of others or for the person’s own account.”<sup>22</sup> “‘Salesperson’ means a person, other than a broker-dealer, who represents or purports to represent a broker-dealer, issuer or owner of securities in effecting or attempting to effect in any manner transactions in securities.”<sup>23</sup>

Individuals employed by the issuer of a federal covered security<sup>24</sup> are not required to be licensed as a salesperson in Oregon to offer or sell the federal covered security, but must be identified on Form NF filed with the Director.<sup>25</sup> Notably, this covers private offerings exempt under Rule 506 of Regulation D, promulgated under Section 4(a)(2) of the Securities Act and crowdfunding offerings exempt under Section 4(a)(6). As such, although an employee of an issuer in a Rule 506 offering will need to confirm an exemption under Rule 3a4-1 for federal purposes, Oregon licensing rules are unlikely to apply.

Moreover, with respect to certain private placements not subject to federal covered security exemptions, persons participating in many of these offerings in Oregon will be exempt from the licensing requirement because the definitions of “broker-dealer” and “salesperson” do not include persons involved

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<sup>21</sup> 17 C.F.R. § 240.3a4-1(a)(4)(iii).

<sup>22</sup> ORS 59.015(1).

<sup>23</sup> ORS 59.015(18)(a).

<sup>24</sup> The Securities Act of 1933 §18.

<sup>25</sup> OAR 441-049-1021(4).

in sales exempted by ORS 59.035.<sup>26</sup> ORS 59.035 includes the list of transactions exempt from registration under the Oregon Securities Laws. For purposes of private placement transactions, this notably includes transactions with “accredited investors,” as defined by the Securities Act, under ORS 59.035(5), but only if there is no public advertising or general solicitation in connection with the transaction. Also, ORS 59.035(12) exempts transactions that result in not more than 10 non-accredited investors in Oregon during any 12 consecutive months, provided no commission is paid and there is no public advertising or general solicitation.<sup>27</sup>

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<sup>26</sup> ORS 59.015(1)(d) (broker-dealer definition); ORS 59.015(18)(b)(B) (salesperson definition).

<sup>27</sup> See ORS 59.035(12)(a) and (b) for the full requirements of this exemption.



## Chapter 2

# Upcoming LLC Legislation: A Legislative Preview of Oregon’s Version of the Revised Uniform Limited Liability Company Act

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## **Upcoming LLC Legislation: A Legislative Preview of Oregon’s Version of the Revised Uniform Limited Liability Company Act**

### **I. INTRODUCTION**

#### **a. Limited Liability Companies: From “New Kid on the Block” to Preeminent Entity in Three Decades.**

Limited liability companies (LLCs) first came into existence in Oregon law on January 1, 1994.<sup>1</sup> The initial Oregon statute was an amalgamation of Oregon’s statutes relating to corporations, limited partnerships and general partnerships. Oregon’s LLCs statutes, codified as Chapter 63 of Oregon Revised Statutes, have been amended on a number of occasions. For example, in response to the issuance of the “check-the-box” tax regulations<sup>2</sup> in 1997, the Oregon Legislature amended the Oregon statute to permit LLCs with only one member.<sup>3</sup> However, Oregon’s core 1994 statute governing LLCs remains the basis for what is now the preeminent business entity being formed in Oregon. For example, in the first seven months of 2022, 32,798 LLCs were formed in Oregon as compared to 5,290 corporations – over a six to one ratio.<sup>4</sup> Yet, in many ways, Oregon’s LLC statutes have fallen behind national trends and are ripe for revision and modernization.

These materials, and the presentation of the author, will provide a summary of the work and the draft legislation that has been drafted by a group formed under the auspices of the Oregon Law Commission called the LLC Modernization Work Group, referred to as the “Work Group” in these materials. The Work Group’s initial draft and its comments are unpublished at this point, but the comments are intended to be available when the legislation is introduced in the Oregon Legislature.

#### **b. Key Online Sources.**

Oregon’s current LLC statutes, found in Oregon Revised Statutes Chapter 63, can be found online at [https://www.oregonlegislature.gov/bills\\_laws/ors/ors063.html](https://www.oregonlegislature.gov/bills_laws/ors/ors063.html).

The Revised Uniform Limited Liability Company Act (RULLCA), drafted by the National Conference of Commissioners on Uniform State Laws (NCCUSL), also known as the Uniform Laws Commission (ULC), can be found online at <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=0a06fb33-7fa0-0e41-f494-ba174e5dc9c7&forceDialog=0>.

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<sup>1</sup> Oregon Laws 1993, c.173.

<sup>2</sup> Treas. Reg. § 301.7701.

<sup>3</sup> Oregon Laws 1997, c. 646.

<sup>4</sup> Oregon Business Statistics, <https://sos.oregon.gov/business/Pages/oregon-business-statistics.aspx>.

## II. Background of Oregon Law Commission’s LLC Modernization Work Group

In early 2018, the Oregon State Bar Business Law Section (BLS) communicated a proposal to the Oregon Law Commission (OLC) that a work group be formed to “review and consider replacing the Oregon Limited Liability Company Act (currently found in ORS Chapter 63) with the Revised Uniform Limited Liability Company Act (2006, as amended in 2011 and 2013) or a modified version thereof.”<sup>5</sup> The proposal noted that many state LLC statutes, including Oregon’s, lacked uniformity and consistency, and these issues can create problems for businesses operating as LLCs, particularly those operating across jurisdictional lines. In addition, many LLCs statutes had been amended on a piecemeal basis, and have not kept up with the applicable case law and other legal developments.<sup>6</sup>

Hence, the BLS proposed that the OLC form a work group composed of various stakeholders, including transactional attorneys, business litigation attorneys, and attorneys familiar with debtor-creditor laws, securities regulations, and tax law, together with representatives from Oregon statute agencies such as the Oregon Department of Consumer and Business Services, the Oregon Department of Justice, Oregon Legislative Counsel, and the Oregon Secretary of State’s office. The proposal also noted that the OLC is in a unique position to review the current Oregon Act and RULLCA, vet proposed changes, and ensure that interested and affected parties are able to weigh in on any proposed changes to ORS Chapter 63.

Upon consideration of the BLS proposal, the OLC approved the formation of the LLC Modernization Work Group (the Work Group). The first meeting of the Work Group was held on March 1, 2019. With a couple of exceptions, the Work Group met on a monthly basis over the next thirty-nine months and completed its principal work on May 23, 2022. All meetings following the beginning of the COVID pandemic were held virtually. Upon completion of its work, the Work Group submitted a proposed draft of a new Oregon limited liability company statute, based on RULLCA, to the Oregon Legislative Counsel’s office for review and preparation of actual draft legislation for the 2023 regular session of the Oregon Legislature.

The Work Group was chaired by John Dilorenzo, with Valerie Sasaki serving as vice-chair and project leader for the Work Group. Sandy Weintraub, Director, Oregon Law Commission at University of Oregon School of Law, served as executive director of the Work Group. The other members of the Work Group included Valerie Sasaki, David Ludwig, Jeffrey Tarr, Cody Hoesly, Michael Walker, Mohsen Manesh, James Hein, Aurelia Erickson, Keil Mueller, Catherine Yao, Jaime Weddle, Roberta Mann, Teresa Pearson, and Emily Maass.

The Work Group was very diverse in its perspectives on RULLCA and the law in general, coming from a variety of professional backgrounds. This diversity proved to be a great strength of the group, adding to the critical analysis of Oregon’s current LLC statute and of RULLCA.

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<sup>5</sup> Memo dated January 23, 2018, from Oregon State Bar Business Law Section to Lane P. Shetterly, Chair, Oregon Law Commission.

<sup>6</sup> Id.

The Work Group was guided by a number of key principles. First, when the group discerned that the Oregon Legislature has made a clear policy decision, particularly in the last 10 years, the group sought to draft its proposed legislation to be consistent with that decision. For example, in 2017, the Oregon legislature amended ORS 63.047 by adding the requirement that an LLC’s Articles of Organization include the initial street address of the LLC and an individual with knowledge of the LLC’s operations and business activities.<sup>7</sup> Contrary to Section 201 of RULLCA which contains only a “bare bones” list of required provisions for the Articles,<sup>8</sup> the Work Group maintained Oregon’s current disclosure and transparency requirements for the Articles.<sup>9</sup> Second, absent a clear policy decision from the Oregon Legislature, in the interests of promoting uniformity in Oregon’s entity laws with other states, the Work Group sought to keep the proposed legislation consistent with RULLCA wherever possible. The statutes of other states that have adopted versions of RULLCA were reviewed from time to time, particularly the version of RULLCA adopted by the state of Washington.<sup>10</sup>

### **III. Background of The Revised Uniform Limited Liability Company Act (RULLCA)**

The ULC promulgated the first uniform LLC act in 1994 and amended it in 1996 to take into account the then newly adopted federal tax “check-the-box” regulations. In 2006, the ULC extensively revised the 1996 act, adopting the initial version of the Revised Uniform Limited Liability Company Act (RULLCA). The 2006 act incorporated then adopted many of the best provisions of the 1996 act, and added and revised provisions based upon two decades of experience and legal developments in LLC and entity law. In 2011 and 2013, additional amendments were added to RULLCA as part of the “Harmonization of Business Entity Acts” (discussed below) and updated and harmonized the language in the provisions that are the same as provisions in the other uniform unincorporated entity acts, and made additional harmonization changes.

While beyond the scope of these materials, in passing it is important to mention the Harmonization of Business Entity Acts projects undertaken by the ULC in the last 16 years. Since the 1990s, the ULC promulgated a number of uniform statutes relating to unincorporated business entities, including the Revised Uniform Partnership Act, the Revised Uniform Limited Partnership Act, the Uniform Limited Cooperative Association Act, and RULLCA.

Beginning in 2006, the ULC authorized a project to integrate its uniform unincorporated entity acts into the “Uniform Business Organization Code” (UBOC), using a “hub-and-spoke” structure similar to the Uniform Commercial Code. The project is known as the Harmonization of Business Entity Acts or the “Hub.” The Hub contains provisions such as definitions and filing requirements which appear in almost all of ULC’s unincorporated entity statutes. For states that adopt UBOC, the ULC’s approach would be to remove from each of its entity acts most of the provisions contained in the Hub. The ULC originally approved the Hub, which is Article 1 of the

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<sup>7</sup> Oregon Laws 2017 c.705 §20.

<sup>8</sup> Contrary to RULLCA which uses the term “Certificate of Organization” for the public filing that creates the LLC, the Work Group decided to maintain Oregon’s current use of the term “Articles of Organization.”

<sup>9</sup> ORS 63.047(1).

<sup>10</sup> The Washington limited liability company statute is codified at Revised Code of Washington (RCW), Chapter 25.15.

Uniform Business Organizations Code in 2011. The harmonization of the unincorporated entities acts phase of the Harmonization Project was completed and approved in 2013. The integration of the various Code-ready harmonized acts into the Code was completed in 2015. The state of Washington adopted a version of UBOC, effective in 2016.<sup>11</sup>

#### **IV. Summary of Key Provisions of the Work Group’s Draft and Comparison to Oregon’s Current LLC Statutes**

##### **a. Introduction and Caveats**

As mentioned above, the OLC Work Group completed its principal draft of its version of RULLCA on May 23, 2022. The Work Group’s draft was then submitted to Oregon Legislative Counsel’s office for review and preparation of the draft for the 2023 Legislative Session. Prior to that date, the OLC will need to formally approve the draft legislation. As of the date of these materials, the Legislative Counsel’s office has just recently provided its initial draft legislation for review by the Work Group and OLC. As that draft has not yet been reviewed by the Work Group and OLC, the discussion in these materials is based only on the Work Group’s draft legislation, and it is possible that the final version introduced in the 2023 Oregon Legislature legislation could be different from the Work Group’s draft. Also, a full summary of the entire Work Group draft is beyond the scope of these materials, which seek only to discuss selected highlights of the draft.

##### **b. Summary of Key Provisions of the Work Group’s Draft**

###### *1. Section 105. Operating Agreement & Limitations.*

One of the most important elements of RULLCA is the primacy of the LLC’s operating agreement. Under current law, ORS 63.057 provides that the “operating agreement, if any, may provide for the regulation and management of the affairs of the limited liability company in any manner *not inconsistent with law or the articles of organization.*” (Emphasis added). In this way, the articles of organization will supersede a conflicting provision in the operating agreement. By contrast, Section 105(a) of RULLCA provides that the operating agreement governs relations among the members and the LLC, the rights and duties of the LLC manager, the activities and affairs of the LLC, the means and conditions for amending the operating agreement.<sup>12</sup>

Also, the very definition of “operating agreement” in RULLCA differs significantly from current law. ORS 63.001(25) defines the operating agreement as “any valid agreement, written or oral, of the member or members as to the affairs of a limited liability company and the conduct of the limited liability company’s business.” However, RULLCA defines the operating agreement as:

“the agreement, whether or not referred to as an operating agreement and whether oral, implied, in a record, or in any combination thereof, of all the members of a limited liability company, including a sole member, concerning the matters

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<sup>11</sup> RCW, Chapter 23.95.

<sup>12</sup> RULLCA, 105(a)(1)-(4).

described in Section 105(a). The term includes the agreement as amended or restated.”<sup>13</sup>

The comments to RULLCA’s definition of operating agreement points out that the operating agreement is a contract, and therefore the provisions of RULLCA relating to the operating agreement must be understood in the context of the law of contracts. It is also noteworthy that the above definition puts no limits on the form of what may constitute the operating agreement of the LLC. Hence, the operating agreement may constitute a number of separate documents, an oral understanding, or other record. In its discussion and commentary under Section 105, the Work Group noted that RULLCA is significantly more permissive to what can constitute an operating agreement than current Oregon statute, but also noted that, like all contracts, a standard “integration clause” in the operating agreement can limit the extraneous documents from becoming part of the operating agreement.

Section 105(b) of RULLCA provides that, to the extent the operating agreement does not provide for a matter described in subsection 105(a), the RULLCA will control the matter. Thus, the provision recognizes this act as comprising mostly default rules— i.e., “gap fillers”<sup>14</sup> for issues as to which the operating agreement is silent.

The Work Group on many occasions used the example of “carpet layers” that merely filed articles of organization, but did not prepare a formal operating agreement. Through the lens of subsections 105(a) and (b), a variety of written records and oral statements might comprise what a court could later find as the operating agreement of the members. Additionally, to the extent that such records or statements do not address a particular issue, then the LLC statute becomes the *de facto* operating agreement for the carpet layers.

Section 105(c) of RULLCA has no direct counterpart under current Oregon law, and contains a list of provisions in the statute that the operating agreement cannot vary, or subjects their variance to certain limitations. The Work Group discussed this subsection extensively, and in several instances departed from RULLCA in favor of maintaining certain core principles of current ORS Chapter 63. In part, the list under Section 105(c) states that the operating agreement *may not*:

- (i) vary the law governing an Oregon LLC;
- (ii) vary the capacity of the LLC to sue or be sued;
- (iii) vary provisions of the statute pertaining to registered agents or the Secretary of State, including filing procedures therewith;
- (iv) alter or eliminate the duty of loyalty or the duty of care, except as provided in 105(d)(discussed below);

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<sup>13</sup> RULLCA, 102(13).

<sup>14</sup> RULLCA, commentary under Section 105(b).

- (v) eliminate the contractual obligation of good faith and fair dealing under Section 409(d), but may set standards, if not “manifestly unreasonable,” by which the performance of the contractual obligation is to be measured;
- (vi) in whole or in part relieve or exonerate a person from liability for conduct involving a breach of the duty of loyalty, improper distribution under Section 406, bad faith, willful or intentional misconduct, or knowing violation of law;<sup>15</sup>
- (vii) vary the rights and duties under Section 410 (relating to required LLC records and the information rights of members);<sup>16</sup>
- (viii) vary the causes of dissolution specified in Section 701(a)(4);
- (ix) restrict the right of a member to maintain an action under Article 8 of RULLCA, except that the operating agreement may require pre-suit mediation, arbitration, litigation in a particular forum; and that the demand for a derivative action<sup>17</sup> contain specified information and be made by specified means;
- (x) vary the right of a member to approve a merger, interest exchange, conversion, or domestication, or the contents of the plan for any such transaction;
- (xi) except as otherwise provided in RULLCA Sections 106 and 107(b), restrict the rights under the act of a person *other than* a member or manager.

Section 105(d) of RULLCA begins with the preface “without limiting other terms that may be included in an operating agreement,” thus affirming the freedom of contract principles that underlie RULLCA. Section 105(d) addresses certain issues relating to fiduciary duties of members that may be affected by the operating agreement. For example, Section 105(d)(1)(A) states that the operating agreement may “specify the method by which a specific act or transaction that would otherwise violate the duty of loyalty may be authorized or ratified by one or more disinterested and independent persons after full disclosure of all material facts.”

In Section 105(d)(3), RULLCA provides that, if not “*manifestly unreasonable*,”<sup>18</sup> the operating agreement may: (i) alter or eliminate the core aspects of the duty of loyalty set forth in RULLCA Section 409(b) and (i); (ii) identify certain categories of activities that do not violate the duty of loyalty; and (iii) alter the duty of care, but may not authorize conduct involving bad faith, willful or intentional misconduct, or knowing violation of law.<sup>19</sup> In determining whether a

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<sup>15</sup> Work Group draft Section 105(c)(7) varied RULLCA considerably, adding the language “in whole or in part” and “breach of the duty of loyalty, improper distribution under Section 406.”

<sup>16</sup> The original version of RULLCA Section 105(c)(7) stated “unreasonably restrict the duties and rights under Section 410, but the operating agreement may impose reasonable restrictions on the availability and use of information obtained under that section and may define appropriate remedies, including liquidated damages, for a breach of any reasonable restriction on use . . .”.

<sup>17</sup> RULLCA Section 802(1).

<sup>18</sup> The “manifestly unreasonable” standard was imported from the Uniform Commercial Code, Section 1-302(b), found in Oregon’s statutes at ORS 71.3020(2).

<sup>19</sup> RULLCA Section 105(d)(3) is similar to the principles set forth in ORS 63.155(10).

provision in the operating agreement is “manifestly unreasonable,” RULLCA Section 105(e) provides that the court, as a matter of law, *shall*: (i) analyze the provision as of the time it “became part of the operating agreement and by considering only circumstances existing at that time;” and (ii) may invalidate the provision “only if, in light of the purposes, activities, and affairs” of the LLC, “it is readily apparent that: (A) the objective of the [provision] is unreasonable; or (B) the [provision] is an unreasonable means to achieve the term’s objective.”

While somewhat analogous to the limitations on operating agreements in current ORS 63.155(10), the provisions of RULLCA Section 105(d) need to be interpreted by the unique terms used in that subsection and the expansive ULC commentary that explains those provisions.

2. *Section 110. Application to Existing Relationships.*

RULLCA Section 110 is strictly an effective date provision. In general, the Work Group felt that Oregon’s new LLC statute should be effective: (i) as to new LLCs, on January 1<sup>st</sup> of the year following the new statute’s enactment; and (ii) as to LLCs existing prior to the date of enactment, the Work Group was deferential to Oregon Legislative Counsel and the Oregon Legislature itself in determining the “all-inclusive” effective date. In its discussions, the Work Group felt that the effective date for pre-existing LLCs should not be more than two years after the year of enactment.

3. *Section 201. Formation of Limited Liability Company.*

Section 201 of RULLCA provides for the manner in which an LLC is initially formed. In Section 201(a), one or more persons may act as organizers by delivering articles of organization<sup>20</sup> to the Secretary of State. As to the required provisions in the articles of organization, the Work Group departed significantly from the ULC’s version of RULLCA. The commentary from RULLCA states that “[c]onsistent with the modern trend, this act requires only the most ‘bare bones’ of disclosure.” However, the Work Group noted that as recently as 2017, in order to provide greater transparency with respect to business entities formed in Oregon, the Oregon Legislature had modified ORS 63.047(1) relating to the provisions that must be set forth in the articles.<sup>21</sup> As such, the Work Group concluded that Section 201 should be modified to conform to most of the current Oregon requirements for the articles of organization. The required provisions for the articles of organization in the Work Group’s draft are:

- (1) the name of the LLC, which must comply with Section 112;
- (2) the initial physical street address, including the number and name of the street, and the mailing address, if different, of the LLC’s principal office;
- (3) the name and street and mailing addresses in this state of the LLC’s registered agent;
- (4) the name and address of each organizer;
- (5) if the LLC will render professional service or services, as defined in ORS 58.015, the professional service or services that the LLC will render; and

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<sup>20</sup> While the ULC’s version of RULLCA uses the term “certificate of formation” as the formative document for an LLC, the Work Group decided

<sup>21</sup> Oregon Laws 2017 c.705 §20.

(6) the name and address of at least one individual who is a member or manager of the LLC or an authorized representative with direct knowledge of the operations and business activities of the LLC.

However, the Work Group did retain two key components of RULLCA by eliminating provisions that *are* currently required by ORS 63.047. First, ORS 63.047(1)(f) requires that the articles must include the “latest date on which the limited liability company will dissolve or a statement that the limited liability company’s existence is perpetual.” However, Section 108(c) of RULLCA provides a default rule that the LLC has “perpetual duration.” In the way, RULLCA defers to the provisions of the LLC’s operating agreement to determine the duration of the LLC and the manner in which the LLC will be dissolved and liquidated. Second, and most significant, the Work Group’s draft maintains RULLCA’s approach that whether the LLC will be member-managed or manager managed will be determined by operating agreement, not the articles of organization. Thus, the requirement in ORS 63.047(1)(d) that the articles state this management-structure dichotomy is eliminated.<sup>22</sup>

The following commentary in RULLCA is helpful in understanding why the ULC eliminated the requirement that the management structure be set forth in the LLC’s formative document:

In 1914 the original Uniform Partnership Act codified a particular type of apparent authority by position, providing that “[t]he act of every partner . . . for apparently carrying on in the usual way the business of the partnership binds the partnership . . . .” This concept of “statutory apparent authority” applies by linkage in the 1916 Uniform Limited Partnership Act and the 1976/85 Revised Uniform Limited Partnership Act and appears in RUPA, ULLCA, ULPA (2001), and almost every LLC statute in the United States. The concept makes good sense for general and limited partnerships. A third party dealing with either type of partnership can know by the formal name of the entity and by a person’s status as general or limited partner whether the person has the power to bind the entity.

The concept does not make sense for modern LLC law, because: (i) an LLC’s status as member-managed or manager-managed is not apparent from the LLC’s name (creating traps for unwary third parties); and (ii) although most LLC statutes provide templates for member-management and manager-management, variability of management structure is a key strength of the LLC as a form of business organization.

The new Act recognizes that “statutory apparent authority” is an attribute of partnership formality that does not belong in an LLC statute. Section 301(a) provides that “a member is not an agent of the limited liability company solely by reason of being a member.” Other law—most especially the law of agency—will handle power-to-bind questions.<sup>23</sup>

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<sup>22</sup> In adopting its version of RULLCA, the statute of Washington does not require the management dichotomy to be included in its certificate of formation. RCW 25.15.071(1).

<sup>23</sup> RULLCA commentary, pp 3-4.

In eliminating “statutory apparent authority,” RULLCA gives greater deference to the state law of agency. Most notably, the RULLCA commentary references the *Restatement (Third) of Agency* on numerous occasions, noting at one point that the Restatement “gives substantial attention to the power of an enterprise’s participants to bind the enterprise.”<sup>24</sup> As such, the operating agreement is the principal vehicle by which members of the LLC will determine what management structure is most appropriate for their business.

4. *Section 301. No Agency Power Of Member As Member.*

Section 301 of RULLCA, adopted in its entirety by the Work Group, states that a member is not considered an agent of the LLC “solely by reason of being a member,”<sup>25</sup> and conversely, a person’s status as a member of the LLC does not prevent or restrict applicable law outside the LLC statutes from “imposing liability on a limited liability company because of the person’s conduct.”<sup>26</sup> In this regard, RULLCA’s approach is a considerable departure from ORS 63.170, which states that an LLC can be held liable for “a member or manager acting in the ordinary course of the business” of the LLC.

Hence, rather than looking to the LLC statutes themselves to determine the authority of a member to act on behalf of the LLC, RULLCA looks principally to the law of agency to determine whether a member has the power to bind the LLC.<sup>27</sup> The drafters of RULLCA further noted that the flexibility of management structure is a central tenet of LLCs, and that it is illogical for LLCs to have to “publicly select between two statutorily preordained structures (i.e., manager-managed/member-managed); and then link a “statutory power to bind” to each of those two structures.”<sup>28</sup>

The Work Group recognized that in adopting Section 301, combined with Section 201’s elimination of the member or manager managed choice in the articles of organization, a significant shift in Oregon’s LLC laws will be made. However, the Work Group also felt that the common law of agency is well established in Oregon and well understood by the courts.

In Section 301(b), RULLCA also looks to common law rules to determine whether the LLC will be directly or vicariously liable for the actions of a person who is a member of the LLC. As such, the traditional legal analysis for determining such liability will be utilized. For example:

- Does the operating agreement of the LLC give the member actual authority to bind the LLC?
- Does the member have actual or apparent authority to bind the LLC?
- Does the doctrine of *respondeat superior* apply to make the LLC liable for the tortious conduct of the member?

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<sup>24</sup> RULLCA commentary, p. 4.

<sup>25</sup> RULLCA Section 301(a).

<sup>26</sup> RULLCA Section 301(b).

<sup>27</sup> RULLCA commentary under Section 301, p. 76.

<sup>28</sup> *Id.*

- Should the LLC be held liable for negligent supervision of a person that is acting on behalf of the LLC?<sup>29</sup>

5. *Section 302. Statement of Limited Liability Company Authority.*

Section 302 introduces a novel concept to LLC law – the “statement of authority.” In this document, the LLC may file a statement with the Secretary of State which states, with respect to “any *position* that exists in or with respect to the company . . . and all persons holding the position” the authority, or limitations thereon, of such persons to sign an instrument transferring real property in the name of the LLC or enter into a transaction to act or bind the LLC.<sup>30</sup> In referring to a “position” with the LLC, the LLC is able to designate the authority of a particular position in the LLC, with the statement remaining effective even if the particular person holding that position changes.

RULLCA provides for two separate types of statements of authority. First, a statement of authority may pertain to the power to transfer real property interests owned by the LLC. For statements relating to real property, the statute of authority must be filed both with the Secretary of State *and* a certified copy of the statement must be recorded with the county office wherein real property records are recorded.<sup>31</sup> Second, statements of authority *not* relating to real property need only be filed with the Secretary of State.<sup>32</sup>

What is the effect of a statement of authority? With respect to properly double-filed statements of authority relating to real property: (i) a statement that grants authority to transfer real property owned by the LLC is conclusive in favor of “a person that gives value in reliance on the grant without knowledge to the contrary;” and (ii) for a statement that contains “a limitation on the authority to transfer real property,” all persons are deemed to have constructive knowledge of such limitation.<sup>33</sup> For statements of authority *not* pertaining to real property, a grant of authority in any such statement “is conclusive in favor of a person that gives value in reliance on the grant,” except if such person has knowledge to the contrary, the statement has been canceled or restrictively amended, or a limitation on the grant is contained in another statement of authority that became effective after the initial statement of authority.<sup>34</sup>

A statement of authority may be canceled or amended with a subsequent filing with the Secretary of State.<sup>35</sup> For a statement pertaining to real property, any cancellation or restrictive amendment must also be recorded in the real property records.<sup>36</sup>

The statement of authority affects only the authority of a person to bind the LLC to persons that are *not* members of that LLC.<sup>37</sup> For members, the operating agreement is

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<sup>29</sup> RULLCA commentary under Section 301, p. 77-78.

<sup>30</sup> RULLCA Section 302(a)(1)-(2)(emphasis added).

<sup>31</sup> RULLCA Section 302(f).

<sup>32</sup> RULLCA Section 302(a).

<sup>33</sup> RULLCA Section 302(f) and (g).

<sup>34</sup> RULLCA Section 302(e).

<sup>35</sup> RULLCA Section 302(b).

<sup>36</sup> RULLCA Section 302(f)(1).

<sup>37</sup> RULLCA Section 302(d).

controlling.<sup>38</sup> Also, a provision in the articles of organization is not effective as a statement of authority.<sup>39</sup>

A statement of dissolution by the LLC or a statement of termination of an earlier statement of authority both will cancel an earlier statement of authority.<sup>40</sup> Such statements of dissolution or termination must be recorded in the real property records to be effective as to third parties that give value.<sup>41</sup> Unless earlier canceled, an effective statement of authority is canceled by *operation of law* five years after the date on which the statement, or its most recent amendment, becomes effective.<sup>42</sup> Finally, a person named in a statement of authority may file and record a “statement of denial” which effectively operates as a restrictive amendment to the initial statement of authority.<sup>43</sup>

## 6. Sections 404-406. Distributions.

Sections 404 through 406 of RULLCA, respectively, provide the default rule for members’ rights to distributions<sup>44</sup> from the LLC, limitations on distributions, and personal liability for members and managers that consent to improper distributions. These provisions are somewhat analogous to the current rules in ORS 63.195, 63.229 and 63.235. The Work Group concluded that, in general, these provisions were an improvement to current Oregon law.

In RULLCA Section 404(a), any pre-dissolution distribution must be in equal shares. This is a default rule that will typically be altered in any operating agreement wherein members have disproportionate membership interests. Section 404(a) is, in application, similar to current Oregon law, which provides that absent rules to the contrary in the articles of organization or operating agreement, distributions are allocated based upon a member’s rights to profits,<sup>45</sup> and profits are allocated among all members equally.<sup>46</sup>

Section 404(b) of RULLCA provides that, prior to dissolution and winding up of the LLC, a person has a right to a distribution “only if the company decides to make an interim distribution” and a person’s dissociation does not entitle a person to a distribution. The Work Group noted that Section 404(b) is a significant improvement over Oregon’s current statute, which has no direct counterpart to Section 404(b).

<sup>38</sup> RULLCA Section 107(d).

<sup>39</sup> RULLCA Section 201(c).

<sup>40</sup> RULLCA Section 302(h).

<sup>41</sup> RULLCA Section 302(f)(1) and (h); *see also*, the example on page 83 of the ULC commentary.

<sup>42</sup> RULLCA Section 302(j).

<sup>43</sup> RULLCA Sections 302(k) and 303.

<sup>44</sup> Under Section 102(4), the definition of “distribution” means a transfer of money or other property from an LLC to a person on account of a transferable interest or in the person’s capacity as a member. The term includes a redemption of a transferable interest or a “transfer to a member in return for the member’s relinquishment of any right to participate as a member in the management or conduct of the company’s activities and affairs or to have access to records or other information concerning the company’s activities and affairs.” However, a “distribution” does not include “reasonable compensation for present or past service or payments made in the ordinary course of business under a bona fide retirement plan or other bona fide benefits program.”

<sup>45</sup> ORS 63.195.

<sup>46</sup> ORS 63.185(2).

Section 404(c) is essentially analogous to current Oregon law,<sup>47</sup> and states that a person does not have a right to demand or receive a distribution from an LLC in any form other than money. However, Section 404(c) goes on to provide that, except for distributions upon winding up, an LLC may distribute an asset in kind “only if each part of the asset is fungible with each other part and each person receives a percentage of the asset equal in value to the person’s share of distributions.” Neither RULLCA nor the ULC commentary define “fungible.”

RULLCA Section 404(d) provides that if a member or transferee becomes entitled to receive a distribution, the member or transferee has the status of, and is entitled to all remedies available to, a “creditor” of the LLC with respect to the distribution. This provision is very similar to current ORS 63.225. However, Section 404(d) further provides that the LLC’s obligation to make a distribution is “subject to offset for any amount owed to the company by the member or a person dissociated as a member on whose account the distribution is made.” This sentence has no direct relative to current law, although current statutes do recognize offset rights in withdrawal and expulsion scenarios.<sup>48</sup>

Noticeably absent from RULLCA are rules relating to the allocation of profits and losses similar to ORS 63.185. In the RULLCA commentary, the ULC drafters state that this omission is intentional for several reasons. First, as Section 404 provides for a simple default rule for the allocation of distributions, “providing an additional set of default profit and loss allocation provisions and capital account rules will be, at best, duplicative and, at worse, inconsistent with the distribution rules.”<sup>49</sup> Second, in a general sense, the tax statutes and regulations (including those relating to capital accounts) provide that tax income and loss are allocated to the member’s economic interest in the LLC, and in turn, these interests are based upon distributions that are made to members upon liquidation of the LLC. As such, in the opinion of the ULC drafters, RULLCA’s default distribution rules provide sufficient guidance to make the necessary tax determinations.<sup>50</sup>

Section 405 of RULLCA creates limits on distributions from the LLC in insolvency situations. In Section 405(a), an LLC may not make a distribution if: (i) the LLC would not be able to pay its debts as they become due “in the ordinary course of the company’s activities and affairs;” *or* (ii) the LLC’s total assets would be less than the sum of its total liabilities *plus* the amount that would be needed, if the LLC were to be dissolved and wound up at the time of the distribution, to satisfy the preferential rights of members and transferees “whose preferential rights are superior to the rights of persons receiving the distribution.”

Analogous to ORS 63.229, the Work Group adopted Section 405 as it adds greater clarity to the analysis of whether the LLC is insolvent. In Section 405(b), the LLC may base such analysis on financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances, or “a fair valuation or other method that is reasonable under the circumstances.” RULLCA 405(c) goes on to provide specific rules as to the timing of when distributions are to be measured for purposes of this section.

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<sup>47</sup> ORS 63.219(2)

<sup>48</sup> See ORS 63.205 and ORS 63.209

<sup>49</sup> Commentary to RULLCA Section 404, p. 93.

<sup>50</sup> *Id.*

Finally, Section 406 of RULLCA sets forth rules providing for personal liability for improper distributions. Specifically, Section 406(a) provides that if a member in a member-managed LLC or a manager in a manager-managed LLC consents to a distribution that violates the rules of Section 405 *and* violates the fiduciary rules in RULLCA Section 409, then the member or manager is personally liable to the LLC for the amount of the distribution which exceeds the amount that could have been distributed without the violation of Section 405. This provision is similar to ORS 63.235.

Section 406(b) adds a new wrinkle that does not exist under current law. In deference to the management structure flexibility that RULLCA gives to the LLC’s operating agreement, this section states that to the extent that the operating agreement of a member-managed LLC “expressly relieves a member of the authority and responsibility to consent to distributions and imposes that authority and responsibility on one or more other members” then only the designated members will have liability under Section 406(b).

Similar to ORS 63.235(2), Section 405(c) of RULLCA provides that a person that receives a distribution knowing that the distribution violated Section 405 of RULLCA is personally liable to the LLC but only to the extent that “the distribution received by the person<sup>51</sup> exceeded the amount that could have been properly paid under Section 405.” RULLCA Sections 405(d) and (e) provide for impleader rules and a two-year statute of limitations with rules that are similar to current Oregon law.<sup>52</sup>

#### 7. *Section 407. Management of LLCs.*

RULLCA Section 407(a) provides the default rule that an LLC is member-managed unless the operating agreement “expressly provides” that the LLC will be “manager-managed,” “managed by managers,” that management will be “vested in managers,” or otherwise contains words of “similar import.” In a member-managed LLC, RULLCA Section 407(b) states that, except as otherwise provided in the act, management rights are vested in the members, each member has equal management rights, and differences among members as to “a matter in the ordinary course of the activities and affairs” may be decided by a majority of the members. However, Section 407(b)(4) states that the affirmative vote or consent of all of the members is required to undertake matters outside the ordinary course of the activities and affairs of the LLC or to amend the operating agreement. To the unanimity list in Section 407(b)(4), the Work Group added the subsection “as otherwise required by the Act.”<sup>53</sup>

For manager-managed LLCs, RULLCA Section 407(c), provides the following default rules (which can of course be altered by the operating agreement): (i) any matter relating to the activities and affairs of the LLC is decided exclusively by the manager, or, if there is more than one manager, by a majority of the managers; (ii) each manager has equal management rights; (iii) all members must still consent to matters outside the ordinary course of the activities and affairs of the LLC or to amend the operating agreement.

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<sup>51</sup>However, ORS 63.235(2) limits this liability to a member of a manager-managed LLC.

<sup>52</sup> See 63.235(3) and (4), respectively.

<sup>53</sup> RULLCA departs slightly from current law in ORS 63.130(3) in not including decisions as to compromising contribution obligations and dissolution of the LLC in the unanimity list.

To select a manager in a manager-managed LLC, RULLCA Section 407(c)(5) states that a manager may be chosen by majority of the members, and will remain a manager until a successor is chosen, or the resignation, removal, or death of the manager. Further, a manager may be removed by a majority of the members. While a person need not be a member of the LLC to be a manager, the dissociation of a member who is also a manager removes the person as a manager.<sup>54</sup> However, if a manager ceases to be a manager, that cessation will not dissociate that person as a member.<sup>55</sup>

Similar to ORS 63.130(5)-(6), Section 407(d) provides that an action requiring the vote or consent of members may be taken without a meeting, and a member may appoint a proxy or other agent to vote, consent, or otherwise act for the member by signing an appointing record, personally or by the member’s agent.

An LLC has the obligation to reimburse a member for an advance in excess of such member’s agreed-upon capital contribution to the LLC, and any such payment or advance shall constitute a loan by such member to the LLC and will accrue interest from the date of such advance.<sup>56</sup> Noting the ambiguity of the interest requirement in RULLCA, the Work Group added a cross-reference to the statutory rate of interest at ORS 82.010(1)(a), which is currently nine percent.

Finally, Section 407(h) provides that a member is not entitled to remuneration for services performed for a member-managed LLC, except for reasonable compensation for services rendered in winding up the activities of the LLC.<sup>57</sup>

#### 8. *Section 409. Fiduciary Duties.*

Section 409 of RULLCA sets forth the key elements of the duty of loyalty, duty of care, as well as the contractual aspects of good faith and fair dealing. While many aspects of RULLCA’s approach to these duties have close corollaries in ORS 63.155, Section 409’s structure and terminology do differ from Oregon’s current statute. The Work Group adopted Section 409 in its entirety.

In a member-managed LLC, a member owes the LLC and the other members duties of loyalty and care as set forth in RULLCA Section 409(b) and (c).<sup>58</sup> Under Section 409(b), a member’s duty of loyalty includes the duties “to account to the company and hold as trustee for it any property, profit, or benefit derived by the member” in the conduct or winding up of the

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<sup>54</sup> RULLCA Section 407(c)(5).

<sup>55</sup> *Id.*

<sup>56</sup> RULLCA Section 407(f)-(g).

<sup>57</sup> Commentary under RULLCA, Section 407(h) further provides:

“This act does not provide for remuneration to a manager of a manager-managed LLC. That issue is for the operating agreement, or a separate agreement between the LLC and the manager. A manager may also have a common law right to compensation. RESTATEMENT (THIRD) AGENCY § 8.13, cmt. d (2006) (“Unless an agreement between a principal and an agent indicates otherwise, a principal has a duty to pay compensation to an agent for services that the agent provides.”).”

<sup>58</sup> RULLCA Section 409(a).

LLC’s affairs, from the use of the LLC’s property, or from the appropriation of “a company opportunity.” The duty of loyalty of a member also includes the duty to refrain from dealing with the LLC as or on behalf of a person having an interest adverse to the LLC, and to refrain from competing with the LLC prior to its dissolution.<sup>59</sup> It is a defense to such an “adverse interest” and any comparable claim in equity or at common law that the transaction was fair to the LLC.<sup>60</sup>

A member’s duty of care in a member-managed LLC is to refrain from engaging in “grossly negligent or reckless conduct, willful or intentional misconduct, or knowing violation of law.”<sup>61</sup> Also, for duties set forth in RULLCA *and* the operating agreement, RULLCA Section 409(d) states that a member must discharge such duties and exercise any rights “consistently with the contractual obligation of good faith and fair dealing.” RULLCA’s commentary to this subsection states that “for the most part those duties and rights apply to relationships *inter se* the members and the LLC and function only to the extent not displaced by the operating agreement.”<sup>62</sup> Section 409(e), similar to ORS 63.155(4), states that a member does not violate a duty under the act or under the operating agreement solely because the member’s conduct furthers the member’s own interests. The “furthers . . . own interest” provisions apply only to members (in either member or manager-managed LLC), but not to managers in a manager-managed LLC.<sup>63</sup>

If a specific act or transaction would otherwise violate the duty of loyalty, all of the members in both a member-managed and manager-managed LLC may authorize or ratify such act or transaction “after full disclosure of all material facts.”<sup>64</sup> However, the operating agreement can provide additional or different methods of authorization or ratification, subject to the requirements of RULLCA Section 105(c)(5), (d)(1), and (d)(3)(A) and (B).

In a manager-managed LLC, RULLCA Section 409(i) states that the duties of loyalty and care generally apply to each manager but not the members. However, even in a manager-managed LLC, the members continue to owe the duties under 409(d) with respect to the contractual obligations of good faith and fair dealing.

#### 9. *Section 410. Rights to Information of Member, Manager, and Person Dissociated as Member.*

Section 410 of the Work Group’s draft is a substantial departure from RULLCA’s version of Section 410, and with some modifications, preserves the current law’s provisions relating to rights to information relating to the LLC.<sup>65</sup> Section 410(1) is similar to ORS 63.771, and requires the LLC to keep certain key records at its principal office, including a copy of the

<sup>59</sup> RULLCA Section 409(b)(2)-(3).

<sup>60</sup> RULLCA Section 409(g).

<sup>61</sup> RULLCA Section 409(c).

<sup>62</sup> Recall the discussion above relating to RULLCA Section 105(c)(6), stating that the operating agreement may not “eliminate the contractual obligation of good faith and fair dealing under Section 409(d), but the operating agreement may prescribe the standards, if not *manifestly* unreasonable, by which the performance of the obligation is to be measured.” The Work Group added the italicized “manifestly” in this provision.

<sup>63</sup> RULLCA Section 409(i)(4).

<sup>64</sup> RULLCA Section 409(f).

<sup>65</sup> See ORS 63.771, ORS 63.777, and ORS 63.781.

articles of organization and operating agreement together with any amendments thereto, certain key financial, tax, and contribution records of the LLC, a record of “any consent given by or vote taken of any member” in the three prior years, and other records relating to recent annual Secretary of State reports, conversion, mergers, and current and former members and managers.

The LLC may not vary the records required under Section 410(1) but, in its operating agreement or otherwise, may impose reasonable restrictions on the availability or use of records and information obtained under Section 410, including “designating information confidential and imposing nondisclosure and safeguarding obligations on the recipient.”<sup>66</sup>

Section 410(2) of the Work Group’s draft follows the principles of ORS 63.777, and allows a member to inspect and copy all of the records listed in Section 410(1). In the Work Group’s draft, the member “need not have any particular purpose for seeking the records.”<sup>67</sup> Derived from Section 410(a)(2) of the ULC’s version of RULLCA, Section 410(2) of the Work Group’s draft provides that the LLC shall furnish to each member, without demand, any information concerning the company’s activities, affairs, financial condition, and other circumstances “which the company knows and is material to the proper exercise of the member’s rights and duties under the operating agreement or this [act], except to the extent the company can establish that it reasonably believes the member already knows the information.” In a member-managed LLC, the duty to furnish information under subsection (b) also applies to each member “to the extent the member knows any of the information described in” such subsection.<sup>68</sup>

Again, borrowing from the ULC’s version,<sup>69</sup> Section 410(2)(d) provides that whenever the act or the operating agreement provides for a member to vote on or give or withhold consent to a matter, before such vote or consent is to be given, the LLC “shall, without demand, provide the member with all information that is known to the company and is material to the member’s decision.”

For a dissociated member, any such person may have access to the information and records to which the person was entitled *while a member* if: (i) the information pertains to the period during which the person was a member or transferee; (ii) such person seeks the information in good faith; and (iii) the person otherwise satisfies the requirements imposed on a member under the applicable provisions of Section 410.<sup>70</sup>

Finally, Section 410(13) of the Work Group’s draft is substantially similar to current ORS 63.781, and provides that the applicable circuit court, upon application of a member, has the authority to “summarily order” the inspection and copying of the LLC’s required records. If the court orders inspection and copying of the information or records demanded, it shall also order the LLC to pay the member’s costs, including reasonable counsel fees, incurred to obtain

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<sup>66</sup> Work Group draft, Section 410(c)(8).

<sup>67</sup> Compare ORS 60.774(3)(a), stating that a shareholder’s demand for information must be made “in good faith and for a proper purpose.”

<sup>68</sup> Work Group draft, Section 410(2)(c).

<sup>69</sup> ULC version of RULLCA Section 410(b)(4).

<sup>70</sup> Work Group draft, Section 410(6).

the order unless the LLC proves that “it refused inspection in good faith because it had a reasonable basis for doubt about the right of the member to inspect the information and records demanded.”<sup>71</sup> If the court does order inspection of the records, it may also impose reasonable restrictions on the use or distribution of the records.<sup>72</sup>

10. *Section 502. Transfer of LLC Interest (i.e., the “Pick-Your-Partner” Provisions).*

One of the essential elements of LLC law is the “pick-your-partner” principle. As with ORS 63.249 under current law, Section 502 of RULLCA embodies this principle. Section 502(a) states that the transfer of all or part of a “transferable interest”<sup>73</sup>: (i) is permissible; (ii) does not by itself cause the dissociation of the transferor or the dissolution or winding up of the LLC; (iii) does not entitle the transferee to participate in the management or conduct of the LLC’s business activities and affairs, and generally does not entitle the transferee the LLC’s records and information.<sup>74</sup> Hence, subject to the provisions of the operating agreement, while the transferee may possess the bare economic rights to distributions from the LLC,<sup>75</sup> the transferee does *not* gain a “seat at the table” of full voting and other governance rights in the LLC.

If the transfer of a transferable interest violates a restriction on transfer that is set forth in the operating agreement, the transfer is “ineffective if the intended transferee has knowledge or notice of the restriction at the time of transfer.”<sup>76</sup>

Section 502(g) provides that, outside of certain expulsion situations,<sup>77</sup> if a member transfers a transferable interest, the transferor retains the rights of a member other than the interest transferred and retains “all the duties and obligations of a member.” This provision differs somewhat from current law, which states that an assignor of an LLC membership interest ceases to be a member of the LLC, but is not released from any liability as a member accruing before the transfer, nor is the assignor relieved from any fiduciary duties that the assignor may owe the LLC or its remaining members.<sup>78</sup>

11. *Section 503. Charging Orders.*

As compared to ORS 63.259, the charging order provisions under current law, RULLCA Section 503 provide considerable detail as to both the process and effect of a charging order. RULLCA also makes clear that RULLCA’s charging order provisions provide the exclusive

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<sup>71</sup> Work Group draft, Section 410(13)(c).

<sup>72</sup> Work Group draft, Section 410(13)(d).

<sup>73</sup> Under RULLCA Section 102(25), “transferable interest” is defined as “the right, as initially owned by a person in the person’s capacity as a member, to receive distributions from a limited liability company, whether or not the person remains a member or continues to own any part of the right. The term applies to any fraction of the interest, by whomever owned.”

<sup>74</sup> RULLCA Section 502(c) provides that upon dissolution and winding up of the LLC, a transferee is entitled to “an account of the company’s transactions only from the date of dissolution.”

<sup>75</sup> RULLCA Section 502(b).

<sup>76</sup> RULLCA Section 502(f).

<sup>77</sup> See RULLCA Section 602(5)(B).

<sup>78</sup> ORS 63.249(5).

remedy of a judgment creditor that seeks to satisfy a judgment from the judgment debtor’s transferable interest in the LLC.<sup>79</sup>

Procedurally, upon the application by a judgment creditor of either a member or a transferee of an LLC, a court may enter a charging order against the transferable interest of the judgment creditor for the amount of the unsatisfied judgment.<sup>80</sup> Except in a foreclosure scenario (discussed below), a charging order constitutes a lien on the transferable interest requiring the LLC to pay to the judgment creditor any distribution that would otherwise be paid to the judgment debtor.<sup>81</sup> To effectuate the collection of any such distribution, in addition to having the power to make all orders necessary to give effect to the charging order, the court also has the authority to appoint a receiver of the distributions to which the charging order is subject, along with “the power to make all inquiries the judgment debtor might have made.”<sup>82</sup> However, RULLCA’s charging order procedure does not deprive any member or transferee of the benefit of any exemption law applicable to such person’s transferable interest in the LLC.<sup>83</sup>

In addition to the charging order procedure discussed above, upon a showing that the distributions from the LLC will not pay the judgment debt within a reasonable time, the court may foreclose the lien created by the charging order and order the sale of the transferable interest in question.<sup>84</sup> However, the purchaser of a foreclosed transferable interest does not become a member of the LLC and is subject to RULLCA Section 502.<sup>85</sup>

At any time before foreclosure, the member or transferee whose transferable interest is subject to a charging order may extinguish the charging order by satisfying the judgment, obtaining a satisfaction of the judgment under ORS 18.225, and filing (or causing the judgment creditor to file), the judgment satisfaction with the court that issued the original charging order.<sup>86</sup> Additionally, RULLCA Section 503(e) provides that the LLC or another member of the LLC not subject to the charging order may pay the judgment creditor the full amount of the judgment debt, and in doing so, succeeds to the rights of the judgment creditor, *including* the charging order.

In the case of a single-member LLC, if a court orders a foreclosure of the sole member’s interest, then the purchaser at the foreclosure sale obtains the member’s entire interest, not just the member’s transferable interest.<sup>87</sup> Additionally, upon foreclosure, the former sole member is dissociated as a member.

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<sup>79</sup> RULLCA Section 503(h).

<sup>80</sup> RULLCA Section 503(a).

<sup>81</sup> *Id.*

<sup>82</sup> RULLCA Section 503(b).

<sup>83</sup> RULLCA Section 503(g).

<sup>84</sup> RULLCA Section 503(c).

<sup>85</sup> *Id.*

<sup>86</sup> RULLCA Section 503(d).

<sup>87</sup> RULLCA Section 503(f).

## 12. *Article 6. Disassociation.*

Article 6 of RULLCA, constituting Section 601 through 603, sets forth a detailed set of provisions that govern a member’s power to dissociate as a member, the various events that cause dissociation, and the ultimate effect of the member’s dissociation. In reviewing these sections, the Work Group noted that the operating agreement of the LLC can almost entirely supersede the overall application of these provisions.

Section 601 of RULLCA sets forth the default rule that a member has the power to dissociate as a member “at any time, rightfully or wrongfully, by withdrawing as a member by express will under Section 602(1).” The ULC commentary to RULLCA Section 601 notes that while the operating agreement may go so far as to negate a member’s power to dissociate, it also points out that such a provision “is fundamentally at odds with the concept of a limited liability company as a creature of contract.”<sup>88</sup>

In 601(b), RULLCA lists the limited occasion in which dissociation is considered “wrongful.” These situations include breach of an express provision of the operating agreement, expulsion by judicial order under 602(6) due to wrongful conduct, certain insolvency situations, or a member that is an entity dissolves or terminates. Further, Section 601(c) confirms that a member that wrongfully dissociates can be liable to the LLC and the other members for damages, and such damages would be in addition to any other liability of such member to the LLC or the members.

Section 602 of RULLCA lists, as statutory default rules, the various situations that bring about the dissociation of a member. These situations include: (i) the LLC has notice of the express will of the member to withdraw; (ii) an event stated in the operating agreement causing dissociation; (iii) foreclosure of a member in a single-member LLC or purchase under Section 807 (discussed below); (iv) the expulsion of the member under certain situations described in Section 602(5); (v) by court order, the member is expelled for wrongful conduct, breach of the operating agreement, acts making it impractical to carry on the business of the LLC; (vi) the death or incapacity (in a member-managed LLC) of an individual member; (vii) in a member-managed LLC, the bankruptcy or other insolvency situations of a member; (viii) in the case of a member that is a trust or an estate, the transfer of such member’s entire transferable interest; (ix) for a member other than an individual, the existence of such member terminates; (x) in situations involving a merge, interest exchange, conversion, or domestication, the person ceases to be a member; or (xi) the LLC dissolves and completes winding up. While Section 602 parallels ORS 63.265(1) in a number of situations, the Work Group felt that the default rules under Section 602 provided greater detail and clarity, particularly for less sophisticated members of the LLC.

RULLCA Section 603(a), again absent contrary provisions in the operating agreement, states that upon the dissociation of a member, the management rights of the member terminate, any fiduciary duties of the member under Section 409 end with respect to “matters arising and events occurring after the person’s dissociation.” However, any transferable interest owned by the member immediately before the dissociation continues to be owned by the former member in

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<sup>88</sup> RULLCA commentary, p. 133.

the capacity of a transferee.<sup>89</sup> Similar to ORS 63.249(5), Section 603(b) states that dissociation by itself does not discharge the former member from any debt, obligation, or other liability to the LLC or the other members which such person incurred while a member of the LLC.

### 13. *Section 701. Dissolution.*

Section 701 of RULLCA sets forth the events that cause dissolution of the LLC. A “dissolved” LLC does not cease to exist. Rather, it’s purpose changes to the limited purpose of winding up its affairs and business activities.<sup>90</sup> Like ORS 63.621(2) and (3), Section 701(a)(1) and (2) provided that the LLC is dissolved as provided in the operating agreement or upon the consent of all of the members (unless the operating agreement provides for a lower threshold for dissolution of the LLC). While ORS 63.621(4) provides that the LLC is dissolved if it has no members, RULLCA provides a more detailed procedure and recognizes that if an LLC has no members, but within 90 days of the absence of a member, transferees “owning the rights to receive a majority of distributions as transferees” consent to the admission of at least one member, then the LLC is not dissolved.<sup>91</sup>

Section 701(a)(4) of RULLCA is a significant addition to current Oregon law. Outside of actions by the Oregon attorney general, ORS 63.661(1)(b) provides that that an LLC may be dissolved in a proceeding by or for a member if the court finds that it is “not reasonably practicable to carry on the business” of the LLC in conformance with the articles of organization or the operating agreement. RULLCA goes further, and provides that, upon the application of a member, a court may order the dissolution of the LLC on the grounds that: (i) the conduct of substantially all of the LLC’s business is “unlawful;” (ii) it is “not reasonably practicable to carry on” the LLC’s business consistent with its articles of organization or operating agreement; or (iii) the managers or “those members in control of the company . . . have acted, are acting, or will act in a manner that is illegal or fraudulent; or . . . have acted or are acting in a manner that is oppressive and was, is, or will be directly harmful” to the applying member.

The Work Group’s version of RULLCA also preserves the provisions of ORS 63.661, 63.664, and 63.671 in granting the Oregon attorney general the power to seek the judicial dissolution of an LLC. These provisions maintain the 2017 Oregon legislation relating to “shell entities.”<sup>92</sup>

### 14. *Section 807. Purchase of LLC Interest During Court Proceeding.*

The Work Group’s version of RULLCA adds a provision similar to ORS 60.952(6), a section that is currently in Oregon’s corporation statute that provides certain elective purchase

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<sup>89</sup> RULLCA Section 603(a)(3).

<sup>90</sup> RULLCA Section 701(a).

<sup>91</sup> RULLCA Section 701(a)(3).

<sup>92</sup> See Oregon Laws 2017, c.705, section 4-6. Section 102(21) of the Work Group’s version of RULLCA adds the definition of “shell entity” which is currently set forth in ORS 63.001(31). That section in current law, by cross reference to ORS 63.661(1)(a)(C)(i), defines a “shell entity” as an LLC that a court finds, in an action by the attorney general, “used or organized for an illegal purpose, was used or organized to defraud or deceive a person or a governmental agency or was used or organized to fraudulently conceal any business activity from another person or a governmental agency”).

rights during litigation among the entity and/or its owners. In particular, Section 807(a) provides that at any time within 90 days after the filing of an action under Section 701(a)(4), discussed above, or a such time as the court may deem equitable, the LLC or one or more members may elect to purchase the entire interest (i.e., not just the transferable interest) of the member that filed action for that interest’s “fair value.” Upon such an election<sup>93</sup>, Section 807 proceeds much like a statutory “buy-sell agreement.”

Upon the filing of an election under Section 807, the LLC shall notify the other members of the LLC regarding the election and the details thereof, giving the other non-electing members the opportunity to participate in the purchase.<sup>94</sup> Other members that elect to participate in the purchase become parties to the proceeding and “shall participate in the purchase in proportion to their respective rights to share in distributions as of the date the first election was filed,” unless the court directs or the members agree otherwise.<sup>95</sup> Unless the court shall determine otherwise, once an election has been filed under Section 807, the action may not be settled or discontinued, and the member that filed the action may not sell or otherwise dispose of such member’s interest in the LLC.<sup>96</sup>

If, within 30 days of the filing of the “latest election,” the parties reach an agreement as to the fair value of the LLC interest and the terms of purchase, the court shall enter an order directing the purchase upon the agreed price and terms.<sup>97</sup> Hence, such an agreement of the parties would conclude the matter.

However, if the parties are unable to reach agreement, Section 807 gives the court the authority to determine the price and terms of the purchase.<sup>98</sup> Specifically, Section 807(b) provides the court may determine the fair value of the interest “with or without the assistance of appraisers, taking into account any impact on the value of the entire interest resulting from the actions giving rise to a proceeding under Section 701(a)(4).”<sup>99</sup> The court shall also determine the terms of purchase, which can include installment payments, an interest rate that court determines equitable, subordination of the purchase obligation to the LLC’s other creditors, collateral for the purchase, and even “a covenant not to compete or other restriction on the seller.”<sup>100</sup> If the court orders more than one member to purchase the interest, the court shall allocate the interest to be sold among the purchase members attempting to “preserve the existing distribution of voting rights and other designations, preferences, qualifications, limitations, restrictions and special or relative rights among the holders of the class or classes of interests and may direct that holders of a specific class or classes not participate in the purchase.”<sup>101</sup>

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<sup>93</sup> Section 807(a)(1) notes that the election is irrevocable unless the court that it is

<sup>94</sup> Section 807(a)(2).

<sup>95</sup> Id.

<sup>96</sup> Section 807(a)(4).

<sup>97</sup> Section 807(a)(5).

<sup>98</sup> Section 807(a)(6).

<sup>99</sup> Section 807(b)(1)(i).

<sup>100</sup> Section 807(b)(1)(iii).

<sup>101</sup> Section 807(b)(5).

Upon a sale under Section 807, the selling member is dissociated from the LLC as of the date of sale unless the purchase order is later modified.<sup>102</sup> After the purchase, the court retains jurisdiction to enforce the purchase order,<sup>103</sup> and may even modify the terms of purchase if the court finds modifications are equitable.<sup>104</sup>

15. *Sections 1051-1056. Domestication.*

RULLCA Section 1051 through 1056 introduce a new tool not currently available under Oregon law – domestication. Current Oregon LLC statutes permit conversions<sup>105</sup> and mergers.<sup>106</sup> Counterpart provisions of RULLCA also provide for these forms of transactions.<sup>107</sup> Under current law and RULLCA, different kinds of business entities can enter into conversion and merger transactions (e.g., a corporation and an LLC can merge with one another).

Under RULLCA and as adopted by the Work Group, domestication is limited to limited liability companies and does not involve other or forms of entities, such as corporations. Hence, by complying with RULLCA Section 1051 through 1065: (i) an Oregon LLC can become a foreign LLC; and (ii) a foreign LLC can become an Oregon LLC.<sup>108</sup> In each instance, the laws of the foreign jurisdiction must specifically permit the domestication.<sup>109</sup> As many operating agreements may not currently contain provisions relating to domestication, Section 1051(c) provides that if such an agreement *does* contain provisions relating to mergers, those provisions apply to domestication “as if the domestication were a merger until the provision is amended” after the effective date of the new statute.

RULLCA Section 1052 provides for a “plan of domestication,” which must contain: (i) the name of the domesticating LLC; (ii) the name and jurisdiction in which the domesticating LLC was formed; (iii) the manner of “converting the interests in the domesticating LLC into interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing;” (iv) the proposed articles of organization of the domesticating LLC; (v) the full text of the operating agreement of the domesticating LLC; (vi) other terms and conditions of the domestication; and (vi) any other provision that may be required by the laws of the foreign jurisdiction involved.<sup>110</sup>

A plan of domestication must be approved by the consent of the members (unless the operating agreement provides for consent of less than all of the members).<sup>111</sup> If a member will be subject to an added liability as a result of the domestication, then RULLCA Section 1053 requires that the plan of domestication be approved by all of the members (unless the operating

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<sup>102</sup> Section 807(b)(4).

<sup>103</sup> Section 807(b)(1)(v).

<sup>104</sup> Section 807(b)(3).

<sup>105</sup> ORS 63.470 – 63.479.

<sup>106</sup> ORS 63.481 – 63.497.

<sup>107</sup> RULLCA Sections 1021 – 1026 (mergers) and Section 1041 – 1046 (conversions).

<sup>108</sup> RULLCA Section 1051(a) & (b).

<sup>109</sup> *Id.*

<sup>110</sup> RULLCA Section 1052(a).

<sup>111</sup> RULLCA Section 1053(a) and ULC commentary p. 231.

agreement permits the consent by fewer than all of the members) *and* the member upon which the liability is to be imposed consents to the plan.<sup>112</sup>

To complete a domestication, a signed “statement of domestication” must be filed with the Secretary of State, and must contain: (i) the name and jurisdictions of both the domesticating and domesticated LLCs; (ii) for an Oregon LLC that is domesticating to another state, a statement that the domestication was approved in accordance with Oregon law, or if a foreign LLC is domesticating to Oregon, a statement that the domestication was approved in accordance with the law of such LLC’s jurisdiction of formation; (iii) the articles of organization of the domesticated LLC.<sup>113</sup> If a foreign LLC domesticates to become an Oregon LLC, its articles of organization must satisfy the provisions of the Oregon LLC statute with respect to the provisions required in the articles of organization (i.e., RULLCA Section 201(b)).

Similar to the provisions of current law relating to mergers and conversions, RULLCA Section 1056 provides that when the domestication is effective: (i) the LLC will be organized under and subject to the law of the state of the domesticated LLC; (ii) is the “same entity without interruption;” (iii) the LLC continues to own all of its property “without transfer, reversion, or impairment;” (iv) the LLC continues to be liable for all of its debts and liabilities that existed before the domestication; (v) the articles of organization of the domesticated entity become effective; (vi) the operating agreement approved as part of the domestication becomes effective; and (vii) the interests of the domesticating LLC are converted to interests in the domesticated LLC.<sup>114</sup> However, the domestication does not create any rights that a “member, manager, or third party would otherwise have upon a dissolution, liquidation, or winding up of the domesticating company.”<sup>115</sup> Finally, when a domestication becomes effective and the LLC becomes an Oregon LLC, its registration in its prior foreign jurisdiction is cancelled.<sup>116</sup>

## V. NEXT STEPS IN THE LEGISLATIVE PROCESS

As of the date of these materials, the Legislative Counsel’s office has just recently provided its initial draft legislation for review by the Work Group and OLC. As that draft has not yet been reviewed by the Work Group and OLC, the discussion in these materials is based only on the Work Group’s draft legislation, and it is possible that the final version introduced in the 2023 Oregon Legislature could have some differences. However, one can expect that the Work Group’s draft, based substantially on the ULC version of RULLCA, will be very similar to the legislation that will be introduced in the Oregon Legislation.

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<sup>112</sup> RULLCA Section 1053(a)(2)(A)-(B). RULLCA Section 105(c)(13) provides that the operating agreement cannot vary the provisions of Section 1053(a)(2).

<sup>113</sup> RULLCA Section 1055(a)-(b).

<sup>114</sup> RULLCA Section 1056(a).

<sup>115</sup> RULLCA Section 1056(b).

<sup>116</sup> RULLCA Section 1056(4).

## **VII. CONCLUSION**

The Work Group’s version of RULLCA represents the best efforts of a dedicated group of professionals that volunteered their time over several years in order to improve the law governing Oregon’s premier business entity. This process will likely continue in future years as the law governing limited liability companies continues to develop and evolve.

## Upcoming LLC Legislation: A Legislative Preview of Oregon’s Version of the Revised Uniform Limited Liability Company Act

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### I. LLC’s – Oregon’s Preeminent Entity

- Original LLC Act – ORS 63 (1994)
  - Patchwork of Pre-existing Entity Acts
- “Check-The-Box” IRS Regulations (1997)
- Numerous amendments to ORS 63
- Work Group Draft (currently unpublished)

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## II. Background of the OLC Work Group

- 2018 – Initial Proposal for Work Group
- Reasons for Formation of LLC Work Group
  - Lack of Uniformity
  - Multi-state Businesses and Lenders
- Composition of Work Group
- Drafting Process – 2019 – 2022
- Key Principles of Work Group’s Approach

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## III. RULLCA

- Background (2006 – 2013)
- Harmonization of Business Entity Acts (the “Hub”)
- Uniform Business Organization Code (UBOC)
- Washington UBOC – RCW Chapter 23.95

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## IV. Key Provisions of Work Group’s Draft and Comparison to Current Law

- Introduction
- Caveats

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## 1. Section 105. Operating Agreements

- RULLCA: Primacy of Operating Agreement
- ORS 63: Articles of Organization Supersedes Operating Agreement
- RULLCA Definition of “Operating Agreement”
- Importance of Integration Clauses
- Section 105(b) – RULLCA “gap-fillers” and the tale of the Carpet Layers

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## 1. Section 105 (continued)

- Section 105(c) – Limitations on Operating Agreement

- Governing Law
- Capacity of LLC to Sue and Be Sued
- Vary registered agent requirements, including filing procedures
- Alter Duty of Loyalty, Duty of Care (But see 105(d))
- Eliminate Good Faith and Fair Dealing
- Exoneration for Bad Acts

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## 1. Section 105 (continued)

- Section 105(c) – Limitations on Operating Agreement
- Vary Information Duties & Rights (410)
- Vary Judicial Dissolution Rights (701(a)(4))
- Right Member Rights to Litigation (except mediation and arbitration, forum selection, etc. permitted)
- Vary Member Approvals of Mergers, Conversions, Etc.
- Restrict rights of Non-Members

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## 1. Section 105 (continued)

- Section 105(d). If not “*manifestly unreasonable*,” the Operating Agreement may:
  - Alter/eliminate core aspects of duty of loyalty (409(b)&(i))
  - Identify activities that do not breach duty of loyalty
  - Alter duty of care (but not bad acts)
- What is “manifestly unreasonable”?

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## 2. Section 110. Effective Date(s).

- Effective Date is 100% an Oregon Legislature Decision
- Work Group Initial Thoughts:
  - New LLCs: January 1<sup>st</sup> following year of enactment
  - Existing LLCs: Up to two years. Possibly 2026?

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### 3. Section 201. Formation of LLCs

- Articles of Organization (instead of RULLCA term “Certificate of Formation”)
- LLC Formed by 1 or more organizers delivering Articles to Secretary of State
- Work Group Draft: Significant divergence from RULLCA
  - Legislative policy clear regarding transparency

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### 3. Section 201. Formation of LLCs (continued)

- Required Contents of Articles of Organization:
  - Name
  - Principal office street address
  - Mailing address
  - Name & address of each organizer
  - If a professional service LLC, the professional service
  - Name & address of individual with direct knowledge of activities

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### 3. Section 201. Formation of LLCs (continued)

- What’s Different for the Articles of Organization?
  - Eliminates statement that LLC is perpetual (or its “latest date”)
  - Member-managed or Manager-Managed
    - RULLCA eliminates “statutory apparent authority”
    - Management structure will be determined by the Operating Agreement
  - Increased significance of agency law
  - Statement of Authority (discussed below)

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### 4. Section 301. Agency Powers of Members

- Member NOT an agent of the LLC “*solely by reason of being a member*”
- Compare to ORS 63.170
- Agent status comes from the Operating Agreement or agency law
- Allows flexibility in design of management structure
- Work Group: Agency law is well developed in Oregon

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## 5. Section 302. Statement of LLC Authority

- New Tool in Oregon: Statement of Authority (SOA)
- “Position” is designated with authority
- Two types: real estate and not real estate
- Real estate SOA filed with Secretary of State AND county
- Non-real estate SOA filed only with Secretary of State
- Effect: generally effective as to a person that “gives value” and relies on the SOA

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## 6. Sections 404-406. Distributions

- Section 404: Default rules
  - Operating Agreement will typically control
  - If no Operating Agreement provision, distributions are equal to all members (similar to ORS 63.185(2)).
  - 404(b): Member has a right to a distribution “only if the company decides”
  - 404(c): No right to demand a distribution for other than money (similar to ORS 63.219(2))

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## 6. Sections 404-406. Distributions

### ■ Section 404: Default rules

- 404(d): Distribution rights of transferees are same as creditor
- 404(d): Makes offset rights specific in statute
- NO allocation or capital account rules in RULLCA. Why?
  - ULC drafters of RULLCA: default distribution & allocation rules can create inconsistencies, and income tax regulations (based on member’s economic interests) provide sufficient guidance
- Most operating agreements will provide sufficient allocation rules

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## 6. Sections 404-406. Distributions

### ■ Section 405: Limits on Distributions in Insolvency

- Compare ORS 63.229
- Tests for Wrongful Distributions: Not able to pay debts in ordinary course OR total LLC assets are less than liabilities plus preferential distribution rights on liquidation
- Work Group opinion: RULLCA provides greater clarity in determining insolvency

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## 6. Sections 404-406. Distributions

- Section 406: Personal liability for wrongful distributions
  - Manager in manager-managed LLC OR Member in member-managed LLC (UNLESS operating agreement relieves a member of authority and responsibility for distributions)
  - Liability is TO the LLC (i.e., not the creditor)
  - Liability requires a showing of breach of fiduciary duty as well
  - Compare to ORS 63.235

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## 7. Section 407. Management of LLCs

- Default Rule: Management structure is member-managed with each member having equal management rights
- Default Rule: 100% of members must approve matters outside the “ordinary course” of the LLC’s business
- Most operating agreements will change the default rules
- Manager-management structure requires express provisions in operating agreement

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## 8. Section 409. Fiduciary Duties

- Duties of Loyalty, Care, Good Faith & Fair Dealing
- Loyalty: duty to account for property, profit, or benefit derived by the member, for “company opportunity,” or dealing on behalf of a person with an adverse interest
- Care: refrain from gross negligence, reckless conduct, willful or intentional misconduct, knowing violation of law
- Good faith & fair dealing: derived from contract law

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## 8. Section 409. Fiduciary Duties

- “Furthering own interests” is not a violation in a member-managed LLC; It IS a violation if a manager does so
- Members may approve or ratify a violation after full disclosure of all material facts
- Operating agreements can provide additional methods of approval or ratification, subject to Section 105

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## 9. Section 410. Information Rights

- Work Group departed substantially from RULLCA
- Draft retains much of current law (ORS 63.771, 63.777, and 63.781)
- 410(1): Required list of LLC records
- 410(2): Member inspection rights of records (member “need not have any particular purpose for seeking the records”)

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## 9. Section 410. Information Rights

- 410(2): LLC must provide members with information, without demand, which the LLC knows is material to the member’s exercise of rights and duties under the operating agreement
- 410(13): Similar to ORS 63.781, a member can apply to a court to “summarily order” inspection and copying of LLC records

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## 10. Section 502. Transfers of LLC Interests

- “Pick-Your-Partner” provisions
- “Transferable Interest” – rights to LLC distributions
- 502(a): Transfer of transferable interest is permissible, transferor is not dissociated, and LLC is not dissolved
- Transferee does not succeed to transferor’s management rights (i.e., no “seat at the table”)
- Operating agreements may (and often do) vary transfer rights

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## 11. Section 503. Charging Orders

- RULLCA provides greater detail than current law (ORS 63.259)
- Charging order is exclusive remedy against a debtor’s LLC interest; constitutes a “lien” on the transferable interest, giving creditor the right to its distributions
- If order is unsuccessful, creditor may request foreclosure
- Single-member LLC: foreclosure takes the entire interest

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## 12. Article 6. Dissociation

- Operating agreement can replace RULLCA’s default rules
- 602(1): Member can dissociate by withdrawal
- 601(b) & (c): wrongful dissociation; potential damages
- 602: default list of dissociation events (notice of withdrawal, express provision in operating agreement, foreclosure, expulsion, death, incapacity (*in a member-managed LLC*), bankruptcy/insolvency, etc.)

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## 12. Article 6. Dissociation

- Effect of Dissociation (again, RULLCA’s default rules)
  - Management rights terminate
  - Member’s fiduciary duties terminate (post-dissociation matters)
  - Member continues to own “transferable interest” as a transferee
  - By itself, dissociation does not relieve the member of any debt or obligation to the LLC or other members

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## 13. Dissolution

- Dissolved LLCs continue to exist; purpose changes
- RULLCA 701. Compare to ORS 63.621; consent of all members or events/procedure in operating agreement
- RULLCA 701(a)(4): right to seek judicial dissolution
  - Grounds: Unlawful, not practical, managers or controlling members actions are illegal, fraudulent, oppressive, or directly harmful
  - 105(c)(9): 701(a)(4) grounds cannot be modified by operating agreement

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## 14. Section 807. Purchase Rights

- Modeled after ORS 60.952 (in corporate statutes)
- Context: action for judicial dissolution under 701(a)(4)
- LLC or Member’s may elect to purchase of member that filed the action for “fair value”
- Process: notice to other members (who have option to participate); parties may agree on price and terms
- If parties can’t agree, court determines value and terms

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## 15. Section 1051-1056. Domestication

- Domestications not currently in Oregon’s LLC statute
- Limited to LLCs
  - Oregon LLC can become a foreign LLC
  - Foreign LLC can become an Oregon LLC
  - Laws of both states must permit domestication
- Steps: member approval of written “plan of domestication,” Statement of Domestication filed in both states

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## V. Next Steps

- Work Group will review draft from Legislative Counsel
- Oregon Law Commission approves draft
- If approved, act is introduced in Oregon Legislature
- Normal legislative process through both houses, signature by governor
- Legislature will finalize effective dates

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## Questions?

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- Thank you!



## Chapter 3

# Presentation Slides: 2022 Employment Law Update

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Portland, Oregon



# 2022 Employment Law Update

Oregon State Bar

Laura Salerno Owens  
Kathryn P. Roberts



 MARKOWITZ  
HERBOLD PC

## What We Will Cover

- Non-Competition Agreements in Employment
- Pay Equity Requirements
- Paid Family Medical Leave in Oregon
- Legislative Updates You Need to Know

# Non-Competition Agreements in Employment



## Non-Competition Agreements

**Why now?** Effective 1/1/22, SB 169 amended ORS 653.295 such that agreements are “void” rather than “voidable”

**What does that mean?** It eliminates the race to action in effect since *Bernard* decision in 2015

## The Date of Formation is Key

- (1) 1986 through 2007
- (2) 2008 through 2021
- (3) 2022 and beyond (for now)

## Formation (1986-2007)

- Non-competition agreements treated the same as non-solicitation agreements
- Upon bona fide advancement or initial employment
- Reasonable duration and geographic scope
- Protectible interest (including customer relationships)

## Formation (2008 through 2021)

- Upon hire with two-weeks advance notice
- Maximum duration: 2 years (2008-2015) and 18 months (2016-2021)
- To protect trade secrets or competitively sensitive information
- Voidable upon affirmative act of employee

## Formation (2008 through 2021 – cont'd)

- Enforceable without payment for exempt employees earning more than median family income for family of 4 (MIF4)
- For exempt employees earning less than MIF4, employer pays 50% of past income or MIF4 (whichever greater) during term of restriction
- For nonexempt employees, employer always pays 50% of past income or MIF4 during restriction

## Formation (2022 and beyond)

- Maximum duration of 12 months
- Must be in writing and signed
- Employer must provide copy within 30 days of termination
- Relevant earnings set by statute and adjusted annually for inflation
- Void (no affirmative act required)

## NCAs in the Real World

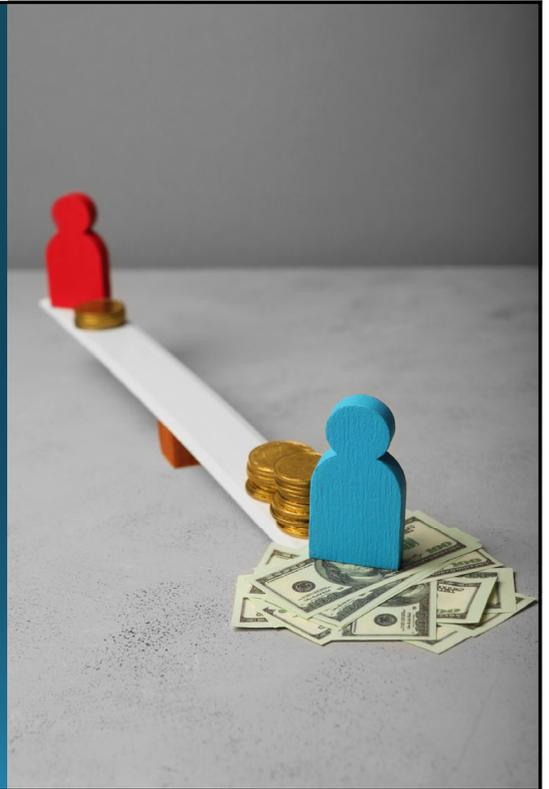
The date of formation is key – resolve any ambiguities as promptly as possible.

For NCAs entered between 2008-2021, employers should provide written notice of intent to enforce at termination.

Update exit procedures to provide NCA copy within 30 days of termination.

Tailor agreement to actual protectible interest - reduces risk of TRO and reliance on judge's blue pencil.

## Oregon's Pay Equity Act (EPA)



## Pay Equity – Why Now?

- In 2021, compensation under the Oregon EPA temporarily redefined to exclude hiring and retention bonuses
- To address challenges of the pandemic labor market
- This exemption expired on September 28

## Overview of Pay Equity Laws

- **Oregon's Equal Pay Act** – prohibits discrimination in compensation based on any protected class; prohibits asking about prior pay; equal pay audit is safe harbor
- **Federal Equal Pay Act** – prohibits discrimination in compensation based on sex; largely similar to Oregon's EPA but generally less expansive
- **Lilly Ledbetter Equal Pay Act** – permits action based on each discriminatory paycheck, regardless of initial date of discrimination

## Key Aspects of Oregon EPA

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- (1) Employers must provide same pay and benefits to all employees performing work of comparable character, unless justified by a bona fide factor (no catch all)
- (2) Employers cannot ask about or set compensation based on prior pay, even if the employee volunteers the information
- (2) Employers may only increase pay to comply with the law

## Key Aspects of Oregon EPA (cont'd)

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- (4) Employers cannot retaliate for conduct related to this law
- (5) Employees have one year to assert a claim (measured from each discriminatory paycheck)
- (6) Applies to all employers in Oregon and all employees who work in Oregon, were hired in Oregon, or are paid in Oregon

## Bona Fide Factors - Basics

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Under the Oregon EPA, the listed “bona fide factors” are exclusive, *i.e.*, there is no catch all category

These factors must be consistent and verifiable, and in use at the time of the alleged violation

## Bona Fide Factors – What are They?

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- Seniority System
- Merit System
- Quantity/Quality of Production
- Workplace Location
- Travel Requirements (if necessary and regular)
- Education
- Training
- Experience
- Combination of the Above

## What Qualifies as Compensation?

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Short answer: pretty much everything

Compensation includes an employee's wages, salary, bonuses (including hiring and retention), benefits (including extra PTO), and equity awards

But there is some good news ....

## What Can Employers Do?

---

- **Reimbursements** – must be for actual expenses, *e.g.*, relocation expenses
- **Benefit Options** – a benefit of actual value to only some employees okay; a declined benefit is still included in calculating compensation
- **Bonuses** – okay if equally available to all; potential bonus is included in total compensation
- **Shift Differential** – where shifts are of “sufficiently different character”

## Safe Harbor – Equal Pay Analysis

---

If an employer has performed an equal pay audit in three years prior to claim can avoid compensatory and punitive damages

- Pay analysis must be realistic and in good faith
- Following audit, employer should engage in reasonable efforts to eliminate unjustifiable wage disparities
- Cannot be used as an admission of liability (and absence of audit not proof of violation)
- For employers who conducted equal pay audit in 2019 (when EPA enacted), the three-year safe harbor may be expiring

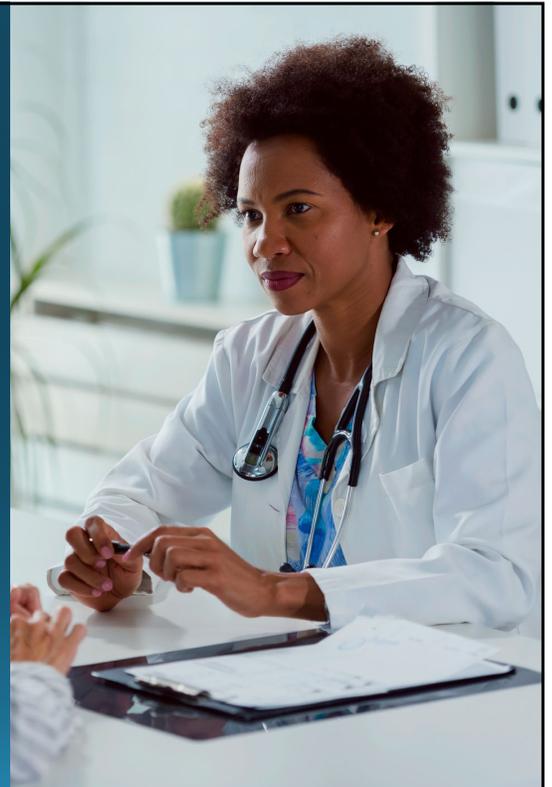
## Hiring / Retention Bonuses – A Thing of the Past?

The short answer: pretty much.

BOLI says that employers can still give these types of bonuses, they must be “available to all employees performing work of comparable character on an equal, non-discriminatory basis.”

But, in practice, this means that employers must pay the equivalent of that bonus to existing employees as well. Similarly, if a new hire negotiates better compensation, the employer must match that for others (absent a bona fide factor).

## Oregon’s Paid Family and Medical Leave Insurance (PFMLI)



# IT'S HAPPENING!!!



## Paid Family and Medical Leave Insurance (PFMLI)

- Applies to all employers
- Applies to nearly all employees, so long as they earned \$1,000+ in wages in the year prior to taking leave and have paid into the fund
- Paid for by employee and employer contributions

## Paid Family and Medical Leave Insurance (cont'd)

- Employees are entitled to 12 weeks of paid leave per year, 2 more paid weeks for pregnancy/childbirth
- Employers and employees begin paying in on January 1, 2023
- Employees can start using their paid family leave benefits on September 1, 2023

## Paid Family and Medical Leave Insurance (cont'd)

- Contributions required beginning on January 1, 2023
  - Some employers (with 25+ employees)
  - All employees
- Total contribution will be 1% of compensation (or less)
- Contribution levels
  - Employers (if required) pay 40%
  - Employees pay 60%
- Benefits available starting on September 1, 2023

## Paid Family and Medical Leave Insurance (cont'd)

- Job protection for employees with 90 days
  - Restored to same or similar position upon return
  - Employee benefits continue
- Temporary assignments to cover employee on leave
  - With notice, can hire temp and fire when employee returns
  - With notice, can transfer existing employee and transfer back when employee returns
- Grants available to offset costs to employers, e.g., up to \$3,000 for costs to hire temporary worker

## PFMLI – Take Note!

- Broad definition of “family member”
  - Related by blood or affinity
  - Close association is equivalent of family relationship
  - Cases will likely test limits of this definition
- As expected, the employer cannot interfere or retaliate against employee for exercising rights (or attempting to)
- Amends ORS 659A.885 to expand remedies – 2 years back pay, greater of compensatory damages or \$200, punitive damages available, right to jury trial

## PFMLI – Take Note! (cont'd)

- Administered by the Oregon Employment Department
- Employers can offer approved equivalent plans
- Should not displace existing PTO or Oregon Sick Time (though employer could reconfigure PTO benefit accordingly)

## PFMLI – Practical Implications

Employees are more likely to take leave when it is paid.

Employers review all employee handbooks and leave policies to ensure compliance.

Employers should provide plenty of advance notice of the newly required deduction before the beginning of 2023

# Employment Law Updates:

## Need-to-Know Speed Round

### Extended Statute of Limitations

The OWFA significantly expanded the statute of limitations period for discrimination, harassment, and sexual assault claims, from one to five years.

This applies to alleged violations that occurred on or after September 29, 2019.

## Crown Act – Hair and Dress Codes

Amends ORS 659A.001 to protect certain hairstyles from discriminatory treatment. Defines “race” to include “physical characteristics historically associated with race” to include types of hair and particular hairstyles.

Also limits dress codes to that do not disproportionately impact members of a protected class.

Includes exceptions for bona fide business reasons.

## OFLA Amendments Pandemic Edition

Covers employers with at least one employee during a public health emergency, so long as employee worked 30 days and at least 25 hours per week in those 30 days.

Employees retain eligibility during separation from employment for up to 180 days.

Expands “sick child” definition to include when school or daycare is closed to employee’s child.

## Gender Identity

Many employment-related statutes were amended to include “gender identity” as a protected class.

Includes ORS 652.210 (Oregon EPA), ORS 653.547 (domestic worker protections), and Chapter 659A (discrimination in employment)

## Childcare Accommodation

No retaliation against an applicant or employee who asks for a schedule that meets childcare needs

However, employer need not provide the requested accommodation

## Health and Safety Complaints

**Rebuttal Presumption** – An employer that fails to hire or discharges an employee within 60 days of a health and safety complaint, will face a rebuttable presumption of retaliation in a resulting action.

**Extended SOL** – An employee now has one year to initiate a retaliation complaint with BOLI following a report of unsafe working conditions (previously 90 days)

## NDA and Arbitration Provisions

Under the OWBFA, employer cannot request an NDA or no-rehire provision in a settlement agreement. Only the settling employee can request these provisions.

Federal law now prohibits employers from requiring arbitration of employee sexual harassment or assault claims.



Please contact Laura or Kathryn  
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**Thank you!**



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## Chapter 4

# Presentation Slides: 2022/2023 Intellectual Property Updates for Business Lawyers

**MELISSA JAFFE**

Law Offices of Melissa B. Jaffe PC  
Portland, Oregon



# 2022/2023 Intellectual Property Updates for Business Lawyers

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#### LICENSED:

- CA
- OR
- WA

#### FOCUS:

- Intellectual Property
- Strategy, Counsel, Negotiations, Drafting

#### BOARDS:

- OSB, Business Law Executive Committee
- King County Washington Women Lawyers, Executive Committee
- Washington Women Lawyers Executive Committee

# Intellectual Property

- Copyright
- Trademark
- Patent
- Trade Dress
- Trade Secret



“Nearly twenty-five years ago we enacted the Digital Millennium Copyright Act, a landmark update to the copyright laws for the internet age. Since then, the internet has significantly changed, and with it so has the world of copyright,” **said Senator Leahy**. “I’m excited to work, alongside Senator Tillis, with filmmakers, musicians, authors, and artists of all stripes, enlisting the help of online platforms, to address online copyright theft that robs these artists of the fruits of their creativity and hard work. The technology exists to protect against this theft; we just need online platforms to use the technology. I’m working hard to make sure our artists get paid, and we can enjoy legal access to their wonderful creations. I look forward to working with all realms of the copyright community to address the problem of copyright theft.”

**Senator Patrick Leahy (D)-VT**



# Digital Millennium Copyright Act of 1998 (DMCA)

- criminalizes production and dissemination of technology, devices, or services intended to circumvent measures that control access to copyrighted works
- Notice-and-takedown
- Intended for Standard Technical Measures (STMs)
- Safe Harbor for Service Providers – unintended results



# Strengthening Measures to Advance Rights Technologies (SMART) Copyright Act of 2022

Senators Thom Tillis (R-NC) and Patrick Leahy (D-VT)

<http://tillis.senate.gov/2022/3/tillis-and-leahy-introduce-bipartisan-legislation-to-combat-copyright-piracy-enhance-content-sharing-and-hold-tech-accountable>



## (SMART) Copyright Act of 2022

- Hoping STM's will be adopted to fit the needs of particular industries
- Aims to encourage platforms to cooperate and work together
- Funding to the Copyright Office & support staff



## (SMART) Copyright Act of 2022

- EU = more restrictive
- No plans for moral rights
- Hopeful, not absolute



# Copyright Claims Board (CCB) of 2022

- alternative forum for resolving copyright disputes of low economic value (up to \$30k)
- no representation needed
- 3-member tribunal



# Copyright Claims Board (CCB) of 2022

Proposed rules: <https://ccb.gov/proceedings/>

- File claim
- Opt out (60 days)
- “Discovery”



## Unified IP Office?

Sen. Tillis requested the National Academy of Public Administration (NAPA) consolidate:

- USPTO (US Patent & Trademark Office)
- USCO (US Copyright Office)
- IPEC (Intellectual Property Enforcement Coordinator)
  - > Senate and Presidential appointed Director
  - > Separate commissioners for each area
  - > increased efficiencies
  - > more resources



## Patent Trial and Appeal Board (PTAB) Reform Act of 2022

- Abused by bad actors
- Disadvantaged patent holders & independent inventors
- Prevent gamesmanship and strategic litigation

<https://www.leahy.senate.gov/imo/media/doc/PTAB%20Reform%20Act%20One%20Pager.pdf>



# USPTO key initiatives

1. Encouraging innovations
2. Protecting innovation
3. Bringing innovation to impact



# USPTO key targets

1. Geographically underserved communities – rural
2. women
3. Ethnic minorities



## USPTO Education Efforts

1. K-12 inspire younger generations to develop and manage innovation mindset
1. Other countries, including working directly with ambassadors
1. Council for Inclusive Innovation:  
<https://www.uspto.gov/initiatives/equity>
1. Pro Bono Program with California Lawyers for the Arts



## USPTO Commerce Efforts

Collaboration with other organizations such as Intellectual Property Owners Association (**IPO**) & American Intellectual Property Law Association (**AIPLA**) hoping to encourage participation in pilot projects



# USPTO Pilot Programs

**Climate Change Mitigation Pilot program** (est. June 3, 2022). Accepting petitions until June 5, 2023 or until they receive 1,000 applications.

- filed electronically
- classified as affecting capture of carbon dioxide, climate change technology, and greenhouse gases
- Certified application which addresses the areas that address climate change mitigation
- Different and more narrow than the Clean Energy Pilot



# USPTO Pilot Programs

**Patents 4 Patients / Cancer Immunotherapy Pilot Program**  
(originally the 2016 National Cancer Moonshot initiative)

- Fast-track, accelerated review for cancer immunotherapy-related patent applications
- No petition fee
- Already processed over 835 petitions, issued 615 patents on methods of treatment applications
- USPTO considering extending beyond cancer immunotherapy treatments to compounds, rare childhood cancers, diagnostics, CT-MRI, & other diagnostic and therapeutic technologies



# USPTO Deferred Subject Matter Eligibility Pilot Program (DSMER)

Evaluates how deferred responses to subject matter eligibility rejections affect examination efficiency & patent quality.

- Invitation only
- Limited waiver of subject matter eligibility rejections
  - defer arguments until final disposition or withdrawal of all other rejections
- Designed to allow the process to proceed.



# USPTO Patents For Humanity Awards

Diagnostics for COVID-19. Annual.

Winners receive accelerated certificate for certain proceedings & street cred (highly publicized to showcase how patents can create affordable, scalable, and sustainable solutions to global challenges.



# USPTO China IP Initiative

Addresses widespread counterfeiting and piracy through the China IP Policy team:

- 11 IP lawyers at the USPTO
- 3 attachés in China
- 5 locally trained members in Beijing, Shanghai, and Guangzhou

Roadshow in San Diego: <https://www.uspto.gov/ip-policy/ip-china/china-ip-road-shows-and-webinar-events>



# Patent Prosecution Highway (PPH)

Fast-track application process & work-sharing program designed to improve efficiency & reduce work redundancy across patent offices around the world

- 27 countries currently participate in the Global PPH
- 9 countries have other PPH programs
- Offices agree to accept certain work product related to Office Actions



# Questions?

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## Chapter 5

# Presentation Slides: Tax Update

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**ALEE SOLEIMANPOUR**

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Portland, Oregon



**Tax Update**  
Major Changes since Jan. 1, 2022  
Oregon State Bar – Business Law Section  
Developments in Business Law 2022

PRESENTED BY

**Schwabe**  
WILLIAMSON & WYATT



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"I enjoy working with clients and their other advisors to achieve the clients' objectives."

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- Former Law Clerk at the United States Tax Court to the Honorable Joseph W. Nega and Carolyn P. Chiechi
- President of the Oregon Arab Iranian Bar Association

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## ROADMAP

- Tax Issues Coming Out of the Inflation Reduction Act
- Oregon State and Local Taxes
- Other Federal, State, and Local Hot Topics and Potential Proposals

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## INFLATION REDUCTION ACT, GENERALLY

- Sweeping tax legislation
- With “narrow” focus

## SECTION 179D DEDUCTION

- Section 179D provides for accelerated cost recovery, in the form of a tax deduction, for certain energy efficient commercial building (EECB) property
- Deduction is permitted for the year the property is placed in service
- IRA lowered the minimum EECB standard from a 50% reduction in total annual energy usage and power costs to a 25% reduction
- IRA modifies the formula for calculating the maximum benefit, by switching to the concept of an “applicable dollar value” (ADV) multiplication factor
- Notably, the ADV can be increased if certain prevailing wage and apprenticeship requirements are satisfied
- IRA also contemplates the EECB property could be installed on or in “tax-exempt” property, which could lead to expanded applicability of the deduction

## SECTION 45L TAX CREDIT

- Section 45L provides a new energy-efficient home credit for certain eligible contractors
- IRA pushes out the applicability of the tax credit to qualified new energy-efficient homes acquired before Jan. 1, 2033 (an 11-year increase in the tax credit)
- The total credit can now be up to \$5,000
- For single-family homes, requirements are tied to Energy Star single-family new construction program requirements, which change over the period of the tax credit
- On the multifamily housing side, the applicability is tied to Energy Star multifamily new construction program requirements
- Additionally, certain prevailing wage requirements may apply; however, the statute does provide certain provisions that permit noncompliance to be fixed

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## SECTION 45Q TAX CREDIT

- Section 45Q provides a tax credit for qualified carbon oxide captured by a taxpayer at a qualified facility
- IRA extends this tax credit to qualified facilities that begin construction between Dec. 31, 2022, and Jan. 1, 2033 (which, for obvious reasons, presents a limited timing planning concern if you are in the process of commencing construction on such a facility)
- IRA will also apply to certain carbon-capture equipment placed in service before Feb. 8, 2018; thus, we see an expansion of this tax credit that looks to the past and the future
- IRA reduces the minimum annual capture requirements to make the tax credit more widely available

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## IRS ENFORCEMENT

- The IRS received a substantial, +\$80B appropriation in the IRA
- Focus on infrastructure, hiring, and high-income taxpayers

## UPDATE ON OREGON STATE AND LOCAL TAXES



# PORTLAND-METRO TAXES



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## METRO SUPPORTING HOUSING SERVICES TAX

### Background

- In May 2020, voters in greater Portland approved a measure to raise money for supportive housing services for people experiencing homelessness or at risk of experiencing homelessness
- The Metro Supporting Housing Services Tax went into effect January 1, 2021
- Will remain in effect through December 31, 2030, unless reauthorized by voters on or before that date

### How much is the tax?

- 1% personal income tax on taxable income above \$125,000 for individuals and \$200,000 for those filing jointly
- 1% business income tax on net income for businesses with gross receipts above \$5,000,000

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## METRO SUPPORTING HOUSING SERVICES TAX

### Personal Income Tax Component

- The personal income tax component calculation differs depending on whether one is a resident of the Metro (i.e., Clackamas, Multnomah, and Washington counties)
- Residency determination turns on issues such as one’s “domicile” and “abode”
- For individuals residing in Metro → 1% tax on Metro resident’s entire Oregon Taxable Income of more than \$125,000 for individuals, and \$200,000 for couples filing jointly
- For individuals residing outside of the Metro → 1% tax on nonresident’s Metro Taxable Income of more than \$125,000 for individuals, and \$200,000 for couples filing jointly
- Definition of “Metro Taxable Income” is in Metro Code 7.05.020

## METRO SUPPORTING HOUSING SERVICES TAX

### Personal Income Tax Component – Part-Year Calculation (Metro Code 7.06.100)

If an individual is a part-year resident of the District, then the individual’s taxable income includes the taxfiler’s Oregon Taxable Income for the portion of the year in which the individual was a Metro resident, and includes the taxfiler’s Metro Taxable Income for the portion of the year in which the individual was a nonresident

## METRO SUPPORTING HOUSING SERVICES TAX

### Business Income Tax Component

- 1% business income tax on net income for businesses with gross receipts above \$5,000,000
- There are a few exemptions to this tax, such as the fact that it does not apply to sole proprietorships and disregarded entities, as those are subject to the personal income tax component (See Metro Code 7.07.050)

## METRO SUPPORTING HOUSING SERVICES TAX

### Withholding and Administration

- For tax year 2022, withholding is mandatory for all employees that work in the Metro and earn \$200,000 or more during the calendar year. This applies equally to resident or nonresident employees
- Employees that earn less than \$200,000 during the calendar year may choose to “opt-in” or “opt-out” based on the employee’s tax situation
- Employers will be required to file quarterly returns, annual reconciliations, and submit W-2s through an online system
- The withholding and filing dates are the same as the Federal/Oregon dates

## PRESCHOOL FOR ALL TAX

### Background

- On November 3, 2020, Multnomah County voters approved a measure to establish a tuition-free preschool program
- Program is funded by a personal income tax, which went into effect January 1, 2021

### How much is the tax?

- 1.5% personal income tax on taxable income above \$125,000 for individuals and \$200,000 for those filing jointly
- 3.0% personal income tax on taxable income above \$250,000 for individuals and \$400,000 for those filing jointly
- The rates will increase 0.8% in 2026

## PRESCHOOL FOR ALL TAX

### Personal Income Tax

- The Preschool Tax calculation differs depending on whether one is a resident of Multnomah County
- Residency determination turns on issues such as one's "domicile" and "abode"
- For Multnomah County residents → 1.5% tax on Multnomah County resident's entire Oregon Taxable Income of more than \$125,000 for individuals, and \$200,000 for couples filing jointly. The Preschool Tax imposes an additional 1.5% tax on an individual's income over \$250,000, and on a joint filers' income over \$400,000
- For those residing outside of Multnomah County → 1.5% tax on the nonresidents' Multnomah County Taxable Income of more than \$125,000 for individuals, and \$200,000 for couples filing jointly. The Preschool Tax imposes an additional 1.5% on an individual's income over \$250,000, and on a joint filers' income over \$400,000

## PRESCHOOL FOR ALL TAX

### Personal Income Tax (Cont.)

- Administrative rules were released on September 9, 2021

- With respect to sourcing, the FAQs provide:

*If I don't live in Multnomah County, am I subject to the tax?*

*Only Multnomah County sourced income is subject to the tax if you live outside of Multnomah County. If you are working remotely (Outside of Multnomah County) for a Multnomah County employer, your income would not be subject to the tax. Example: If an employee works 50% of the time in Multnomah County, 50% of their income would be subject to the tax thresholds*

*If a Multnomah County resident makes 100% of their income outside of Multnomah County, is their total income subject to the tax?*

*Yes*

*If a Multnomah County resident makes a portion of income within Multnomah County, would their total Oregon taxable income be subject to the tax?*

*Yes*

## PRESCHOOL FOR ALL TAX

### Credits and Deductions

The Preschool Tax contains two provisions that address the issue of double taxation

- The first is a deduction for pass-through income that is subject to tax under the Multnomah County Business Income Tax
- The second is a credit for Multnomah County residents who are taxed on the same property by another jurisdiction

## PRESCHOOL FOR ALL TAX

### Withholding and Administration

- For tax year 2021, employers were not required to withhold for employees unless and until their payroll system is capable. Employers were, however, required to offer in writing to withhold starting in 2021 when their systems are updated to handle such withholding
- For tax year 2022, withholding became mandatory
- Employers are required to file quarterly returns, annual reconciliations, and submit W-2s through an online system
- The withholding and filing dates are the same as the Federal/Oregon dates

## OREGON PASS-THROUGH ENTITY (“PTE”) TAX

### History

- In 2017, as part of the Tax Cuts and Jobs Act, Congress enacted section 164(b)(6) of the IRC (“Code”)
- Code section 164(b)(6) effectively limited the Federal deduction of State and Local Tax (“SALT”) to \$10,000 per year for any tax year beginning after December 31, 2017, and before January 1, 2026
- States, primarily those with high SALT, sought to circumvent Congress’ new cap
- In 2018, Connecticut was the first state to pass a workaround; thereafter, other states quickly joined

## OREGON PTE TAX

### History (cont.)

- On November 9, 2020, the IRS issued Notice 2020-75
- In that Notice, IRS stated it would “propose[] regulations to clarify State and local taxes imposed on and paid by a partnership or an S corporation on its income are allowed as a deduction by the partnership or an S corporation in computing its non-separately stated taxable income or loss for the taxable year of payment”
- Before the issuance of the Notice, the IRS had not issued any guidance regarding the efficacy of the PTE workarounds
- Following the issuance of the Notice, it appears that IRS is at least acknowledging the efficacy of the PTE workarounds

## OREGON PTE TAX

### History (cont.)

- On February 4, 2021, Senate Bill 727 (“SB 727”) was introduced into the Oregon Legislature
- On July 19, 2021, Governor Kate Brown signed the bill into law with an effective date of September 25, 2021
- SB 727 applies to tax years beginning on or after January 1, 2022, and before January 1, 2024

## OREGON PTE TAX

### Mechanics

- SB 727 is an election-based PTE workaround and allows PTE to elect to be liable for and pay a “pass-through business alternative income tax” (“PTE Tax”) if the PTE consists of: (1) individuals who are subject to the personal income tax under ORS Chapter 316; or (2) entities that are PTEs who are owned entirely by individuals subject to the personal income tax under ORS Chapter 316
- A PTE can only elect to pay the PTE tax if all members of the PTE consent to the election
- Such election must be made annually on or before the due date, including extensions, of the PTE’s returns (cannot make election retroactively)
- A PTE can revoke its election only if on or before the due date of the PTE’s return and only if all members agree to the revocation

## OREGON PTE TAX

### Mechanics (cont.)

- Once a PTE elects to be subject to the PTE Tax, the PTE Tax is imposed on the sum of each member’s share of distributive proceeds from the entity for the tax year (“Total Distributive Proceeds”)
- The PTE Tax rate is: (1) 9% on the first \$250,000 of Total Distributive Proceeds; and (2) 9.9% on Total Distributive Proceeds in excess of \$250,000
- SB 727 allows the PTE member a credit against taxes that are otherwise due under ORS Chapter 316
- That credit must be equal the PTE member’s pro rata share of the PTE Tax paid by the PTE
- If the amount of the PTE member’s credit plus the sum of amounts allowable as payment of tax under ORS 316.187 or 316.583, other tax prepayment amounts, and other refundable credit amounts, exceeds the tax imposed under ORS Chapters 314 and 316, then the PTE member will receive a refund in an amount equal to the excess

## OREGON PAID FAMILY MEDICAL LEAVE

### History

- In 2019, the Oregon legislature passed the Paid Family Medical Leave Act
- The Act established a paid family and medical leave insurance program for Oregon workers that will be funded by employee contributions
- Program was delayed during COVID, now rebranded as “Paid Leave Oregon”

## OREGON PAID FAMILY MEDICAL LEAVE

### Overview

- The program allows Oregon employees to take up to 12 weeks (or in some situations, up to 14 weeks) of paid time off for qualifying family and medical leave reasons beginning in September 2023
- Funded by employer and employee contributions to a fund, which will be administered by the Oregon Employment Department (“OED”), beginning January 2023
- Employers with fewer than 25 employees are not required to make employer contributions, but are required to make payroll deductions for employee contributions
- There is an alternative option, in which employers may comply with the program by establishing an “equivalent plan” that the OED must approve in advance

## OREGON PAID FAMILY MEDICAL LEAVE

### Contributions

- The OED will determine the contribution rate annually, subject to a statutory maximum of 1% of the employees' wages – the contribution rate for 2023 is 1%
- Employees contribution 60% (or .6% of their wages) and employers contribution 40% (or .4% of the employees' wages)
- Employers must withhold employee contributions from employees' pay (similar to payroll withholdings)

## OTHER FEDERAL, STATE, AND LOCAL HOT TOPICS AND PROPOSALS



## WASHINGTON STATE CAPITAL GAINS TAX

- ESSB 5096 – Passed by 2021 Washington State Legislature
- Enacted as RCW 82.87
- Imposes 7% tax on the sale or exchange of long-term capital assets
- On profits exceeding \$250,000 annually
- Applies to Individuals
- Washington State gains
- Tax effect January 1, 2022
- Revenue collected to fund education legacy trust account and common school construction account

## CAPITAL GAINS TAX – RCW 82.87.020, DEFINITIONS

- “Adjusted Capital Gain” means federal net long-term capital gain (each to the extent included in calculating federal net long-term capital gain):
  - Plus any exempt long-term capital loss
  - Plus any long-term capital loss not allocated to WA
  - Plus any amount of loss carryforward not allocated to WA
  - Less any amount of long-term capital gain not allocated to WA
  - Less any amount of long-term capital gain exempt from this tax
- “Capital Gain” or “Loss” means gain or loss on sale or exchange of a long-term capital asset
- “Long-Term Capital Asset” means a capital asset held for more than one year

## CAPITAL GAINS TAX – RCW 82.87.020, DEFINITIONS CONT

- “Capital Asset” has the same meaning as Code Section 1221
- “Federal Net Long-Term Capital Gain” is as determined under the Code, but as if Sections 55-59, 1400Z-1, and 1400Z-2 did not exist
- “Taxpayer” means an individual
- “Individual” means a natural person

## CAPITAL GAINS TAX – RCW 82.87.020, DEFINITIONS CONT.

- “Resident” means an individual:
  - Who is domiciled in the state during the taxable year, unless the individual:
    - Maintained no permanent place of abode in WA during the entire taxable year; OR
    - Maintained a permanent place of abode outside WA during the entire taxable year; OR
    - Spent in the aggregate not more than 30 days of the taxable year in WA
  - OR
  - Who is not domiciled in WA during the taxable year, but maintained a place of abode and was physically present in WA for more than 183 days during the taxable year

## CAPITAL GAINS TAX – RCW 82.87.040, TAX IMPOSED

- An “excise” tax is imposed on the sale or exchange of long-term capital assets
- 7% tax
- No carryover or carryback
- Tax applies when long-term capital gains are recognized by the taxpayer

## CAPITAL GAINS TAX – COURT CHALLENGES

- *Quinn/Clayton, et al v. State of Washington*
- In March 2022, Douglas County Superior Court ruled the tax does not meet state constitutional requirements
- Remains on appeal to the Washington Supreme Court
- Washington Department of Revenue continues publishing guidance at <https://dor.wa.gov/taxes-rates/other-taxes/capital-gains-tax>

QUESTIONS AND COMMENTS?



HEALTHCARE



MANUFACTURING  
DISTRIBUTION & RETAIL



NATURAL RESOURCES



TRANSPORTATION, PORTS  
& MARITIME



REAL ESTATE &  
CONSTRUCTION



TECHNOLOGY



## Chapter 6

# Presentation Slides: A Few of Our Favorite Things Business Lawyers Should Know About Bankruptcy

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# A FEW OF OUR FAVORITE THINGS BUSINESS LAWYERS SHOULD KNOW ABOUT BANKRUPTCY

Presented by: Ava Schoen and Danny Newman

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## TYPES OF BUSINESS BANKRUPTCY FILINGS

Chapter 13

Chapter 12

Chapter 7

Chapter 11

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## CHAPTER 13: SOLE PROPRIETORSHIPS CAN QUALIFY

- **Chapter 13** - Who is eligible?  
Individuals including businesses owned as sole proprietorships with regular income
- Repayment plan to creditors over three to five years
- No co-debtor stay for non-“consumer” debts
- Discharge upon plan completion



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## CHAPTER 12: FAMILY FARMERS AND FISHERMEN

- **Chapter 12** – Who is eligible?  
Individual or corporate farmers or fishermen with regular annual income
- Repayment plan to creditors over three to five years
- Hybrid of Chapter 13 and Chapter 11
- Discharge upon plan completion



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## CHAPTER 7 – LIQUIDATION

- **Chapter 7** trustee liquidates non-exempt assets and distributes proceeds in order of priority set forth in the bankruptcy code
- Who is eligible? Businesses and individuals
- Discharge not available to business debtors

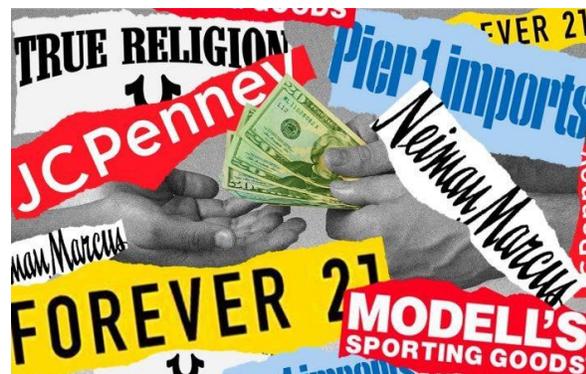


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## CHAPTER 11 – REORGANIZATION

- Who is eligible? Primarily businesses but sometimes individuals
- The debtor generally remains in charge
- Continued operations, liquidation, or both



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## PRE-BANKRUPTCY CONSIDERATIONS – CHAPTER 7 AND 13 DEBTORS

### Chapter 7:

- Will secured creditors get all the assets?
- Can you liquidate assets for more than a trustee can?
- Can you comply with Oregon wind-down statutes?
- Is there a risk of successor liability?

### Chapter 13:

- Do you meet the debt limits (\$2,750,000)
- Do you have a plan?

### Generally:

- Were there fraudulent transfers?

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## PRE-BANKRUPTCY CONSIDERATIONS – CREDITORS

- Accepting preferential payments – know the risks
- Should you ship product on standard credit terms?
- COD please?
- Should you have a guarantor?
- Should you take collateral?

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## PRE-BANKRUPTCY CONSIDERATIONS – CHAPTER 11 DEBTORS

- Cash is King: Do your clients have sufficient cash flow or financing?
- Timing: Do your clients' business prospects support a Chapter 11 filing?
- Goal: Do your clients have an identified plan?



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## BANKRUPTCY CONSIDERATIONS IN A NEGOTIATED SETTLEMENT

Mitigate risks by:

- Get paid as soon as possible
- Get (and perfect) a security interest in collateral sufficient to satisfy the settlement
- State the basis for the settlement if the underlying claim is non-dischargeable
- Preserve original claim amount in case of bankruptcy filing
- Delay the release of the underlying claim until 91 days after payment

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## HOW CHAPTER 11 CAN HELP YOUR CLIENTS



## CHAPTER 11 GIVES YOU THE OPPORTUNITY TO:

- Negotiate with creditors
- Create breathing room
- Continue operations
- Recapitalize the business
- Sell some or all assets
- Eliminate or reduce debts and other liabilities



## CHAPTER 11 GIVES YOU THE OPPORTUNITY TO:

- Change repayment terms
- Cut off unsecured creditor interest
- Address real estate leases
- Eliminate unfavorable contracts
- Preserve claims
- Avoidance powers
- Buy assets
- Make strategic investments



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## THE SALE PROCESS IN CHAPTER 11

### Opportunities for Buyers and Sellers

- 363 Sale v Plan
- Free and Clear
- “Cherry Pick” assets and contracts
- Avoid third party consents
- Federal Court Order protections



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## THE SALE PROCESS IN CHAPTER 11

### 363 Sale Timeline

- Stalking Horse - APA
- Bid procedures - Protections
- Due diligence - Marketing
- Overbids - Auction
- Court Order - Close the sale



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## PROOFS OF CLAIM

- Use the form
- Attach relevant evidence to support
- Keep track of the deadline
- If contingent or unliquidated, update it
- Administrative claims and dealing with a debtor-in-possession

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## THE AUTOMATIC STAY

- The filing of a bankruptcy petition (voluntary or involuntary) generally creates an automatic stay that stops all actions that might impact or exercise control over property of the estate
- Section 362 of the Bankruptcy Code
- Void *ab initio*; actions will be undone



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## THE AUTOMATIC STAY PROTECTS

- Property of the Estate. Section 362(a)(1)-(4)
- Property of the Debtor. Section 362(a)(5)
- The Debtor. Section 362(a)(1), (2), (6)-(8)
- Interpreted very broadly (i.e. Insurance proceeds)

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## SELECT EXCEPTIONS TO THE AUTOMATIC STAY

- Individual Debtor who has had two or more cases dismissed in the prior year. Section 362(c)(4)
- Certain multiple filer small business debtors or entities that acquired substantially all the assets of such a debtor. Section 362(n)
- Other exceptions to the automatic stay include Section 362(b), (l), (m), and (o)

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## DURATION OF THE STAY

Termination without court order

- Acts against Property of the Estate. Section 362(c)(1)
- Other acts. Section 362(c)(2)
- Individual who had prior case dismissed within the preceding year. Section 362(c)(3), 362(i)
- Individual debtor who fails to timely file a statement of intent or perform stated intent. Section 362(h)

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## DURATION OF THE STAY (CONT'D)

Relief by Court Order. Section 362(d)

- Grounds for Relief Section 362(d)
- 362(d)(1) or 362(d)(2)
- Timing of hearing Section 362(e)-(f)
- Burden of proof Section 362(g)

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## AUTOMATIC STAY MISCELLANEOUS

- Stay violations. Sections 362(k), 342(g)(2).
- Often when the automatic stay ends, the discharge injunction starts. Sections 524(a)(2)&(3)
- In Chapter 13, there is a co-debtor stay with respect to consumer debts. Section 1301
- Can co-extend to persons or entities whose assets or energy are essential to reorganization. Section 105
- The bankruptcy court can use its power under Section 105 to impose an injunction after the stay expires, except as specified in Section 362(o).

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## **Chapter 7**

# **Presentation Slides: Ethics in the Age of Social Media: The Dos and Don'ts in and out of Client Disputes**

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Buchalter PC

Portland, Oregon



Oregon  State Bar

## Ethics in the Age of Social Media: the Dos and Don'ts in and out of Client Disputes

Amber Bevacqua-Lynott, Buchalter

2022 OSB Business Law Update – November , 2022

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LOS ANGELES  
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**BEING A LAWYER  
IS EASY.  
IT'S LIKE RIDING A BIKE.  
EXCEPT THE BIKE IS ON FIRE.  
YOU ARE ON FIRE.  
EVERYTHING IS ON FIRE.**

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## Exhibit A: social media is hard

- A Galveston, Texas lawyer requested a continuance due to a reported death in the family. The trial judge checked the lawyer's Facebook page and ...

Discovered that the lawyer had spent the week drinking and partying.

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## Topics/Agenda

- Social media & lawyers
- Social media & “friending”
- Social media & jurors
- Social media & confidentiality
  
- Questions

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## Why do we care about social media?

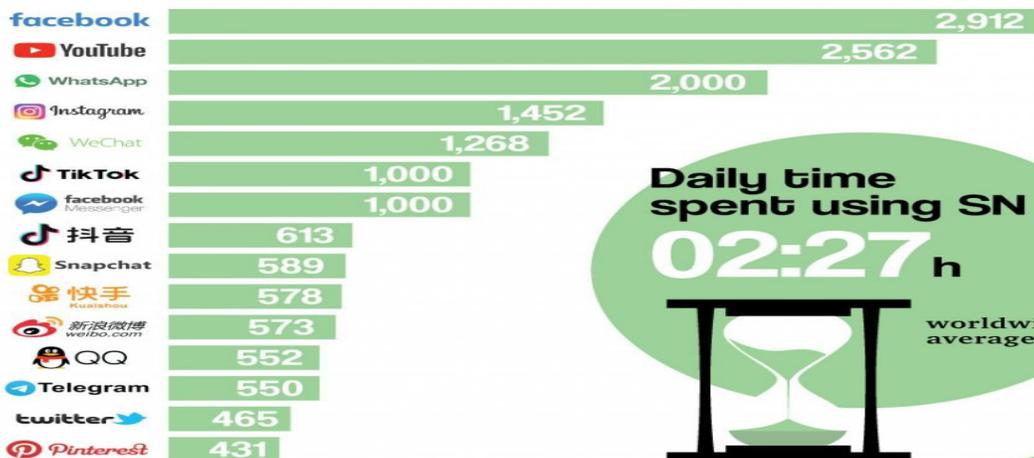
- Relevant Stats as of July 2022
  - 4.7B social media users worldwide (59% of population)
  - Every second, 7 brand new social media users
  - Daily time on social media: 2 hours and 27 minutes
  - FB Messenger and Whatsapp handle 60B messages a day.
- What does this tell you about how lawyers can and do use SM?

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## World communicates through social media

### Most popular social networks

(in millions)



Daily time spent using SN

02:27 h

worldwide average

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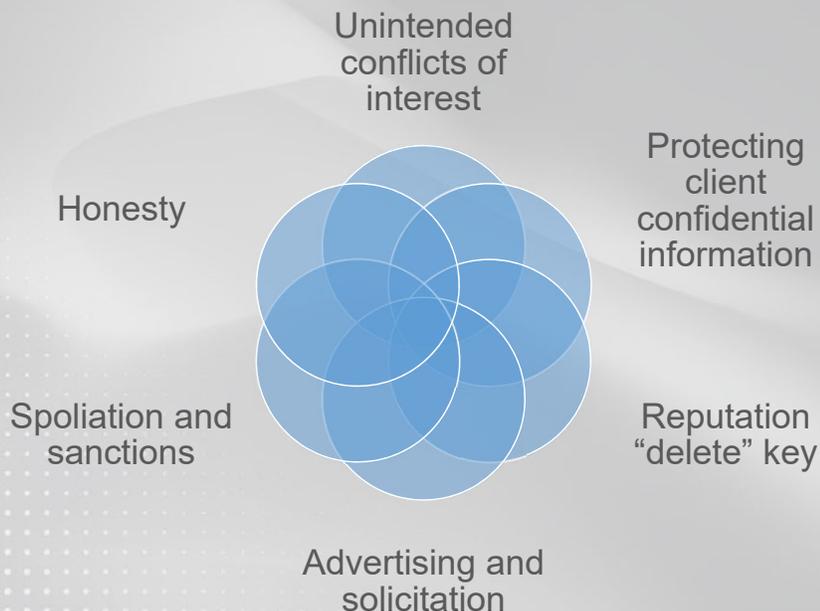
## Lawyers use of social media platforms



Source: Sprout Social & ABA  
Tech Report 2018—Marketing

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## Ethical issues raised by social media



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#socialmedia  
#lawyers

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## Scenario #1: Lawyers and social media

Sam is a young lawyer at home on a Friday night without much to do. He goes online and begins looking around on the website classmates.com and finds that an old high-school friend of his doesn't have a profile page. Coincidentally, this old friend now works at the same high school that they both had attended.

Sam goes ahead and creates a profile for Sam and writes in the bio:

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"Hey all! How is it going. I am married to an incredibly beautiful woman, AND I get to hang out with high school chicks all day (and some evenings too). I have even been lucky with a few. It just doesn't get better than this."

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- Did it violate the rules of professional conduct for Sam to create a fake profile?
- Can a lawyer be disciplined for conduct that is outside of the practice of law?
- If so, when and under what circumstances?

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- RPC 8.4(a): It is professional misconduct for a lawyer to:
  - (1) violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;  
—\* \* \*
  - (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer’s fitness to practice law.
- *In re Carpenter*, 337 Or. 226, 95 P.3d 203 (2004) (lawyer reprimanded for conducted involving dishonesty even though not conduct in representing client or acting as lawyer).

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## Washington RPC 8.4(c)

Court:

“[I]t is necessary to identify the nexus between the lawyer's conduct and the lawyer's fitness to practice law to establish that the lawyer's conduct is of the type of conduct for which this court may call the lawyer to answer.”

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## Employee fired from Taco Bell for licking shells

<http://www.cbsnews.com/news/employee-fired-from-taco-bell-for-licking-shells/>



A photo of an unnamed employee licking Taco Bell shells caused disgust on social media. / FACEBOOK

Taco Bell has fired the employee who caused a social media storm after appearing in an online photo licking a stack of taco shells, CBS Los Angeles reports.

The picture, originally posted by user "Jj O'Brien Nolan" on the fast food chain's Facebook feed Sunday, was taken by the employee's co-worker at a Taco Bell in Ridgecrest. The co-worker was also terminated.

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## The internet and privacy



**A HELPFUL VENN DIAGRAM**

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#socialmedia  
#confidentiality  
#negativeposts

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## Scenario No. 2

- Samuel represented Albert in a dissolution proceeding until there was a break-down in the relationship and Samuel withdrew. There were disputes about billing and strategy but the biggest issue was Samuel's advice about child support. Albert simply believed Samuel was wrong about how much child support he would have to pay pursuant to the guidelines.
- After Samuel withdrew, the case was litigated through trial and Albert was required to pay child support, though, at an amount less than Samuel indicated would be required by the guidelines.

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- About a month later, Samuel received an email alert that he received a new review on his [avvo.com](https://www.avvo.com) page that read:
  - “Albert A. wrote:
    - “Samuel is the worst attorney ever. He stole my money by charging too much and gave me the worse advice. He did not even know how to read the child support guidelines and was wrong about how much I would have to pay. Don’t hire - he’s *crooked!*”
- *What, if anything, can Samuel say in response?*

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## Social Media Reviews

- RPC 1.6(a): A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)
- RPC 1.0(f)
  - (f) “**Information relating to the representation of a client**” denotes both information protected by the attorney-client privilege under applicable law, and other information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

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- RPC 1.6(b) provides that you may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
  - To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or a civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client. See RPC 1.6(b)(4).
- *So, what does this mean?*

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- There are *other* ethics opinions warning about responding to social media:
  - Los Angeles County Bar Association Op. 525 (2012)
  - Professional Ethics Committee for the State Bar of Texas Op 662 (2016)
  - San Francisco Opinion 2014-1
  - NYSBA Opinion 1032 (10/30/14)
- Cases too:
  - In re Skinner*, 295 Ga. 217, 758 S.E.2d 788 (2014) and *In re Tsamis* (Ill. 2014) (reprimands for disclosing confidential client information in response to negative online reviews)
- And the ABA issued formal opinion 496 (2021)

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## *In re Conry*, 368 Or 349 (2021)

- “[I]t appears that negative online reviews may have a dramatic impact on an attorney’s income. \*\*\* A 2014 study, for example, had concluded that ‘[e]ighty-three percent of respondents indicated that their review of online feedback was their first step to finding an attorney.’ \*\*\* In the context of online reviews of restaurants, a 2011 study concluded that a drop of one star in ratings could affect revenue between five and nine percent.”
- Compare with lawyer’s knowledge of client secrets – risks there

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- Issue: What is a “controversy” in RPC 1.6(b)(5)?
- ABA cmt [10] RPC 1.6:
  - The lawyer’s right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

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- Some fancy footwork by the court. But it opened the door!

(1) “[W]e agree with respondent that the disclosure was within the boundary of information that he reasonably believed was necessary to respond to the review. Client had asserted that he was not deportable with the charges against him. That raised the issue whether those charges, in fact, made client deportable.”

(2) “We therefore conclude that respondent was not objectively reasonable in his belief that it necessary to reveal client's name in the Avvo review.”

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- So what are our options?

- Breathe and self-evaluate.
- Contact the social media provider.
- Resolve any disputes between you and the client.
- Engage in litigation?
- Consider a responsive post? Think about limits of *Conry*.

- Bar suggests: “The post is inaccurate. I represented this client zealously and effectively. My ethical duty to protect this client’s confidences prevents me from responding in more detail. Please see my website for accurate information about my practice.”

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# #socialmedia #investigatingjurors

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## Scenario #3: Investigating potential jurors

Lauren is preparing for a jury trial in which she believes the verdict will ultimately depend upon the political leanings of the jury members. She receives the jury pool list and provides it to her associate with instructions to “get me as much information as you can on each prospective juror before voir dire starts.”

Associate reports back with Facebook posts, tweets, Google comments, political party registration lists that she pulled off of Wikileaks, property ownership records from the county, and criminal histories. There are some pieces of information that when Lauren asks where Associate found it, she simply answers, “a friend of mine is a ‘friend’ of theirs.”

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- May you investigate prospective jurors on the internet and use that information during voir dire?
- Are there any restrictions on the manner/methods you may use in acquiring or using the information?
- Are there any categories of information you cannot use?

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- RPC 3.5(b): A lawyer shall not “communicate ex parte on the merits of a cause with [a judge, juror, prospective juror or other official] during the proceeding unless authorized to do so by law or court order”.
- UTCR 3.120(1): Except as necessary during trial, \* \* \* parties, witnesses or court employees must not initiate contact with any juror concerning any case which that juror was sworn to try.
- LR 48-2 No Communications with Jurors—before, during, and after Trial Except as authorized by the Court, attorneys, parties, witnesses, or court employees must not initiate contact with any juror concerning any case which that juror was sworn to try.

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## Competence a must

- RPC 1.1: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
- ABA Cmt [8]: Lawyer must “maintain” competence by keeping abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology**, engage in continuing study and education.



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## Carino v. Muenzen, 2010 WL 3448071 (NJ 2010):

- THE COURT: Are you Googling these [potential jurors]?  
\*\*\*
- [PLAINTIFF'S COUNSEL]: I'm getting information on jurors-we've done it all the time, everyone does it. It's not unusual. It's not. There's no rule, no case or any suggestion in any case that says-  
\*\*\*
- THE COURT: No, no, **here is the rule. The rule is it's my courtroom and I control it.**  
\*\*\*
- THE COURT: I believe in a fair and even playing field. I believe that everyone should have an equal opportunity. Now, with that said there was no advance indication that you would be using it. The only reason you're doing that is because we happen to have a [Wi-Fi] connection in this courtroom at this point which allows you to have wireless internet access.  
\*\*\*
- THE COURT: And that is fine provided there was a notice. There is no notice. Therefore, you have an inherent advantage regarding the jury selection process, which I don't particularly feel is appropriate. So, therefore, my ruling is close the laptop for the jury selection process. You want to-I can't control what goes on outside of this courtroom, but I can control what goes on inside the courtroom.

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## Oracle Am., Inc. v. Google, Inc.,

- “Trial judges have such respect for juries — reverential respect would not be too strong to say — that it must pain them to contemplate that, in addition to the sacrifice jurors make for our country, they must suffer trial lawyers and jury consultants scouring over their Facebook and other profiles to dissect their politics, religion, relationships, preferences, friends, photographs, and other personal information.”
- The Court called upon the parties to voluntarily consent to a ban against all Internet research on the venire or our jury until the trial is over.
- If don’t agree, each side shall inform the venire of the specific extent to which it (including jury consultants, clients, and other agents) will use Internet searches to investigate and to monitor jurors \* \* \* and the extent to which they will perform ongoing searches while the trial is underway.
- Venire will be given opportunity to adjust privacy settings.

*172 F. Supp. 3d 1100 (N.D. Cal. 2016)*

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## ABA Formal Ethics Op. 466

- Viewing a juror’s information that is available without making an access request so that the juror is unaware that the information has been viewed. For example, viewing a juror’s Facebook page that is open to the public.  
Answer: Generally “yes”
- Viewing a juror’s information by requesting access to the juror’s social media. For example, sending a “friend” request to a juror so that you can view the juror’s Facebook page if the juror has placed privacy restrictions at the “Friends” level.  
Answer: Generally “no”
- Viewing a juror’s information where the juror will or may learn the identity of the viewer. For example, viewing a juror’s LinkedIn profile, if the juror has a premium LinkedIn account.  
Answer: Generally, “yes, qualified.”

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- Practical limits?
  - No timely jury list
  - Not enough information
  - Not enough time
  - Not enough recourses
  - No jury questionnaires
- Other issue: monitoring jurors
  - Assess whether or not misconduct occurred
  - If so, then report: Court will determine materiality
  - See, e.g.: *U.S. v. Bolinger*, 837 F.2d 436 (11<sup>th</sup> Cir.)

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#socialmedia  
#friending

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## Scenario #4: Friending for information

» Ari wishes to investigate an opposing party or witness by accessing the person's Facebook page. While viewing the publicly available information on the website, Ari learns that there appears to be additional information that the person has kept from public view through privacy settings and that would be available by submitting a "friend" request through the person's website.

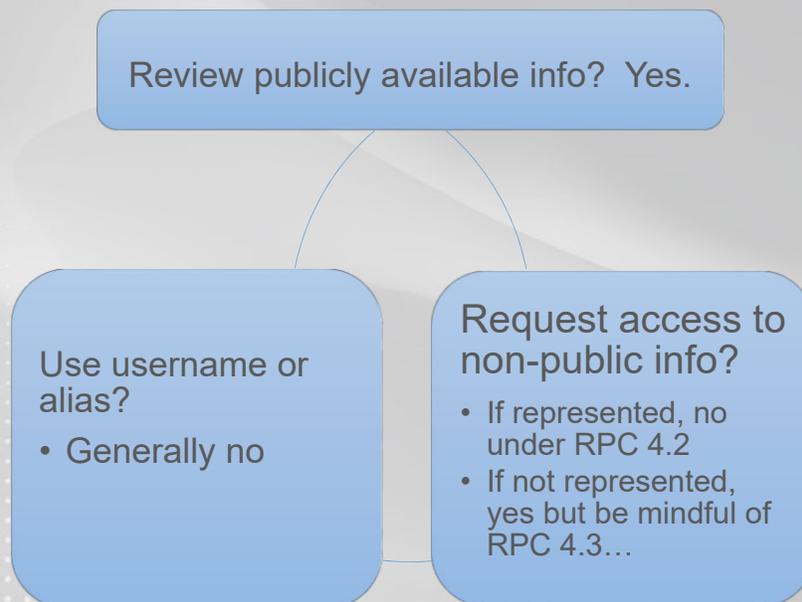


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- May Ari send a friend request to the opposing party or witness?
- Does it matter if the person is represented?
- May Ari use third parties to make the request?
- May Ari use fake identities or usernames?
- Are there are other ways to request the information?

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## OSB Ethics Opinion 2013-189



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## Be careful where you sit...

- In re John J. Robertelli – paralegal friending opposing party
  - Communicating with a person represented by counsel;
  - Failure to supervise a non-lawyer assistant;
  - Conduct involving dishonesty, fraud, deceit and misrepresentation; and
  - Conduct prejudicial to the administration of justice.
- In the Matter of Eric Gamble, No. 112, 037 (Dec. 5, 2014) (Kansas) (Lawyer suspended for 6 months for communications with unrepresented adverse party on social media).
- Truthful Friending v. Truthful Friending Plus

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## Requesting social media through discovery

- Normal discovery procedures should apply
  - “Social media information is treated just as any other type of information would be in the discovery process.” *Locke v. Swift Transportation Co. of Arizona, LLC*, 2019 WL 430930, (W.D. Ky. Feb. 4, 2019).
- But courts – wary of fishing expeditions especially due to the non-public and personal nature of social media
  - “Need some evidence showing relevant information can be found on the account

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- *Ye v. Cliff Veisman, Inc.*, 2016 WL 950948, at \*3 (N.D. Ill. Mar. 7, 2016) (denying request to access entire Facebook archive because request was not limited by time or relevant content).
- *Zimmerman v. Weis Markets Inc.* (granted discovery due to the public availability of pictures that contradicted plaintiff’s claim that he did not wear shorts due to his embarrassment about a scar)
- *Trail v. Lesko* (denied mutual requests for access to Facebook accounts because there was no evidence that contradictory or useful information could be found in either Facebook account)

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## Cautionary tale

### *Lester v. Allied Concrete Co.*

- Discovery request for FB
- P Lawyer advised client to “clean up” the FB page because “we do NOT want blow ups of other pics at trial so please, please clean up your facebook and myspace.”



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ANY  
QUESTIONS  
?

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## Presenter: Amber Bevacqua-Lynott



Amber Bevacqua-Lynott is Senior Counsel & Associate General Counsel in Buchalter's Portland and San Diego offices, and a member of Buchalter's Professional Responsibility and Litigation Practice Groups.

Ms. Bevacqua-Lynott provides guidance and legal representation to attorneys, licensed professionals, and other business clients, including firms and in-house legal departments. Her practice centers on legal ethics, risk management, and discipline defense.

She acts as outside counsel to clients in a variety of industries, providing advice and counsel on all manner of ethics issues, including conflicts, confidentiality, malpractice, risk management, and fee issues.

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