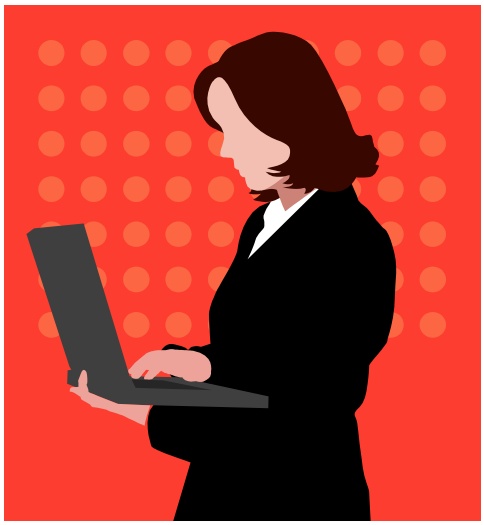
Professsional Liability Fund
and
Oregon Women Lawyers
Present

Practical Contract Lawyering



May 1, 2008
9:00 a.m. - 3:00 p.m.
Portland, Oregon

4 MCLE Credits
(.75 General, 2.5 General or Practical Skills, .75 Ethics)

MCLE FORM 1: Recordkeeping Form *(Do Not Return This Form to the Bar)*

Instructions:
Pursuant to MCLE Rule 7.2, every active member shall maintain records of participation in **accredited** CLE activities. You may wish to use this form to record your CLE activities, attaching it to a copy of the program brochure or other information regarding the CLE activity.

Do not return this form to the Oregon State Bar. This is to be retained in your own MCLE file.

Name:	Bar Number:
Sponsor of CLE Activity: OSB Professional Liability Fund	
Title of CLE Activity: Practical Contract Lawyering	
Date: 5/1/2008	Location: Hilton Executive Towers, Portland, Oregon

❑ *Activity has been accredited by the Oregon State Bar for the following credit:*	❑ **Full Credit.** *I attended the entire program and the total of authorized credits are:*	❑ **Partial Credit.** *I attended _____ hours of the program and am entitled to the following credits*:*
.75 **General**	____ **General**	____ **General**
.75 **Prof Resp-Ethics**	____ **Prof Resp-Ethics**	____ **Prof Resp-Ethics**
____ **Access to Justice**	____ **Access to Justice**	____ **Access to Justice**
____ **Child Abuse Rep.**	____ **Child Abuse Rep.**	____ **Child Abuse Rep.**
2.5 **Practical Skills** or Gen. Skills	____ **Practical Skills**	____ **Practical Skills**

***Credit Calculation:**
One (1) MCLE credit may be claimed for each sixty (60) minutes of actual participation. Do not include registration, introductions, business meetings and programs less than 30 minutes. MCLE credits may not be claimed for any activity that has not been accredited by the MCLE Administrator. If the program has not been accredited by the MCLE Administrator, you must submit a Group CLE Activity Accreditation application (See MCLE Form 2.)

Caveat:
If the actual program length is less than the credit hours approved, Bar members are responsible for making the appropriate adjustments in their compliance reports. Adjustments must also be made for late arrival, early departure or other periods of absence or non-participation.

Faculty Bios

Sheila Blackford received a B.A. degree in English from Mills College, Oakland, California; teaching credentials in English, Business Education, Multiple Subjects K-12, and Cross-Cultural Language Acquisition; and a J.D. with tax law concentration from McGeorge School of Law, University of the Pacific, Sacramento, California. She has been an active member of the Oregon State Bar since 2000 and her legal experience includes work as a paralegal, research assistant, and sole practitioner. Ms. Blackford is a frequent speaker and author of articles on a variety of practice management, technology and malpractice avoidance topics for the ABA Standing Committee on Lawyers' Professional Liability, the ABA TECHSHOW 2007, the GP|Solo Division, and the ABA Government and Public Sector Lawyers Division, along with Oregon local bar groups and law schools. She is a contributing author to *The Fee Agreement Compendium,* published by the Oregon State Bar and *A Guide to Setting Up and Running Your Law Office*, *Planning Ahead: A Guide to Protecting Your Clients' Interests in the Event of Your Disability or Death*, and *A Guide to Setting Up and Using Your Lawyer Trust Account* published by the Oregon State Bar Professional Liability Fund. In addition to her legal experience, Ms. Blackford has extensive marketing, staff training, advertising, and public relations experience and over 10 years of teaching experience. Ms. Blackford joined the Oregon State Bar Professional Liability Fund as a practice management advisor in January 2005.

Bonnie Cafferky Carter After practicing in Los Angeles for a few years, Ms. Carter returned home to Portland and has been a contract lawyer and sole practitioner since 2006. She has a diverse civil practice, ranging from premises liability defense as a contract lawyer to small business consulting and estate planning in her solo capacity. Ms. Carter started contracting when she was looking for a way to practice law part time. She found that practicing part time also gave her more opportunity to network and volunteer. She coordinated the Oregon Women Lawyers (OWLS) Contract Attorney monthly lunches for 2007 and ran the OWLS Playgroup for 18 months. She served on the OWLS spring 2007 CLE committee, where she moderated a panel that included Elizabeth Harchenko, the Director of the Oregon Dept. of Revenue. She is currently on the steering committee to establish a chapter of OWLS in Clackamas County and on the Rule of Law Planning Committee. She was selected as a Fellow for the 2008 Oregon State Bar Leadership College. Admitted to the Bar in both Oregon and California, Ms. Carter is a 2003 graduate of Boston University School of Law. She lives in West Linn, but regularly contracts with lawyers in Multnomah, Clackamas, Washington and Marion Counties as well as continuing to practice California law remotely. She lives with her husband John, an orchestra conductor, and their two young sons Rowan and Ashton.

Heather Decker received her JD from University of Oregon School of Law in 1996. She has been a contract attorney for 6 years. She has provided litigation management and support for defense of cases involving personal injury and death in auto, semi-trucking and rail accidents, and construction defect cases. Prior to her contract experience she was an associate at Cosgrave Vergeer & Kester.

Philip Griffin has practiced law for the past 20 years as a member of both the Oregon and Washington bars. Working both within and outside traditional law firms, his legal experience is diverse, ranging from representing 10,000 commercial fishermen in the Exxon Valdez oil spill to serving as counsel to Lockheed-Martin in the King 56 air crash disaster litigation. Mr. Griffin has provided contract legal services to other attorneys as part of his practice since 1995. In 2006, he created The Griffin Law Group, a "virtual law

firm," comprised of a network of similarly situated attorneys committed to providing high quality legal services outside of the context of the traditional "brick and mortar" law offices. Mr. Griffin frequently travels to Asia where he teaches law to students in China, Vietnam and Singapore. He is a strong advocate of "small is beautiful" economics, as is reflected in his approach to the practice of law.

Helen M. Hierschbiel received her J.D. from Lewis & Clark Law School. She is Deputy General Counsel for the Oregon State Bar (OSB), where she answers ethics questions for Oregon lawyers and provides legal advice to OSB. Prior to her work as Deputy General Counsel, Ms. Hierschbiel worked in the Client Assistance Office of the OSB (2003-2006), in private practice (1998 to 2003), and in legal services in Arizona (1991 to 1997).

Kimi Nam is a graduate of the University of Washington, Seattle, Washington (B.A. Sociology, 1987) and Willamette University College of Law, Salem, Oregon (J.D., Certificate in Dispute Resolution, 1996). She has been a member of the Oregon State Bar since 1996. Ms. Nam joined the Professional Liability Fund in October 2007 as Excess Program Administrator. Prior to joining the PLF, Ms. Nam practiced family law for three years and worked for seven years in the Public Defender's Office in Salem, Oregon doing criminal appellate work. Ms. Nam is a member of the Oregon Minority Lawyers Association, Oregon Women Lawyers, and the Multnomah Bar Association. She was previously on the Board of Directors for the Oregon Criminal Defense Lawyers Association and has done volunteer work for St. Andrews Legal Clinic and Catholic Charities Immigration Legal Services.

Richard W. Wingard a partner with the CPA firm, Maginnis & Carey LLP in Portland, Oregon. He is a graduate of Lewis & Clark College, Portland, Oregon and a Certified Public Accountant with over 30 years of public accounting experience. His significant areas of concentration include: personal and corporate tax planning and compliance, exempt organization taxation, financial consulting, litigation support, and business acquisition and sale consultation. His industry specializations include professional services firms, contractors, wholesalers, and manufacturers. He is a member of the American Institute of Certified Public Accountants, Oregon Society of Certified Public Accountants and PKF North American Network. He is the Past President of the Education Foundation of the Oregon Society of Certified Public Accountants and also serves on the Board of Trustees and as Chair of the Operations Committee of the YMCA of Columbia-Willamette.

Practice Management for Contract Lawyering

Sheila Blackford, PLF Practice Management Advisor

Practice Management for Contract Lawyers
Table of Contents

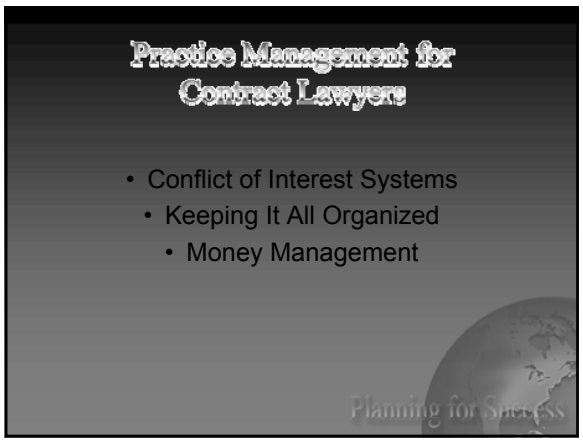
" A contract lawyer is . . ."

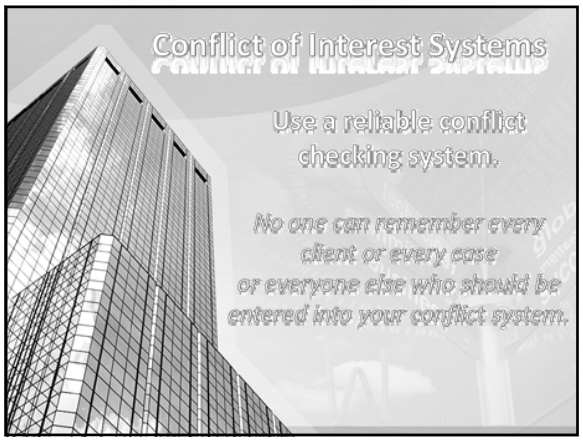
". . .a great transition into a law firm or solo practice."

". . .a great way to keep active in your career and raise a young family."

". . .a great option for attorneys who are pursuing additional passions, like writing a book, sailing a boat, or living a life well-lived."

". . .a great career choice!"





Check Conflicts

- ❑At first contact.
- ❑When file is opened.
- ❑Whenever a new person enters the case.

Check Conflicts

- ✓**Clients and Adverse Parties**
- ✓**Related Parties**
- ✓**Declined Clients**
- ✓**Prospects**
- ✓**Pro Bono Clients**

Keeping it all Organized

Calendaring, docketing, file tickling systems.

Do you have a reliable system for tracking dates and deadlines?

Calendaring

- ☑Discovery dates
- ☑Litigation deadlines
- ☑Procedural deadlines
- ☑Statute of limitations
- ☑Tort claim notice deadlines

Docketing

- ☑All deadlines as they arise
- ☑Reminder notices of deadlines
  - ☑*A few days, a week, a month*
- ☑Final reminders
- ☑Final reviews
- ☑Follow-up reminders

File Tickling

1. A good tickling system beats letting files stack up on your desk.
2. A good tickling system prevents vertical piles on your floor.
3. A good tickling system stops files from falling through the crack because nothing has happened to create activity.

- ☑ Tickle file for review every 30 days.
- ☑ Tickle file to be pulled and reviewed every 60 days.
- ☑ Never put a file away without a future tickle date.

File Organization

1. Organize Paper Files
   - Use intake sheets
   - Color code your files
   - Use appropriate sub files/category listings
2. Organize Electronic Files
   - Create file structure that makes sense
     - *Clients\Client Name\Appropriate sub files*
   - Back up your computer regularly
   - Do periodic test restores

MONEY MANAGEMENT

Don't be afraid to ask for cash up front to ensure cash when you're half-way through or finished!

Money Management

$ Track your time.
$ Track your expenses.
$ Track your income.
$ **Are your clients profitable?**

Money Management

"Use written fee agreements."
"Billing is the art of getting paid."
"You work; you get paid."

Practice Management for Contract Lawyers

- Conflict of Interest Systems
- Keeping It All Organized—
  - ✓Calendaring
  - ✓Docketing
  - ✓File Tickling
  - ✓Electronic & Paper Files
- Money Management

A Contract Lawyer

A Contract Lawyer

A Contract Lawyer is…

A Contract Lawyer is a great career choice for a well-balanced life!

Practice Management for Contract Lawyers

Thank you!

Planning for Success

PROFESSIONAL LIABILITY FUND

PLF EXEMPTION GUIDELINES
LAW CLERK/SUPERVISED ATTORNEY
AND FOR
RETIRED OR OF COUNSEL (RETIRED)

You may perform legal research and writing without purchasing Professional Liability Fund Coverage, provided:

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

2. You make no strategy or case decisions;

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

4. You sign no pleadings or briefs;

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

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

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

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

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

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

2. Do not participate in or conduct client interviews;

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

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

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

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

Checklist for Contract Lawyers: Things Your Hiring Attorney May Not Have Thought About Discussing With You

1. Discussing conflicts of interest together.
2. Discussing how long the project will take.
3. Discussing what the budget for the project will be.
4. Discussing whether you will work on site and have use of the hiring attorney's equipment and office staff.
5. Discussing what form the work product will be delivered.
6. Discussing what to do if the project's time requirements and scope require the assignment to be restructured or revalued.
7. Discussing whether the project requires rush status – requiring a 24-hour turnaround – and whether a rush premium rate applies.
8. Discussing how much a contract lawyer with your experience should charge for the specific project.
9. Discussing whether you need supervision and if so, how much.
10. Discussing that because you are exempt from PLF coverage your work ***must*** be reviewed and supervised by an attorney.
11. Discussing that because you are exempt from PLF coverage you may not make strategy or case decisions.
12. Discussing that because you are exempt from PLF coverage you may not sign pleadings or briefs.
13. Discussing that because you are exempt from PLF coverage you may not attend depositions as the attorney of record.
14. Discussing that because you are exempt from PLF coverage you may not make court appearances as the attorney of record.
15. Discussing that because you are exempt from PLF coverage you may not hold yourself out to any client as an attorney.
16. Discussing that because you are exempt from PLF coverage you may not use the title "attorney," "attorney at law," or "lawyer" on any correspondence or documents.
17. Discussing whether you should purchase your own PLF coverage and the higher contract lawyer rate you will charge for this added security.
18. Discussing payment terms, discounts for early payment, and clarification that your payment is not dependent upon the client paying the hiring attorney.

CONTRACT WORK AGREEMENT
LETTER OF UNDERSTANDING
(Sample Modify as appropriate)

Re: [*Contract Project*]

Dear [*Name*]:

The purpose of this letter is to confirm, based on our conversation of [*date*], that I will work on [*project description*] as a contract lawyer under your direct supervision. I appreciate this opportunity to assist you with this client matter and the trust you have placed in me.

We have agreed that I will handle this matter for an hourly contract rate of $_____an hour/or a project rate of $_____. We have agreed that the project should be accomplished in _____ hours and that the deadline shall be _____. Should either estimated time or deadline prove to be impracticable, we each agree to notify each other at once and to negotiate new deadlines, scope and rush premiums as reasonable for the situation.
I [will/will not] work on site and [will/will not] have the use of your equipment and support staff. The work product form to be delivered to you shall be_____. I [will be provided/will not] be provided access to the full client file which will be returned to you at the completion of the contract project.

It is further understood that I do not carry malpractice insurance from the PLF because I am considered as a supervised attorney and would be indemnified as a supervised attorney working under you.

Again, I would like to thank you for this opportunity to assist you as a contract attorney. If you have any questions, please feel free to call.

Very truly yours,

[Contract Attorney]

NEW CONTRACT PROJECT INFORMATION SHEET

The new contract project information sheet should be completed for every new contract project that you will undertake. It will enable you to have all the pertinent information relating to the contract project. Any other required information sheet (such as information sheets relating to a domestic relations case, probate of an estate, preparation of a will, etc.) should be filled out at the beginning of the contract project. See the PLF website, www.osbplf.org Practice Aids and Forms under Loss Prevention.

By tracking "Referred by," the contract lawyer can determine what means of marketing is working so that it can be expanded.

The new contract project information sheet (see attached sample) has space at the bottom for the contract attorney to fill in the appropriate docket control information. It also has a space to be checked when it has been determined there is no conflict of interest involved. No contract project should be commenced until conflicts have been checked.

This sheet should be placed in a contract project file for reference. Because the hiring attorney is the client for the contract attorney, you may find it easiest to file contract projects under the hiring attorney's name, much as you would track multiple matters for the same client.

NEW CONTRACT PROJECT INFORMATION SHEET

TODAY'S DATE_____

Hiring Attorney's Full Name_____

Firm Name_____

Street Address_____

City/State_____ Zip_____ E-mail Address _____

Telephone_____ Fax_____

Referred by_____

Names of all parties and potential parties:

Name_____ Relationship_____

Name_____ Relationship_____

Name_____ Relationship_____

Name_____ Relationship_____

Nature of contract project_____

_____

Work Product Format_____

Deadlines_____

Hourly Rate_____ or Project Rate_____

Payment Terms_____

Retainer_____Retainer Received_____

PLF Insurance Required_____

Copy of entire file_____

Contract Work Agreement/Letter of Understanding_____

FOR OFFICE USE ONLY

Fee arrangement:
Billing arrangement:

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

CONFLICT CONTROL	
NAME	RELATIONSHIP

File opened by_____ Conflicts checked by_____ Deadlines docketed by_____
Contract Work Agreement/Letter of Understanding sent by_____ Date:_____

PROJECT ASSIGNMENT

Date of Assignment: _____

Assigning Lawyer: _____

Case Name: _____

Facts: _____

_____

_____

_____

_____

_____

_____

Issues to be Researched: _____

_____

_____

_____

_____

_____

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

_____

_____

Amount of Time to be Spent on Project: _____

DUE DATE: _____

LETTER CONFIRMING WILL NOT WORK ON CONTRACT PROJECT

(Sample — Modify as appropriate)

(May be sent by certified mail, return receipt requested)

Re: [*Subject*]

Dear [*Name*]:

The purpose of this letter is to confirm, based on our conversation of [*date*], that I will not work on the contract project you discussed with me [*describe matter*] because [*insert reason for declination if possible and appropriate to state it*]. My decision to decline this contract project should not be taken as an indication that I do not wish to assist you with other contract projects that you may need help with.

Thank you for contacting me about this contract project. I hope you will consider using my services in the future.

Very truly yours,
[Contract Attorney]

DECLINED CONTRACT PROJECT INFORMATION SHEET

TODAY'S DATE_____

Hiring Attorney's Full Name_____

Firm Name_____

Street Address_____

City/State_____ Zip_____ E-mail Address _____

Telephone_____ Fax_____

Referred by_____

Nature of contract project_____

Conference with Hiring Attorney Regarding: _____

_____

_____

Date Declined Contract Project: _____

Reason for Decline: _____

_____

_____

CONFLICT CONTROL	
NAME	RELATIONSHIP

Entered into conflicts system by _____

Letter confirming will not work on contract project_____

Setting Up an Effective Filing System

By Beverly Michaelis

Organizing and maintaining a filing system that meets your firm's needs can be a frustrating endeavor. What works well in one practice area may not translate to another. This article examines the most common approaches to organizing file material and provides tips that can be applied in virtually every office.

Filing Systems: Alpha vs. Numeric

If you find the subject of file management baffling, you are not alone. If you are a newer lawyer, your exposure to office systems may be limited, depending on previous work experience. If you are a seasoned lawyer who has left a firm to set up a solo practice or partnership, you may feel compelled to mimic your old firm's file structure. Before doing so, carefully consider which system is best for you and your type of clientele: numbering client files or organizing them alphabetically.

For the typical small law office, the alphabet can't be beat. It is the most straightforward and efficient approach to organizing client files. When "John Jones" calls to ask a question about his case, the Jones file is easily located without the need to refer to a list or index that cross-references file numbers to client names. This approach works well for lawyers who tend to have clients with one-time matters. [i] If, however, you work in a multi-attorney office, or have single clients with many matters, a numeric or combination alpha-numeric system will serve you well. When "John Jones" calls about the lease agreement you are drafting, a numeric or alpha-numeric system will help you distinguish his real property file from the corporate, litigation, and tax matters also attributable to "Jones."

In numeric or numeric combination filing systems, file numbers can be assigned in sequential order, with or without a year designation. For example, the Jones corporate file could be No. 100 (a sequential number without a year) or 07-100 if it was file number 100 opened in 2007. Alternatively, you could assign each client a permanent number with sequential numbers for each matter file opened on the client's behalf. If John Jones' permanent client number was 1000, his matter files would be 1000-01 (real property), 1000-02 (corporate), 1000-03 (litigation) and 1000-04 (tax).

If you elect to number your files, remember these two tips. First, use the least number of digits possible. The longer your number sequences, the greater the likelihood of filing errors. Second, keep a master client/matter list on your computer to minimize duplicate file numbers and other mistakes. Although such lists can be set up in word processing programs such as Word or WordPerfect, a database or case management program is preferable.

File Media: Folders vs. Binders

Now that you have decided upon a filing system, how should the file material itself be stored? File folders? Notebook binders? If you use file folders, should they be letter-size or legal? Different practices lend themselves to different methods of organization, but file folders are generally the better choice for most practitioners. Cost is the primary reason—folders are usually cheaper and easily fit into existing desk drawers, cabinets, and bookcases. In addition, filing into folders is usually faster and less of a struggle. Binders work best for trial notebooks or other special document organization projects. (If you use binders, recycle the notebooks when files are closed and put binder contents into a folder for easier storage.)

What about size? In the battle of letter vs. legal, economy wins out again. Letter-size files are less expensive and make the best use of space in the majority of filing cabinet systems. With the scaling down of documents from 14 inches to 11 inches in length, legal-size folders are no longer necessary.

Color Coding

Color-coding of files can be a very effective way to improve the efficiency of your filing system. By associating a color with a given category of main file or subfile, you can easily locate the information you are looking for. For example, a general practice might use color-coding for main files: red for domestic relations, green for real property, yellow for personal injury, blue for wills and estates. When Ms. Smith calls about her divorce, it is easy to pick out the red file sitting on the associate's credenza. Color association is an advantage at filing time for the same reason. If documents need to be filed in the Taylor real property and personal injury cases, the appropriate green and yellow files can easily be distinguished.

If you prefer, you can use plain folders for your main file and color-code your subfiles: blue for legal research, yellow for pleadings, red for discovery, and so forth. Use the method that works best for you and your cases.

Files and Client Relations

When you are setting up a file for yourself, don't forget about the client. Giving the client his or her own file folder in which to place the signed fee agreement and other correspondence and materials he or she will be receiving from you

promotes positive client relations. The folder should include one of your business cards so the client always has your address, phone, fax, e-mail, etc. readily available. Providing clients with a folder helps to keep them organized and lessens the chance that documents will be lost or misplaced. Instruct the client to bring his or her file to each of your meetings, and if appropriate, use the file to record notes or questions for future appointments.

Sample Practice Area File Structures

Does your office have a standard subfile structure for each practice area? Creating such a framework ensures consistency—files are set up the same way each time—and makes filing and retrieval of documents more efficient. Start by looking for common patterns in existing files. Do you find yourself setting up subfolders for Correspondence, Pleadings, and Legal Research in each of your client files? This could be the beginning of *your firm's* subfile framework. To implement a framework for your filing system, create an index. To ensure that folders are always organized in the proper order for each file, assign numbers to each of your subfiles or file sections. Here are sample structures for three types of files: corporate, personal injury, and domestic relations.

Corporate

Subfile Number	*Name of Subfile*
1	Correspondence and General—this year
2	Correspondence and General—last year
3	Board of Directors Minutes
4	Directors Meetings, General
5	Articles and By-laws (current)
6	Corporate Documents/ Incorporations
7	Shareholder Minutes
8	Shareholder Meetings, general (this year)
9	Annual Reports
10	Officers
11	Securities Issued
12	Securities to be Issued
13	Audits/Financial Statements
14a	Taxes—Federal
14b	Taxes—State
14c	Taxes—Local
14d	Taxes—Foreign
15a	Regulatory Agencies—Federal
15b	Regulatory Agencies—State
15c	Regulatory Agencies—Local
15d	Regulatory Agencies—Foreign
16a	Real Property Owned
16b	Real Property Leased
17a	Acquisitions and Mergers—completed
17b	Acquisitions and Mergers—future
18a	Equipment Contracts—company
18b	Employment Contracts—company
18c	Other Contracts—to company
18d	Contracts from Company
19	Trade Association
20	Pension and Profit Sharing—current
21	Personnel Forms
22	Labor Agreements—current
23	Labor cases[ii]

Personal Injury

Subfile Number	*Name of Subfile*
<u>Investigation</u>	
1	Witnesses/Investigative Reports
2	Police Reports/Police Photos
3	Defendants (Corporate)
4	Technical Research
5	Medical Research
6	Experts/Consultants
7	Demonstrative Evidence (Photos, sketches, repair estimates, maps, audio or videotapes, etc.)
<u>Damages</u>	
8	Plaintiff's Treating Physicians
9	Client's Diary/Notes from Client
10	Other Injury Claims (Workers comp, prior injury claims or suits)
11	Economic Damages (Medical bills, funeral expenses)
12	Lost Wages/Tax Returns/Personnel Records
<u>Damages--Miscellaneous</u>	
13a	Plaintiff's Insurance (UIM/PIP/Health)
13b	Liens (Health, PIP, Hospital, Physician, Comp, AFS, Medicare)
13c	Authorizations
13d	Settlement/Mediation
13e	Litigation Expenses
<u>Pleadings</u>	
14a	Pleadings (Trial notices and all pleadings, including discovery)
14b	Legal Research
15	Produced to Plaintiff (All documents produced to plaintiff and defendant's response to plaintiff's request(s) for production; copies of relevant documents should be cross-filed in appropriate places, e.g., medical records to subfile 8, personnel records to subfile 12.)
16a	Defendant's Discovery (separate defendants) (Includes defendant's requests and plaintiff's responses. Correspondence that constitutes a request or reply to discovery should be copied and cross-filed to the appropriate discovery subfile; original correspondence should be placed in the main client file.)
16b	Produced to Defendant (Make a working copy of defendant's request, bind all documents produced in response, file here.)

Trial

17	Pretrial (Motions in Limine, witness list, trial schedule)
18	Trial Memo and Evidentiary Memos
19	Voir Dire
20	Exhibits
21	Opening Statement
22	Lay Witnesses/Liability and Damage
23	Plaintiff's Expert Witnesses
24	Offers of Proof
25	Defendant's Case-in-Chief
26	Motions for Directed Verdict
27	Closing
28	Rebuttal
29	Jury Instructions and Verdict[iii]

Domestic Relations

This sample system uses a combination of file folders, three-ring binders and expandable file pockets. The file folders are made of durable pressboard and come with two interior dividers, providing a total of 6 filing tabs within the folder to file documents.[iv]

File Folder Contents

File Folder

Tab	*Contents*
1	Pleading Index[v] Tabs Pleadings
2	Correspondence (Including fax transmittals and confirmations)
3	Reports (Custody reports, reports from physicians, etc.)
4	Depositions[vi]
5	Client's Notes (Any material received from the client)
6	Attorney's Notes (Notes generated by firm attorneys or staff)

Color-coded three-ring notebooks are used to manage discovery and trial exhibits. Discovery documents are filed in two binders, one for the petitioner, and one for the respondent. A discovery index in each binder tracks documents received, documents produced, and the date of production.[vii] Expanded file pockets are used for bulky items.

Trial exhibits are organized in similar fashion. An exhibit index tracks the items offered and admitted into evidence.[viii]

To successfully implement a framework for your subfiles, create a master subfile index. To ensure that folders are always organized in the proper order for each file, assign subfile numbers to each of your subfile names, as in the above examples.

Pulling the Whole Package Together

In addition to the above, effective file management also involves establishing and following file opening and file closing procedures and using tools such as client intake forms, fee agreements, engagement, nonengagement and disengagement letters, and a file closing checklist. Many sample forms, letters, and checklists are available at no charge from the Professional Liability Fund, www.osbplf.org. We also encourage practitioners from all firms—small or large—who have office system questions to contact our practice management team. Office and phone consultations are free and confidential. For more information about the PLF's practice management program, contact the PLF at 503-639-6911 or 800-452-1639.

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[i] The Association for Information Management Professionals (ARMA International) is a tremendous resource for those interested in the latest in record management information and technology. 4200 Somerset Drive, Suite 215, Prairie Village, Kansas 66208. (913) 341-0339. Publications available to non-members include: *Alphabetic Filing Rules, Filing Procedures—A Guideline,* and *Numeric Filing—A Guideline*. From the home page, www.arma.org, click on Publications and follow the links to ARMA Bookstore, Non-Members Store, then to Filing Basics.

[ii] *How to Manage Your Law Office*, Altman Weil, § 10.03, pp. 10-26, 10-27 (Matthew Bender & Co., Inc. Rel. 22-7/95 Pub. 356.)

[iii] Personal injury subfile structure adapted courtesy of Linda J. Rudnick, Esq., Beaverton, Oregon.

[iv] Domestic relations file structure supplied courtesy of Beth Mason & Associates, Beaverton, Oregon, with special thanks to James Jensen. The pressboard file folders described in the article are available from Oxford (Oxford Classifolders, number 1257) or Smead (Smead UPC 14075-C402-5A-2D).

[v] The pleading index is a word processing document with four columns: Number (the chronological number assigned to each pleading document as it is received); Party (the name of the party who generated the pleading); Pleading (title of the pleading); and Date. All pleadings are assigned a number, filed behind an 8.5 x 11 divider sheet with the appropriate numbered tab, and added to the index. The tab sets are from Kleer-Fax and come in sets of 25. (Kleer-Fax #8000 series, stock number 81170.) The index is best set up in a table.

[vi] Deposition transcripts are stored in a manila envelope which is hole punched to fit in the file. This portion of the file may also contain Requests for Production.

[vii] All discovery documents are tabbed, assigned a number, filed by number, and added to the index. Because binders are used to organize discovery, the Kleer-Fax tab sets are three-hole punched.

[viii] The exhibit index is a word processing document with five columns: Petitioner, Respondent, Description, Offered, Admitted. This allows the attorney to track each exhibit as it is offered and to note whether it is admitted. The Petitioner and Respondent columns are used to note the exhibit numbers (1-100 for the petitioner, 101 and up for the respondent.) As with the pleading index, the exhibit index is best set up as a table.

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MANAGING CLIENT E-MAIL

Are you struggling with how to manage client e-mail? Would you like a hassle-free way to select, print, and save messages relating to particular clients or matters? This article offers four simple approaches to keep your e-mail inbox lean and mean:

(1) the built-in capabilities of Outlook;
(2) Adobe Acrobat;
(3) QuickFile 4Outlook; and
(4) case management software.

These approaches will help to ensure that you are incorporating client e-mail into the appropriate client digital or paper file.

BUILT-IN CAPABILITIES OF OUTLOOK

Client e-mails in Outlook can easily be saved to a text file that can be viewed (and searched) in Word or WordPerfect. First, create a folder on your computer for each client if you haven't already. If a client has multiple case matters, use subfolders. Each matter may have a subfolder for correspondence, pleadings, and other documents, as needed. Then set up e-mail folders and subfolders for each of your clients and client matters in your Outlook inbox that mirror the folders and subfolders in the client's computer files. Drag the messages from the inbox into the appropriate client e-mail folder.

To save client e-mails en masse using Outlook 2002, navigate to the e-mail folder containing the messages you want to save, choose "Select All," or select the individual messages you want to place in a text file. With the messages highlighted, choose "File, Save As," and navigate to the folder on your computer where you want to save the messages. Give the file a name, such as "Jones e-mail messages." "Jones e-mail messages" will be saved as a text file that can be opened in Notepad, WordPad, Word, or WordPerfect. If you save multiple messages in one batch, they will automatically be consolidated into one text document. The document can be searched, if necessary; stored with client Jones' other electronic documents; and printed for the client's paper file, if desired. The original e-mail messages can then be deleted from Outlook, freeing up valuable space and improving your computer processing speed.

If you want to save the attachments or graphics along with the original e-mail, when you select the "File, Save As" option, change the message type at the bottom of the dialog box from the default (which may be plain text, HTML, or rich text) to Outlook Message Format (.msg). To find and open the message later, you access it from Windows Explorer. You will note it has an envelope icon.

This technique should work in other versions of Outlook as well. If the "File, Save As" option is not available, select the messages you want to save, right click, choose "Print," and check the "Print to File" checkbox before clicking OK. Because you

are “printing” to a file (a text file on your computer) and not physically printing the messages, this is equivalent to the “Save As” approach.

You can save e-mails in this way one at a time – as you receive them – or all at once at the end of a client matter. Depending on the duration of the matter, save e-mails frequently enough to protect your client’s information from loss.

ADOBE ACROBAT

If your office already owns Adobe Acrobat 7.0 Professional, you may want to consider this approach for saving client e-mail:

1. In Outlook, select the inbox folder with the e-mail message you want to save.
2. Click the button “Convert Selected Folder to Adobe PDF.”
3. In the “Save In” box, specify a folder on your computer (e.g., client/matter) in which to save the PDF file, type a file name, and click “Save.”

To convert a folder of e-mail messages to a PDF file and append the file to an existing PDF file:

1. In Outlook, select the relevant inbox folder.
2. Choose “Adobe PDF>Convert and Append to Existing Adobe PDF> Selected Folder.”
3. Select the PDF file to which you want to append the new PDF file.
4. Click “Open.”

QUICKFILE 4OUTLOOK

QuickFile 4Outlook – Lawyers Edition is an add-in to Microsoft Outlook that doesn’t require users to learn a separate software program. After installing it, two new icons appear on your Outlook toolbar. You can easily create a filing system for your e-mail that corresponds to the client’s paper file and that moves e-mail out of your inbox and sent items to the correct client/case folder. If you prefer to print e-mail and save hard copies to the client file, QuickFile can speed up the sorting, printing, and filing process. (Folder names and other key information, such as case number and description, can be printed on each e-mail message to ensure more accurate filing.) Electronic archives can be created in Word or HTML by case or client, with e-mail attachments stored in a separate folder and accessible from the archived document.

QuickFile 4Outlook – Lawyers Edition starts at $97.50. For more information, or a one-week free trial of this product, visit http://www.outlook4lawyers.com.

CASE MANAGEMENT SOFTWARE

For those who are looking for solutions beyond mere e-mail management, purchasing case management software may make the most sense. Case management centralizes all client and matter data into one software program – from calendaring, docketing, conflicts, and billing to e-mail, documents, research, and more. The options here abound. One of the better known, LexisNexis® Time Matters, allows users to store e-mail and attachments in the appropriate case or contact file when received or sent. Mail does not remain in the Outlook inbox.

If you think case management may be the best choice for you, contact a practice management advisor at the Professional Liability Fund for more information: 800-452-1639 (toll-free in Oregon) or 503-639-6911.

Conclusion

Once a matter is concluded, the client's computer folder or subfolder (including e-mail messages) can be digitally stored. You can then delete the original computer file to free up space on your computer hard drive.

As e-mail communication becomes more prevalent, finding a reliable means of filing client messages is critical. Whether you use one of the approaches described above or simply print all client e-mails, be consistent. Capture all messages, sent and received, as well as attachments, and retain them (electronically or in paper form) just as you would correspondence, pleadings, or other client documents. For help with e-mail management; file open, organizing, or retention issues; or other office organizational issues, contact the practice management advisors of the PLF. Remember, your inbox is not your filing system.

Beverly Michaelis
PLF Practice Management Advisor

Our thanks to Ellen Freedman, CLM, Law Practice Management Coordinator, Pennsylvania Bar Association; and Jay Solomon, a contributor to Technolawyer, an online technology forum for lawyers, for their contributions to this article which originally appeared in the November 2006 issue of the PLF newsletter, In Brief.

Retention of Electronic Records after the File is Closed – What is a Lawyer's Professional Responsibility?

by David J. Bilinsky Bsc LLB MBA

In this paper we explore a lawyer's responsibility with respect to the disposition of electronic records relating to representations of or services to clients after the matters have terminated and the files have been closed or retired.

This paper does not delve into questions of a lawyer's retaining lien or a lawyer's right to withhold contents of a file from a client or another lawyer representing a former client. Nor does this paper purport to enter into questions regarding the ownership or proprietary interests in the contents of a lawyer's file except where it may be relevant to the storage issue. These questions may be questions of law and it is not the intent of this paper to explore or give opinions on matters that concern questions of law.

Most states ethics committees of state bar associations have written ethics opinions on the topic of the disposition of closed and retired or dormant client files. The ABA has rendered Formal Opinion 92-369 (1992) and Informal Opinion 1384 (1977) which discuss this issue. The ABA opinions and the ABA Model Rules of Professional Conduct are advisory only. A reader is advised to check on the ethics rules, laws and court opinions of their individual jurisdiction. This paper addresses current issues raised by the technological nature of the data as it relates to retention, preservation and storage. It is intended to raise issues and provide suggestions for consideration by attorneys in light of the jurisprudence of their respective jurisdictions.

Types of Records:

There are several types of electronic records that can be developed by a law firm in the process of handling a client's file or in providing legal services to a client. A typical listing may include:

1. Accounting records – including personal client / contact information entered into an accounting system, records of funds received into and disbursed from trust, records of accounts rendered and payments made, file names associated with the client, disbursement records on a client's file and other office-specific records generated for the purposes of managing the accounting function of the law practice.
2. Word Processing records – including letters, faxes, memos, documents, pleadings, submissions, opinions, filings and drafts of same and backups of same.
3. Communication records – including email (between lawyer and client, lawyer and lawyer, lawyer and third party and inter-office), or delivery of same such as courier records or email that may have originally existed in paper form but which were subsequently digitalized, records of telephone calls placed or received or long distance charges associated with same, faxes themselves or listing of faxes sent and received and charges associated with same, recordings of communications or meetings (such as taping or video recording of conversations or meetings that have become digitalized)
4. Evidence – this could include evidence that exists in electronic form in its native format (for example email, word processing and accounting records, database and spreadsheet data or any other evidence that was created electronically) and evidence which was digitalized such as photographs, voice or video recordings, documents which were scanned and subsequently kept in image format or converted to an OCR format or both, and evidence that was created within the firm (such as affidavits, replies to interrogatories and the like). This can also include evidence which was produced by your own client and by adverse parties or others.
5. Lawyer's brief – including notes, entries into case management, evidence management and trial management software, electronic listings of documents, photographs, email exchanges, and time and matter chronologies. This category could include items which may exist in the law firm in several places – for example, evidence which was produced by discovery and which was subsequently entered either in its native

format directly or in a summary fashion, into trial preparation or other analysis software (such as databases, spreadsheets, trial presentation software).

6. Documents created for the client – including corporate records, wills, land and mortgage documents, agreements – in other words, electronic versions of documents that were finalized in written or paper form. This could include documents which were subsequently entered into the public arena as well as those which were strictly confidential or private within a small group.
7. Ancillary records – electronic diary and meeting entries, electronic summaries of telephone calls received and returned, notes made in calendaring and contact software.

Where do the records Reside?

In this aspect of the question we examine where the electronic records could reside in a law firm setting. A listing of the locations could typically include the following:

1. On hard drives, either on specific workstations or on servers, laptops and home computers, and in some cases, third party machines (such as computers in business centers in hotels and airports).
2. On backups, in tape and other data storage and retention devices.
3. On floppy disks, ZIP and other high-storage media.
4. On web servers when using group ware software (such as lotus notes or other software used to facilitate multi-party work situations) or web-based applications (such as time and billing, database, document depository applications, ASP's (application service providers) or web-enabled mediation applications or web-based backup depositories, for example.
5. On the Internet, Extranets and Intranets.
6. In email folders and database servers.
7. On audio, video and other storage media.

Other ways of Looking at the Electronic Information:

There are at least four broad ways of viewing electronic files in the hands of a lawyer:

1. Those that were in existence before the lawyer's retainer, outside of the lawyer's office,
2. Those that were in existence before the lawyer's retainer, inside the lawyer's office,
3. Those that came into existence during the retainer for the benefit of the lawyer,
4. Those that came into existence during the retainer for the benefit of the client.

As for category #1 - it is fairly clear that these documents came into the lawyers' hands solely as agents for the client or third parties responsible for their delivery to the lawyer. Following termination of the retainer, these documents, whether in electronic or other form, should be returned to their rightful owner. Copies of these documents may be required to be retained as part of a lawyers' duty to maintain his/her file for malpractice claims, to defend against a client complaint and as required by professional conduct requirements.

As for category #2 - these documents could encompass proprietary information in the hands of the lawyer - encompassing such things as precedents or materials in knowledge management or document databases, electronic resources, research databases, CD-ROM and internet research resources, materials on intranets etc. It is clear that these documents are not intended to form part of the client's file nor is there any intention to transfer any interest in these materials to the client. It is clear that these are and remain the property of the lawyer and law firm. No specific policy need be addressed regarding their disposition after the conclusion of the lawyer's retainer.

Category #3 encompasses such matters as time and billing records for the lawyer, draft documents, inter-office email and timed or regular computer system backups - in other words, the electronic records that record the business processes active in the law firm that assist the production and provision of legal services. The lawyer must consider if any of these must be retained for malpractice defense, to defend against a client complaint or for professional conduct requirements.

If not, then the attorney need consider how to retain these documents. If they have to be retained, then issues arise as to how best to retain these:

electronically or in hard-copy form. If they are retained in hard-copy form (by way of printing and storage on the client file that will be sent to storage) then the paper copies can be subject to the usual office policy on the retention and destruction of closed files. If they are to be kept electronically, then a number of issues arise.

Are they to be kept on the firm's network? If so, then periodic backups will contain copies of the documents – and I assume at this point that these backups will be retained indefinitely. The attorney must consider this and decide if an alternate retention strategy is warranted. For example, these records could be burned onto a CD-ROM or other storage media and deleted from the office network system. The CD-ROM or storage media could then be deleted or discarded following the passage of the appropriate time for retention of this type of records according to bar and regulatory requirements.

As for the fourth category, we can further subdivide this into at least five categories:

a, Documents prepared by the lawyer for the benefit of the client.

b. Documents prepared by the lawyer for his or her own benefit or protection.

c. Documents sent by the client to the lawyer during the course of the retainer, the property of which is intended to pass to the lawyer at the date of dispatch,

d. Documents sent by the client to the lawyer during the course of the retainer, the property of which is to remain with the client, and

e. Documents prepared by a third party during the course of the retainer and sent to the lawyer.

Dealing with each of these categories in turn:

a. Documents prepared by the lawyer for the benefit of the client.

This category includes traditional documents, were they in hard copy form, would belong to the client (such as wills, final contracts, leases and the like). However, in an electronic society, documents in this category can encompass documents which may not reflect their full utility in hard-copy form. They could also include notes and annotations made to transcripts in evidence managers such as Summation™ (although the transcripts themselves fall into Category 1, arguably the lawyer's notes and annotations to those transcripts may fall into category 1 or 2), entries made in trial presentation software such as Trial Director™ or PowerPoint™, entries made in strategy tools such as CaseMap™ or all entries made in case management systems such as Amicus Attorney™ or Time Matters™. Moreover, the "document" in most cases would be created with software that has been licenced by the law firm and cannot be transferred to the client. The issue then becomes, given that you have electronic copies of these documents, what do you do with them?

First, to the fullest extent possible, all electronic copies of documents in this category should be removed from any computers or storage devices not in the possession or control of the lawyer. This would extend to data that was placed in an ASP (application service provider), extranet or internet multi-party workgroup setting.

Second, since a lawyer should preserve his/her file for a minimum time to protect against a malpractice claim or defend against a client complaint, electronic copies of all these records should be preserved. See the discussion in category #3 above concerning separating documents from the office network and their storage on media that can be later discarded or destroyed. I further suggest that these documents be placed on separate media from those in category #3 as their retention period may be different from those in category #3.

Third, this category may include work product that may be transformed into the firm's knowledge management system or precedent system. In this case, identifying characteristics (names, addresses etc) should be removed from the intended precedent. Following the purging of client information from the intended precedent, it should be stored as part of the firm's system in a manner that reflects its use as a precedent (trust will for husband and wife, first time marriage for both, two children both their own) and not identified with any identifying characteristics (as George Jones Will, for example).

b. Documents prepared by the lawyer for his or her own benefit or protection.

Here the client has no claim of property over these records. This could include notes for trial, summaries of instructions or conversations, notes for submissions to court, inter-office memos (not

memos of law), computerized BF (bring forward or tickler) diary entries and notes made in electronic contact managers and case managers. .

The difficulty here is that in some cases any client's data can be clearly separated from other client's information (such as in Summation™ or CaseMap™) while in other cases it is part of the database built for the management of the firm (such as in Amicus Attorney™ or Time Matters™). Where the data can be clearly separated, then an appropriate manner for handling this would be to adopt the suggested method in Category #3 above, separate the data, burn it onto a CD-ROM or other storage media and store it away with a copy of the relevant software required to access the data. Again, consider if the data should be stored on a separate disk to allow for different storage periods. Where the information may not be separated, as in Amicus Attorney or Time Matters database, then the firm must adopt a policy of whether or not to preserve periodic backups of the database that would allow the database to be rebuilt as of a certain date. This is especially important where the database is purged of older files/information on a periodic basis. Then the decision must be made of the policy to be followed for the retention of these databases and the appropriate period that such data must be retained prior to destruction.

c. Documents sent by the client to the lawyer during the course of the retainer, the property of which is intended to pass to the lawyer at the date of dispatch.

Where these documents existed only in hardcopy, preserving the same was not difficult as they could be stored in a sub-file and placed in storage. Presumably the client kept copies of these but in any event copies could be provided with relative ease. In an electronic world, these documents could include electronic instructions (as in email or attachments to email). Some email programs store all email in one large file and as such separating out particular email messages can be difficult. Consider creating a separate electronic client folder for each matter in your email client and adopting a policy for the transfer of all relevant client-oriented email to the appropriate client email folder. Until the software evolves to allow separation and storage of such electronic documents in the manner suggested in Category #3, the least costly and invasive method may be to make hard copy printouts of such documents and store the hardcopy records with the paper file and purge the email from the system.

d. Documents prepared by a third party during the course of the retainer and sent to the lawyer.

Documents in this category are the property of the client either because the client is expected to pay for them as a disbursement or they are paid for by a third party on behalf of the client. The client is entitled to receive these documents. Where the documents exist in electronic form, the client may elect to receive paper copies as they may not have the relevant software to access the data in its native form. However, this does not relieve the law firm from the need to preserve this data in the event of a claim against the firm either due to settler's remorse or a negligence claim. As such, a prudent method of handling may be to burn this data onto a CD-ROM as noted in category #3 above and preserve it along with a copy of the relevant software to allow such data to be recreated, should the need arise.

Conclusion:

Every firm has a cost to storage. The need to preserve data and files against the possibility that it may be needed in the future (such as in a wills or estates matter where the need to document instructions, testator capacity or to negate undue influence allegations) or in the defense of negligence allegations has to be determined against the rules in each jurisdiction on the preservation of client files and in light of relevant limitation dates. The growth in electronic communication, databases and electronic analysis tools places a new need on law firms to consider their data storage, retention and preservation policies. Lastly the continual change in electronic media, operating systems, hardware and software raise issues on the ability to recreate data at some indefinite time in the future even if such data has been stored in a vault and on media that limit the ravages of time. It is suggested that the policies and procedures put into place by a firm for the preservation of data be determined against such variables as the expected need for the data in the future, the difficulty in recreating the data from hardcopy (such as rebuilding a relational database), the compatibility of older software on newer hardware and current operating systems. A firm needs to consider their ability to defend themselves against claims and their ability to recreate the

necessary data and evidence that would be required in such a situation.

Storage Considerations:

Storage of electronic media raises questions as to the electronic document backup, storage and retrieval systems in place in the lawyer's office. This is very important where the rate of change in technology is so rapid that the storage media becomes obsolete prior to the passage of applicable limitation periods.

I have suggested that electronic documents be gathered together and burned onto a CD-ROM or CD-ROM's, distinguishing the documents by the appropriate disposal period. In addition, I suggest that you should also store a copy of all software and operating systems required to read the information. I have chosen CD-ROM's as they are very inexpensive and stable yet compact. These CD-ROM's should be stored off-site, in a secure and safe environment. Moreover, preserving a copy of the software required to access the information at least gives the lawyer the opportunity to be able to access the data at some time in the future. I do not advocate storage on networked office systems, as there is continual pressure to delete older files which may result in the unwitting deletion of data.

Consider your office network backups. Some networks maintain a method of generation of backups that extend only three generations back (grandfather, father and son). This implies that older files could be deleted and all backup copies quickly lost as the newer generation of backups rewrite older ones. Moreover, tape backups are not as robust as CD-ROM's. Since current computer DVD drives are preserving the ability to read CD-ROM's – I suggest CD-ROM technology as the preferred storage media at the moment. However, this may change as technology changes. Firms are well advised to consider their storage choices and whether or not data and software needs to be periodically migrated to newer storage devices as technology evolves.

There are also computer hardware considerations. For example, the firm may consider preserving a working copy of current computer hardware (such as a Pentium II machine and its Windows 98™ operating system) in order to reduce the chances that a newer computer would not be able to run the relevant application software and/or operating system in order to retrieve the data.

Lastly, the firm should have a policy to periodically review all electronic records once all retention and limitation periods have expired and to destroy the storage media as the periods expire.

Bibliography:

1. *ABA Formal Opinion 92-369 (1992) and Informal Opinion 1384 (1977)*
2. *ABA Model Rules of Professional Conduct*
3. *Whose File is it Anyway? Who Owns Client File Documents when the Retainer Ends,. J. Morris, F. Folk and J. Vamplew, Vol 52, Part 1, January 1994 The Advocate p. 97.*

HOW TO BACK UP YOUR COMPUTER

Disasters happen to someone else somewhere else. Too bad this isn't true. Despite being trained – if not genetically hardwired – to anticipate the worst, many lawyers fail to have an adequate backup and recovery system to protect all the important information entrusted to their computers. The information stored on your computer is truly the lifeline of your practice. Safeguarding this information is critical to your practice's survival and an ethical obligation you owe to your clients.

Look around you. If your computer crashed or was ruined in a disaster, how much would the downtime cost you? Even a relatively minor calamity can wreak devastation on your law practice. Just consider the prospect of recreating all your documents, forms, client billing, time records, calendar entries, contacts, and emails. Scary, isn't it? If you aren't safeguarding your data on a regular basis, keep reading so you can learn how to get a system in place. Even if you have the support of an Information Technology (IT) department for your law office, keep reading so that you understand what they are doing and can apply it to your home computer.

DATA BACKUP OR FULL-SYSTEM BACKUP?

The term "data backup" refers to backing up or making a duplicate copy of selected information stored on your computer. The term "full-system backup" refers to backing up or making a duplicate copy of the complete computer system – operating system, software application programs, program customizations, folders, and files – not just the data. The full-system backup is the better choice. Why is a full-system backup so important? Imagine that your computer hard drive has crashed. Everything is gone. Luckily, you took the time to back up your data. However, before you can access it, you must first reinstall your operating system, programs, security patches, updates, etc. Only then can your computer read the data you saved. If you need further convincing, take a moment to look at all the programs you have on your computer. If the prospect of reloading all those programs seems daunting – as it should – consider buying a full-system backup and recovery program for your office. A full-system backup and recovery software program is inexpensive and easy to purchase. (See Resources at the end of this article.) It will prove its worth in gold, or at least in many, many billable hours.

CHOOSING A BACKUP AND RECOVERY SYSTEM

A good backup and recovery system has three elements: (1) automatic backup software; (2) a reliable storage device that is kept offsite; and (3) someone who can be trusted to ensure that the system is working. A good backup and recovery system will let you sleep easier knowing that your valuable information is protected.

1. Make It Automatic. The key to the software is that it must work well for the user. Otherwise, the user won't use it. Automatic backup software is the safest choice because you don't have to fit backing up into your day. Instead of an annoying

pop-up window asking if you want to back up now or later, it just quickly and quietly does the backup automatically. It doesn't allow you to elbow it aside when you're rushed and taking the short view of your priority list. The automatic software program you choose should be easy to set up. Typically, once you install the program, an interactive setup allows you to specify what you want backed up, when, and how often. Select a program that has a restore feature so that any archived information can be restored to your computer.

2. Storage Devices. Once you have backed up all the data and programs on your hard drive, you will need to find a place to store the data until you back up again. Dedicating an external hard drive to the backup process is far superior to downloading the backup files onto numerous discs. A second removable hard drive or other external storage device is an affordable convenience; it will allow you to make a duplicate backup to be stored offsite, with the original locked in your law office's fireproof safe or file cabinet. When buying an external hard drive, purchase the largest capacity you can reasonably afford. Another storage option is the Iomega Rev, a combination of hard drive and special disks. Useful for PCs or Macs, it is a greatly improved combination of the Iomega Zip Drive and the Iomega Removable Hard Disk Drive. It claims to provide fast and easy backup, disaster recovery, and data transport solutions for a single PC. Other features include password protection, encryption, and removable disks, making it more secure and flexible than an external hard disk drive. The sealed disks are more durable and have higher capacity than CDs or DVDs. For more information, visit www.iomega.com. Especially in areas prone to natural disasters, the safest storage of backup information is offsite, preferably in another geographic location. The importance of this topic was recently underscored by the devastation delivered by Hurricanes Katrina and Rita. Using Internet-based backup services is one possible solution, although still controversial.

3. System Backup Policies and Procedures. If you choose a full-system backup software program, your computer backup and recovery, system policy is simple because you can set the frequency of the backup. How often should you perform backups? The frequency should be dictated by your comfort level with risking any data created or received since your last backup. Most technology advisors recommend that you back up your new file information once daily, back up your full system once weekly, ship backups out of the geographic area semi-weekly (if living in a disaster-prone area), and do periodic restores semi-weekly or monthly. Your policy should also designate the person who is responsible for performing periodic test restores to be sure the program is working. Part of ensuring that the system is working is to periodically check to see whether you can restore a file and then compare it carefully with the file you backed up. The restored information should be identical to the backed-up information. The time to check is before you need the information. A recovered file that is unreadable because it is corrupt is not a surprise you want in the eleventh hour of any case.

SELECTING YOUR BACKUP SOFTWARE

When you compare backup software products, look for one that allows you to: (1) recover entire operating systems and/or individual files; (2) schedule backups to occur automatically; (3) customize the timing of backups based on the occurrence of events such as billing; (4) back up and restore quickly; and (5) test the restoration process. If you need assistance with these or other practice management questions, call the PLF at 503-639-6911 or 1-800-452-1639.

RESOURCES

For Product Reviews and Articles:
CNet.com – www.cnet.com
Law Practice Today – www.abanet.org/lpm/lpt/
Law Technology News – www.lawtechnologynews.com
Legal Ethics Forum – www.legalethicsforum.com
PC Magazine online – www.pcmagazine.com

To Comparison Shop:
Cyberguys.com – www.cyberguys.com
PriceGrabber.com – www.pricegrabber.com

System Backup Software Products:
Norton Ghost, Backup Exec, and other products – www.symantec.com/index.htm
Personal Backup X4 – www.apple.com/downloads/macosx/system_disk_utilities/

Online Data Storage Resources:
Backup My Info! – www.backupmyinfo.com
BackUp Solutions – www.online-computer-backup.com
EVault – www.evault.com.
Files Anywhere – www.filesanywhere.com
Iron Mountain – www.ironmountain.com.
US Data Trust www.usdatatrust.com

Sheila M. Blackford
PLF Practice Management Advisor

Originally appeared in the February 2006 issue of In Brief.

APPLICATION SERVICE PROVIDERS FOR ONLINE DATA STORAGE

An Application Service Provider (ASP) is an Internet-based electronic service that backs up your entire system automatically and stores the data on the Internet in a secure form and location. This online data storage method for backup and recovery has generated much discussion in legal circles. Online data storage can provide access to documents in a way that offsite backup cannot – especially if your offsite backup is stored in your same town or locale. This is one of the many tragic lessons learned in the wake of Hurricane Katrina, when one-third of the lawyers in Louisiana lost their offices, libraries, computers, client files, and homes. Even if the lawyers had backup devices or CDs at their home or other local site, few were able to access the backups. The ability of displaced lawyers to retrieve their client documents and financial data through the use of ASPs provides a powerful incentive to consider this alternative.

Online backup for PCs and servers can provide up-to-the-minute data backup protection; however, many lawyers have reservations about using ASPs. Generally, the security issues associated with storage are the main concern. Placing client information in the hands of third parties, the solvency of the provider, the security of the storage location, the method of storage, and the preservation of confidentiality are high on the list of reasonable concerns considered by lawyers. These concerns apply whether lawyers are storing paper files in a document storage facility or storing electronic data through an ASP. With a paper document storage facility, once you are confident that the facility either has no access to your stored documents or maintains confidentiality and privacy, you turn over the boxes of client files for storage and periodic retrieval. Placing electronic client data in the hands of third parties who remotely upload it to their Web site is really not any different. Proper security is crucial for each. A hacker can access an electronic site that isn't secure; a thief can break into and enter a paper storage facility that isn't secure.

Both a physical storage center and an ASP provide the user with a special key. An ASP's security can be so restrictive that the user may be the only person who has the "key" – an aspect of storage that requires thought, planning, and safeguarding. There may be no electronic "locksmith" to help you enter your "storage facility" if the key is lost. Therefore, if you are the only key holder, you should store the key (usually a password) locally somewhere that is secure, such as a safe deposit box, and also somewhere secure in another geographic area. Don't rely on your memory – this is a key (password) you hopefully will never have to use.

When choosing an automated, online data backup, storage, and restore system, ask these questions:

- Does the system offer the highest form of security data encryption available in the United States: Advanced Encryption Standard (AES)?
- Does the system offer a private encryption key that is held only by your office?
- Does the system encrypt all transmitted data at the source?
- Does the system provide continuous, automatic backups?
- Does the system have the capability to back up time-sensitive data like open files, e-mails, and databases?
- Does the system provide full coverage for complete data protection and recovery, including backup, offsite storage, ability to restore data over the network or dedicated storage device, online remote recovery, and offline archiving and recovery?
- Does the system provide instant file restores 24 hours a day, 7 days a week, 365 days a year?
- Does the system provide automatic notification of exceptions or problems encountered?
- Does the system provide detailed activity reports?
- Is the ASP's server in a geographic location that is separate from your locale?
- Does the ASP take precautions for disasters in its own area, such as backing up on a server in another location?
- Is the ASP's physical site secure? (The highest level of security is a Tier One Data Center Facility.)
- Is there a secure way for your firm to access the stored information if someone loses the law firm encryption key?

DIARY / TICKLER SYSTEMS

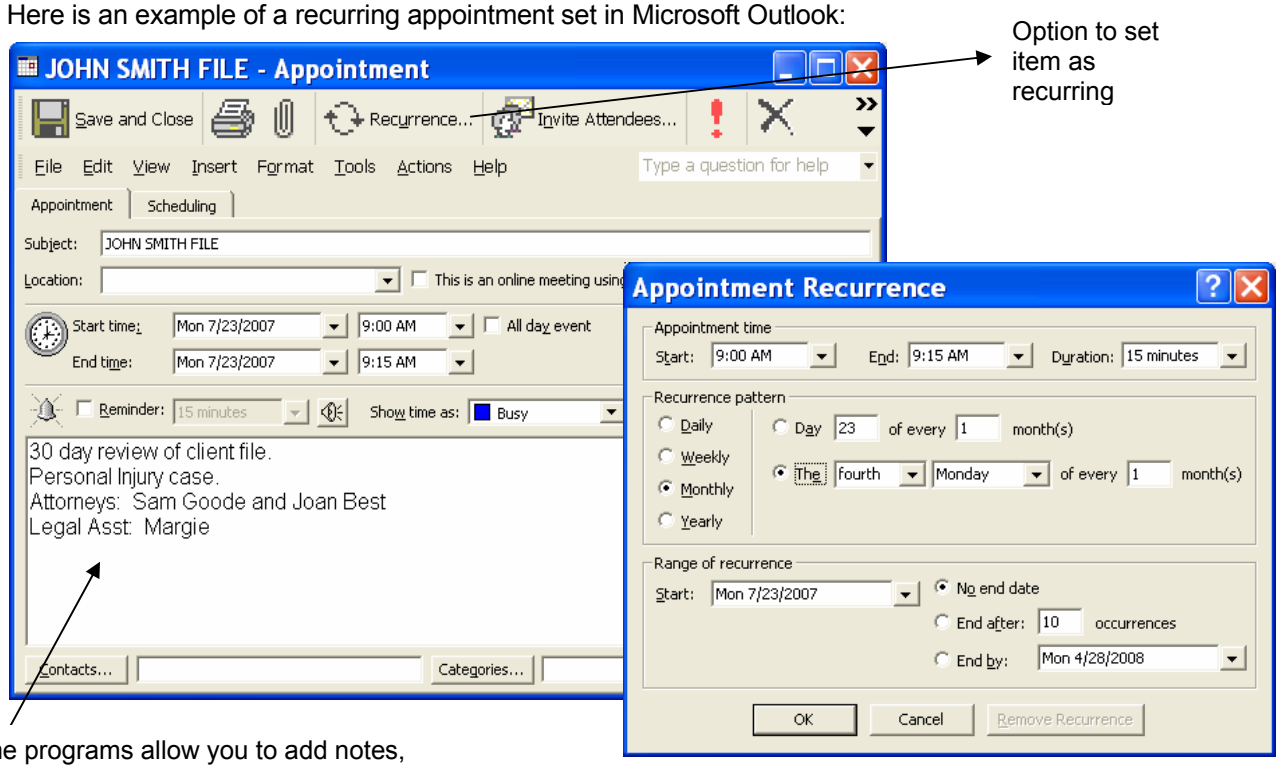
No file should ever be put in the file cabinet without a diary date on it or be tickled for more than 60 days unless it is a corporation and only annual meetings need to be noted. It is best to review all files at least once in any 30-day period. If the attorney working on the file does not indicate a diary date, the secretary should check with the attorney to determine when it should next be reviewed.

The most elementary system for the sole practitioner with a limited number of files is to keep a list of all open files. This list should be printed on the first day of each month and kept readily available on your desk. As work is performed on a file or the file is reviewed during the month, that file is crossed off the list. On the last day of the month, a quick review of the list will indicate which files were not seen during the month. You can then pull these files for review.

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

If you are using a computerized calendaring program, set tickle dates for each of your files by using recurring appointments or tasks. In most cases, the screen to create a new appointment or task will have an option to set that item as recurring. If you are using recurring appointments or tasks to tickle files, choose a recurrence pattern that falls on a work day (fourth Monday of the month) instead of a specific date, which may recur on a weekend or holiday in the future.

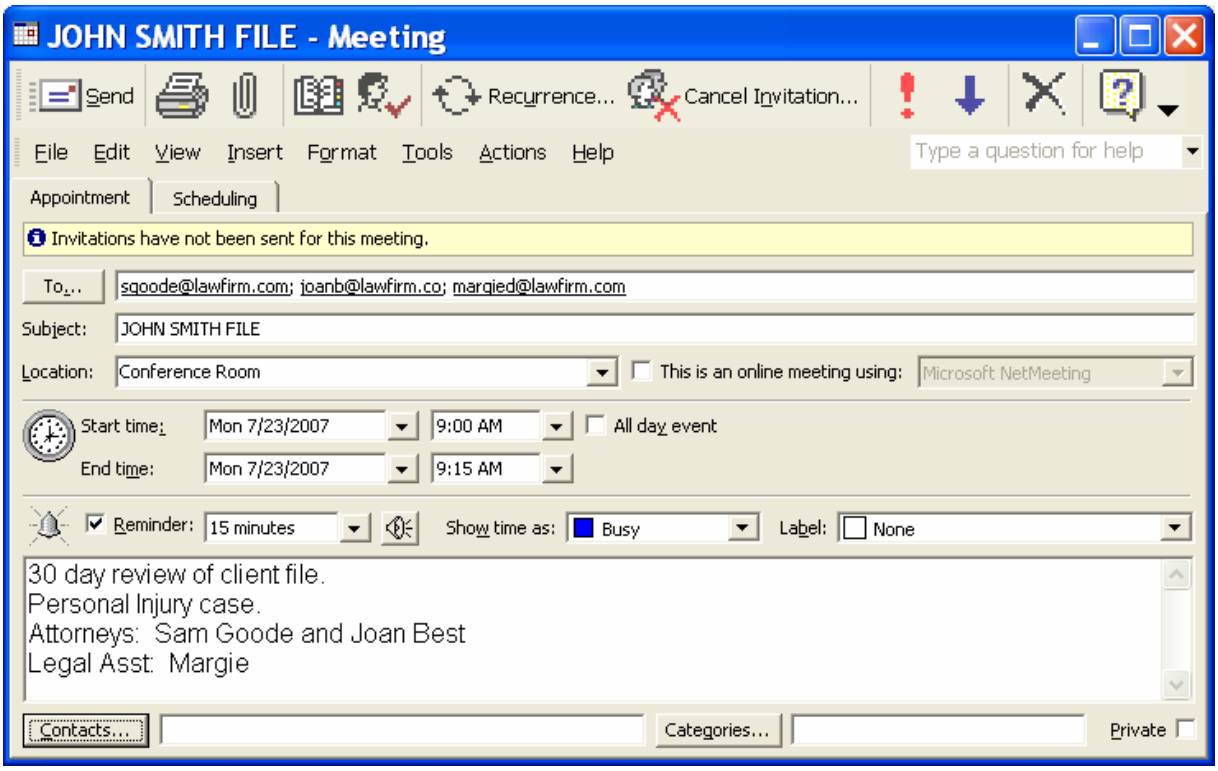
Here is an example of a recurring appointment set in Microsoft Outlook:



Option to set item as recurring

Some programs allow you to add notes, such as the reason the file is being tickled.

Your program may also allow you to set up a group of attorneys and legal assistants who need to participate in the file review by selecting the option to invite attendees. Your calendar appointment becomes an email that you send to those parties who should attend the client file review:



Each morning you or your secretary should pull all files tickled for that day. If, after reviewing the file, you determine there is nothing to be done at that time, the file is re-tickled to another future date. NO FILE SHOULD EVER BE PLACED IN THE FILING CABINET WITHOUT A FUTURE TICKLE DATE. If the file is tickled for a specific task to be performed, it should be accomplished that day. If there is no immediate deadline and you are unable to perform the task that day, tickle the file one to three days later when you will have time to complete the task. Don't let files stack up on your desk. Be realistic about what tasks you can complete, and use your tickle system to make sure items you cannot complete today will come across your desk in a day or two when they can be completed.

A good tickler system will alleviate the need to keep files stacked on your desk if they are not being worked on or the need to set aside an entire day reviewing every open file. A tickler system also prevents files from falling through the cracks when they get stuck in the file cabinet because nothing has happened to create any activity on the file.

FOLLOW-UP

One of the most important aspects of docket control is to follow up once a reminder is made to see that a task is actually accomplished prior to its deadline date. Unfortunately, this is also one of the most overlooked requirements of a good docket system.

On occasion, an item will be held for one final review. Make sure the item does not get buried on a desk or in the file. If an item is sent by certified mail, enter a follow-up date to verify the return receipt came back to the office. If an item is filed, check to be sure that the item was received by the court. When sending documents out for service, enter a follow-up date to check with the process server confirming that service has been accomplished. This is especially crucial if service must be made within 60 days of filing the complaint when there is a statute of limitations problem.

Use your docket or follow-up system for any matter that has an irrevocable deadline, such as giving notice of a claim, filing a complaint, effecting service of summons, or filing notice of appeal, Some other important dates are: notices of annual meetings for corporations, probate deadlines, notice of sale in foreclosures, tax filing deadlines, and intangible dates such as when to have a will or pension and profit sharing plan completed. There are specific deadlines and dates for each practice area. Consult the PLF Practice Aids and Forms and your OSB CLE materials for checklists and forms.

Important treatment in the docket control system:

1 . The final deadline should be immediately entered on the calendars of the attorney, secretary, and the central docket clerk.

2. Sufficient lead time should be determined for completion of each task, and appropriate reminder dates entered in the calendars of the attorney and secretary, as well as the central docket system.

3. Final reminders should be specially indicated (i.e., red ink or bold if using a paper calendar).

4. Reminder notices and follow-ups should be brought to the attorney's attention and tasks should be marked off when completed and by whom. A separate follow-up log for each case can be maintained so that these important actions, deadlines, and follow up tasks are noted, along with information about when they were accomplished and by whom.

5. This is the most important step: If the secretary or docket clerk does not receive notice that the task has been completed by the due date, that person should immediately contact the responsible attorney to find out why the task has not been completed.

6. In the event a final notice is ignored or the responsible attorney is unavailable for any reason, the supervising/managing attorney should be notified of the problem by the secretary or person in charge of the docket. A firm policy should be created to address this potential situation. *See Oregon RPC 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers.*

PRACTICAL CONTRACT LAWYERING RESOURCES

ARTICLES:

Professional Liability Fund
www.osbplf.org
IN BRIEF
(March 2000 to February 2008)

Practice Management:

- A Common Sense Approach to Avoiding Malpractice Claims – March 2007
- Application Service Providers for Online Data Storage – February 2006
- Are You Getting Paid for What You Do? - June 2005
- Assessing Your Financial Fitness – August 2007
- Digital Recorders – February 2008
- Document Destruction – June 2005
- Do You Know the Security Level of Your Computer? - October 2004
- Four Simple Ways to Save Client E-Mail – November 2006
- Frequently Asked Questions About Filing - December 2002
- Frequently Asked Trust Account Questions - July 2002
- How to Back Up Your Computer – February 2006
- How to Handle an Unhappy Client – February 2008
- IRS 1099 Reporting Requirements for Attorneys – August 2007
- Laptop Computers: Protecting Confidential Client Information – October 2004
- New Case Affects Tolling by Advance Payments – March 2007
- News About Rules – June 2005
- Office Systems Checkup – February 2006
- Plan Now for Your Summer Vacation or Sabbatical – May 2004
- Protect Your Firm - March 2002
- Protect Yourself From Embezzlement - July 2002
- Resources for Backing Up Your Computer – February 2006
- Sample Privacy Policy Notice - October 2001
- Solving File Retention Issues - July 2000
- Technology Tips - October 2001, February 2006, and August 2007
- Technology Tips: Power Fluctuations – May 2004
- Ten Web Sites Every Lawyer Should Know – May 2004
- Tips for Using the PLF Web Site – June 2003
- Tips, Traps & Resources – May 2004, October 2004, March 2005, June 2005, February 2006,
- June 2006, November 2006, March 2007, August 2007, February 2008
- Turbocharge your Workflow – June 2006
- What to do About Stolen/Lost Client Files – October 2004
- What Your Staff Isn't Telling You - July 2002
- Working Smarter by Using Technology – October 2004
- Why Associates Leave - October 2001
- Windows XP - March 2002

Oregon State Bar

Bar Counsel
http://www.osbar.org/ethics/bulletinbarcounsel.html

Oregon State Bar Bulletin — NOVEMBER 2006
- **What's In a Name:** ***Things to consider before hanging that shingle***
  By Sylvia E. Stevens

Oregon State Bar Bulletin — JANUARY 2006
- **CLIENT FILES, REVISITED**
  More light on a topic that won't go away
  By Helen Hierschbiel

Oregon State Bar Bulletin — NOVEMBER 2004
- **SUPERVISING NONLAWYERS**
  The watchwords are: "train" and "supervise"
  By Helen Hierschbiel

BLOGS:

ABA Blawg Directory: Contract Attorneys

Popular -- based on the number of times ABA readers have visited ABA descriptions of these blawgs.

- Temporary Attorney: The Sweatshop Edition

  http://temporaryattorney.blogspot.com

  This blawg's intent is to "expose the nasty sweatshops, swindling law schools, and opportunistic staffing agencies."

- My Attorney Blog

  http://www.myattorneyblog.com

  Commentary on the working life of a contract attorney in Washington D.C. and temporary legal staffing.

- Black Sheep of Philly Contract Attorneys

  http://blacksheepcontractatty.blogspot.com

  Recognizing the increase in contract attorney work, the use of contractors by major firms especially for document review, the need for better information for contractors and document reviewers, and the desire for improvements in the legal contracting field, this website was created by a contract attorney for other contract attorneys.

- JDWired Blog

  http://www.jdwired.com

Professional development, lifestyle, and community for contract attorneys.

- The State of Beasley

  http://stateofbeasley.blogspot.com

  "Go prestigious, go public, or don't go at all." — A general rule for all who are considering law school.

MARKETING:

The Oregon State Bar Bulletin 

Classified advertising and professional lawyer announcement advertising, Contact Leone Gholston by e-mail at lgholston@osbar.org, or by telephone at 503-620-0222 or 800-452-8260 ext. 348.

Display advertising, contact LLM Publications by e-mail at linda@llm.com, or by telephone (503) 656-8013, or visit the LLM website at www.llm.com.

The Oregon State Bar Membership Directory 

Including the OSB website Attorney's Guide to Products & Services

Listings are included free with the purchase of a 1/6 page or larger display ad, or can be purchased independently. Hot link your website to the Oregon State Bar website with the purchase of an ad or listing.
Contact John Garbett at LLM Publications, Inc: 503-445-2224 • john@llm.com 8201 SE 17th Ave., Portland, OR 97202 • Fax: 503-655-0778 • www.llm.com
Published in February. Circulation 19,000. Deadlines are early fall! *(E.g. 2008 edition: Early Reservation Prices: 10/10/07; ad copy due: 12/1/07.)*

NETWORKING:

Local Oregon Bars and Contacts

http://www.osbar.org/members/localbars.asp

- **Sixth Judicial District Bar Association**
  Evan D Hansen (exp. 12/2008)
  Grable & Hantke LLP
  334 SE 2nd Ave
  PO Box 1760
  Pendleton OR 97801
  phone: 541 276-1851
  fax: 541 276-3146
  email: ehansen@grablelaw.com

- **Baker County Bar Association – (vacant)**

- **Benton County Bar Association**
  Steven A Heinrich (exp. 12/2008)
  527 NW 3rd St
  Corvallis OR 97330
  phone: 541 757-0706
  fax: 541 754-2503
  email: steve@corvallislegal.com

- **Clackamas County Bar Association**
  website: www.clackamas-bar.org
  Peter K Glazer (exp. 12/2008)
  Glazer & Associates PC
  4500 Kruse Way Ste 390
  Lake Oswego OR 97035
  phone: 503 635-8801
  fax: 503 635-1108
  email: peter@peterglazer.com

- **Clatsop County Bar Association**
  Lawrence J Popkin (exp. 3/2008)
  Campbell & Popkin LLC
  318 S Holladay Dr
  Seaside OR 97138
  phone: 503 738-8400
  fax: 503 738-5740
  email: lpopkin@campbellpopkin.com

- **Columbia County Bar Association**
  Teri L Powers (exp. 12/2008)
  Powers & Mark
  38504 NW Reeder Rd
  Portland OR 97231
  phone: 503 621-7498
  fax: 503 621-0500

- **Coos County Bar Association – (vacant)**

- **Crook/Jefferson County Bar Association**
  Brigid K Turner (exp. 10/2008)
  Crook County DA's Office
  Crook County Courthouse
  300 NE 3rd St
  Prineville OR 97754
  phone: 541 447-4158
  fax: 541 447-6978
  email: brigid.turner@co.crook.or.us

- **Curry County Bar Association**
  Alexandria C Streich (exp. 3/2008)
  Law Ofc of Alexandria Streich
  610 5th St Ste B
  PO Box 7799
  Brookings OR 97415
  phone: 541 469-0901
  fax: 541 469-0903
  email: acs@assetprotectionfirm.com

- **Deschutes County Bar Association**
  Laura Craska Cooper (exp. 9/2008)
  Ball Janik LLP
  15 SW Colorado Ste 3
  Bend OR 97702
  phone: 541 617-1309
  fax: 541 617-8824
  email: lcooper@balljanik.com

- **Douglas County Bar Association**
  website: dougcobar.homestead.com/Index.html
  Randy C Rubin (exp. 12/2008)
  Randy C Rubin PC
  836 W Military Ste 206
  Roseburg OR 97470
  phone: 541 677-7102
  fax: 541 673-2180
  email: randy@randyrubin.com

- **Grant County Bar Association – (vacant)**

- **Harney County Bar Association**
  Stephen D Finlayson (exp. 6/2008)
  Stephen D Finlayson PC
  709 Ponderosa Vlg
  Burns OR 97720
  phone: 541 573-2151
  fax: 541 573-2550
  email: finlaysonlaw@centurytel.net

- **Hood River County Bar Association – (vacant)**

- **Jackson County Bar Association**
  Ryan James Vanderhoof (exp. 12/2008)
  Hornecker Cowling Hassen
  717 Murphy Rd
  Medford OR 97504
  phone: 541 779-8900
  fax: 541 779-2982
  email: rjv@roguelaw.com

- **Josephine County Bar Association**
  Mary E Landers (exp. 3/2008)
  Josephine Co Defense Lawyers
  130 NW D St
  Grants Pass OR 97526
  phone: 541 956-9922
  fax: 541 956-9923
  email: mary_landers_attorney@yahoo.com

- **Klamath County Bar Association**
  Valerie Beth Hedrick (exp. 12/2008)
  Boivin Uerlings & Dilaconi PC
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  Klamath Falls OR 97601
  phone: 541 884 8101
  fax: 541 884-8498
  email: vhedrick_0@qwestoffice.net

- **Lake County Bar Association – (vacant)**

- **Lane County Bar Association**
  Murray S Petitt (exp. 6/2008)
  Thorp Purdy et al
  1011 Harlow Rd Ste 300
  Springfield OR 97477
  phone: 541 747-3354
  fax: 541 747-3367
  email: mpetitt@thorp-purdy.com

- **Lincoln County Bar Association**
  website: www.co.lincoln.or.us/bar
  Penelope Wadsworth McCarthy (exp. 12/2008)
  Affiliated Computer Svcs
  345 SW 11th
  Newport OR 97365
  phone: 541 574-8276
  fax: 520 886-4763
  email: penelope.mccarthy@acs-inc.com

- **Linn County Bar Association**

Denise B Soto (exp. 6/2008)
Soto Law Firm PC
939 Elm St
PO Box 1045
Albany OR 97321
phone: 541 917-0111
fax: 541 917-0333
email: denise@sotolaw.net

- **Malheur County Bar Association – (vacant)**

- **Marion County Bar Association**
  website: www.marioncountybar.org
  Ryan W Collier (exp. 12/2008)
  Clark Lindauer Fetherston
  880 Liberty St NE
  PO Box 2206
  Salem OR 97301
  phone: 503 581-1542
  fax: 503 585-3978
  email: rcollier@clarklindauer.com

- **Mid-Columbia County Bar Association**
  Michael B FitzSimons (exp. 12/2008)
  Jaques Sharp Sherrerd
  205 3rd St
  PO Box 457
  Hood River OR 97031
  phone: 541 386-1311
  fax: 541 386-8771
  email: hrlaw@gorge.net

- **Multnomah County Bar Association**
  website: www.mbabar.org
  Thomas W Brown (exp. 6/2008)
  Cosgrave Vergeer Kester LLP
  805 SW Broadway 8th Flr
  Portland OR 97205
  phone: 503 323-9000
  fax: 503 323-9019
  email: tbrown@cvk-law.com

- **Polk County Bar Association**
  Noal S Smith (exp. 12/2009)
  Chris L Lillegard PC
  236 SW Mill
  Dallas OR 97338
  phone: 503 623-6676
  fax: 503 623-8339
  email: cllpc@aol.com

- **Tillamook County Bar Association**

William K Sargent (exp. 4/2008)
1134 Main Ave
Tillamook OR 97141
phone: 503 842-4921
fax: 503 842-8862
email: wsargent@oregoncoast.com

- **Union County Bar Association**
  Russell B West (exp. 9/2008)
  Circuit Court Judge
  Union Co Circuit Court
  1008 K Ave
  La Grande OR 97850
  phone: 541 962-9500
  fax: 541 962-7710
  email: russell.b.west@ojd.state.or.us

- **Wallowa County Bar Association**
  Paige Louise Sully (exp. 12/2008)
  Law Office of Paige Sully
  309 S River Rd Ste B1
  Enterprise OR 97828
  phone: 541 426-0535
  fax: 541 426-0248
  email: psullylawoffice@eoni.com

- **Wasco County Bar Association – (vacant)**

- **Washington County Bar Association**
  website: www.wcbabar.org
  Rebecca Pihl Mehringer (exp. 6/2009)
  Washington County DA's Office
  150 N 1st Ave Ste 300 MS40
  Hillsboro OR 97124
  phone: 503 846-8759
  fax: 503 846-2990
  email: becky_mehringer@co.washington.or.us

- **Yamhill County Bar Association – (vacant)**

Oregon Attorney/Legal Associations and Organizations

Federal Bar Association-Oregon Chapter
Katherine Heekin (503) 222-5578

Hispanic National Bar Association
Alejandro G. Tosi (503) 796-2446

Lawyers With Disabilities
Victor Hoffer (503) 845-6650

National Lawyers Guild/NW Constitutional Rights Center
Alan S. Graf (503) 241-0260

Oregon Association of Defense Counsel
Sandra Fisher (503) 253-0527

Oregon Criminal Defense Lawyers Association
John Potter (541) 686-8716

Oregon Gay & Lesbian Law Association
www.ogalla.org

Oregon Hispanic Bar Association
Kevin Diaz (360) 693-6130 x204

Oregon Minority Lawyers Association
Anastasia Meisner (503) 697-1035

Oregon Patent Law Association
Graciela Cowger (503) 222-3613 x127

Oregon Trial Lawyers Association
Beth Bernard (503) 223-5587

Oregon Women Lawyers
Catherine Ciarlo (503) 595-7826

Independent Contractor or Employee? Tax Issues for Contract Lawyers

Richard Wingard, CPA, Maginnis & Carey LLP

Independent Contractor or Employee?
Tax Issues for Contract Lawyers

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INDEPENDENT CONTRACTOR OR EMPLOYEE ?

TAX ISSUES FOR CONTRACT LAWYERS

PRESENTATION TO THE OREGON STATE BAR
PROFESSIONAL LIABILITY FUND
MAY 1, 2008
RICHARD W. WINGARD, CPA
MAGINNIS & CAREY LLP

SO, IF I'M A CONTRACTOR, WHERE IS MY PICKUP TRUCK… AND MY BIG DOG?

ADVANTAGES FOR INDEPENDENT CONTRACTORS

- **Ability to deduct work related expenses without percentage of AGI limitations:**
  - **Equipment and supplies**
  - **Certain meals and entertainment**
  - **License and dues**
  - **Auto expense**
  - **Commuting**
  - **Health insurance costs "above the line"**

ADVANTAGES FOR INDEPENDENT CONTRACTORS - Continued

- **Possible significant increase in retirement plan contributions over IRA or 401(k):**
  - Keogh or SEP Plan: 25% of net IC income
  - Combination of deferral-401(k)-and Keogh or SEP
  - Defined benefit plan

DISADVANTAGES FOR INDEPENDENT CONTRACTORS

- **Additional taxes-Cost and Filing requirements:**
  - Self-employment Tax (FICA & Medicare)
  - Portland City License and/or Multnomah County Business Income Tax
    - Depends on where work performed
    - Not required if revenues < $50,000
  - Tri-Met Tax
    - Depends on where work performed
- **Need to maintain additional records**
- **Overall out of pocket costs for benefits usually provided by employer**

FACTORS DETERMINING WHETHER EMPLOYEE OR INDEPENDENT CONTRACTOR

- **IRS formerly used a 20 factor test**
  - Still used as an analytical tool
- **Now focus is on overall situation based on three overall factors:**
  - Behavioral Control
  - Financial Control
  - Type of Relationship

BEHAVIORAL CONTROL (RIGHT TO DIRECT AND CONTROL HOW WORKER PERFORMS TASKS)

- Direct Instruction, Training and Other means to control work.
  - Behavioral Control may exist if employer has right to control how the work results are achieved.

FINANCIAL CONTROL (RIGHT TO CONTROL BUSINESS AND FINANCIAL ASPECTS OF WORKER'S JOB)

- Extent to which worker has unreimbursed business expenses
- Both connected to and independent of the specific job
- Extent of the worker's investment in facilities/equipment used
  - Significant investment not required
- Extent to which worker can realize a profit or a loss

TYPE OF RELATIONSHIP

- Written contracts describing the relationship the parties intended to create
- Availability of worker to perform services for similar businesses
- Are "Employee" type benefits provided to the worker?
- Permanency of the relationship

OPTIONS FOR WORKERS WHO BELIEVE THEY ARE MISCLASSIFIED AS INDEPENDENT CONTRACTORS

- **File IRS Form SS-8 requesting Determination of Status**
- **File IRS Form 8919 requesting withholding from "Employer"**

DEFENSES AVAILABLE TO FIRMS (IRS § 530 "Safe Harbor")

- **"Reasonable Basis"**
  - **Judicial precedent, published rulings, etc.**
- **Past IRS audits**
  - **After 1/1/97: Must have been examined on this specific issue with no penalty assessment**
- **Long standing, recognized practice of a significant portion of the industry**

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FAX 503.295.1019
MOBILE 503.819.0872

APPENDIX

Form **SS-8**
(Rev. November 2006)
Department of the Treasury
Internal Revenue Service

Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding

OMB No. 1545-0004

Name of firm (or person) for whom the worker performed services		Worker's name	
Firm's address (include street address, apt. or suite no., city, state, and ZIP code)		Worker's address (include street address, apt. or suite no., city, state, and ZIP code)	
Trade name		Daytime telephone number	Worker's social security number
Telephone number (include area code)	Firm's employer identification number	Worker's employer identification number (if any)	

Note. If the worker is paid by a firm other than the one listed on this form for these services, enter the name, address, and employer identification number of the payer. ▶

Disclosure of Information

The information provided on Form SS-8 may be disclosed to the firm, worker, or payer named above to assist the IRS in the determination process. For example, if you are a worker, we may disclose the information you provide on Form SS-8 to the firm or payer named above. The information can only be disclosed to assist with the determination process. If you provide incomplete information, we may not be able to process your request. See *Privacy Act and Paperwork Reduction Act Notice* on page 5 for more information. **If you do not want this information disclosed to other parties, do not file Form SS-8.**

Parts I–V. All filers of Form SS-8 must complete all questions in Parts I–IV. Part V must be completed if the worker provides a service directly to customers or is a salesperson. If you cannot answer a question, enter "Unknown" or "Does not apply." If you need more space for a question, attach another sheet with the part and question number clearly identified.

Part I General Information

1 This form is being completed by: ☐ Firm ☐ Worker; for services performed _____ (beginning date) to _____ (ending date).

2 Explain your reason(s) for filing this form (for example, you received a bill from the IRS, you believe you erroneously received a Form 1099 or Form W-2, you are unable to get worker's compensation benefits, or you were audited or are being audited by the IRS). _____

3 Total number of workers who performed or are performing the same or similar services _____

4 How did the worker obtain the job? ☐ Application ☐ Bid ☐ Employment Agency ☐ Other (specify) _____

5 Attach copies of all supporting documentation (contracts, invoices, memos, Forms W-2 or Forms 1099-MISC issued or received, IRS closing agreements, IRS rulings, etc.). In addition, please inform us of any current or past litigation concerning the worker's status. If no income reporting forms (Form 1099-MISC or W-2) were furnished to the worker, enter the amount of income earned for the year(s) at issue $ _____

If both Form W-2 and Form 1099-MISC were issued or received, explain why. _____

6 Describe the firm's business. _____

7 Describe the work done by the worker and provide the worker's job title. _____

8 Explain why you believe the worker is an employee or an independent contractor. _____

9 Did the worker perform services for the firm in any capacity before providing the services that are the subject of this determination request?
☐ **Yes** ☐ **No** ☐ **N/A**

If "Yes," what were the dates of the prior service? _____

If "Yes," explain the differences, if any, between the current and prior service. _____

10 If the work is done under a written agreement between the firm and the worker, attach a copy (preferably signed by both parties). Describe the terms and conditions of the work arrangement. _____

Part II Behavioral Control

1 What specific training and/or instruction is the worker given by the firm? _____

2 How does the worker receive work assignments? _____

3 Who determines the methods by which the assignments are performed? _____

4 Who is the worker required to contact if problems or complaints arise and who is responsible for their resolution? _____

5 What types of reports are required from the worker? Attach examples. _____

6 Describe the worker's daily routine such as, schedule, hours, etc. _____

7 At what location(s) does the worker perform services (e.g., firm's premises, own shop or office, home, customer's location, etc.)? Indicate the appropriate percentage of time the worker spends in each location, if more than one. _____

8 Describe any meetings the worker is required to attend and any penalties for not attending (e.g., sales meetings, monthly meetings, staff meetings, etc.). _____

9 Is the worker required to provide the services personally? . . . . . ☐ Yes ☐ No

10 If substitutes or helpers are needed, who hires them? _____

11 If the worker hires the substitutes or helpers, is approval required? . . . . . ☐ Yes ☐ No
If "Yes," by whom? _____

12 Who pays the substitutes or helpers? _____

13 Is the worker reimbursed if the worker pays the substitutes or helpers? . . . . . ☐ Yes ☐ No
If "Yes," by whom?

Part III Financial Control

1 List the supplies, equipment, materials, and property provided by each party:
The firm _____
The worker _____
Other party _____

2 Does the worker lease equipment? . . . . . ☐ Yes ☐ No
If "Yes," what are the terms of the lease? (Attach a copy or explanatory statement.) _____

3 What expenses are incurred by the worker in the performance of services for the firm? _____

4 Specify which, if any, expenses are reimbursed by:
The firm _____
Other party _____

5 Type of pay the worker receives: ☐ Salary ☐ Commission ☐ Hourly Wage ☐ Piece Work
☐ Lump Sum ☐ Other (specify) _____
If type of pay is commission, and the firm guarantees a minimum amount of pay, specify amount $ _____.

6 Is the worker allowed a drawing account for advances? . . . . . ☐ Yes ☐ No
If "Yes," how often? _____
Specify any restrictions. _____

7 Whom does the customer pay? . . . . . ☐ Firm ☐ Worker
If worker, does the worker pay the total amount to the firm? ☐ Yes ☐ No If "No," explain. _____

8 Does the firm carry worker's compensation insurance on the worker? . . . . . ☐ Yes ☐ No

9 What economic loss or financial risk, if any, can the worker incur beyond the normal loss of salary (e.g., loss or damage of equipment, material, etc.)? _____

Part IV Relationship of the Worker and Firm

1 List the benefits available to the worker (e.g., paid vacations, sick pay, pensions, bonuses, paid holidays, personal days, insurance benefits). _____

2 Can the relationship be terminated by either party without incurring liability or penalty? . . . . . ☐ Yes ☐ No
If "No," explain your answer. _____

3 Did the worker perform similar services for others during the same time period? . . . . . ☐ Yes ☐ No
If "Yes," is the worker required to get approval from the firm? . . . . . ☐ Yes ☐ No

4 Describe any agreements prohibiting competition between the worker and the firm while the worker is performing services or during any later period. Attach any available documentation. _____

5 Is the worker a member of a union? . . . . . ☐ Yes ☐ No

6 What type of advertising, if any, does the worker do (e.g., a business listing in a directory, business cards, etc.)? Provide copies, if applicable.

7 If the worker assembles or processes a product at home, who provides the materials and instructions or pattern? _____

8 What does the worker do with the finished product (e.g., return it to the firm, provide it to another party, or sell it)? _____

9 How does the firm represent the worker to its customers (e.g., employee, partner, representative, or contractor)? _____

10 If the worker no longer performs services for the firm, how did the relationship end (e.g., worker quit or was fired, job completed, contract ended, firm or worker went out of business)? _____

Part V For Service Providers or Salespersons. Complete this part if the worker provided a service directly to customers or is a salesperson.

1 What are the worker's responsibilities in soliciting new customers? _____

2 Who provides the worker with leads to prospective customers? _____

3 Describe any reporting requirements pertaining to the leads. _____

4 What terms and conditions of sale, if any, are required by the firm? _____

5 Are orders submitted to and subject to approval by the firm? . . . . . ☐ Yes ☐ No

6 Who determines the worker's territory? _____

7 Did the worker pay for the privilege of serving customers on the route or in the territory? . . . . . ☐ Yes ☐ No
If "Yes," whom did the worker pay? _____
If "Yes," how much did the worker pay? . . . . . $ _____

8 Where does the worker sell the product (e.g., in a home, retail establishment, etc.)? _____

9 List the product and/or services distributed by the worker (e.g., meat, vegetables, fruit, bakery products, beverages, or laundry or dry cleaning services). If more than one type of product and/or service is distributed, specify the principal one. _____

10 Does the worker sell life insurance full time? . . . . . ☐ Yes ☐ No

11 Does the worker sell other types of insurance for the firm? . . . . . ☐ Yes ☐ No
If "Yes," enter the percentage of the worker's total working time spent in selling other types of insurance . . . . _____%

12 If the worker solicits orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments, enter the percentage of the worker's time spent in the solicitation . . . . . _____%

13 Is the merchandise purchased by the customers for resale or use in their business operations? . . . . . ☐ Yes ☐ No
Describe the merchandise and state whether it is equipment installed on the customers' premises. _____

Sign Here

Under penalties of perjury, I declare that I have examined this request, including accompanying documents, and to the best of my knowledge and belief, the facts presented are true, correct, and complete.

▶ _____ Title ▶ _____ Date ▶ _____
Type or print name below signature.

General Instructions

Section references are to the Internal Revenue Code unless otherwise noted.

Purpose

Firms and workers file Form SS-8 to request a determination of the status of a worker for purposes of federal employment taxes and income tax withholding.

A Form SS-8 determination may be requested only in order to resolve federal tax matters. If Form SS-8 is submitted for a tax year for which the statute of limitations on the tax return has expired, a determination letter will not be issued. The statute of limitations expires 3 years from the due date of the tax return or the date filed, whichever is later.

The IRS does not issue a determination letter for proposed transactions or on hypothetical situations. We may, however, issue an information letter when it is considered appropriate.

Definition

Firm. For the purposes of this form, the term "firm" means any individual, business enterprise, organization, state, or other entity for which a worker has performed services. The firm may or may not have paid the worker directly for these services.

If the firm was not responsible for payment for services, be sure to enter the name, address, and employer identification number of the payer on the first page of Form SS-8, below the identifying information for the firm and the worker.

The SS-8 Determination Process

The IRS will acknowledge the receipt of your Form SS-8. Because there are usually two (or more) parties who could be affected by a determination of employment status, the IRS attempts to get information from all parties involved by sending those parties blank Forms SS-8 for completion. Some or all of the information provided on this Form SS-8 may be shared with the other parties listed on page 1. The case will be assigned to a technician who will review the facts, apply the law, and render a decision. The technician may ask for additional information from the requestor, from other involved parties, or from third parties that could help clarify the work relationship before rendering a decision. The IRS will generally issue a formal determination to the firm or payer (if that is a different entity), and will send a copy to the worker. A determination letter applies only to a worker (or a class of workers) requesting it, and the decision is binding on the IRS. In certain cases, a formal determination will not be issued. Instead, an information letter may be issued. Although an information letter is advisory only and is not binding on the IRS, it may be used to assist the worker to fulfill his or her federal tax obligations.

Neither the SS-8 determination process nor the review of any records in connection with the determination constitutes an examination (audit) of any federal tax return. If the periods under consideration have previously been examined, the SS-8 determination process will not constitute a reexamination under IRS reopening procedures. Because this is not an examination of any federal tax return, the appeal rights available in connection with an examination do not apply to an SS-8 determination. However, if you disagree with a determination and you have additional information concerning the work relationship that you believe was not previously considered, you may request that the determining office reconsider the determination.

Completing Form SS-8

Answer all questions as completely as possible. Attach additional sheets if you need more space. Provide information for all years the worker provided services for the firm. Determinations are based on the entire relationship between the firm and the worker. Also indicate if there were any significant changes in the work relationship over the service term.

Additional copies of this form may be obtained by calling 1-800-829-4933 or from the IRS website at *www.irs.gov.*

Fee

There is no fee for requesting an SS-8 determination letter.

Signature

Form SS-8 must be signed and dated by the taxpayer. A stamped signature will not be accepted.

The person who signs for a corporation must be an officer of the corporation who has personal knowledge of the facts. If the corporation is a member of an affiliated group filing a consolidated return, it must be signed by an officer of the common parent of the group.

The person signing for a trust, partnership, or limited liability company must be, respectively, a trustee, general partner, or member-manager who has personal knowledge of the facts.

Where To File

Send the completed Form SS-8 to the address listed below for the firm's location. However, only for cases involving federal agencies, send Form SS-8 to the Internal Revenue Service, Attn: CC:CORP:T:C, Ben Franklin Station, P.O. Box 7604, Washington, DC 20044.

Firm's location:	Send to:
Alaska, Arizona, Arkansas, California, Colorado, Hawaii, Idaho, Illinois, Iowa, Kansas, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, Wisconsin, Wyoming, American Samoa, Guam, Puerto Rico, U.S. Virgin Islands	Internal Revenue Service SS-8 Determinations P.O. Box 630 Stop 631 Holtsville, NY 11742-0630
Alabama, Connecticut, Delaware, District of Columbia, Florida, Georgia, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia, all other locations not listed	Internal Revenue Service SS-8 Determinations 40 Lakemont Road Newport, VT 05855-1555

Instructions for Workers

If you are requesting a determination for more than one firm, complete a separate Form SS-8 for each firm.

Form SS-8 is not a claim for refund of social security and Medicare taxes or federal income tax withholding.

If the IRS determines that you are an employee, you are responsible for filing an amended return for any corrections related to this decision. A determination that a worker is an employee does not necessarily reduce any current or prior tax liability. For more information, call 1-800-829-1040.

Time for filing a claim for refund. Generally, you must file your claim for a credit or refund within 3 years from the date your original return was filed or within 2 years from the date the tax was paid, whichever is later.

Filing Form SS-8 does not prevent the expiration of the time in which a claim for a refund must be filed. If you are concerned about a refund, and the statute of limitations for filing a claim for refund for the year(s) at issue has not yet expired, you should file Form 1040X, Amended U.S. Individual Income Tax Return, to protect your statute of limitations. File a separate Form 1040X for each year.

On the Form 1040X you file, do not complete lines 1 through 24 on the form. Write "Protective Claim" at the top of the form, sign and date it. In addition, you should enter the following statement in Part II, Explanation of Changes: "Filed Form SS-8 with the Internal Revenue Service Office in (Holtsville, NY; Newport, VT; or Washington, DC; as appropriate). By filing this protective claim, I reserve the right to file a claim for any refund that may be due after a determination of my employment tax status has been completed."

Filing Form SS-8 does not alter the requirement to timely file an income tax return. Do not delay filing your tax return in anticipation of an answer to your SS-8 request. In addition, if applicable, do not delay in responding to a request for payment while waiting for a determination of your worker status.

Instructions for Firms

If a **worker** has requested a determination of his or her status while working for you, you will receive a request from the IRS to complete a Form SS-8. In cases of this type, the IRS usually gives each party an opportunity to present a statement of the facts because any decision will affect the employment tax status of the parties. Failure to respond to this request will not prevent the IRS from issuing a determination letter based on the information he or she has made available so that the worker may fulfill his or her federal tax obligations. However, the information that you provide is extremely valuable in determining the status of the worker.

If you are requesting a determination for a particular class of worker, complete the form for one individual who is representative of the class of workers whose status is in question. If you want a written determination for more than one class of workers, complete a separate Form SS-8 for one worker from each class whose status is typical of that class. A written determination for any worker will apply to other workers of the same class if the facts are not materially different for these workers. Please provide a list of names and addresses of all workers potentially affected by this determination.

If you have a reasonable basis for not treating a worker as an employee, you may be relieved from having to pay employment taxes for that worker under section 530 of the 1978 Revenue Act. However, this relief provision cannot be considered in conjunction with a Form SS-8 determination because the determination does not constitute an examination of any tax return. For more information regarding section 530 of the 1978 Revenue Act and to determine if you qualify for relief under this section, you may visit the IRS website at *www.irs.gov*.

Privacy Act and Paperwork Reduction Act Notice. We ask for the information on this form to carry out the Internal Revenue laws of the United States. This information will be used to determine the employment status of the worker(s) described on the form. Subtitle C, Employment Taxes, of the Internal Revenue Code imposes employment taxes on wages. Sections 3121(d), 3306(a), and 3401(c) and (d) and the related regulations define employee and employer for purposes of employment taxes imposed under Subtitle C. Section 6001 authorizes the IRS to request information needed to determine if a worker(s) or firm is subject to these taxes. Section 6109 requires you to provide your taxpayer identification number. Neither workers nor firms are required to request a status determination, but if you choose to do so, you must provide the information requested on this form. Failure to provide the requested information may prevent us from making a status determination. If any worker or the firm has requested a status determination and you are being asked to provide information for use in that determination, you are not required to provide the requested information. However, failure to provide such information will prevent the IRS from considering it in making the status determination. Providing false or fraudulent information may subject you to penalties. Routine uses of this information include providing it to the Department of Justice for use in civil and criminal litigation, to the Social Security Administration for the administration of social security programs, and to cities, states, and the District of Columbia for the administration of their tax laws. We may also disclose this information to other countries under a tax treaty, to federal and state agencies to enforce federal nontax criminal laws, or to federal law enforcement and intelligence agencies to combat terrorism. We may provide this information to the affected worker(s), the firm, or payer as part of the status determination process.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by section 6103.

The time needed to complete and file this form will vary depending on individual circumstances. The estimated average time is: Recordkeeping, 22 hrs.; Learning about the law or the form, 47 min.; and Preparing and sending the form to the IRS, 1 hr., 11 min. If you have comments concerning the accuracy of these time estimates or suggestions for making this form simpler, we would be happy to hear from you. You can write to the Internal Revenue Service, Tax Products Coordinating Committee, SE:W:CAR:MP:T:T:SP, 1111 Constitution Ave. NW, IR-6406, Washington, DC 20224. Do not send the tax form to this address. Instead, see *Where To File* on page 4.

Form **8919**

Department of the Treasury
Internal Revenue Service

Uncollected Social Security and Medicare Tax on Wages

▶ See instructions on back.

▶ Attach to Form 1040, Form 1040NR, Form 1040NR-EZ, Form 1040-SS, or Form 1040-PR.

OMB No. 1545-0074

2007

Attachment Sequence No. **72**

Name of person who must file this form. If married, complete a separate Form 8919 for each spouse who must file this form.

Social security number

Who must file. You must file Form 8919 if **all** of the following apply.

- You performed services for a firm.
- The firm did not withhold your share of social security and Medicare taxes from your pay.
- Your pay from the firm was not for services as an independent contractor.
- One or more of the reasons listed below under *Reason codes* apply to you.

Reason codes: For each firm listed below, enter the applicable reason code(s) for filing this form in column (c). If none of the reason codes apply to you, but you believe you should have been treated as an employee, enter reason code G, and file Form SS-8 on or before the date you file your tax return.

A I filed Form SS-8 and received a determination letter stating that I am an employee of this firm.

B I was designated as a "section 530 employee" by my employer or by the IRS prior to January 1, 1997.

C I received other correspondence from the IRS that states I am an employee.

D I was previously treated as an employee by this firm and am performing services in a substantially similar capacity and under substantially similar direction and control. (You must also enter reason code G.)

E My co-workers, performing substantially similar services under substantially similar direction and control, are treated as employees. (You must also enter reason code G.)

F My co-workers, performing substantially similar services under substantially similar direction and control, filed Form SS-8 for this firm and received a determination that they were employees. (You must also enter reason code G.)

G I filed Form SS-8 with the IRS and have not received a reply.

	(a) Name of firm	(b) Firm's federal identification number (see instructions)	(c) Enter reason code(s) from above	(d) Date IRS determination or correspondence was received (MM/DD/YYYY) (see instructions)	(e) Check if Form 1099-MISC was received	(f) Total wages received with no social security or Medicare tax withholding and not reported on Form W-2
1					☐	
2					☐	
3					☐	
4					☐	
5					☐	

6	**Total wages.** Combine lines 1 through 5 in column (f). Enter here and include on Form 1040, line 7, Form 1040NR, line 8, or Form 1040NR-EZ, line 3		6	
7	Maximum amount of wages subject to social security tax	7 97,500.00		
8	Total social security wages and tips (total of boxes 3 and 7 on Form(s) W-2) or railroad retirement (tier 1) compensation, and unreported tips subject to social security tax from Form 4137, line 10	8		
9	Subtract line 8 from line 7. If line 8 is more than line 7, enter -0- here and on line 10		9	
10	Wages subject to social security tax. Enter the smaller of line 6 or line 9		10	
11	Multiply line 10 by .062 (social security tax rate)		11	
12	Multiply line 6 by .0145 (Medicare tax rate)		12	
13	Add lines 11 and 12. Enter here and on Form 1040, line 59, Form 1040NR, line 54, or Form 1040NR-EZ, line 16 ▶		13	

General Instructions

Purpose of form. Use Form 8919 to figure and report your share of the uncollected social security and Medicare taxes due on your compensation if you were an employee but were treated as an independent contractor by your employer. By filing this form, your social security and Medicare taxes will be credited to your social security record. For an explanation of the difference between an independent contractor and an employee, see Pub. 1779, Independent Contractor or Employee.

Do not use this form for services you performed as an independent contractor. Instead, use Schedule C (Form 1040), Profit or Loss From Business, or Schedule C-EZ (Form 1040), Net Profit From Business, to report the income. And use Schedule SE (Form 1040), Self-Employment Tax, to figure the tax on net earnings from self-employment.

Firm. For purposes of this form, the term "firm" means any individual, business enterprise, company, non-profit organization, state, or other entity for which you performed services. This firm may or may not have paid you directly for these services.

Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding. File this form if you want the IRS to determine whether you are an independent contractor or an employee. See the form instructions for information on completing the form.

Section 530 employee. A section 530 employee is one who was determined to be an employee by the IRS prior to January 1, 1997, but whose employer has been granted relief from payment of employment taxes under Section 530 of the Revenue Act of 1978.

Specific Instructions

Lines 1 through 5. Complete a separate line for each firm. If you worked as an employee for more than 5 firms in 2007, attach additional Form(s) 8919 with lines 1 through 5 completed. Complete lines 6 through 13 on only one Form 8919. The line 6 amount on that Form 8919 should be the combined totals of all lines 1 through 5 of all your Forms 8919.

Column (a). Enter the name of the firm for which you worked. If you received a Form 1099-MISC from the firm, enter the firm's name exactly as it is entered on Form 1099-MISC.

Column (b). The federal identification number for a firm can be an employer identification number (EIN) or a social security number (SSN) (if the firm is an individual). An EIN is a nine-digit number assigned by the IRS to a business. Enter an EIN like this: XX-XXXXXXX. Enter an SSN like this: XXX-XX-XXXX. If you received a Form 1099-MISC from the firm, enter the firm's federal identification number that is entered on Form 1099-MISC. If you do not know the firm's federal identification number, you can use Form W-9, Request for Taxpayer Identification Number and Certification, to request it from the firm. If you are unable to obtain the number, enter "unknown."

Column (c). Enter the reason code for why you are filing this form. You can enter more than one reason code for a firm. If none of the reason codes apply to you, but you believe you should have been treated as an employee, enter reason code G, and file Form SS-8 on or before the date you file your tax return.

If you enter reason code D and you are not certain about your worker status, you should file Form SS-8 to request a determination of your worker status. Also enter reason code G.

If you enter reason code E or F, you should file Form SS-8 to request a determination of your worker status. Also enter reason code G.

If you enter reason codes D, E, F, or G, you or the firm that paid you may be contacted for additional information. Use of these reason codes is not a guarantee that the IRS will agree with your worker status determination. If the IRS does not agree that you are an employee, you may be billed for the additional tax, penalties, and interest resulting from the change to your worker status.

Column (d). Complete only if reason code A, B, or C is entered in column (c).

Paperwork Reduction Act Notice. We ask for the information on this form to carry out the Internal Revenue laws of the United States. You are required to give us the information. We need it to ensure that you are complying with these laws and to allow us to figure and collect the right amount of tax.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by Internal Revenue Code section 6103.

The average time and expenses required to complete and file this form will vary depending on individual circumstances. For the estimated averages, see the instructions for your income tax return.

If you have suggestions for making this form simpler, we would be happy to hear from you. See the instructions for your tax return.

Practical Contract Lawyering

PLF Coverage

Kimi Nam, PLF Excess Administrator

PLF COVERAGE

Kimi Nam
PLF Staff Attorney
Excess Program Administrator

Are you in or are you out?

- All active members of the Oregon State Bar engaged in the private practice of law whose principal office is in Oregon are required to participate in the PLF's primary coverage plan. PLF Policy 3.100; ORS 9.080(2)(a)

Exemptions from PLF participation

PLF Policy 3.150(G)(7)
Law Clerks
Supervised Attorneys

How to maintain your exemption:

- Your work is reviewed & supervised by an attorney with PLF coverage.
- You do not make any strategy or case decisions.
- You do not hold yourself out to any client as an attorney or represent any party.
- You do not sign any pleadings or briefs.
- You do not attend any depositions as attorney of record.

Maintaining your exemption:

- You make no court appearances.
- You do not use the title "attorney," attorney at law" or "lawyer" on any correspondence or documents.
- You are not listed in the firm name or firm letterhead as an attorney or firm member.

Legal Malpractice Claims

There are no guarantees in life.

Reduce your exposure to malpractice claims by:

- Directing any work that you do to the hiring attorney and never send any work directly to the client.
- Do not participate in or conduct any client interviews as an attorney.
- Do not discuss the case (formally or informally) with the client.
- Do not correspond with the client.

Tips for Contract Lawyers

- Permissible to have a business card that lists you as "attorney at law." It is recommended that you have two sets – one for attorneys you work for; the other to give to witnesses, experts, clients.
- Incorporate the PLF exemption guidelines into your employment contract.

PLF Coverage Concerns

- Does PLF primary coverage stack?
- Should a contract lawyer purchase PLF excess coverage?
  - Generally a supervised contract lawyer's work is covered under the law firm's PLF excess plan.
  - Exceptions from coverage:
    - Coverage issues
    - Firm's coverage limits have been exhausted
    - The contract attorney is providing specialized legal services that is not being reviewed by the firm i.e. preparation of a Qualified Domestic Relations Order (QDRO).
- What is your exposure if you discover a malpractice issue during the course of an assignment?
- What if you are not provided proper supervision?

Questions or Concerns?

Kimi Nam
PLF Staff Attorney
Excess Program Administrator
(503) 639-6285
kimin@osbplf.org

Jeff Crawford
Director of Administration
Director of Excess Program
(503) 639-6911 ext. 455
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Practical Contract Lawyering

Ethical Considerations for Contract Lawyers

Helen Hierschbiel, Deputy General Counsel, Oregon State Bar

Ethical Considerations for Contract Lawyers

Table of Contents

PLF Contract Lawyering CLE
May 1, 2008 – 11:30 a.m. to 12:15 p.m.

Ethical Considerations for Contract Lawyers
Q & A

The questions in this segment will touch on:

- Fee Arrangements
- Confidentiality
- Conflicts of Interest
- The Duty of Loyalty
- Withdrawal from a Contract Assignment and
- What to do about Client Complaints and Potential Malpractice

Fee Arrangements

1. Is client consent required before a firm can hire a contract lawyer to work on a client's matter?

2. If consent is required, must the firm reveal the terms of the underlying fee arrangement with the contract lawyer?

3. May a contract lawyer take a percentage of a contingent fee as payment on a contract assignment?

4. If yes, does this constitute a "division of fees?" Must this be disclosed to the underlying client? How?

Confidentiality

5. Should the contract lawyer have unfettered access to the hiring firm's computer network? If not, why not?

6. Should the contract lawyer have unfettered access to the hiring firm's physical client files? If not, why not?

Ethical Considerations for Contract Lawyers
Q & A

Confidentiality, Continued

7. Is there an issue with client confidentiality if the contract lawyer uses the hiring firm's time and billing software? If the contract lawyer's access to information is limited only to those matters he or she is working on, does that restriction adequately address any concerns?

8. Some contract lawyers work out of their own office. Other contract lawyers work at the office of the hiring firm using law firm staff and law firm equipment. Does this pose a confidentiality problem?

Conflicts

9. Conflicts can be a thorny issue for contract lawyers. Let's start with the fundamentals – who is the client? The hiring firm, the underlying client, or both?

10. Should prospective contract assignments be tracked in the conflict system if the contract lawyer obtains confidential information in the course of discussing a potential assignment with a hiring attorney?

11. Are there any inherent problems in working simultaneously as a contract lawyer and as a sole practitioner with your own client base?

Duty of Loyalty

12. Do contract lawyers owe a "duty of loyalty" to the hiring firm not to solicit away the firm's clients? Is there any circumstance where solicitation of the hiring firm's clients would be permissible?

Ethical Considerations for Contract Lawyers Q & A

Withdrawal from a Contract Assignment/Disputes with Hiring Firm

13. What ethical duties does a contract lawyer have upon (early) termination of an assignment?

14. In the event of a dispute between the hiring lawyer and contract lawyer regarding ownership of physical files, records, electronic data, etc., who prevails from an ethical standpoint if the parties did not enter into a written agreement addressing these issues?

Touchy Issues – Client Complaints and Potential Malpractice

15. If the underlying client contacts the contract lawyer with a complaint about her legal bill or the work done on her case, what should the contract lawyer do?

16. What are the ethical responsibilities of a contract lawyer if he or she discovers malpractice on the part of the hiring lawyer during the course of an assignment?

SELECTED OREGON RULES OF PROFESSIONAL CONDUCT

Effective January 1, 2005; as amended thru December 2007

Rule 1.0 TERMINOLOGY

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(d) "Firm" or "law firm" denotes a lawyer or lawyers, including “Of Counsel” lawyers, in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a private or public legal aid or public defender organization, a legal services organization or the legal department of a corporation or other public or private organization. Any other lawyer, including an office sharer or a lawyer working for or with a firm on a limited basis, is not a member of a firm absent indicia sufficient to establish a de facto law firm among the lawyers involved.

…….

(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.

……..

Rule 1.5 FEES

(a) A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee or a clearly excessive amount for expenses.

(b) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(c) A lawyer shall not enter into an arrangement for, charge or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of spousal or child support or a property settlement; or

(2) a contingent fee for representing a defendant in a criminal case.

(d) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the client gives informed consent to the fact that there will be a division of fees, and

(2) the total fee of the lawyers for all legal services they rendered the client is not clearly excessive.

(e) Paragraph (d) does not prohibit payments to a former firm member pursuant to a separation or retirement agreement, or payments to a selling lawyer for the sale of a law practice pursuant to Rule 1.17.

Rule 1.6 CONFIDENTIALITY

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;

(2) to prevent reasonably certain death or substantial bodily harm;

(3) to secure legal advice about the lawyer's compliance with these Rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(5) to comply with other law, court order, or as permitted by these Rules; or

(6) to provide the following information in discussions preliminary to the sale of a law practice under Rule 1.17 with respect to each client potentially

subject to the transfer: the client's identity; the identities of any adverse parties; the nature and extent of the legal services involved; and fee and payment information. A potential purchasing lawyer shall have the same responsibilities as the selling lawyer to preserve information relating to the representation of such clients whether or not the sale of the practice closes or the client ultimately consents to representation by the purchasing lawyer.

Rule 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client;

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer; or

(3) the lawyer is related to another lawyer, as parent, child, sibling, spouse or domestic partner, in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter.

(b) Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and

(4) each affected client gives informed consent, confirmed in writing.

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Rule 1.9 DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless each affected client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter, unless each affected client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

(d) For purposes of this rule, matters are "substantially related" if (1) the lawyer's representation of the current client will injure or damage the former client in connection with the same transaction or legal dispute in which the lawyer previously represented the former client; or (2) there is a substantial risk that confidential factual information as would normally have been obtained in the prior representation of the former client would materially advance the current client's position in the subsequent matter.

Rule 1.10 IMPUTATION OF CONFLICTS OF INTEREST; SCREENING

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer or on Rule 1.7(a)(3) and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9, unless the personally disqualified lawyer is screened from any form of participation or representation in the matter. For purposes of this rule, screening requires that:

(1) the personally disqualified lawyer shall serve on the lawyer's former law firm an affidavit attesting that during the period of the lawyer's disqualification the personally disqualified lawyer will not participate in any manner in the matter or the representation and will not discuss the matter or the representation with any other firm member; and the personally disqualified lawyer shall serve, if requested by the former law firm, a further affidavit describing the lawyer's actual compliance with these undertakings promptly upon final disposition of the matter or representation;

(2) at least one firm member shall serve on the former law firm an affidavit attesting that all firm members are aware of the requirement that the personally disqualified lawyer be screened from participating in or discussing the matter or the representation and describing the procedures being followed to screen the personally disqualified lawyer; and at least one firm member shall serve, if requested by the former law firm, a further affidavit describing the actual compliance by the firm members with the procedures for screening the personally disqualified lawyer promptly upon final disposition of the matter or representation; and

(3) no violation of this Rule shall be deemed to have occurred if the personally disqualified lawyer does not know that the lawyer's firm members have accepted employment with respect to a matter which would require the making and service of such affidavits and if all firm members having knowledge of the accepted employment do not know of the disqualification.

(d) A disqualification prescribed by this rule may be waived by the affected clients under the conditions stated in Rule 1.7.

(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

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Rule 1.15-1 SAFEKEEPING PROPERTY

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(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The

lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

Rule 1.16 DECLINING OR TERMINATING REPRESENTATION

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(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers, personal property and money of the client to the extent permitted by other law.

FORMAL OPINION NO. 2005-44

Conflicts of Interest, Current Clients: Part-Time Nonlawyer Employees

Facts:

Law Firm *A* presently employs Nonlawyer on a part-time basis. Nonlawyer also proposes to work part-time for Law Firm *B*. Law Firm *A* and Law Firm *B* are presently on opposite sides of several matters.

Question:

May Law Firm *A* and Law Firm *B* simultaneously employ Nonlawyer?

Conclusion:

Yes, qualified.

Discussion:

The answer to this question depends in part on the nature of Nonlawyer's employment by the two firms and in part on what Nonlawyer may actually know. If Nonlawyer's employment does not provide Nonlawyer with access to information relating to the representation of a client[1] of either firm, there is no reason to prohibit the simultaneous employment. This conclusion would likely be true if, for example, Nonlawyer is employed by both firms as a janitor or a messenger. If, on the other hand, Nonlawyer is employed in a position that gives Nonlawyer access to information relating to the representation of a client (for example, Nonlawyer is employed as a secretary or legal assistant), the answer becomes more complex. Oregon RPC 1.10(a) provides:

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[1] Oregon RPC 1.0(f) provides:

> "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.

> While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9. . . .

Oregon RPC 1.0(d) provides:

> "Firm" or "law firm" denotes a lawyer or lawyers, including "Of Counsel" lawyers, in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a private or public legal aid or public defender organization, a legal services organization or the legal department of a corporation or other public or private organization. Any other lawyer, including an office sharer or a lawyer working for or with a firm on a limited basis, is not a member of a firm absent indicia sufficient to establish a de facto law firm among the lawyers involved.

The net effect of these two sections is that when a single lawyer is employed by two firms, the firms are considered as a single unit for conflict-of-interest purposes. It therefore follows that the handling of opposite sides of a matter by the two firms that have a common lawyer would give rise to a conflict of interest under Oregon RPC 1.7(a)[2] and

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[2] Oregon RPC 1.7(a) provides:

> Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client;
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer; or
>
> (3) the lawyer is related to another lawyer, as parent, child, sibling, spouse or domestic partner, in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter.

would be prohibited under Oregon RPC 1.7(b).[3] Cf. OSB Formal Ethics Op No 2005-40 and sources cited therein.

On the other hand, there is no clear basis for applying these rules directly to nonlawyers. The only directly applicable rule in such situations is Oregon RPC 5.3(a), which provides:

> [A] lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.

If the lawyer is prohibited by Oregon RPC 1.6(a)[4] from revealing information relating to the representation of a client, so too would the Nonlawyer assistant.

Thus, as long as a firm takes reasonable care[5] to make sure that Nonlawyer has not in fact worked on or acquired information relating to the representation of a client with respect to any matter on which the two firms' clients are adverse, the firm has met its obligation under Oregon RPC 5.3. *Cf*. OSB Formal Ethics Op No 2005-50. If, on the other hand, a firm discovers or should have discovered that Nonlawyer has acquired

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[3] Oregon RPC 1.7(b) provides:

> Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and
>
> (4) each affected client gives informed consent, confirmed in writing.

[4] Oregon RPC 1.6(a) provides:

> 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).

[5] Oregon RPC 1.0(h) provides:

> "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question, except that for purposes of determining a lawyer's knowledge of the existence of a conflict of interest, all facts which the lawyer knew, or by the exercise of reasonable care should have known, will be attributed to the lawyer. A person's knowledge may be inferred from circumstances.

information relating to the representation of a client with respect to any matter on which the firms are adverse, simultaneous employment would be improper unless both clients consent after full disclosure. *Cf*. Oregon RPC 1.6(a); OSB Formal Ethics Op Nos 2005-23, 2005-17. *See also* Oregon RPC 1.0(g).[6]

Approved by Board of Governors, August 2005.

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[6] Oregon RPC 1.0(g) provides:

> "Informed Consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.

COMMENT: For additional information on this general topic and related subjects, see THE ETHICAL OREGON LAWYER §§9.22–9.23, 12.3–12.5 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §123 (2003); and ABA Model Rules 1.0(c), 1.6, 1.7, 1.10(a), 5.3(a).

See also Barbara Fishleder, *Office Sharing,* 52 OSB BULLETIN 23 (June 1992). *Cf*. *State v*. *Charlesworth/Parks,* 151 Or App 100, 951 P2d 153 (1997) (*former* DR 4-101(D) imposed duty to exercise reasonable care to prevent employees from disclosing client secrets, but this duty is not a ground to suppress evidence obtained as result of disclosure).

FORMAL OPINION NO. 2005-50

Conflicts of Interest, Current Clients: Office Sharers Representing Opposing Parties

Facts:

Lawyer *A* and Lawyer *B,* who maintain independent practices, share office space. Both lawyers handle personal injury litigation.

Questions:

1. May Lawyer *A* represent the plaintiff in a lawsuit in which Lawyer *B* represents the defendant?

2. Would the answer be different if Lawyer *A* and Lawyer *B* share a common employee who is in possession of confidences and secrets of both Lawyer *A*'s clients and Lawyer *B*'s clients?

Conclusions:

1. Yes, qualified.

2. Yes.

Discussion:

If Lawyer *A* and Lawyer *B* were part of the same firm, the simultaneous representation of a plaintiff and a defendant in the same litigation would give rise to a prohibited, nonwaivable conflict of interest. See, e.g., Oregon RPC 1.7,[1] discussed in OSB Formal Ethics Op No 2005-28.

Nevertheless, and as long as Lawyer *A* and Lawyer *B* (1) do not hold themselves out to the public as members of the same firm through

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[1] Oregon RPC 1.7 provides:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client;

joint advertising, a joint letterhead, or otherwise; (2) respect the confidentiality of information relating to the representation of their respective clients and cause their employees to do so; and (3) keep their respective files separately, there is no reason why Lawyer *A* and Lawyer *B* cannot represent opposite parties. *See also* Oregon RPC 1.0(d).[2]

We do not believe that these requirements prohibit office sharers from using the same telephone system or the same file room as long as the files are physically separated and the appropriate limitations on access to files are made clear to, and are observed by, the lawyers and their employees. If a common telephone system is used, however, office sharers may not represent adverse parties unless they have taken steps to assure that telephone messages that contain confidential client information or legal advice (i.e., information relating to the representation of a

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> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer; or
>
> (3) the lawyer is related to another lawyer, as parent, child, sibling, spouse or domestic partner, in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter.
>
> (b) Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and
>
> (4) each affected client gives informed consent, confirmed in writing.

[2] Oregon RPC 1.0(d) provides:

> "Firm" or "law firm" denotes a lawyer or lawyers, including "Of Counsel" lawyers, in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a private or public legal aid or public defender organization, a legal services organization or the legal department of a corporation or other public or private organization. Any other lawyer, including an office sharer or a lawyer working for or with a firm on a limited basis, is not a member of a firm absent indicia sufficient to establish a de facto law firm among the lawyers involved.

client[3]) are not given to or transmitted by shared personnel. Similarly, mail must not be opened by shared personnel.

If, on the other hand, Lawyer *A* and Lawyer *B* share a secretary or other employee who is in possession of the confidences or secrets of both Lawyer *A*'s clients and Lawyer *B*'s clients, or if any of the other steps outlined above are not taken, the simultaneous representations of the plaintiff and the defendant would be prohibited by either if not both Oregon RPC 1.6 and Oregon RPC 1.7. *See also*

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[3] Oregon RPC 1.6 provides, in pertinent part:

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
>
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;
>
> (2) to prevent reasonably certain death or substantial bodily harm;
>
> (3) to secure legal advice about the lawyer's compliance with these Rules;
>
> (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
>
> (5) to comply with other law, court order, or as permitted by these Rules; or
>
> (6) to provide the following information in discussions preliminary to the sale of a law practice under Rule 1.17. . . .

Oregon RPC 1.0(f).[4] *Cf*. OSB Formal Ethics Op Nos 2005-44, 2005-28, 2005-12.

Approved by Board of Governors, August 2005.

[4] Oregon RPC 1.0(f) provides:

> 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 by held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

COMMENT: For additional information on this general topic and related subjects, see THE ETHICAL OREGON LAWYER §§2.19, 9.23, 12.3–12.5 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §123 (2003); and ABA Model Rules 1.6, 1.7. *See also* Barbara Fishleder, *Office Sharing,* 52 OSB BULLETIN 23 (June 1992). *Cf. State v. Charlesworth/Parks,* 151 Or App 100, 951 P2d 153 (1997) (*former* DR 4-101(D) imposed duty to exercise reasonable care to prevent employees from disclosing client secrets; but this rule is not ground to suppress evidence obtained as result of the disclosure).

FORMAL OPINION NO. 2005-70

Lawyer Changing Firms: Duty of Loyalty

Facts:

Lawyer is an associate or partner at Firm *A*. Lawyer is considering leaving Firm *A* and going to Firm *B*.

Questions:

1. Before Lawyer leaves Firm *A*, may Lawyer inform clients for whom Lawyer does work at Firm *A* of Lawyer's intention to go to Firm *B*?

2. If Lawyer leaves Firm *A* and joins Firm *B*, may Lawyer take the files of clients for whom Lawyer has done or is doing work?

3. After Lawyer leaves, may Lawyer personally contact clients for whom Lawyer did work while at Firm *A* to solicit their business for Firm *B*?

Conclusions:

1. See discussion.

2. Yes, qualified.

3. Yes, qualified.

Discussion:

1. *Contact with Clients While Still at Firm A.*

The primary duty of all lawyers is the fiduciary duty that lawyers owe to their clients. *Cf.* OSB Formal Ethics Op No 2005-26. Depending on the nature and status of Lawyer's work, this duty may well mean that advance notification is necessary to permit the clients to decide whether they wish to stay with Firm *A*, to go with Lawyer to Firm *B*, or to pursue some other alternative.

On the other hand, Lawyer also owes duties to Firm *A*, Lawyer's current firm, arising out of the contractual, fiduciary, or agency relationship between Lawyer and Firm *A*. This contractual, fiduciary, or agency duty may be violated if, while still being compensated by Firm *A*,

Lawyer endeavors to take clients away from Firm *A*. *Cf*. OSB Formal Ethics Op No 2005-60; ABA Formal Ethics Op No 99-414 (1999); *Joseph D. Shein, P.C. v. Myers,* 576 A2d 985 (Pa 1990); *Adler, Barish, Daniels, Levin v. Epstein,* 393 A2d 1175, 1182–1186 (Pa 1978). If Lawyer's conduct would, under the circumstances, amount to "conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law" in violation of Oregon RPC 8.4(a)(3), Lawyer would be subject to discipline. Absent specific facts, we cannot say whether that would be the case here.

Regardless of the contractual, fiduciary, or agency relationship between Lawyer and Firm *A,* however, it is clear under Oregon RPC 8.4(3) that Lawyer may not misrepresent Lawyer's status or intentions to others at Firm *A*. *See In re Smith,* 315 Or 260, 843 P2d 449 (1992); *In re Murdock,* 328 Or 18, 968 P2d 1270 (1998) (although not expressly written, implicit in disciplinary rules and in duty of loyalty arising from lawyer's contractual or agency relationship with his or her law firm is duty of candor toward that law firm). *Cf. In re Hiller,* 298 Or 526, 694 P2d 540 (1985); *In re Houchin,* 290 Or 433, 622 P2d 723 (1981).

2. *Control over Client Files and Property*.

Oregon RPC 1.15-1(a), (d), and (e) provide, in pertinent part:

> (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession separate from the lawyer's own property. Funds, including advances for costs and expenses and escrow and other funds held for another, shall be kept in a separate "Lawyer Trust Account" maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Each lawyer trust account shall be an interest bearing account in a financial institution selected by the lawyer or law firm in the exercise of reasonable care. Lawyer trust accounts shall conform to Rule 1.15-2. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.
>
> . . . .
>
> (d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

> (e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

Pursuant to these sections, and assuming that Firm *A* does not have a valid and enforceable lien on any client property for unpaid fees, Firm *A* must promptly surrender client property to Lawyer, if the clients so request. *Cf*. OSB Formal Ethics Op Nos 2005-60, 2005-90, 2005-125.[1]

With respect to any portion of the file that does not constitute client property, it is necessary to consider Oregon RPC 1.16(d):

> (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers, personal property and money of the client to the extent permitted by other law.

As a practical matter, and assuming again that Firm *A* does not have a valid and enforceable lien, the only way to "protect a client's interests" would be to turn over all parts of the file that a client might reasonably need. See OSB Formal Ethics Op No 2005-125, regarding payment for photocopy costs and the identification of certain documents that may need to be provided to a client who requests them.

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[1] As noted in OSB Formal Ethics Op No 2005-60, Firm *A* may not insist that clients physically pick up their files in person if Firm *A* receives written directions from the clients to send the files elsewhere. In the period of time before receiving a client's decision about who will handle a matter, neither Firm *A* nor Lawyer should deny each other access to information about a client or a matter that is necessary to protect a client's interests. *Cf*. Oregon RPC 1.1 (lawyer shall provide competent representation to client; competent representation requires legal knowledge, skill, thoroughness, and preparation reasonably necessary for representation); Oregon RPC 1.3 (lawyer shall not neglect legal matter entrusted to lawyer).

3. *Solicitation of Former Clients*.

Lawyers are not prohibited from soliciting the clients of other lawyers. Although in-person or telephone solicitation is generally prohibited by Oregon RPC 7.3(a),[2] Oregon RPC 7.3(a)(2) contains an exception for former clients, subject to the limitations in Oregon RPC 7.3(b)(3). Clients for whom Lawyer worked while at Firm *A* are Lawyer's former clients. Lawyer also may solicit the former clients in writing if the requirements of Oregon RPC 7.1(a)–(c) are met.

Approved by Board of Governors, August 2005.

[2] Oregon RPC 7.3(b) provides:

> (b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:
>
> (1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the prospective client is such that the person could not exercise reasonable judgment in employing a lawyer;
>
> (2) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or
>
> (3) the solicitation involves coercion, duress or harassment.

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§7.2, 7.6, 7.39, 11.14–11.15, 12.22, 12.28–12.30 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§9(3), 16, 33, 43–46 (2003); and ABA Model Rules 1.1, 1.3, 1.15–1.16(d), 7.3(a)–(b), 8.4(c). *See also* Washington Informal Ethics Op No 1702 (unpublished).

FORMAL OPINION NO. 2005-155

Conflicts of Interest: Multiple "Of Counsel" Relationships

Facts:

Lawyer *A* operates Law Firm 1 as a sole practitioner. Lawyer *A* is also Of Counsel to Law Firm 2 and is listed as such on Law Firm 2's letterhead. Lawyer *B* is a sole practitioner who wishes to be Of Counsel to Law Firm 1.

Question:

What conflict-of-interest issues are implicated by the proposed arrangement?

Conclusion:

See discussion.

Discussion:

The Oregon RPC do not provide a precise definition of the "Of Counsel" relationship, but such relationships clearly are permitted. Oregon RPC 1.0(d) provides:

> (d) "Firm" or "law firm" denotes a lawyer or lawyers, including "Of Counsel" lawyers, in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a private or public legal aid or public defender organization, a legal services organization or the legal department of a corporation or other public or private organization. Any other lawyer, including an office sharer or a lawyer working for or with a firm on a limited basis, is not a member of a firm absent indicia sufficient to establish a de facto law firm among the lawyers involved.

Oregon RPC 7.5(b) provides:

> (b) A lawyer may be designated "Of Counsel" on a letterhead if the lawyer has a continuing professional relationship with a lawyer or law firm, other than as a partner or associate.

As Of Counsel, Lawyer *B* is a member of Law Firm 1 and Lawyer *A* is a member of Law Firm 2. As a result, Law Firm 1, Law Firm 2, and Lawyer *B*'s sole practice will be treated as a single unit for conflict-of-interest purposes. The clients of Law Firm 2 are deemed to be clients of Law Firm 1 (through the Of Counsel relationship of Lawyer *A*

and Law Firm 2) while the clients of Law Firm 1 (including the clients of Law Firm 2), will be deemed to be clients of Lawyer *B*.

The Of Counsel relationship can and should be distinguished from the situation in which law firms, or a lawyer and a law firm, associate with each other or are employed as co-counsel on specific cases. An occasional collaboration with no indicia sufficient to establish a de facto law firm among the lawyers will avoid the implication that they are members of the same firm.

Approved by Board of Governors, August 2005.

COMMENT: *See* OSB Formal Ethics Op Nos 2005-50, 2005-44, 2005-12. For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §2.19 (Oregon CLE 2003) and RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§9, 123 (2003).

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 00-420
Surcharge to Client for Use of a Contract Lawyer

November 29, 2000

When costs associated with legal services of a contract lawyer are billed to the client as fees for legal services, the amount that may be charged for such services is governed by the requirement of Model Rule 1.5(a) that a lawyer's fee shall be reasonable. A surcharge to the costs may be added by the billing lawyer if the total charge represents a reasonable fee for services provided to the client. When legal services of a contract lawyer are billed to the client as an expense or cost, in the absence of any understanding to the contrary with the client, the client may be charged only the cost directly associated with the services, including expenses incurred by the billing lawyer to obtain and provide the benefit of the contract lawyer's services.

Introduction

This opinion addresses whether under the ABA Model Rules of Professional Conduct, a lawyer who retains the services of a contract lawyer (hereinafter "retaining lawyer") may add a surcharge when billing a client for the cost of services provided by a contract lawyer.[1] A "surcharge" is made when the retaining lawyer charges the client more for the services of the contract lawyer than the cost incurred by the retaining lawyer for obtaining those services, either directly or through the contract lawyer's agency or employer; in other words, a surcharge is profit.

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1. In many instances, the fee and cost structure for a legal engagement is the subject of an agreement between a client and a lawyer. This agreement, or a disclosure concerning fees and costs, may be required by the rules in some circumstances discussed here. Whether or not an agreement exists between the lawyer and her client as to how the costs of a contract lawyer will be billed, those costs must be reasonable. Most of the conclusions reached in this opinion are based upon the presumption that no such specific agreement exists.

This opinion does not address whether and in what circumstances disclosure to the client of a relationship of the retaining lawyer with a contract lawyer is required.

This opinion is based on the Model Rules of Professional Conduct and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, codes of professional responsibility, and opinions promulgated in the individual jurisdictions are controlling.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, 541 North Fairbanks Court, 14th Floor, Chicago, Illinois 60611-3314 Telephone (312)988-5300 CHAIR: Donald B. Hilliker, Chicago, IL ❑ Loretta C. Argrett, Washington, DC ❑ Jackson M. Bruce, Jr., Milwaukee, WI ❑ William B. Dunn, Detroit, MI ❑ James W. Durham, Philadelphia, PA ❑ Mark I. Harrison, Phoenix, AZ ❑ Daniel W. Hildebrand, Madison, WI ❑ William H. Jeffress, Jr., Washington, DC ❑ Bruce Alan Mann, San Francisco, CA [through 2000] ❑ M. Peter Moser, Baltimore, MD ❑ CENTER FOR PROFESSIONAL RESPONSIBILITY: George A. Kuhlman, Ethics Counsel; Eileen B. Libby, Associate Ethics Counsel

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The term "contract lawyer" is used in this opinion to mean any lawyer retained by a lawyer or law firm who is not employed permanently for general assignment by the lawyer or law firm engaged by the client. The relationship between a retaining lawyer and a contract lawyer can arise in a variety of ways.[2] Contract lawyers may be engaged to work on one or more specific matters. They may be employed either by the firm directly or assigned by an independent organization. In either case, the contract lawyer functions as a part of the legal services delivery group and reports to a retaining lawyer. Other contract lawyers are retained as specialists or special counsel to perform a specific service in a specific matter. A lawyer may be required to engage a specialist to assure competent representation, or obtain the services of a lawyer in another jurisdiction to provide required opinions or other assistance to the retaining lawyer. The work of the contract lawyer may be performed on the premises of the retaining lawyer or elsewhere and the degree of supervision will vary, as will the contract lawyer's participation in the general practice activities of the retaining lawyer or law firm.

Services of a contract lawyer may be billed to the client either as fees for legal services or as costs or expenses incurred by the retaining lawyer. Whether the cost attributable to a contract lawyer is billed as an expense or included in legal services fees is not addressed by the Model Rules and does not seem to be a matter of ethics. When a contract lawyer's services are billed with the retaining lawyer's as fees for legal services, however, the client's reasonable expectation is that the retaining lawyer has supervised the work of the contract lawyer or adopted that work as her own.

Billing Contract Lawyer Services as an Expense

In ABA Formal Opinion 93-379 (Billing for Professional Fees, Disbursements and Other Expenses), the Committee stated that lawyers should disclose to their

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Although the Committee finds no requirement under the rules for disclosing the identity of specific personnel assigned to a client's matter absent client inquiry, the Committee recognizes that client expectations and the overall client-lawyer relationship may make such disclosure desirable.

2. In ABA Formal Opinion 88-356 (Temporary Lawyers), *in* FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 35 (ABA 2000), the term "temporary lawyer" was used in examining the ethical obligations of law firms and temporary lawyers in general. The term was defined as meaning "a lawyer engaged by a firm for a limited period, either directly or through a lawyer placement agency." *Id.* at 35, n.1. This term would exclude lawyers who work part-time or full-time for an extended period for one firm exclusively, although without contemplation of permanent employment, as well as those who have an "of counsel" relationship or are associated as independent counsel on a particular case. It is the intent of this opinion to include any lawyer on temporary assignment for or associated on a non-permanent basis with a lawyer or law firm. As noted by Deborah L. Arron and Deborah Guyol, *Ethical Considerations Raised by the Use of Contract Attorneys*, *in* LAW PRACTICE MANAGEMENT, SOLO PRACTICE ISSUE, vol. 23, no. 1 (ABA, January/February 1997) (hereinafter "Arron and Guyol"), whether the temporary arrangement is short- or long-term makes little difference in applying ethical precepts.

clients the basis for the fee and any other charges to the client. That opinion provides the following as guidance:[3] fees for legal services should be inclusive of general office overhead in the absence of disclosure in advance of the engagement to the contrary;[4] in the absence of disclosure, it is improper to assess a surcharge on disbursements over and above the actual payment of funds to third persons made by the lawyer on the client's behalf, unless the lawyer herself incurs additional expenses beyond the actual cost of the disbursement item;[5] if a lawyer receives a discounted rate from a third party provider, it would be improper if she did not pass along the benefit of the discount to her client rather than charge the client the full rate and reserve profit to herself when billing as a disbursement;[6] in billing clients for fees and costs in connection with legal services, it is impermissible for a lawyer to create an additional source of profit for the law firm beyond that which is involved in the provision of professional services themselves (unless the client has agreed or consents otherwise).[7]

The analysis of billing expenses and disbursements in Opinion 93-379 is made in the context of goods or services of non-lawyers: expert witnesses, court stenographers, airfare, taxicabs, meals, hotel rooms, and internal expenses allocable to a client's matter for such things as photocopy paper, computer time, and messenger services. Thus, Opinion 93-379 does not speak directly to the subject of this opinion, contract lawyers, in the context of disbursements or expenses. We conclude in this opinion that the principles of Opinion 93-379 equally are applicable to surcharges for legal services provided by contract lawyers when billed to the client as a cost or expense.

Billing Contract Lawyer Services as Legal Services

Paragraph (a) of Rule 1.5 (Fees)[8] provides the overarching requirement that a lawyer's fee shall be reasonable and sets forth a list of factors to be considered in determining the reasonableness of a fee. The rule specifically does not address the individual components that, taken together, determine the actual amount of any legal fee, such as costs associated with delivering the legal services, or the part of a fee that might constitute the lawyer's profit. Certainly, the absence of a specific

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3. *See* FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 at 216. The principles in Opinion 93-379 were based liberally upon the desirability of promoting the lawyer-client relationship rather than on any specific requirement contained in the Model Rules.

4. *Id.* at 223.

5. *Id. See also* State Bar of Michigan Committee on Ethics Opinion Number RI-241 (August 10, 1995).

6. *Id.* at 223.

7. *Id.* at 224.

8. Rule 1.5(a) provides:

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

reference to a lawyer's profit in Rule 1.5 cannot reasonably be read to prohibit a lawyer from including a profit factor in her fees. It is implicit in Formal Opinion 93-379 that profit from providing legal services is expected and appropriate, as long as the total fee is reasonable.

Disclosure to a client of the basis or rate of a legal fee is required in Rule 1.5(b) and in Rule 1.5(c) applicable to contingent fees. Rule 1.5(b) provides that "[w]hen the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing representation."[9] Although Rule 1.5(b) requires communication with the client concerning fee basis and rate only when the client has not been represented regularly, the Committee believes that the spirit of this rule best is served by communication whenever the fee basis or rate structure for services provided to a regularly represented client changes.[10]

Some of the ethical issues affecting a retaining lawyer in her relationship with a temporary lawyer were addressed in ABA Formal Opinion 88-356.[11] The opinion discussed at length issues of fee sharing and disclosures required under Rule

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(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) whether the fee is fixed or contingent.

9. DR2-106 contained substantially the same factors listed in Rule 1.5(a) to determine reasonableness, but did not require that the basis of the fee be communicated to the client "preferably in writing" as does Rule 1.5(b). It is apparent that the reasonableness of a fee may be influenced by what services are provided by the retaining lawyer in relation to what is effectively "subcontracted" and billed as an expense. For example, if a lawyer representing a client in a contingent fee matter contracted out all work except for the trial itself and passed along contract lawyers' work as expenses over and above the contingent fee, the reasonableness of the resulting cost of legal services to the client would be subject to examination, even assuming compliance with Rule 1.5(c). Courts generally will not enforce contingent fee contracts that result in fees not reflecting the reasonable value of services. *See* ROBERT L. ROSSI, ATTORNEY'S FEES § 5.15 (2d ed. 1995). The same analysis pertains to any fee arrangement.

10. Both Rule 1.5(b) and DR2-106 require communication with the client when not regularly represented by the lawyer. In the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 50 (2000) ("the Restatement"), a lawyer is required to communicate the fee basis to the client before or within a reasonable time after beginning to represent the client *in a matter*, unless the lawyer previously has represented the client on the same basis or at the same rate as would be proposed. Thus, the standard expressed in the Restatement would require communication of any different fee basis as to successive matters for the same client.

11. *See supra* text accompanying note 2.

1.5(e),[12] but the subject of surcharges on fees paid for services of contract lawyers was not subjected to analysis in the context of billing practices.[13] In discussing payments made to a temporary lawyer placement agency, including the temporary lawyer's compensation, Opinion 88-356 stated:

> A legal fee is paid by a client to a lawyer. Here the law firm bills the client and *is paid a legal fee* for services to the client. The fee paid by the client to the firm ordinarily would include the total paid the lawyer and the agency, and *also may include charges for overhead and profit.*[14]

Neither Rule 1.5(e) nor Rule 1.5(b) would require disclosure to the client of the share of the fees each lawyer receives when fees for services are being divided, or of the relationship between the costs of a lawyer assigned to work on a matter and the billing rate for that lawyer.

Opinion 88-356 may be read to imply that where charges incurred by the retaining lawyer for temporary lawyers are billed to the client as an expense or disbursement, the client must be advised of the *compensation* arrangement between the retaining lawyer and the contract lawyer or the contract lawyer's agency.[15] There is no provision in the rules that requires disclosure of how disbursements are calculated,[16] or that distinguishes different duties of disclosure of

12. Rule 1.5(e) provides:

> (e) A division of a fee between lawyers who are not in the same firm may be made only if:
>
> (1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;
>
> (2) the client is advised of and does not object to the participation of all the lawyers involved; and
>
> (3) the total fee is reasonable.

13. FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 at 44-47.

14. *Id.* at 46 (emphasis supplied).

15. Many state and local bars have taken the position that the use of a contract or temporary lawyer always must be disclosed to the client, *e.g.*, Los Angles County Bar Association Formal Opinion 473 (1993); Ohio Bd. of Commissioners on Grievances and Discipline Opinion No. 90-23, 1990 WL 640499 (December 14, 1990); New Hampshire Opinion 1989-90/9 (Feb. 25, 1990); Association of the Bar of the City of the City of New York Committee on Professional and Judicial Ethics Formal Opinion 1989-2 (May 10, 1989); *see also* Oliver v. Board of Governors, Ky. Bar Ass'n, 779 S.W.2d 212, 216 (Ky. 1989) (cited in Arron and Guyon at 34, *supra* note 2 and accompanying text). Arron and Guyon conclude that a conservative reading of the requirements of Rule 1.5(e) suggests that disclosure is necessary whenever a contract lawyer's work is paid for by the client, regardless of whether it is paid as a disbursement or included in legal services. Illinois State Bar Advisory Opinion 98-02 (September 1998) apparently construes Formal Opinion 88-356 as meaning that disclosure is required when a contract lawyer is not working under close supervision or payment is charged as a disbursement.

16. *See* FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 at 222-23. Although Opinion 93-379 does not attach any significance to the word "disbursement," the Committee suggests that use of that term denotes what has been spent by the billing lawyer, as distinguished from an expense incurred by the billing lawyer. "Expense"

the involvement of contract lawyers predicated on how their services will be charged to the client. Opinion 88-356 should be regarded as supporting the conclusion that the role of contract lawyers retained to work on a client's matter(s) should be disclosed to the client (when not otherwise required by Rules 1.5(b), 1.5(c), or 1.5(e)) based on the relationship of the contract lawyers with the firm, particularly when the work of the contract lawyer will not be supervised within the justifiable expectations of the client. The bases for disclosure, independent of Rule 1.5, are found in Rule 1.2(a) (Scope of Representation), requiring discussion with the client concerning the means by which the representation is pursued; Rule 1.4 (Communication), a general requirement for communication concerning the representation; and Rule 7.5(d) (Firm Names and Letterheads), which prohibits misrepresenting a relationship among lawyers.

The matter of surcharges on legal fees has been considered in several jurisdictions. Recent ethics opinions in Virginia, Colorado, and the District of Columbia[17] have approved the right of a retaining lawyer to charge the client more for the services of a contract lawyer than is paid to the contract lawyer when those costs are billed to the client as legal services, subject only to the obligation of Rule 1.5(a) to charge a reasonable fee. There is no duty to disclose the surcharge when the work of the contract lawyer is supervised or, absent supervision, when the work of the contract lawyer is adopted as the work of the retaining lawyer.

Each of these recent opinions also expressly or impliedly observes that it is improper to add surcharges on payments made to a contract lawyer when billed to the client as disbursements unless there is an agreement with the client or disclosure about a markup in advance of the billing. Virginia Opinion 1712 suggests that rather than bill a placement agency's fee as a disbursement with a disclosed markup, the firm simply should bill for services in an amount reflecting the marked-up charge.[18]

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may be a more comprehensive term that would include charges for additional costs directly associated with a particular disbursement.

17. Virginia Legal Ethics Opinion 1735 (October 20, 1999); Colorado Bar Association Ethics Committee Formal Opinion 105 (May 22, 1999); Virginia Legal Ethics Opinion 1712 (July 22, 1998); District of Columbia Bar Legal Ethics Committee Opinion 284 (Sept. 15, 1990).

18. In Mahaney, Geghan & Roosa v. Nelson J. Baker, No. CR 970138281 (Conn. Super. August 9, 1999), the court determined that a lawyer who employed the services of contract lawyers for special assistance in a litigation matter, disclosing their involvement to the client, could not charge the client the hourly rate agreed upon by the client and the billing lawyer for the case when the retaining lawyer paid for services provided at a lesser hourly rate. The charges were not billed as disbursements, but as services. The court based its conclusion on the fact that the retaining lawyer and the contract lawyers formally were not affiliated in practice. The court's discussion does not disclose the entire terms of the fee contract. In the report of the case, no reference is made to rules of professional conduct. In the Committee's view, the formality of affiliation of lawyers does not govern the right to add a surcharge to services under the Model Rules.

Conclusion

Subject to the Rule 1.5(a) mandate that "a lawyers fee shall be reasonable," a lawyer may, under the Model Rules, add a surcharge on amounts paid to a contract lawyer when services provided by the contract lawyer are billed as legal services. This is true whether the use and role of the contract lawyer are or are not disclosed to the client. The addition of a surcharge above cost does not require disclosure to the client in this circumstance, even when communication about fees is required under Rule 1.5(b). If the costs associated with contracting counsel's services are billed as an expense, they should not be greater than the actual cost incurred, plus those costs that are associated directly with the provision of services, unless there has been a specific agreement with the client otherwise.