

P.I. Settlements and Welfare

Your client has been in a car accident, and you are representing her on a personal injury claim. If she is also receiving Temporary Assistance to Needy Families (TANF) (formerly Aid to Families with Dependent Children [ADC]) or medical assistance (i.e., Medicaid or Oregon Health Plan), you need to consider two important issues before you enter into a settlement. First, the state will attach a lien on the settlement to the extent of all assistance (cash and medical) it has provided since the date of the injury. Second, the client's net settlement may affect eligibility for TANF and medical assistance.

State Lien on Settlement

ORS 416.540(1) provides: “[T]he Department of Human Services and the Oregon Health Authority shall have a lien upon the amount of any judgment in favor of a recipient or amount payable to the recipient under a settlement or compromise for all assistance received by such recipient from the date of the injury of the recipient to the date of satisfaction of such judgment or payment under such settlement or compromise.”

Continued on page 2

In Memoriam – Carol Wilson 1939 - 2011

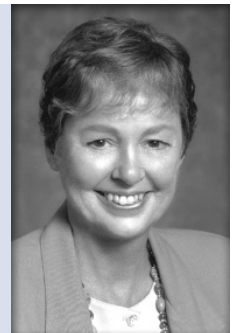
It is with great sadness that we announce the passing of Carol Wilson, the PLF's founding practice management advisor, who worked at the PLF from 1985 to 2004.

Carol created the PLF's practice management advisor program and was one of the first practice management advisors in the country. She was the inspiration and developing force behind the PLF's collection of practice aids and handbooks, which continue to be used by lawyers and law office staff throughout the state and the nation. Carol started the first stress management support group associated with the Oregon Attorney Assistance Program. She wrote countless articles, served as newsletter editor, presented numerous CLEs, and volunteered her time and energy to many committees and associations.

After 20 years of dedicated service, Carol retired in 2004, and enjoyed traveling and spending time with her family. She cheerfully continued her volunteerism, spending many hours helping seniors.

Carol's work with thousands of lawyers and law office staff has made a substantial positive impact on the legal profession in Oregon and elsewhere. Her resourcefulness, diligence, kindness, and humor were greatly appreciated by those who were fortunate to know her. She spent most of her life helping people and remains highly respected.

On behalf of the lawyers of Oregon and the staff of the Professional Liability Fund, we acknowledge her life of extraordinary service and the legacy of her contributions. We will miss Carol very much.



DISCLAIMER

IN BRIEF includes claim prevention information that helps you to minimize the likelihood of being sued for legal malpractice. The material presented does not establish, report, or create the standard of care for attorneys. The articles do not represent a complete analysis of the topics presented, and readers should conduct their own appropriate research.

This provision grants the Department of Human Services (DHS) and the Oregon Health Authority (OHA) a lien against any judgment on or settlement of a claim for damages for personal injuries. ORS 416.510(5), 416.540(1). This does not include SAIF (State Accident Insurance Fund) or workers' compensation claims. It also excludes claims that are not for personal injuries, such as claims for violations of the Fair Housing Act.

TANF and medical assistance applicants and recipients are required to report to DHS,¹ the OHA, and their managed care organization (MCO) that they have made a claim for damages for personal injuries. They must do so within 10 days of initiating the claim. This notification must include the names and addresses of all parties against whom the action or claim is brought, a copy of each claim or demand, and, if an action has been brought, the case number and county where the action is filed. ORS 416.530; OAR 461-195-0310. If the TANF or medical assistance recipient fails to report the claim for personal injuries, and the claim is settled before DHS, the OHA, or the MCO has the opportunity to satisfy its lien, the state will have a claim against your client to the extent of the lien. OAR 461-195-0310; ORS 416.610.²

Although a lien could exceed the amount of the personal injury claim, DHS rules permit the recipient to keep enough of the net settlement to pay for attorney fees, medical costs, and other costs and expenses. OAR 461-195-0305. A presumption exists that the proceeds are for payment of medical expenses, unless otherwise identified. OAR 461-195-0305. A certain amount also may be set aside for future medical expenses, especially if the injured party is a minor. ORS 416.590, 416.600; OAR 461-195-0320.

If a child in a TANF family is injured, the state will assert a lien only to the extent of medical assistance provided for that child. The state will not assert a lien for the cash assistance received. However, if an adult in the family is injured, the state will attempt to attach a lien for the amount of both cash and medical assistance that can be attributed to the personal injury. For medical assistance, it will be the amount paid for the injured individual. For TANF, depending on the circumstances, it may include assistance that has been provided to the entire family. If the family has medical coverage through an MCO, the OHA may assign its lien to the MCO for recovery. ORS 416.540(3); OAR 461-195-0321.

Effect of Settlement on Eligibility for Assistance

Once the matter of the lien has been settled, it is essential to consider the effect of the final settlement on your client's eligibility for public assistance programs.

When the family receives a personal injury settlement, the net proceeds after payment of the lien, costs, attorney fees, etc., will be compared with the TANF resource limit. The family will be ineligible for TANF only for so long as they retain proceeds in excess of that limit. Once the family spends the money down to the resource limit, the family will again be eligible for TANF benefits. If the client has other resources, those resources, along with the personal injury settlement proceeds, will count toward the resource limit for all public assistance programs.

TANF families participating in Oregon's Job Opportunities and Basic Skills (JOBS) program have a resource limit of \$10,000. For all others, the resource limit is \$2,500.³ Thus, those families participating in the JOBS program can receive net personal injury settlement proceeds of up to \$10,000 before it affects their TANF benefits.⁴ OAR 461-160-0015. As long as they receive TANF, they will continue to qualify for medical assistance.

For Supplemental Nutrition Assistance Program (SNAP) benefits (formerly food stamps), the personal injury settlement proceeds are not counted at all if the family is "categorically eligible." A family is categorically eligible if the family is also receiving TANF or Supplemental Security Income (SSI),⁵ has a household member working under a JOBS Plus agreement, or has income less than 185 percent of the federal poverty level and has received a pamphlet about Information and Referral Services. OAR 461-135-0505.

For families who receive SNAP benefits but do not fit into one of the categories listed above, the personal injury settlement proceeds are considered a resource and will be compared with the SNAP resource limits.⁶ OAR 461-140-0120. If the proceeds exceed those limits, the family will be ineligible until the proceeds are spent to below the SNAP resource limit. Categorical eligibility lasts only as long as the family is eligible for the other assistance program that makes the family categorically eligible. Alternatively, if the eligibility is based on income less than 185 percent of the federal poverty level and receipt of the Information and Referral Services pamphlet, then categorical eligibility lasts only for the duration of the SNAP certification period of one year. Once the client is no longer categorically eligible, the client will have to spend down to be below the SNAP resource limit before reapplying for SNAP benefits.

For SSI, the personal injury settlement proceeds are considered income in the month received and resources in the following months. 20 CFR §§416.1121(f), 416.1207(d). The individual will be ineligible for SSI

in the month the settlement is received if it exceeds the income limits. In the following months, the individual will be ineligible so long as the remaining funds, along with the individual's other countable assets, exceed the resource limit of \$2,000 for an individual and \$3,000 for a couple. 20 CFR §416.1205. Once the money is spent down to below the resource limits, the individual or couple will re-qualify. There will likely be an overpayment for the month in which the money was received, but that overpayment should be waived as long as the client promptly reports to the Social Security Administration (SSA) that he or she received the settlement. As with TANF, as long as the client receives SSI, the client will continue to qualify for medical assistance (i.e., Medicaid).

Each of these programs (TANF, SNAP, and SSI) has limits on the value of noncash resources that the individual can retain. Therefore, the client should be cautious about how money is spent to reduce it below the resource limits. Some items, such as motor vehicles, have separate value limits; and some or all of the equity value may be excluded. The rules are different for each program. Other resources are excluded regardless of value, such as the client's home, furniture, household goods, and personal belongings. See OAR Chapter 461, Division 145; 20 CFR §416.1216.

The client cannot give away the proceeds of the settlement in most cases. The client must receive some value in return. Most programs have a transfer-of-assets disqualification period, which may be lengthy depending on the benefit and the amount transferred.

PLF Board Positions

The Board of Directors of the Professional Liability Fund is looking for two lawyer members to each serve a five-year term on the PLF Board of Directors beginning January 2012. Directors attend approximately six two-day board meetings per year plus various committee meetings. Directors are also required to spend a considerable amount of time reading board materials between meetings and participating in telephone conference calls. PLF policies prohibit directors and their firms from prosecuting or defending claims against lawyers. Interested persons should send a brief résumé by August 1, 2011, to Ira R. Zarov, Professional Liability Fund, PO Box 231600, Tigard, OR 97281-1600.

There is no resource limit for Social Security Disability Insurance (SSDI) benefits. Thus, a personal injury settlement will not affect those benefits. However, some clients may receive a combination of SSDI and SSI benefits. The settlement could affect the SSI portion of the benefits. Many people confuse SSDI and SSI benefits. A client may know that he or she is on "disability" but may not know which program is involved. Since the income and resource rules are very different, it is important to verify whether the client receives SSDI, SSI, or both.⁷

If you are representing a client on a personal injury claim who receives public assistance benefits, it is advisable to call your local Legal Aid or Oregon Law Center office for advice before finalizing the terms of the settlement.

KAREN BERKOWITZ
OREGON LAW CENTER, INC.

Thanks to Lorey H. Freeman for her assistance with this article.

¹ They must report to the Personal Injury Liens Unit, PO Box 14512, Salem, OR 97309, 503-378-4514, FAX: 503-378-2577. OAR 461-195-0310.

² ORS 416.610 only gives the OHA, not DHS, the right to file a claim against an individual who fails to give notice and settles a claim before the OHA can satisfy its lien for medical assistance. DHS, by rule, grants itself this authority with respect to TANF benefits. OAR 461-195-0310(6).

³ OAR 461-160-0015.

⁴ Includes receipt by the attorney representing the client, so long as the attorney has settled all claims and can disburse the money to the client.

⁵ Supplemental Security Income (SSI): a federally funded disability program for low-income individuals who do not qualify for Social Security Disability Insurance (SSDI) or whose monthly SSDI benefit payment, and other income, is \$694 or less.

⁶ \$3,000 for households with at least one member who is age 60 or over; \$10,000 for groups with one member working under a JOBS Plus agreement; and \$2,000 for all other households. OAR 461-160-0015.

⁷ You can get this information directly from the Social Security Administration (SSA) with a written release, or you can call SSA's toll-free number (1-800-772-1213) with the client present. SSA will verify the client's identification and will give the client the necessary information.

Commercial Lease Tenants and Real Property Foreclosures

Judicial and nonjudicial foreclosures involving commercial properties remain prevalent in Oregon with few signs of any imminent reduction. The leasing of commercial properties will continue, of course, along with the attendant risks to business owners of a foreclosure action. Proper advice to a potential tenant will mitigate the risks and, in the case of some businesses, may make or break a company's survival in a foreclosure. This article explores some of the issues that should be addressed to reduce a business owner/tenant's risks in a nonjudicial foreclosure of commercial property.

What Is the Effect of a Foreclosure?

This article explores issues pertaining only to nonjudicial foreclosures. Actions against guarantors and for judicial foreclosure, in which case the lender will be seeking a deficiency judgment, involve issues regarding priority, redemption rights, and claims that are outside the scope of this article. In a nonjudicial foreclosure, the lender is not entitled to a deficiency judgment against the landlord, there are no redemption rights, and the lender simply is seeking to either take control of the property or obtain funds from a third-party purchaser. (Separate issues pertain to guarantors.)

- If there is an existing secured loan against the real property, the security instrument (almost always a trust deed in Oregon) securing the loan will have priority over the tenant's leasehold interest, and upon foreclosure, the leasehold interest would be extinguished.

Practice Tip: Although the foreclosure would be a default of the landlord under the lease, most well-crafted commercial leases also have a provision that limits the landlord's liability to the landlord's interest in the property, so if the landlord's interest is foreclosed, there is no further claim by the commercial tenant against the landlord. A commercial tenant who seeks to retain additional rights against the landlord should closely review this provision.

- If there is no existing secured loan against the property, then the leasehold interest will have priority over any subsequent recorded mortgage or trust deed. If there is no requirement to subordinate, then the tenant has leverage in dealing with the landlord and the proposed lender. However, any well-crafted commercial lease will have a provision requiring that the tenant enter into some form of Subordination, Nondisturbance and Attornment (SNDA) agreement with the landlord and the proposed lender.

2010 PLF Annual Report

The 2010 PLF Annual Report is available on the PLF's Web site. Log on to www.osbplf.org, then select Annual Reports under News and Information. If you do not have Internet access, call Tanya Hanson at the PLF at 503-639-6911 or 1-800-452-1639 and request a copy.

What Can You Do to Protect Your Commercial Tenant Client?

- **Knowledge Is King.** In this economy, you should strongly consider the benefits of obtaining a lot book report. Most title companies will provide lot book reports under these circumstances for less than \$500, depending on the size and scope of the property. If a commercial tenant is investing thousands or tens of thousands in improvements, advertising, and other start-up costs, it may well be worth the hundreds of dollars it will cost to ascertain the property status. Not only will it identify any judgments or other monetary encumbrances against the real property, which will give you some insight into the landlord's financial situation, you will be able to ascertain if there are any loans secured by the real property. Even without the cooperation of the landlord or the lender, you will be able to ascertain general terms and conditions of the loan(s), including the loan amount, the loan term, and any modifications (if material, since a failure to record may affect priority). If any loans do exist, you also may be able to ascertain the status of those loans (e.g., any pending or even rescinded foreclosure actions). The commercial tenant would be well advised to ascertain the work-out plans of the potential landlord before entering into any long-term lease. If the property is free and clear, that also may be a consideration in the negotiating process.

Practice Tip: Many county recorders now provide online access to real property records, including records of any trust deeds, modifications, and notices of default and rescissions of the same. These can be accessed quickly and may provide some insights for your clients before incurring the cost of ordering a title report.

- **The Merits of a Strong SNDA.** The costs and benefits of an SNDA agreement should be and, in some cases, will need to be explored many times during the leasing process, including at the inception if there is an existing lender. The SNDA will provide a set of terms to govern the relationship between the landlord, tenant, and lender in a foreclosure.

- ▶ **Subordination.** The subordination provision typically provides that the lease is subordinate in right,

interest, and lien, for all purposes, to the lender and to all renewals, modifications, consolidations, replacements, and extensions thereof. Most commercial leases provide that the lease will be subordinate to any existing or future trust deeds granted by the landlord, and most lenders will insist on a subordination of the lease to the lender. The key question, then, is what saving provisions can be inserted, if any, pursuant to a nondisturbance and/or attornment clause.

- ▶ **Nondisturbance.** Generally, the nondisturbance provision works for the benefit of the tenant. This provision typically allows the tenant, so long as it is not in default under the lease beyond any applicable cure period, to continue the lease notwithstanding the landlord's default. This provision is an agreement between the lender and the tenant that enables the tenant to continue with the lease if the lender forecloses. If the lease provides for automatic subordination by the tenant in the event of a lender trust deed against the subject property, or if a new lender insists on subordination of a lease before the providing of a lease, it is critical that the tenant insist on a nondisturbance provision. From a lender's perspective, it is critical to then link the nondisturbance with the attornment. Otherwise, the tenant is in a position to leave or hold the lender to the lease, as the market dictates.
- ▶ **Attornment.** An attornment clause generally requires a tenant to continue the existing lease under a new landlord after a foreclosure. The new landlord may be the lender, if the lender is the successful bidder at the foreclosure sale, or a third party. From a lender's perspective, an attornment clause will secure the economic value of the leaseholds. From the tenant's perspective, it provides economic certainty in the event of a landlord's default. The precise language of the attornment clause may vary from lease to lease, and from SNDA to SNDA. Therefore, it is critical to look at the specific language of each attornment clause to determine its particular operation. There is no such thing as a "generic" attornment clause. An attornment clause may contain preconditions (e.g., giving notice to a tenant after foreclosure of a continuing obligation). In general, if no preconditions exist in an attornment clause, the attornment operates automatically, and the existing lease will continue to bind both the tenant and the new landlord.

Practice Tip: Many commercial leases and SNDAs fail to include provisions that cover deeds in lieu of foreclosure, which are more and more common. Also, make sure to identify that the tenant shall attorn to and recognize any transferee (e.g., purchaser at a foreclosure sale) on the same terms and conditions of the lease or subject to any carve-outs or preconditions. For example: How will the security

deposit be treated and what are the attendant obligations of any successor landlord? What are the successor landlord's obligations with respect to any offsets or defenses a tenant may have? Is there a need for any additional obligations not otherwise found in the original lease (e.g., indemnification or hold harmless obligations)?

Practice Tip: An SNDA should be catered to your client's perspective and drafted to particularly address specific economic conditions. For example: Will the lender be bound by any agreement that the tenant may have regarding prepaid rent or advances? Is there a risk of collusion between the landlord and the tenant once the landlord gets notice of the foreclosure? Will the lender be bound by any modification of the lease made without the lender's consent (e.g., a reduction in the lease term or a change of monetary obligations)?

- **Record Your Memorandum of Lease.** Oregon recording statutes will establish priority based on either constructive or, in some cases, actual notice. Constructive notice will be presumed in the event of a properly recorded memorandum of lease. (It is not necessary to record the entire lease.) While most lenders will investigate the status of any leasehold interests notwithstanding the lack of any recording, consider recording a memorandum of lease anyway. Given the significant investment of time and money for most tenants and the increased risks of foreclosure, a strong argument can be made regarding the merits of recording a memorandum of lease.

Conclusion

A commercial tenant seeking to protect its economic interests under present market conditions should review very closely the potential consequences of a landlord foreclosure. The benefits to be gained by reviewing the status of all liens and encumbrances pursuant to a title search, recording the memorandum of lease, and negotiating a strong SNDA (to the extent a commercial lender will allow) will generally far outweigh the costs.

CHRISTOPHER R. AMBROSE
AMBROSE LAW GROUP LLC

Thanks to David R. Ambrose, Ambrose Law Group LLC, for his assistance with this article.

PLF Handbooks on BarBooks™

The PLF is pleased to announce that the following PLF handbooks are now available and fully searchable on OSB BarBooks™ at www.osbar.org: *A Guide to Setting Up and Using Your Lawyer Trust Account* (2011) and *Planning Ahead: A Guide to Protecting Your Clients' Interests in the Event of Your Disability or Death* (2009).

Getting Help: Conflicts, Confidentiality, and Consulting Your Colleagues

Whether you are a new lawyer who is unsure about a matter or an experienced practitioner handling an unusual situation, odds are you've reached out for help. Maybe you picked up the phone to talk to your mentor or you posted a question on a LISTSERV. Whatever you did, you may not have given much consideration to confidentiality or conflicts of interest.

Oregon Formal Opinion 2011-184 seeks to address these issues. Here are the scenarios laid out in the opinion:

Lawyer A participates in a mentoring program for new lawyers. Lawyer B is Lawyer A's mentor and is not in Lawyer A's law firm. Lawyer A wishes to discuss a matter concerning one of his clients with Lawyer B.

Lawyer C is a sole practitioner. She encounters an unusual situation in a case she is handling and wishes to receive advice on how to proceed from knowledgeable colleagues who participate in her LISTSERV.

May Lawyer A disclose information relating to the representation of his client with Lawyer B?

May Lawyer B consult regarding Lawyer A's client matter without first checking for conflicts of interest between Lawyer A's client and any client of Lawyer B's firm?

Are You New to Private Practice?

On November 2–4, 2011, the Professional Liability Fund is sponsoring a practical skills and ethics seminar in Portland for new admittees and lawyers entering private practice. The full seminar qualifies for 15.75 MCLE credits, which will satisfy the MCLE requirements for new admittees' first reporting period.

The fee for the program is \$65 and includes lunch on November 2 and 3. The registration form will be available on the PLF's Web site in early September. To print a registration form, go to www.osbplf.org and click on Upcoming Seminars.

For more information, call DeAnna Shields at 503-639-6911 or 1-800-452-1639. The registration deadline is October 26, 2011. Space is limited – register early!

May Lawyer C relate the details of the unusual situation she has encountered to other lawyers who participate in her LISTSERV?

Resolving the Dilemma

Lawyers who seek advice and lawyers who give advice “must exercise care to avoid violating their duties to their respective clients.” It does not matter how the discussion arises: in a formal mentoring relationship, in casual conversation, or on a LISTSERV.

Considerations for the Consulting Lawyer

The ethics opinion addresses this situation:

“Consultations that are general in nature and that do not involve disclosure of information relating to the representation of a specific client do not implicate Oregon RPC 1.6. For instance, there would be no violation of the rule in a LISTSERV inquiry seeking the name or citation for a recent case on a subject relevant to a client matter or to discussions about an issue of law or procedure that might be present in a client matter. Similarly, inquiries or discussions posted as hypotheticals generally do not implicate Oregon RPC 1.6. Accordingly, Lawyer A might safely pose a question to Lawyer B, or Lawyer C might post an inquiry on a LISTSERV, as a hypothetical case.

“Framing a question as a hypothetical is not a perfect solution, however. Lawyers faces (sic) a significant risk of violating Oregon RPC 1.6 when posing hypothetical questions if the facts provided permit persons outside the lawyer's firm to determine the client's identity. Where the facts are so unique or where other circumstances might reveal the identity of the consulting lawyer's client even without the client being named, the lawyer must first obtain the client's informed consent for the disclosures.

• • • •

“A lawyer should avoid consulting with another lawyer who is likely to be or become counsel for an adverse party in the matter. In the absence of an agreement to the contrary, the consulted lawyer does not assume any obligation to the consulting lawyer's client by simply participating in the consultation. *The consulting lawyer thus risks divulging sensitive information to a client's current or future adversary, who is not prohibited from subsequently using the information for the benefit of his or her own client. This should be a particular concern to Lawyer C if she posts her inquiry to a LISTSERV, whose members may represent parties on all sides of legal issues.*” (Emphasis added.)

What Should a Consulting Lawyer Do to Minimize the Risks?

Obtain an agreement that the consulted lawyer will maintain client confidentiality and not engage in representation adverse to the consulting lawyer's client.

Considerations for the Consulted Lawyer

A consulted lawyer assumes no obligations to the consulting lawyer's client by virtue of the consultation. However, even a consultation premised on hypothetical facts can cause problems. Assume new Lawyer A asks experienced Lawyer B how a tenant can void a lease. Lawyer B advises Lawyer A how to proceed, and Lawyer A's client repudiates the lease. Lawyer B later learns that the landlord whose lease was repudiated is a client of his firm. If Lawyer A and Lawyer B have no confidentiality agreement, Lawyer B must tell the firm's client about the consultation and its possible consequences. If Lawyer A and Lawyer B entered into a confidentiality agreement, then Lawyer B and his firm would be disqualified from continuing to represent the landlord.

What Should the Consulted Lawyer Do?

- Get the identity of Lawyer A's client prior to consultation.
- Run a conflict check.
- Seek an agreement from Lawyer A that the consultation will not create any obligations by Lawyer B to Lawyer A's clients.

Oregon bar members are encouraged to read the opinion in its entirety. If you need help setting up a conflict of interest system, contact the Practice Management Advisors at the Professional Liability Fund for assistance.

BEVERLY A. MICHAELIS
PLF PRACTICE MANAGEMENT ADVISOR

Files piled high?

Call for free and confidential law office systems assistance.

- Calendaring & Filing Systems
- Office Management
- Time Management

Practice Management Advisors of the Professional Liability Fund

Dee Crocker • Beverly Michaelis • Sheila Blackford
503-539-5911 or 1-800-452-1639

Common Mistakes Lawyers Make With Technology

Given everything lawyers have to do to keep their practices going and their clients well served, they can't be expected to be technology experts. Nonetheless, they would do well to follow some basic rules. Here are the technological gaffes we see most often in law offices.

- **The computer stays on at night for remote access with no screensaver password set up.** This is fine if you'd like to invite unauthorized persons to load your network with pornography or otherwise browse your files.

- **The computer never gets turned off.** Computers, you have noticed, are imperfect. Processes don't terminate the way they should, applications get tangled, and your own tendency to have 15 programs running at once tends to create collisions. Basically, a lot of stuff hangs around impeding the performance of your computer. The fix is easy: Either turn the computer off every night, or, if you need it for remote access, turn it off when you go to lunch. Once a day is the rule.

- **The passwords are too short to be secure.** Nowadays, passwords need to be 12 characters long – there should be no exceptions to this anymore. Anyone with any IT sophistication can crack an eight-character password with current tools, no matter what it is, in less than two hours. With 12 characters, on the other hand, it will take 17 years to crack. Most bad guys can't wait that long. Make it easy on yourself and create a passphrase – for example, GoingonanAlaskan-cruisein2011! is perfect and easy to remember.

- **Passwords are kept in overly obvious places.** It seems that many people can't remember their passwords and log-on IDs. We find passwords on monitors, under keyboards, and in the top drawer of the lawyer's desk. We would guess that the bad guys can figure out those places, too.

- **Illegal software is loaded on the computers.** Being penny wise and pound foolish is far too common – the installation of illegal software in law offices is horrifying. The Business Software Alliance (BSA) is not amused by illegal software. And at \$150,000 per copyright violation, you are unlikely to be amused if it's discovered in your office. By the way, most of the BSA's tip-offs come from employees. Do all of your employees adore you?

- **Backup media goes bad.** Inevitably. No matter what kind of backup you use (and shame on you if you're not backing up), you must – absolutely must – do test restores of the data to ensure that all is well. That is true even if you are using an online backup provider. We once saw a major online

Continued on page 8

backup provider lose five years of law firm data – and, you guessed it, they had never done a test restore.


- **Autocomplete is used without restraint.** Autocomplete is the Outlook function that helpfully suggests an e-mail address when you begin to type. Unfortunately, it isn't always the correct address. (In one week alone, we received three e-mails meant for other people.) One option is simply to turn Autocomplete off. A different option for those who like Autocomplete is to have a firm rule: When you finish the e-mail, take your hands off the keyboard until you have verified that the addresses on the e-mail are those of your intended recipients. Without this rule, you, too, could be among the hordes of lawyers who have, at the very least, embarrassed themselves.

- **There is no PIN on the lawyer's smartphone.** Remember that rule about keeping client data confidential? If you don't have a PIN on your smartphone, run, do not walk, and get one installed. We once found a smartphone lost at an airport with no PIN. The owner was lucky that we were honest and turned it over to security.

SHARON D. NELSON, ESQ., AND JOHN W. SIMEK

The authors are the president and vice president of Sensei Enterprises, Inc. (www.senseient.com), a computer forensics, legal technology, and information security firm based in Fairfax, VA.

Help is out there...



Call for **free and confidential**
law office systems assistance.

**Practice
Management
Advisors** of the
Professional Liability Fund

Dee Crocker • Beverly Michaelis
Sheila Blackford

**503-639-6911 or
1-800-452-1639**

PDF/A – PDF for Archiving

We are all familiar with the benefits of using PDF documents to preserve the original layout of word processing documents, PowerPoint presentations, Excel spreadsheets, etc., and to allow users to view them with the free Adobe Reader, even without the originating application. This universal format is one federal courts have adopted and require for electronic filing of pleadings through the Case Management/Electronic Case Filing (CM/ECF) system.

In addition to existing CM/ECF technical requirements, such as megabyte file size limits on any given document or attachment, the courts may soon require PDFs to be submitted in PDF/A format. This standard format, developed by a Joint Working Group supervised by the Association for Information and Image Management (AIIM), seeks to allow long-term archiving and the ability to review archived documents reliably in the future. The Public Access to Court Electronic Records (PACER) Web site discusses this planned change in the following text.

What Is PDF/A?

PDF/A is an International Standards Organization (ISO) standard document format. The standard has been published for almost five years and is available in the current versions of all major word processors and scanning systems. It is a subset of the PDF standard, which excludes those PDF features that give rise to concerns about the ability to archive documents.

Why Is the Federal Judiciary Transitioning to PDF/A?

PDF/A offers a cost-effective and efficient solution which ensures that electronic records are preserved far into the future. The change from PDF to PDF/A will improve the ability to archive documents and comply with requirements of the National Archives and Records Administration (NARA).

What Software Do I Need to View PDF/A?

A PDF viewer, such as Adobe (or the PDF viewer you currently use), should already have the ability to view PDF/A documents. You can test your ability to view PDF/A documents by visiting this site: (www.pacer.gov/documents/sample_pdfa.pdf). This document is in the PDF/A format.

When Will I Begin to See PDF/A Documents in CM/ECF?

CM/ECF already accepts PDF/A documents. Each court will set its own deadline for requiring documents to be filed in the PDF/A format.

Can I Save PDF/A Documents?

Yes. PDF/A documents can be saved in the same manner as PDFs. While viewing the PDF/A, click on File→Save As.

Source: (www.pacer.gov/announcements/general/pdfa.html).

PDF/A documents require certain features and prohibit others, which may affect how your firm creates and uses PDF documents. For example, you cannot delete or move pages in a PDF/A document, and all fonts must be embedded in the PDFs (to eliminate reliance on fonts specific to a given user's computer). Embedding fonts increases file size slightly, which may have implications when e-filing and observing document file size limits that some courts impose. Also, some fonts have vendor license restrictions on embedding and therefore should not be used if you want to create a PDF/A-compliant document.

To save a file in PDF/A format, select (1) File→Save As→PDF/A or (2) File→Save As→Options and check the PDF/A box.

If Acrobat has been added to your Microsoft Word program, you can embed fonts when saving a PDF from Word by going to the Acrobat menu→Preferences→Advanced Settings→Fonts→and checking the box to Embed All Fonts.

Keep in mind that although a non-compliant PDF can sometimes be brought into compliance, it is easier to create PDF/A-compliant documents from word processing, presentation, or spreadsheet source documents. It is highly recommended that you start embedding fonts in PDF documents that you may need to render PDF/A-compliant. Fonts cannot be added to the PDF after it is created, and fonts that are not embedded are the primary reason existing PDFs cannot be converted to PDF/A format.

Use Adobe's Preflight feature (located under the Advanced menu in Adobe Acrobat) to determine reasons a given document is not compliant with PDF/A format. Once you run the Preflight process, you may be able to edit your word processing document to remedy problems and then try again to convert it to PDF/A.

Hyperlinks to other PDFs or to Web sites are not allowed in PDF/A format. If you currently use hyperlinks to link to

authorities cited in your briefs, you may consider including the authorities within your PDF document, since links to Westlaw, Lexis/Nexis, or other PDF documents are not compliant with the PDF/A format. The functionality of any hyperlinks to the Internet is stripped when the document is converted to PDF/A format.

Compliance also requires that no security of any kind is used, so do not password-protect or encrypt your documents.

For more technical information on additional requirements and restrictions of PDF/A and step-by-step instructions on creating and converting PDF/A-compliant documents, please review Rick Borstein's posts in his Acrobat for Legal Professionals Blog at <http://blogs.adobe.com/acrolaw/category/pdfa-pdf-for-archiving/>.

Although PDF/A is not yet required by some federal courts, it is being discussed among the judiciary at PACER. Each court will set its own deadline to require documents in PDF/A format. Given that this format is designed to promote long-term storage and to facilitate retrieval of documents in the future, it would be advantageous to start saving pleadings in this format sooner rather than later.

If you would like to buy Adobe Acrobat licenses for your firm, Litgistix offers Acrobat at wholesale prices and provides individual or group training. From pleadings management to document production and collaboration, you may find Adobe Acrobat to be a good program to have in your software suite.

REAGAN DEWITT-HENDERSON
ADVANCED CERTIFIED PARALEGAL &
LITIGATION SUPPORT ANALYST

Vj ku'ctveng'y cu'qt ki kpcnf 'rwdrtuj gf 'kp'B Ncy . 'yj g'PCNU o ci c /kp'g'qt 'rgi c'n'rt qhgwakpcnu . 'xqno g'7; . 'kaug'6. 'urt kpi 2011. The author can be contacted at 918-585-1131 or at reagan@litgistix.com.

Help New Admittees

Are you interested in helping new lawyers by answering questions about your practice area? If so, share your experience practicing law by leading a roundtable discussion with new admittees at the PLF's *Learning the Ropes* luncheon on Thursday, November 3, 2011. Call Tanya Hanson at 503-639-7203 or e-mail tanyah@osbplf.org if you are interested.



Oregon Lawyer Assistance Foundation

Helping lawyers in need receive addiction and mental health treatment

The Oregon Lawyer Assistance Foundation (OLAF) is a 501(c)(3) nonprofit agency that provides financial need-based grants to Oregon lawyers to defray the expense of treatment for alcoholism, chemical dependency, mental health issues, or other impairment. OLAF assists lawyers who access the Oregon Attorney Assistance Program (OAAP) and who are unable to pay for needed treatment. (Treatment is outside the scope of services offered by the OAAP.) Lawyers who need OLAF's financial assistance can apply for a loan or grant through the Oregon Attorney Assistance Program.

Your donations to OLAF make a difference in the lives of Oregon lawyers who are suffering with an illness they cannot afford to treat. Contributions are tax-deductible. For more information about OLAF or to make a donation, contact Barbara Fishleder at 503-684-7425 or at barbaraf@oaap.org.

OLAF Donations that make a difference.

PO Box 231600 • Tigard, Oregon 97281-1600 • 503-684-7425

Abbott & Munns LLC • Alleman Hall McCoy Russell & Tuttle LLP • Mark A. Anderson • Anonymous • Aubertine Draper Rose, LLP • Christina Austin-Smith • Dennis L. Bartoldus • David H. Becker • Steve M. Bloom • Kristen T. Bonanno • Brittle & Brittle PC • Kelly Kennedy Brown • Hilary Browning-Craig • George K. Bryce • Eugene H. Buckle • Daniel B. Burg • Jacob Bush • Chase & Weil, LLP • Thomas Christ • Thomas E. Cooney • John J. Cosgrave • Cosgrave Vergeer Kester LLP • Van Covington • Sarah B. Creem • M. Renee Cummings • Sarah E. Dennison-Leonard • George L. Derr • Dexter & Moffet • Catherine M. Dexter • John H. Durkheimer • Alec L. Esquivel • Farleigh Wada Witt • David Gettis • Gevurtz, Menashe, Larson & Howe, PC • Gleaves Swearingen Potter & Scott LLP • John W. Gould • S. Ward Greene • Maiya Hall-Olsen • Harold S. Harding • Amanda K. Hoffman • Holland & Knight LLP • Scott Hookland LLP • Tom Hoyt • Jaqua & Wheatley LLC • Douglas J. Kelso • K&L Gates • Kennedy Watts Arellano & Ricks LLP • Anton C. Kirchhof • Klein, Hand & Ledesma • Charles K. Landskroner • Law Office of Todd Struble • John Lohuis • James A. Marshall • McEwen Gisvold LLP • Walter W. McMonies Jr. • Robert Moore • Morning 12-Step Group • Lynn M. Myrick • Robert J. Neuberger • Elizabeth J. Nevue • Keith Nichols • Jeffrey L. Olson • Thomas C. Peachey, PC • Michele Pearce • Perkins Coie LLP • Kathryn M. Pratt • James G. Rice • Elden & Marjorie Rosenthal • Michelle A. Ryan • Laura Schantz • Schroeder Law Offices, PC • Smith Freed & Eberhard PC • Stoel Rives • Tarlow, Naito & Summers, LLP • Thede Culpepper Moore Munro & Silliman LLP • Cynthia Thompson • Thomas & Andrea Tongue • Troy, Rosenberg & Wolfe, PC • Rebecca Tuazon • Vangelisti Kocher LLP • Stephen J. Williams • Lawrence Wobbrock • Barbara Woodford • Yazbeck, Cloran & Bowser, PC • Kimberly Ybarra-Cole • Yturri Rose LLP • Zarosinski Law Group • Ira Zarov & Darcy Norville

In Memory of Deborah Dealy-Browning: Joan Browning • James & Joan O. Browning • Jeanette M. Launer • Dawn Patrol • Rosemary & William Ramsey • Dean & Virginia Shacklett • Robert & Cindy Thomson

In Memory of Michael Sweeney: Anonymous • Astoria Pointe Treatment Center • Barran Liebman LLP • Dady Kathleen Blake • Bondurant Family • Brown Roseta Long McConville & Kilcullen • Wallace P. Carson, Jr. & Gloria Carson • Cooney & Crew LLP • John P. Corderman • Meloney C. Crawford • Barbara S. Fishleder • Shari Gregory • Michael Henderson • Mike Long • Kirstin Lurtz • Robert & Laurie Lusk • Stephen R. & Juanita E. Moore • PLF Defense Panel Golfers • Douglas S. Querin • Patrick Reily

In Memory of Marianne LaPlante: Kathey Shaw

Tips, Traps, and Resources

EARNED UPON RECEIPT FEE AGREEMENT: In December 2010, the Oregon Supreme Court approved amendments to Oregon Rules of Professional Conduct 1.5 and 1.15 regarding “earned upon receipt” fees. The PLF now has a sample “Earned Upon Receipt Fee Agreement” on its Web site. From the PLF home page (www.osbplf.org), log in and select Practice Aids and Forms, then Engagement Letters. Practitioners are advised to carefully read and understand OSB Formal Opinion No. 2005-151, ORPC 1.5(c)(3), and ORPC 1.15-1(c). *The PLF sincerely thanks Bradley F. Tellam of Stoel Rives LLP for his review of this fee agreement, as well as his ongoing assistance with the review and updating of PLF practice aids.*

DOMESTIC RELATIONS: For articles discussing the interplay between family law and other practice areas, see “Estate Planning Considerations in Marital Dissolutions,” by Erik Schimmelbusch, and “Bankruptcy Law for Family Practitioners,” by Joanne Reisman, originally published in the June 2010 and April 2009 issues, respectively, of the *OSB Family Law Section Newsletter*.

FREE ACCESS TO OSB BARBOOKS™: Beginning January 1, 2011, all active bar members in good standing now have access to the BarBooks™ Online Legal Research Library as a benefit of membership. BarBooks™ currently includes all OSB Legal Publications, *The Ethical Oregon Lawyer*, *Oregon Formal Ethics Opinions*, *Oregon Legislation Highlights*, *Uniform Civil and Criminal Jury Instructions*, and two PLF handbooks. BarBooks™ will also expand in the future to include other PLF publications, Disciplinary Board Reporter opinions, and select OSB CLE Seminars materials. To access BarBooks™, log in under the Member Login on the OSB Web site at www.osbar.org.

SOCIAL MEDIA JURY INSTRUCTION: The 2010 Supplement to the Uniform Civil Jury Instructions (UCJI) includes revised UCJI 5.01, which directs jurors to refrain from searching the Internet, blogs, or any other electronic tools to get information about the case, or from communicating about the case with anyone outside the courtroom by cell phone, e-mail, smartphone, or texting, or through any blog, Web site, chat room, or social networking site. The UCJI are included on BarBooks™.

TRAP – PRIVILEGE AND CLIENT E-MAIL: A California court recently ruled that a client’s e-mails between her and her attorney were not confidential communications protected by attorney-client privilege because the client’s employer had warned that employee e-mails were not confidential and were subject to monitoring. Although some jurisdictions have distinguished between employees using work versus personal e-mail accounts, the most conservative approach is to advise clients not to read, download, or access e-mails from their attorney while at work. See the PLF’s practice aid, “Using E-Mail in the Office,” as well as “Engagement Letter and Fee Agreement – Alternate,” which includes specific language about e-mail communication.

PRACTICE MANAGEMENT TIPS: Visit the new Practice Management Tips page on the PLF Web site under Loss Prevention. You can sign up for the Tip of the Week, subscribe to the Practice Management Advisors’ blogs, or follow their tips and legal news on Twitter. You can also read current and archived issues of *Law Practice TODAY* (the ABA’s Webzine published by the Law Practice Management Section) and subscribe to the Law Practice Management Advisors Pipes Feed (designed by the ABA’s Legal Technology Resource Center).

ACROBAT X: For information about Adobe’s newest version of Acrobat (“ten”), visit the Oregon Law Practice Management blog of PLF Practice Management Advisor Beverly Michaelis. See blog posts “Acrobat X Is Here!” (Oct. 19, 2010); “The Best of Acrobat” (Dec. 13, 2010); and “What to Expect if You Upgrade to Acrobat X” (Jan. 3, 2011).

Thanks to Beverly Michaelis, PLF Practice Management Advisor, for her assistance with these tips.

IN BRIEF

Published
by the
Professional
Liability Fund
Ira R. Zarov, CEO

Editors:

Barbara S. Fishleder,
Director of Personal
and Practice
Management
Assistance
and

Tanya Hanson,
Loss Prevention
Attorney

503-639-6911
1-800-452-1639
www.osbplf.org

Professional Liability Fund Board of Directors and Officers

Frederick C. Ruby
Salem
Chair

William G. Carter
Medford
Vice-Chair

Tim Martinez
Salem
Secretary-Treasurer
Public Member

Lisa Almasy Miller
Clackamas

Laura E. Rackner
Portland

Valerie D. Fisher
Portland

Guy B. Greco
Newport

John A. Berge
Bend

Valerie D. Saiki
Salem
Public Member

Cases of Note

DOMESTIC RELATIONS/PERS: In *Bell v. Public Employees Retirement Board* (PERB) (Dec. 1, 2010), the Oregon Court of Appeals held that the plaintiff could not recover damages for inaccurate benefit estimates that PERB provided her. The court said that PERB did not owe the plaintiff a heightened duty of care to invoke the economic loss rule and that ORS 238.455 and 238.715 are “in essence, disclaimers of any duty to provide binding benefit entitlement at any time before formal calculation of benefits, and, by the same token, warnings to members that they cannot rely on estimates.” (www.publications.ojd.state.or.us/A140350.htm)

ATTORNEY FEES: In the case of *In re the Marriage of Bolte and Bolte* (Dec. 2, 2010), the Oregon Supreme Court held that the term “appeal” in ORS 107.105(5) did not refer to a denial of a petition for review, so the court lacked authority to award attorney fees for responding to the petition. (www.publications.ojd.state.or.us/S058330.htm) In the case of *In re the Marriage of Polacek and Polacek* (Dec. 2, 2010), the Oregon Supreme Court held that ORS 19.440, which extends to the appellate courts the authority to award attorney fees “on an appeal,” did not authorize the court to award attorney fees for opposing an unsuccessful petition for review. (www.publications.ojd.state.or.us/S058307.htm) (A bill to address this issue is currently before the 2011 Oregon Legislature.)

REAL ESTATE/TAX: In *United States v. Richey* (Jan. 21, 2011), the Ninth Circuit Court of Appeals held that any communication in a real estate appraiser’s work file related to an appraisal for submission to the IRS was for the purpose of determining value – not for providing legal advice – and therefore not protected by the attorney-client privilege. The court also held that the entire work file was not prepared in anticipation of litigation and thus was not protected by the work-product doctrine. (www.ca9.uscourts.gov/datastore/opinions/2011/01/21/09-35462.pdf)

BANKRUPTCY/FORECLOSURES: In *McCoy v. BNC Mortgage* (Feb. 7, 2011), the U.S. Bankruptcy Court for the District of Oregon held that Oregon law permits nonjudicial foreclosure under ORS 86.735 only when the beneficiary’s interest is clearly documented in a public record. The “beneficiary” in this case was the lender, not MERS, the court said. Because the complaint alleged a number of unrecorded assignments of the lender’s interest, the court denied a motion to dismiss a wrongful disclosure claim. (http://www.orb.uscourts.gov/Judges/file_attachment/40040208021115141.pdf)

ESTATE TAX: In *Baccei v. United States* (Feb. 16, 2011), the Ninth Circuit Court of Appeals held that a taxpayer’s reliance on an accountant to file a payment extension request is not reasonable cause under 26 USC §6651(a)(2) excusing the taxpayer’s failure to timely pay estate taxes owed. By failing to confirm that an extension had been requested and granted before the payment deadline elapsed, the taxpayer failed to exercise the ordinary business care and prudence necessary to establish reasonable cause and thus remained responsible for late penalties and interest. (www.ca9.uscourts.gov/datastore/opinions/2011/02/16/08-16965.pdf)

DEBTOR-CREDITOR: In *Malan v. Tipton* (Feb. 17, 2011), the Oregon Supreme Court held that if a creditor does not affirmatively accept a debtor’s valid written offer of payment under ORS 81.010, and instead remains silent, the offer is not accepted. Thus, the debtor was relieved of liability for the consequences of nonpayment – in this case, foreclosure on the trust deed. (www.publications.ojd.state.or.us/S058156.htm)

CORPORATIONS: In *FCC v. AT&T, Inc.* (Mar. 1, 2011), the U.S. Supreme Court held that corporations do not have “personal privacy” for the purpose of the Freedom of Information Act exemption for information gathered for law enforcement reasons. (www.supremecourt.gov/opinions/10pdf/09-1279.pdf)