

**OREGON STATE BAR**  
**PROFESSIONAL LIABILITY FUND**

**2013 CLAIMS MADE PLAN**

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**January 1, 2013**

**2013 CLAIMS MADE PLAN**

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PROFESSIONAL LIABILITY FUND**

**2013 CLAIMS MADE PLAN**

**NOTICE**

This Claims Made Plan (“Plan”) contains provisions that reduce the Limits of Coverage by the costs of legal defense. See SECTIONS IV and VI.

Various provisions in this Plan restrict coverage. Read the entire Plan to determine rights, duties, and what is and is not covered.

**INTERPRETATION OF THIS PLAN**

**Preface and Aid to Interpretation.** The Professional Liability Fund (“PLF”) is an instrumentality of the Oregon State Bar created pursuant to powers delegated to it in ORS 9.080(2)(a). The statute states in part:

*The board shall have the authority to require all active members of the state bar engaged in the private practice of law whose principal offices are in Oregon to carry professional liability insurance and shall be empowered, either by itself or in conjunction with other bar organizations, to do whatever is necessary and convenient to implement this provision, including the authority to own, organize and sponsor any insurance organization authorized under the laws of the State of Oregon and to establish a lawyer’s professional liability fund.*

Pursuant to this statute, the Board of Governors of the Oregon State Bar created a professional liability fund (the Professional Liability Fund) not subject to state insurance law. The initial Plan developed to implement the Board of Governors’ decision, and all subsequent changes to the Plan are approved by both the Board of Directors of the Professional Liability Fund and the Board of Governors.

The Plan is not intended to cover all claims that can be made against Oregon lawyers. The limits, exclusions, and conditions of the Plan are in place to enable the PLF to meet the Mission and Goals set forth in Chapter One of the PLF Policies, which includes the Goal, “To provide the mandatory professional liability coverage consistent with a sound financial condition, superior claims handling, efficient administration, and effective loss prevention.” The limits, exclusions, and conditions are to be fairly and objectively construed for that purpose. While mandatory malpractice coverage and the existence of the Professional Liability Fund do provide incidental benefits to the public, the Plan is not to be construed as written with the public as an intended beneficiary. The Plan is not an insurance policy and is not an adhesion contract.

Because the Plan has limits and exclusions, members of the Oregon State Bar are encouraged to purchase excess malpractice coverage and coverage for excluded claims through general liability and other insurance policies. Lawyers and their firms should consult with their own insurance agents as to available coverages. Excess malpractice coverage is also available through the PLF.

**Bracketed Titles.** The bracketed titles appearing throughout this Plan are not part of the Plan and should not be used as an aid in interpreting the Plan. The bracketed titles are intended simply as a guide to locating pertinent provisions.

**Use of Capitals.** Capitalized terms are defined in SECTION I. The definition of COVERED PARTY

appearing in SECTION II and the definition of COVERED ACTIVITY appearing in SECTION III are particularly crucial to the understanding of the Plan.

**Plan Comments.** The discussions labeled "*COMMENTS*" following various provisions of the Plan are intended as aids in interpretation. These interpretive provisions add background information and provide additional considerations to be used in the interpretation and construction of the Plan.

The Comments are similar in form to those in the Uniform Commercial Code and Restatements. They are intended to aid in the construction of the Plan language. The Comments are to assist attorneys in interpreting the coverage available to them and to provide a specific basis for interpretation by courts and arbitrators.

**Attorneys in Private Practice; Coverage and Exemption.** Only Oregon attorneys engaged in the "private practice of law" whose principal office is in Oregon are covered by this Plan. ORS 9.080(2). An attorney not engaged in the private practice of law in Oregon or whose principal office is outside Oregon must file a request for exemption with the PLF indicating the attorney is not subject to PLF coverage requirements. Each year, participating attorneys are issued a certificate entitled "Claims Made Plan Declarations." The participating attorney is listed as the "Named Party" in the Declarations.

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## SECTION I — DEFINITIONS

Throughout this Plan, when appearing in capital letters:

1. "BUSINESS TRUSTEE" means one who acts in the capacity of or with the title "trustee" and whose activities include the operation, management, or control of any business property, business, or institution in a manner similar to an owner, officer, director, partner, or shareholder.

### *COMMENTS*

*The term "BUSINESS TRUSTEE" is used in SECTION III.3 and in SECTION V.5. This Plan is intended to cover the ordinary range of activities in which attorneys in the private practice of law are typically engaged. The Plan is not intended to cover BUSINESS TRUSTEE activities as defined in this Subsection. Examples of types of BUSINESS TRUSTEE activities for which coverage is excluded under the Plan include, among other things: serving on the board of trustees of a charitable, educational, or religious institution; serving as the trustee for a real estate or other investment syndication; serving as trustee for the liquidation of any business or institution; and serving as trustee for the control of a union or other institution.*

*Attorneys who engage in BUSINESS TRUSTEE activities as defined in this Subsection are encouraged to obtain appropriate insurance coverage from the commercial market for their activities.*

2. "CLAIM" means a demand for DAMAGES or written notice to a COVERED PARTY of an intent to hold a COVERED PARTY liable as a result of a COVERED ACTIVITY, if such notice might reasonably be expected to result in an assertion of a right to DAMAGES.

3. "CLAIMS EXPENSE" means:

a. Fees charged by any attorney designated by the PLF;

- b.** All other fees, costs, and expenses resulting from the investigation, adjustment, defense, repair and appeal of a CLAIM, if incurred by the PLF; or
- c.** Fees charged by any attorney designated by the COVERED PARTY with the PLF's written consent.

However, CLAIMS EXPENSE does not include the PLF's costs for compensation of its regular employees and officials or the PLF's other routine administrative costs.

**4.** "CLAIMS EXPENSE ALLOWANCE" means the separate allowance for aggregate CLAIMS EXPENSE for all CLAIMS as provided for in SECTION VI.1.b of this Plan.

**5.** "COVERAGE PERIOD" means the coverage period shown in the Declarations under the heading "COVERAGE PERIOD."

**6.** "COVERED ACTIVITY" means conduct qualifying as such under SECTION III — WHAT IS A COVERED ACTIVITY.

**7.** "COVERED PARTY" means any person or organization qualifying as such under SECTION II — WHO IS A COVERED PARTY.

**8.** "DAMAGES" means money to be paid as compensation for harm or loss. It does not refer to fines, penalties, punitive or exemplary damages, or equitable relief such as restitution, disgorgement, rescission, injunctions, accountings, or damages and relief otherwise excluded by this Plan.

**9.** "EXCESS CLAIMS EXPENSE" means any CLAIMS EXPENSE in excess of the CLAIMS EXPENSE ALLOWANCE. EXCESS CLAIMS EXPENSE is included in the Limits of Coverage at SECTION VI.1.a and reduces amounts available to pay DAMAGES under this Plan.

**10.** "INVESTMENT ADVICE" refers to any of the following activities:

- a.** Advising any person, firm, corporation, or other entity respecting the value of a particular investment, or recommending investing in, purchasing, or selling a particular investment;
- b.** Managing any investment;
- c.** Buying or selling any investment for another;
- d.** (1) Acting as a broker for a borrower or lender, or  
  
(2) Advising or failing to advise any person in connection with the borrowing of any funds or property by any COVERED PARTY for the COVERED PARTY or for another;
- e.** Issuing or promulgating any economic analysis of any investment, or warranting or guaranteeing the value, nature, collectability, or characteristics of any investment;
- f.** Giving advice of any nature when the compensation for such advice is in whole or in part

contingent or dependent on the success or failure of a particular investment; or

**g.** Inducing someone to make a particular investment.

**11.** "LAW ENTITY" refers to a professional corporation, partnership, limited liability partnership, limited liability company, or sole proprietorship engaged in the private practice of law in Oregon.

**12.** "PLAN YEAR" means the period January 1 through December 31 of the calendar year for which this Plan was issued.

**13.** "PLF" means the Professional Liability Fund of the Oregon State Bar.

**14.** "SAME OR RELATED CLAIMS" means two or more CLAIMS that are based on or arise out of facts, practices, circumstances, situations, transactions, occurrences, COVERED ACTIVITIES, damages, liability, or the relationships of the people or entities involved (including clients, claimants, attorneys, and/or other advisors) that are logically or causally connected or linked or share a common bond or nexus. CLAIMS are related in the following situations:

**a.** *Secondary or dependent liability.* CLAIMS such as those based on vicarious liability, failure to supervise, or negligent referral are related to the CLAIMS on which they are based.

**b.** *Same transactions or occurrences.* Multiple CLAIMS arising out of the same transaction or occurrence or series of transactions or occurrences are related. However, with regard to this Subsection b only, the PLF will not treat the CLAIMS as related if:

(1) The participating COVERED PARTIES acted independently of one another;

(2) They represented different clients or groups of clients whose interests were adverse; and

(3) The claimants do not rely on any common theory of liability or damage.

**c.** *Alleged scheme or plan.* If claimants attempt to tie together different acts as part of an alleged overall scheme or operation, then the CLAIMS are related.

**d.** *Actual pattern or practice.* Even if a scheme or practice is not alleged, CLAIMS that arise from a method, pattern, or practice in fact used or adopted by one or more COVERED PARTIES or LAW ENTITIES in representing multiple clients in similar matters are related.

**e.** *One loss.* When successive or collective errors each cause or contribute to single or multiple clients' and/or claimants' harm or cumulatively enhance their damages or losses, then the CLAIMS are related.

**f.** *Class actions.* All CLAIMS alleged as part of a class action or purported class action are related.

#### COMMENTS

**SAME OR RELATED CLAIMS.** *Each PLF Plan sets a maximum limit of coverage per year. This limit defines the PLF's total maximum obligation under the terms of each Plan issued by the PLF.*

*However, absent additional Plan provisions, numerous circumstances could arise in which the PLF, as issuer of other PLF Plans, would be liable beyond the limits specified in one individual Plan. For example, Plans issued to the same attorney in different PLAN YEARS might apply. Or, Plans issued to different attorneys might all apply. In some circumstances, the PLF intends to extend a separate limit under each Plan. In other circumstances, when the CLAIMS are related, the PLF does not so intend. Because the concept of “relatedness” is broad and factually based, there is no one definition or rule that will apply to every situation. The PLF has therefore elected to explain its intent by listing certain circumstances in which only one limit is available regardless of the number of Plans that may apply. See Subsections 14.a to 14.f above.*

*Example No. 1: Attorney A is an associate in a firm and commits malpractice. CLAIMS are made against Attorney A and various partners in the firm. All attorneys share one limit. CLAIMS such as those based on vicarious liability, failure to supervise, or negligent referral are always related to the CLAIMS on which they are based. See Subsection 14.a above. Even if Attorney A and some of the other lawyers are at different firms at the time of the CLAIM, all attorneys and the firm share one Limit of Coverage and one CLAIMS EXPENSE ALLOWANCE.*

*Example No. 2: Attorney A writes a tax opinion for an investment offering, and Attorneys B and C, with a different law firm, assemble the offering circular. Investors 1 and 2 bring CLAIMS in 2010 and Investor 3 brings a CLAIM in 2011 relating to the offering. No CLAIM is asserted prior to 2010. Only one Limit of Coverage applies to all CLAIMS. This is because the CLAIMS arise out of the same transaction or occurrence, or series of transactions or occurrences. See Subsection 14.b above. CLAIMS by investors in the same or similar investments will almost always be related. However, because the CLAIMS in this example are made against COVERED PARTIES in two different firms, up to two CLAIMS EXPENSE ALLOWANCES may potentially apply. See Section VI.2. Note also that, under these facts, all CLAIMS against Attorneys A, B, and C are treated as having been first made in 2010, pursuant to Section IV.1.b(2). This could result in available limits having been exhausted before a CLAIM is eventually made against a particular COVERED PARTY. The timing of making CLAIMS does not increase the available limits.*

*Example No. 3: Attorneys A and B represent husband and wife, respectively, in a divorce. Husband sues A for malpractice in litigating his prenuptial agreement. Wife sues B for not getting her proper custody rights over the children. A’s and B’s CLAIMS are not related. A’s and B’s CLAIMS would be related, but for the exception in the second sentence of Subsection 14.b above.*

*Example No. 4: An owner sells his company to its employees by selling shares to two employee benefit plans set up for that purpose. The plans and/or their members sue the company, its outside corporate counsel A, its ERISA lawyer B, the owner, his attorney C, and the plans’ former attorney D, contending there were improprieties in the due diligence, the form of the agreements, and the amount and value of shares issued. The defendants file cross-claims. All CLAIMS are related. They arise out of the same transactions or occurrences and therefore are related under Subsection 14.b. For the exception in Subsection 14.b to apply, all three elements must be satisfied. The exception does not apply because the claimants rely on common theories of liability. In addition, the exception may not apply because not all interests were adverse, theories of damages are common, or the attorneys did not act independently of one another. Finally, even if the exception in Subsection 14.b did apply, the CLAIMS would still be related under Subsection 14.d because they involve one loss. Although the CLAIMS are related, if all four attorneys’ firms are sued, depending on the circumstances, up to four total CLAIMS EXPENSE ALLOWANCES might be available under Section VI.2.*



*Example No. 5: Attorney F represents an investment manager for multiple transactions over multiple years in which the manager purchased stocks in Company A on behalf of various groups of investors. Attorneys G and H represent different groups of investors. Attorney J represents Company A. Attorneys F, G, H, and J are all in different firms. They are all sued by the investors for securities violations arising out of this group of transactions. Although the different acts by different lawyers at different times could legitimately be viewed as separate and unconnected, the claimant in this example attempts to tie them together as part of an alleged overall scheme or operation. The CLAIMS are related because the claimants have made them so. See Subsection 14.c above. This will often be the case in securities CLAIMS. As long as such allegations remain in the case, only one limit will be available, even if alternative CLAIMS are also alleged. In this example, although there is only one Limit of Coverage available for all CLAIMS, depending on the circumstances, multiple CLAIMS EXPENSE ALLOWANCES might be available. See Section VI.2.*

*Example No. 6: Attorneys A, B, and C in the same firm represent a large number of asbestos clients over ten years' time, using a firm-wide formula for evaluating large numbers of cases with minimum effort. They are sued by certain clients for improper evaluation of their cases' values, although the plaintiffs do not allege a common scheme or plan. Because the firm in fact operated a firm-wide formula for handling the cases, the CLAIMS are related based on the COVERED PARTIES' own pattern or practice. The CLAIMS are related because the COVERED PARTIES' own conduct has made them so. See Subsection 14.d above. Attorneys A, B, and C will share one Limit of Coverage and one CLAIMS EXPENSE ALLOWANCE. LAW ENTITIES should protect themselves from such CLAIMS brought by multiple clients by purchasing adequate excess insurance.*

*Example No. 7: Attorney C represents a group of clients at trial and commits certain errors. Attorney D of the same firm undertakes the appeal, but fails to file the notice of appeal on time. Attorney E is hired by clients to sue Attorneys C and D for malpractice, but misses the statute of limitations. Clients sue all three attorneys. The CLAIMS are related and only a single Limit of Coverage applies to all CLAIMS. See Subsection 14.e above. When, as in this example, successive or collective errors each cause single or multiple clients and/or claimants harm or cumulatively enhance their damages or losses, then the CLAIMS are related. In such a situation, a claimant or group of claimants cannot increase the limits potentially available by alleging separate errors by separate attorneys. Attorney E, however, may be entitled to a CLAIMS EXPENSE ALLOWANCE separate from the one shared by C and D.*

*Example No. 8: Attorneys A, B, and C in the same firm represent a large banking institution. They are sued by the bank's customers in a class action lawsuit for their part in advising the bank on allegedly improper banking practices. All CLAIMS are related. No class action or purported class action can ever trigger more than one Limit of Coverage. See Subsection 14.f above.*

**15.** "SUIT" means a civil proceeding in which DAMAGES are alleged. SUIT includes an arbitration or alternative dispute resolution proceeding to which the COVERED PARTY submits with the consent of the PLF.

**16.** "YOU" and "YOUR" mean the Named Party shown in the Declarations.

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## **SECTION II — WHO IS A COVERED PARTY**

**1.** The following are COVERED PARTIES:

- a.** YOU.
  - b.** In the event of YOUR death, adjudicated incapacity, or bankruptcy, YOUR conservator, guardian, trustee in bankruptcy, or legal or personal representative, but only when acting in such capacity.
  - c.** Any attorney or LAW ENTITY legally liable for YOUR COVERED ACTIVITIES, but only to the extent such legal liability arises from YOUR COVERED ACTIVITIES.
- 2.** Notwithstanding Subsection 1, no business enterprise (except a LAW ENTITY) or any partner, proprietor, officer, director, stockholder, or employee of such enterprise is a COVERED PARTY.

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**SECTION III — WHAT IS A COVERED ACTIVITY**

The following are COVERED ACTIVITIES, if the acts, errors, or omissions occur during the COVERAGE PERIOD; or prior to the COVERAGE PERIOD, if on the effective date of this Plan YOU have no knowledge that any CLAIM has been asserted arising out of such prior act, error, or omission, and there is no prior policy or Plan that provides coverage for such liability or CLAIM resulting from the act, error, or omission, whether or not the available limits of liability of such prior policy or Plan are sufficient to pay any liability or CLAIM:

[YOUR CONDUCT]

- 1.** Any act, error, or omission committed by YOU that satisfies all of the following criteria:
  - a.** YOU committed the act, error, or omission in rendering professional services in YOUR capacity as an attorney in private practice, or in failing to render professional services that should have been rendered in YOUR capacity as an attorney in private practice.
  - b.** At the time YOU rendered or failed to render these professional services:
    - (1)** YOUR principal office was located in the State of Oregon;
    - (2)** YOU were licensed to practice law in the State of Oregon; and
    - (3)** Such activity occurred after any Retroactive Date shown in the Declarations.

[CONDUCT OF OTHERS]

- 2.** Any act, error, or omission committed by a person for whose conduct YOU are legally liable in YOUR capacity as an attorney, provided at the time of the act, error, or omission each of the following criteria was satisfied:
  - a.** The act, error, or omission causing YOUR liability:
    - (1)** Arose while YOU were licensed to practice law in the State of Oregon;
    - (2)** Arose while YOUR principal office was located in the State of Oregon; and

(3) Occurred after any Retroactive Date shown in the Declarations.

b. The act, error, or omission, if committed by YOU, would constitute the rendering of professional services in YOUR capacity as an attorney in private practice.

c. The act, error, or omission was not committed by an attorney who at the time of the act, error, or omission:

(1) Maintained his or her principal office outside the State of Oregon; or

(2) Maintained his or her principal office within the State of Oregon and either:

(a) Claimed exemption from participation in the Professional Liability Fund,  
or

(b) Was not an active member of the Oregon State Bar.

[YOUR CONDUCT IN A SPECIAL CAPACITY]

3. Any act, error, or omission committed by YOU in YOUR capacity as a personal representative, administrator, conservator, executor, guardian, guardian *ad litem*, special representative pursuant to ORS 128.179, or trustee (except BUSINESS TRUSTEE); provided that the act, error, or omission arose out of a COVERED ACTIVITY as defined in Subsections 1 and 2 above, and the CLAIM is brought by or for the benefit of a beneficiary of the special capacity relationship and arises out of a breach of that relationship.

COMMENTS

*To qualify for coverage, a CLAIM must arise out of a COVERED ACTIVITY. The definition of COVERED ACTIVITY imposes a number of restrictions on coverage including the following:*

**Principal Office.** *To qualify for coverage, a COVERED PARTY'S "principal office" must be located in the State of Oregon at the time specified in the definition. "Principal office" as used in the Plan has the same definition as provided in ORS 9.080(2)(c). For further clarification, see PLF Board of Directors Policy 3.180 (available on the PLF website, [www.osbplf.org](http://www.osbplf.org) or telephone the PLF to request a copy).*

**Prior CLAIMS.** *Section III limits the definition of COVERED ACTIVITY with respect to acts, errors, or omissions that happen prior to the COVERAGE PERIOD, so that no coverage is granted when there is prior knowledge or prior insurance. For illustration of the application of this language, see *Chamberlin v. Smith*, 140 Cal Rptr 493 (1977).*

*To the extent there is prior insurance or other coverage applicable to the CLAIM, it is reasonable to omit the extension of further coverage. Likewise, to the extent YOU have knowledge that particular acts, errors, or omissions have given rise to a CLAIM, it is reasonable that that CLAIM and other CLAIMS arising out of such acts, errors, or omissions would not be covered. Such CLAIMS should instead be covered under the policy or PLF PLAN in force, if any, at the time the first such CLAIM was made.*

**Types of Activity.** COVERED ACTIVITIES have been divided into three categories. Subsection 1 deals with coverage for YOUR conduct as an attorney in private practice. Subsection 2 deals with coverage for YOUR liability for the conduct of others. Subsection 3 deals with coverage for YOUR conduct in a special capacity (e.g., as a personal representative of an estate). The term "BUSINESS TRUSTEE" as used in this section is defined in Section I.

**Professional Services.** To qualify for coverage under Section III.1 and III.2.b, the act, error or omission causing YOUR liability must be committed "in rendering professional services in YOUR capacity as an attorney, or in failing to render professional services that should have been rendered in YOUR capacity as an attorney." This language limits coverage to those activities commonly regarded as the rendering of professional services as a lawyer. This language, in addition to limiting coverage to YOUR conduct as a lawyer, is expressly intended to limit the definition of COVERED ACTIVITY so that it does not include YOUR conduct in carrying out the commercial or administrative aspects of law practice. Examples of commercial or administrative activities could include: collecting fees or costs; guaranteeing that the client will pay third parties (e.g., court reporters, experts or other vendors) for services provided; depositing, endorsing or otherwise transferring negotiable instruments; depositing or withdrawing monies or instruments into or from trust accounts; or activities as a trustee that require no specialized legal skill or training, such as paying bills on time or not incurring unnecessary expenses. The foregoing list of commercial or administrative activities is not exclusive, but rather is illustrative of the kinds of activities that are regarded as part of the commercial aspect of law (not covered), as opposed to the rendering of professional services (covered).

*Example.* A client purports to hire the Covered Party and provides the Covered Party with a cashier's check, which the Covered Party deposits into her firm's client trust account. The Covered Party, on the client's instructions, wire-transfers some of the proceeds of the cashier's check to a third party. The cashier's check later turns out to be forged and the funds transferred out of the trust account belonged to other clients. The Covered Party is later sued by a third party such as a bank or other client arising out of the improper transfer of funds. The Covered Party's conduct is not covered under her PLF Plan. Placing, holding or disbursing funds in lawyer trust accounts are not considered professional services for purposes of the PLF Plan.

**Special Capacity.** Subsection 3 provides limited coverage for YOUR acts as a personal representative, administrator, conservator, executor, guardian, or trustee. However, not all acts in a special capacity are covered under this Plan. Attorneys acting in a special capacity, as described in Subsection III.3 may subject themselves to claims from third parties that are beyond the coverage provided by this Plan. For example, in acting as a conservator or personal representative, an attorney may engage in certain business activities, such as terminating an employee or signing a contract. If such actions result in a claim by the terminated employee or the other party to the contract, the estate or corpus should respond to such claims in the first instance, and should protect the attorney in the process. Attorneys engaged in these activities should obtain appropriate commercial general liability, errors and omissions, or other commercial coverage. The claim will not be covered under Subsection III.3.

The Plan purposefully uses the term "special capacity" rather than "fiduciary" in Subsection 3 to avoid any implication that this coverage includes fiduciary obligations other than those specifically identified. There is no coverage for YOUR conduct under Subsection 3 unless YOU were formally named or designated as a personal representative, administrator, conservator, executor, guardian, or trustee (except BUSINESS TRUSTEE) and served in such capacity.

**Ancillary Services.** *Some law firms are now branching out and providing their clients with ancillary services, either through their own lawyers and staff or through affiliates. These ancillary services can include such activities as architectural and engineering consulting, counseling, financial and investment services, lobbying, marketing, advertising, trade services, public relations, real estate development and appraisal, and other services. Only CLAIMS arising out of services falling within the definition of COVERED ACTIVITY will be covered under this Plan. For example, a lawyer-lobbyist engaged in the private practice of law, including conduct such as advising a client on lobbying reporting requirements or drafting or interpreting proposed legislation, would be engaged in a COVERED ACTIVITY and would be covered. Generally, however, ancillary services will not be covered because of this requirement.*

**Retroactive Date and Prior Acts.** *Section III introduces the concept of a Retroactive Date. No Retroactive Date will apply to any attorney who has held coverage with the PLF continuously since the inception of the PLF. Attorneys who first obtained coverage with the PLF at a later date and attorneys who have interrupted coverage will find a Retroactive Date in the Declarations. This date will be the date on which YOUR most recent period of continuous coverage commenced. This Plan does not cover CLAIMS arising out of conduct prior to the Retroactive Date.*

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## SECTION IV — GRANT OF COVERAGE

### 1. Indemnity.

**a.** The PLF will pay those sums that a COVERED PARTY becomes legally obligated to pay as DAMAGES because of CLAIMS arising out of a COVERED ACTIVITY to which this Plan applies. No other obligation or liability to pay sums or perform acts or services is covered unless specifically provided for under Subsection 2 - Defense.

**b.** This Plan applies only to CLAIMS first made against a COVERED PARTY during the COVERAGE PERIOD.

**(1)** The applicable COVERAGE PERIOD for a CLAIM will be the earliest of:

**(a)** When a lawsuit is filed or an arbitration or ADR proceeding is formally initiated; or

**(b)** When notice of a CLAIM is received by any COVERED PARTY or by the PLF; or

**(c)** When the PLF first becomes aware of facts or circumstances that reasonably could be expected to be the basis of a CLAIM; or

**(d)** When a claimant intends to make a CLAIM but defers assertion of the CLAIM for the purpose of obtaining coverage under a later COVERAGE PERIOD and the COVERED PARTY knows or should know that the COVERED ACTIVITY that is the basis of the CLAIM could result in a CLAIM.

(2) Two or more CLAIMS that are SAME OR RELATED CLAIMS, whenever made, will all be deemed to have been first made at the time the earliest such CLAIM was first made. This provision will apply to YOU only if YOU have coverage from any source applicable to the earliest such SAME OR RELATED CLAIM (whether or not the available limits of liability of such prior policy or plan are sufficient to pay any liability or CLAIM).

c. This Plan applies only to SUITS brought in the United States, its territories or possessions, Canada, or the jurisdiction of any Indian Tribe in the United States. This Plan does not apply to SUITS brought in any other jurisdiction, or to SUITS brought to enforce a judgment rendered in any jurisdiction other than the United States, its territories or possessions, Canada, or the jurisdiction of any Indian Tribe in the United States.

d. The amount the PLF will pay for damages is limited as described in SECTION VI.

## 2. Defense.

a. Until the CLAIMS EXPENSE ALLOWANCE and the Limits of Coverage extended by this Plan are exhausted, the PLF will defend any SUIT against a COVERED PARTY seeking DAMAGES to which this coverage applies. The PLF has the sole right to investigate, repair, settle, designate defense attorneys, and otherwise conduct defense, repair, or prevention of any CLAIM or potential CLAIM.

b. With respect to any CLAIM or potential CLAIM the PLF defends or repairs, the PLF will pay all CLAIMS EXPENSE the PLF may incur. All payments for EXCESS CLAIMS EXPENSE will reduce the Limits of Coverage.

c. If the CLAIMS EXPENSE ALLOWANCE and Limits of Coverage extended by this Plan are exhausted prior to the conclusion of any CLAIM, the PLF may withdraw from further defense of the CLAIM.

### COMMENTS

**Claims Made Coverage.** *As claims made coverage, this Plan applies to CLAIMS first made during the time period shown in the Declarations. CLAIMS first made either prior to or subsequent to that time period are not covered by this Plan, although they may be covered by a prior or subsequent PLF Plan.*

**Damages.** *This Plan grants coverage only for CLAIMS seeking DAMAGES. There is no coverage granted for other claims, actions, suits, or proceedings seeking equitable remedies such as restitution of funds or property, disgorgement, accountings or injunctions.*

**When Claim First Made.** *Subsection 1.b(1) of this section is intended to make clear that the earliest of the several events listed determines when the CLAIM is first made. Subsection 1.b(1)(c) adopts an objective, reasonable person standard to determine when the PLF's knowledge of facts or circumstances can rise to the level of a CLAIM for purpose of triggering an applicable COVERAGE PERIOD. This subsection is based solely on the objective nature of information received by the PLF. Covered Parties should thus be aware that any information or knowledge they may have that is not transmitted to the PLF is irrelevant to any determination made under this subsection.*

If facts or circumstances meet the requirements of subsection 1.b(1)(c), then any subsequent CLAIM that constitutes a SAME OR RELATED CLAIM under Section 1.14 will relate back to the COVERAGE PERIOD at the time the original notice of information was provided to the PLF.

**SAME OR RELATED CLAIMS.** Subsection 1.b(2) states a special rule applicable when several CLAIMS arise out of the SAME OR RELATED CLAIMS. Under this rule, all such SAME OR RELATED CLAIMS are considered first made at the time the earliest of the several SAME OR RELATED CLAIMS is first made. Thus, regardless of the number of claimants asserting SAME OR RELATED CLAIMS, the number of PLAN YEARS involved, or the number of transactions giving rise to the CLAIMS, all such CLAIMS are treated as first made in the earliest applicable PLAN YEAR and only one Limit of Coverage and one CLAIMS EXPENSE ALLOWANCE apply. There is an exception to the special rule in Subsection 1.b(2) for COVERED PARTIES who had no coverage (with the PLF or otherwise) at the time the initial CLAIM was made, but this exception does not create any additional Limits of Coverage. Pursuant to Subsection VI.2, only one Limit of Coverage would be available.

**Scope of Duty to Defend.** Subsection 2 defines the PLF's obligation to defend. The obligation to defend continues only until the CLAIMS EXPENSE ALLOWANCE and the Limits of Coverage are exhausted. In that event, the PLF will tender control of the defense to the COVERED PARTY or excess insurance carrier, if any. The PLF's payment of the CLAIMS EXPENSE ALLOWANCE and Limits of Coverage ends all of the PLF's duties.

**Control of Defense.** Subsection 2.a allocates to the PLF control of the investigation, settlement, and defense of the CLAIM. See SECTION IX—ASSISTANCE, COOPERATION, AND DUTIES OF COVERED PARTY.

**Costs of Defense.** Subsection 2.b obligates the PLF to pay reasonable and necessary costs of defense. Only those expenses incurred by the PLF or with the PLF's authority are covered.

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## SECTION V — EXCLUSIONS FROM COVERAGE

### [WRONGFUL CONDUCT EXCLUSIONS]

1. This Plan does not apply to a COVERED PARTY for any CLAIM in which that COVERED PARTY participates in a fraudulent or collusive CLAIM.
2. This Plan does not apply to any CLAIM based on or arising out of any intentional, dishonest, fraudulent, criminal, malicious, knowingly wrongful, or knowingly unethical acts, errors, or omissions committed by YOU or at YOUR direction or in which YOU acquiesce or remain passive after having personal knowledge thereof.

### COMMENTS

*Exclusions 1 and 2 set out the circumstances in which wrongful conduct will eliminate coverage. An intent to harm is not required.*

**Voluntary Exposure to CLAIMS.** An attorney may sometimes voluntarily expose himself or herself to a CLAIM or known risk through a course of action or inaction when the attorney knows there is a more reasonable alternative means of resolving a problem. For example, an attorney might disburse settlement proceeds to a client even though the attorney knows of valid hospital, insurance company, or

*PIP liens, or other valid liens or claims to the funds. If the attorney disburses the proceeds to the client and a CLAIM arises from the other claimants, Exclusion 2 will apply and the CLAIM will not be covered.*

**Unethical Conduct.** *If a CLAIM arises that involves unethical conduct by an attorney, Exclusion 2 may also apply to the conduct and the CLAIM would therefore not be covered. This can occur, for example, if an attorney violates Disciplinary Rule ORPC 8.4(a)(3) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation) or ORPC 5.5(a) (aiding a nonlawyer in the unlawful practice of law) and a CLAIM results.*

*Example: Attorney A allows a title company to use his name, letterhead, or forms in connection with a real estate transaction in which Attorney A has no significant involvement. Attorney A's activities violate ORPC 8.4(a)(3) and ORPC 5.5(a). A CLAIM is made against Attorney A in connection with the real estate transaction. Because Attorney A's activities fall within the terms of Exclusion 2, there will be no coverage for the CLAIM. In addition, the CLAIM likely would not even be within the terms of the coverage grant under this Plan because the activities giving rise to the CLAIM do not fall within the definition of a COVERED ACTIVITY. The same analysis would apply if Attorney A allowed an insurance or investment company to use his name, letterhead, or forms in connection with a living trust or investment transaction in which Attorney A has no significant involvement.*

**3.** This Plan does not apply to any CLAIM based on or arising out of a proceeding brought against YOU by the Oregon State Bar or any similar entity.

**4.** This Plan does not apply to:

- a.** The part of any CLAIM seeking punitive, exemplary or statutorily enhanced damages; or
- b.** Any CLAIM for or arising out of the imposition of attorney fees, costs, fines, penalties, or other sanctions imposed under any federal or state statute, administrative rule, court rule, or case law intended to penalize bad faith conduct and/or the assertion of frivolous or bad faith claims or defenses. The PLF will defend the COVERED PARTY against such a CLAIM, but any liability for indemnity arising from such CLAIM will be excluded.

#### COMMENTS

*A COVERED PARTY may become subject to punitive or exemplary damages, attorney fees, costs, fines, penalties, or other sanctions in two ways. The COVERED PARTY may have these damages assessed directly against the COVERED PARTY or the COVERED PARTY may have a client or other person sue the COVERED PARTY for indemnity for causing the client to be subjected to these damages.*

*Subsection a of Exclusion 4 applies to direct actions for punitive, exemplary or enhanced damages. It excludes coverage for that part of any CLAIM asserting such damages. In addition, such CLAIMS do not involve covered DAMAGES as defined in this Plan. If YOU are sued for punitive damages, YOU are not covered for that exposure. Similarly, YOU are not covered to the extent compensatory damages are doubled, trebled or otherwise enhanced.*

*Subsection b of Exclusion 4 applies to both direct actions against a COVERED PARTY and actions for indemnity brought by others. The courts have become increasingly intolerant of attorneys' improper actions in several areas including trial practice, discovery, and conflicts of interest. Statutes, court rules, and common law approaches imposing various monetary sanctions have been developed to*



*deter such inappropriate conduct. The purpose of these sanctions would be threatened if the PLF were to indemnify the guilty attorney and pay the cost of indemnification out of the assessments paid by all attorneys.*

*Thus, if YOU cause YOUR client to be subjected to a punitive damage award (based upon the client's wrongful conduct toward the claimant) because of a failure, for example, to assert a statute of limitations defense, the PLF will cover YOUR liability for the punitive damages suffered by YOUR client. Subsection a does not apply because the action is not a direct action for punitive damages and Subsection b does not apply because the punitive damages suffered by YOUR client are not the type of damages described in Subsection b.*

*On the other hand, if YOU cause YOUR client to be subjected to an award of attorney fees, costs, fines, penalties, or other sanctions imposed because of YOUR conduct, or such an award is made against YOU, Subsection b applies and the CLAIM for such damages (or for any related consequential damages) will be excluded.*

#### [BUSINESS ACTIVITY EXCLUSIONS]

**5.** This Plan does not apply to that part of any CLAIM based on or arising out of YOUR conduct as an officer, director, partner, BUSINESS TRUSTEE, employee, shareholder, member, or manager of any entity except a LAW ENTITY.

#### COMMENTS

*A COVERED PARTY, in addition to his or her role as an attorney, may act as an officer, director, partner, BUSINESS TRUSTEE, employee, shareholder, member, or manager of an entity. This exclusion eliminates coverage for the COVERED PARTY'S liability while acting in these capacities. However, the exclusion does not apply if the liability is based on such status in a LAW ENTITY.*

**6.** This Plan does not apply to any CLAIM by or on behalf of any business enterprise:

**a.** In which YOU have an ownership interest, or in which YOU had an ownership interest at the time of the alleged acts, errors, or omissions on which the CLAIM is based;

**b.** In which YOU are a general partner, managing member, or employee, or in which YOU were a general partner, managing member, or employee at the time of the alleged acts, errors, or omissions on which the CLAIM is based; or

**c.** That is controlled, operated, or managed by YOU, either individually or in a fiduciary capacity, including the ownership, maintenance, or use of any property in connection therewith, or was so controlled, operated, or managed by YOU at the time of the alleged acts, errors, or omissions on which the CLAIM is based.

Ownership interest, for the purpose of this exclusion, does not include an ownership interest now or previously held by YOU solely as a passive investment, as long as YOU, those YOU control, YOUR spouse, parent, step-parent, child, step-child, sibling, or any member of YOUR household, and those with whom YOU are regularly engaged in the practice of law, collectively now own or previously owned an interest of 10 percent or less in the business enterprise.

## COMMENTS

*Intimacy with a client can increase risk of loss in two ways: (1) The attorney's services may be rendered in a more casual and less thorough manner than if the services were extended at arm's length; and (2) After a loss, the attorney may feel particularly motivated to assure the client's recovery. While the PLF is cognizant of a natural desire of attorneys to serve those with whom they are closely connected, the PLF has determined that coverage for such services should be excluded. Exclusion 6 delineates the level of intimacy required to defeat coverage. See also Exclusion 11.*

7. This Plan does not apply to any CLAIM made by:
- a. YOUR present, former, or prospective partner, employer, or employee; or
  - b. A present, former, or prospective officer, director, or employee of a professional corporation in which YOU were a shareholder,

unless such CLAIM arises out of YOUR conduct in an attorney-client capacity for one of the parties listed in Subsections a or b.

## COMMENTS

*The PLF does not always cover YOUR conduct in relation to YOUR past, present, or prospective partners, employers, employees, and fellow shareholders, even if such conduct arises out of a COVERED ACTIVITY. Coverage is limited by this exclusion to YOUR conduct in relation to such persons in situations in which YOU are acting as their attorney and they are YOUR client.*

8. This Plan does not apply to any CLAIM based on or arising out of any business transaction subject to ORPC 1.8(a) or its equivalent in which YOU participate with a client unless disclosure in the form of Disclosure Form ORPC 1 (attached as Exhibit A to this Plan) has been properly executed prior to the occurrence giving rise to the CLAIM and either:
- a. A copy of the executed disclosure form is forwarded to the PLF within 10 calendar days of execution; or
  - b. If delivery of a copy of the disclosure form to the PLF within 10 calendar days of execution would violate ORPC 1.6, ORS 9.460(3), or any other rule governing client confidences and secrets, YOU may instead send the PLF an alternative letter stating: (1) the name of the client with whom YOU are participating in a business transaction; (2) that YOU have provided the client with a disclosure letter pursuant to the requirements of ORPC 1.0(g) and 1.8(a); (3) the date of the disclosure letter; and (4) that providing the PLF with a copy of the disclosure letter at the present time would violate applicable rules governing client confidences and secrets. This alternative letter must be delivered to the PLF within 10 calendar days of execution of the disclosure letter.

## COMMENTS

**ORPC 1.** *Form ORPC 1, referred to above, is attached to this Plan following SECTION XV. The form includes an explanation of ORPC 1.8(a) which should be provided to the client involved in the*

*business transaction.*

***Applicability of Exclusion.*** *When an attorney engages in a business transaction with a client, the attorney has an ethical duty to make certain disclosures to the client. ORPC 1.0(g) and 1.8(a) provide:*

***RULE 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES***

*(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to client unless:*

*(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;*

*(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and*

*(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.*

***RULE 1.0(g)***

*(g) "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.*

*This exclusion is not intended to be an interpretation of ORPC 1.8(a). Instead, the Plan is invoking the body of law interpreting ORPC 1.8(a) to define when the exclusion is applicable.*

***Use of the PLF's Form Not Mandated.*** *Because of the obvious conflict of interest and the high duty placed on attorneys, when the exclusion applies, the attorney is nearly always at risk of being liable when things go wrong. The only effective defense is to show that the attorney has made full disclosure, which includes a sufficient explanation to the client of the potential adverse impact of the differing interests of the parties to make the client's consent meaningful. Form ORPC 1 is the PLF's attempt to set out an effective disclosure which will provide an adequate defense to such CLAIMS. The PLF is sufficiently confident that this disclosure will be effective to agree that the exclusion will not apply if YOU use the PLF's proposed form. YOU are free to use YOUR own form in lieu of the PLF's form, but if YOU do so YOU proceed at YOUR own risk, i.e., if YOUR disclosure is less effective than the PLF's disclosure form, the exclusion will apply. Use of the PLF's form is not intended to assure YOU of compliance with the ethical requirements applicable to YOUR particular circumstances. It is YOUR responsibility to consult ORPC 1.0(g) and 1.8(a) and add any disclosures necessary to satisfy the*

*disciplinary rules.*

**Timing of Disclosure.** *To be effective, it is important that the PLF can prove the disclosure was made prior to entering into the business transaction. Therefore, the disclosure should be reduced to writing and signed prior to entering into the transaction. There may be limited situations in which reducing the required disclosure to writing prior to entering into the transaction is impractical. In those circumstances, execution of the disclosure letter after entry into the transaction will not render the exclusion effective provided the execution takes place while the client still has an opportunity to withdraw from the transaction and the effectiveness of the disclosure is not compromised. Additional language may be necessary to render the disclosure effective in these circumstances.*

**Delivery to the PLF.** *Following execution of the disclosure letter, a copy of the letter or an alternative letter must be delivered to the PLF in a timely manner. Failure to do so will result in any subsequent CLAIM against YOU being excluded.*

**Other Disclosures.** *By its terms, ORPC 1.8(a) and this exclusion apply only to business transactions with a client in which the client expects the lawyer to exercise the lawyer's professional judgment therein for the protection of the client. However, lawyers frequently enter into business transactions with others not recognizing that the other expects the lawyer to exercise professional judgment for his or her protection. It can be the "client's" expectation and not the lawyer's recognition that triggers application of ORPC 1.8(a) and this exclusion.*

*Whenever YOU enter into a business transaction with a client, former client, or any other person, YOU should make it **clear in writing** at the **start** for YOUR own protection whether or not YOU will also be providing legal services or exercising YOUR professional judgment for the protection of other persons involved in the transaction (or for the business entity itself). Avoiding potential misunderstandings up front can prevent difficult legal malpractice CLAIMS from arising later.*

**9.** This Plan does not apply to any CLAIM based on or arising out of any act, error, or omission committed by YOU (or by someone for whose conduct YOU are legally liable) while in the course of rendering INVESTMENT ADVICE if the INVESTMENT ADVICE is in fact either the sole cause or a contributing cause of any resulting damage. However, if all INVESTMENT ADVICE rendered by YOU constitutes a COVERED ACTIVITY described in Section III.3, this exclusion will not apply unless part or all of such INVESTMENT ADVICE is described in Subsections d, e, f, or g of the definition of INVESTMENT ADVICE in Section I.10.

#### COMMENTS

*In prior years, the PLF suffered extreme losses as a result of COVERED PARTIES engaging in INVESTMENT ADVICE activity. It was never intended that the Plan cover such activities. An INVESTMENT ADVICE exclusion was added to the Plan in 1984. Nevertheless, losses continued in situations where the COVERED PARTY had rendered both INVESTMENT ADVICE and legal advice. In addition, some CLAIMS resulted where the attorney provided INVESTMENT ADVICE in the guise of legal advice.*

*Exclusion 9, first introduced in 1987, represented a totally new approach to this problem. Instead of excluding all INVESTMENT ADVICE, the PLF has clearly delineated specific activities which will not be covered whether or not legal as well as INVESTMENT ADVICE is involved. These specific activities are defined in Section I.10 under the definition of INVESTMENT ADVICE. The PLF's choice of delineated activities was guided by specific cases that exposed the PLF in situations never intended to*

*be covered. The PLF is cognizant that COVERED PARTIES doing structured settlements and COVERED PARTIES in business practice and tax practice legitimately engage in the rendering of general INVESTMENT ADVICE as a part of their practices. In delineating the activities to be excluded, the PLF has attempted to retain coverage for these legitimate practices. For example, the last sentence of the exclusion permits coverage for certain activities normally undertaken by conservators and personal representatives (i.e., COVERED ACTIVITIES described in Section III.3) when acting in that capacity even though the same activities would not be covered if performed in any other capacity. See the definition of INVESTMENT ADVICE in Section I.10.*

*Exclusion 9 applies whether the COVERED PARTY is directly or vicariously liable for the INVESTMENT ADVICE.*

*Note that Exclusion 9 could defeat coverage for an entire CLAIM even if only part of the CLAIM involved INVESTMENT ADVICE. If INVESTMENT ADVICE is in fact either the sole or a contributing cause of any resulting damage that is part of the CLAIM, the entire CLAIM is excluded.*

#### [PERSONAL RELATIONSHIP AND BENEFITS EXCLUSIONS]

**10.** This Plan does not apply to any CLAIM:

- a.** For the return of any fees, costs, or disbursements paid to a COVERED PARTY (or paid to any other attorney or LAW ENTITY with which the COVERED PARTY was associated at the time the fees, costs, or disbursements were incurred or paid), including but not limited to fees, costs, and disbursements alleged to be excessive, not earned, or negligently incurred;
- b.** Arising from or relating to the negotiation, securing, or collection of fees, costs, or disbursements owed or claimed to be owed to a COVERED PARTY or any LAW ENTITY with which the COVERED PARTY is now associated, or was associated at the time of the conduct giving rise to the CLAIM; or
- c.** For damages or the recovery of funds or property that have or will directly or indirectly benefit any COVERED PARTY.

#### COMMENTS

*This Plan is intended to cover liability for errors committed in rendering professional services. It is not intended to cover liabilities arising out of the business aspects of the practice of law. Here, the Plan clarifies this distinction by excluding liabilities arising out of fee disputes whether the CLAIM seeks a return of a paid fee, cost, or disbursement. Subsection c, in addition, excludes CLAIMS for damages or the recovery of funds or property that, for whatever reason, have resulted or will result in the accrual of a benefit to any COVERED PARTY.*

*Attorneys sometimes attempt to correct their own mistakes without notifying the PLF. In some cases, the attorneys charge their clients for the time spent in correcting their prior mistakes, which can lead to a later CLAIM from the client. The better course of action is to notify the PLF of a potential CLAIM as soon as it arises and allow the PLF to hire and pay for repair counsel if appropriate. In the PLF's experience, repair counsel is usually more successful in obtaining relief from a court or an opposing party than the attorney who made the mistake. In addition, under Subsection a of this exclusion, the PLF does not cover CLAIMS from a client for recovery of fees previously paid by the client to a COVERED PARTY (including fees charged by an attorney to correct the attorney's prior mistake).*

*Example No. 1: Attorney A sues Client for unpaid fees; Client counterclaims for the return of fees already paid to Attorney A which allegedly were excessive and negligently incurred by Attorney A. Under Subsection a, there is no coverage for the CLAIM.*

*Example No. 2: Attorney B allows a default to be taken against Client, and bills an additional \$2,500 in attorney fees incurred by Attorney B in his successful effort to get the default set aside. Client pays the bill, but later sues Attorney B to recover the fees paid. Under Subsection a there is no coverage for the CLAIM.*

*Example No. 3: Attorney C writes a demand letter to Client for unpaid fees, then files a lawsuit for collection of the fees. Client counterclaims for unlawful debt collection. Under Subsection b, there is no coverage for the CLAIM. The same is true if Client is the plaintiff and sues for unlawful debt collection in response to the demand letter from Attorney C.*

*Example No. 4: Attorney D negotiates a fee and security agreement with Client on behalf of Attorney D's own firm. Other firm members, not Attorney D, represent Client. Attorney D later leaves the firm, Client disputes the fee and security agreement, and the firm sues Attorney D for negligence in representing the firm. Under Subsection b, there is no coverage for the CLAIM.*

*Example No. 5: Attorney E takes a security interest in stock belonging to Client as security for fees. Client fails to pay the fees and Attorney E executes on the stock and becomes the owner. Client sues for recovery of the stock and damages. Under Subsection c, there is no coverage for the CLAIM. The same is true if Attorney E receives the stock as a fee and later is sued for recovery of the stock or damages.*

**11.** This Plan does not apply to any CLAIM based upon or arising out of YOUR legal services performed on behalf of YOUR spouse, parent, step-parent, child, step-child, sibling, or any member of YOUR household, or on behalf of a business entity in which any of them, individually or collectively, have a controlling interest.

#### COMMENT

*Work performed for family members is not covered under this Plan. A CLAIM based upon or arising out of such work, even for example a CLAIM against other lawyers or THE FIRM for failure to supervise, will be excluded from coverage. This exclusion does not apply, however, if one attorney performs legal services for another attorney's family member.*

**12.** This Plan does not apply to any CLAIM arising out of a COVERED PARTY'S activity as a fiduciary under any employee retirement, deferred benefit, or other similar plan.

**13.** This Plan does not apply to any CLAIM arising out of any witnessing of a signature or any acknowledgment, verification upon oath or affirmation, or other notarial act without the physical appearance before such witness or notary public, unless such CLAIM arises from the acts of YOUR employee and YOU have no actual knowledge of such act.

#### [GOVERNMENT ACTIVITY EXCLUSION]

**14.** This Plan does not apply to any CLAIM arising out of YOUR conduct:

- a.** As a public official or an employee of a governmental body, subdivision, or agency; or

**b.** In any other capacity that comes within the defense and indemnity requirements of ORS 30.285 and 30.287, or other similar state or federal statute, rule, or case law. If a public body rejects the defense and indemnity of such a CLAIM, the PLF will provide coverage for such COVERED ACTIVITY and will be subrogated to all YOUR rights against the public body.

*COMMENTS*

*Subsection a excludes coverage for all public officials and government employees. The term "public official" as used in this section does not include part-time city attorneys hired on a contract basis. The term "employee" refers to a salaried person. Thus, the exclusion does not apply, for example, to YOU when YOU are hired on an hourly or contingent fee basis so long as the governmental entity does not provide YOU with office facilities, staff, or other indicia of employment.*

*Subsection a applies whether or not the public official or employee is entitled to defense or indemnity from the governmental entity. Subsection b, in addition, excludes coverage for YOU in other relationships with a governmental entity, but only if statute, rule, or case law entitles YOU to defense or indemnity from the governmental entity.*

[HOUSE COUNSEL EXCLUSION]

**15.** This Plan does not apply to any CLAIM arising out of YOUR conduct as an employee in an employer-employee relationship other than YOUR conduct as an employee for a LAW ENTITY.

*COMMENTS*

*This exclusion applies to conduct as an employee even when the employee represents a third party in an attorney-client relationship as part of the employment. Examples of this application include employment by an insurance company, labor organization, member association, or governmental entity that involves representation of the rights of insureds, union or association members, clients of the employer, or the employer itself.*

[GENERAL TORTIOUS CONDUCT EXCLUSIONS]

**16.** This Plan does not apply to any CLAIM against any COVERED PARTY for:

- a.** Bodily injury, sickness, disease, or death of any person;
- b.** Injury to, loss of, loss of use of, or destruction of any real, personal, or intangible property; or
- c.** Mental anguish or emotional distress in connection with any CLAIM described under Subsections a or b.

This exclusion does not apply to any CLAIM made under ORS 419B.010 if the CLAIM arose from an otherwise COVERED ACTIVITY.

*COMMENTS*

*The CLAIMS excluded are not typical errors-and-omissions torts and are, therefore, considered*

*inappropriate for coverage under the Plan. YOU are encouraged to seek coverage for these CLAIMS through commercial insurance markets.*

*Prior to 1991 the Plan expressly excluded "personal injury" and "advertising injury," defining those terms in a manner similar to their definitions in standard commercial general liability policies. The deletion of these defined terms from this Exclusion is not intended to imply that all personal injury and advertising injury CLAIMS are covered. Instead, the deletion is intended only to permit coverage for personal injury or advertising injury CLAIMS, if any, that fall within the other coverage terms of the Plan.*

*Subsection b of this exclusion is intended to encompass a broad definition of property. For these purposes, property includes real, personal and intangible property (e.g. electronic data, financial instruments, money etc.) held by an attorney. However, Subsection b is not intended to apply to the extent the loss or damage of property materially and adversely affects an attorney's performance of professional services, in which event the consequential damages resulting from the loss or damage to property would be covered. For the purposes of this Comment, "consequential damages" means the extent to which the attorney's professional services are adversely affected by the property damage or loss.*

*Example No. 1: Client gives Attorney A valuable jewelry to hold for safekeeping. The jewelry is stolen or lost. There is no coverage for the value of the stolen or lost jewelry, since the loss of the property did not adversely affect the performance of professional services. Attorney A can obtain appropriate coverage for such losses from commercial insurance sources.*

*Example No. 2: Client gives Attorney B a defective ladder from which Client fell. The ladder is evidence in the personal injury case Attorney B is handling for Client. Attorney B loses the ladder. Because the ladder is lost, Client loses the personal injury case. The CLAIM for the loss of the personal injury case is covered. The damages are the difference in the outcome of the personal injury case caused by the loss of the ladder. There would be no coverage for the loss of the value of the ladder. Coverage for the value of the ladder can be obtained through commercial insurance sources.*

*Example No. 3: Client gives Attorney C important documents relevant to a legal matter being handled by Attorney C for Client. After the conclusion of handling of the legal matter, the documents are lost or destroyed. Client makes a CLAIM for loss of the documents, reconstruction costs, and consequential damages due to future inability to use the documents. There is no coverage for this CLAIM, as loss of the documents did not adversely affect any professional services because the professional services had been completed. Again, coverage for loss of the property (documents) itself can be obtained through commercial general liability or other insurance or through a valuable papers endorsement to such coverage.*

***Child Abuse Reporting Statute.*** *This exclusion would ordinarily exclude coverage for the type of damages that might be alleged against an attorney for failure to comply with ORS 419B.010, the child abuse reporting statute. (It is presently uncertain whether civil liability can arise under the statute.) If there is otherwise coverage under this Plan for a CLAIM arising under ORS 419B.010, the PLF will not apply Exclusion 16 to the CLAIM.*

**17.** This Plan does not apply to any CLAIM based on or arising out of harassment or discrimination on the basis of race, creed, age, religion, sex, sexual preference, disability, pregnancy, national origin, marital status, or any other basis prohibited by law.



## COMMENTS

*The CLAIMS excluded are not typical errors-and-omissions torts and are, therefore, inappropriate for coverage under the Plan.*

### [PATENT EXCLUSION]

**18.** This Plan does not apply to any CLAIM based upon or arising out of professional services rendered or any act, error, or omission committed in relation to the prosecution of a patent if YOU were not registered with the U.S. Patent and Trademark Office at the time the CLAIM arose.

### [SUA EXCLUSION]

**19.** This Plan does not apply to any CLAIM for damages consisting of a special underwriting assessment imposed by the PLF.

### [CONTRACTUAL OBLIGATION EXCLUSION]

**20.** This Plan does not apply to any CLAIM:

- a.** Based upon or arising out of any bond or any surety, guaranty, warranty, joint control, or similar agreement, or any assumed obligation to indemnify another, whether signed or otherwise agreed to by YOU or someone for whose conduct YOU are legally liable, unless the CLAIM arises out of a COVERED ACTIVITY described in SECTION III.3 and the person against whom the CLAIM is made signs the bond or agreement solely in that capacity;
- b.** Any costs connected to ORS 20.160 or similar statute or rule;
- c.** For liability based on an agreement or representation, if the Covered Party would not have been liable in the absence of the agreement or representation; or
- d.** Claims in contract based upon an alleged promise to obtain a certain outcome or result.

## COMMENTS

*In the Plan, the PLF agrees to assume certain tort risks of Oregon attorneys for certain errors or omissions in the private practice of law; it does not assume the risk of making good on attorneys' contractual obligations. So, for example, an agreement to indemnify or guarantee an obligation will generally not be covered, except in the limited circumstances described in Subsection a. That subsection is discussed further below in this Comment.*

*Subsection b, while involving a statutory rather than contractual obligation, nevertheless expresses a similar concept, since under ORS 20.160 an attorney who represents a nonresident or foreign corporation plaintiff in essence agrees to guarantee payment of litigation costs not paid by his or her client.*

*Subsection c states the general rule that contractual liabilities are not covered under the PLF Plan. For example, an attorney who places an attorney fee provision in his or her retainer agreement voluntarily accepts the risk of making good on that contractual obligation. Because a client's attorney fees incurred in litigating a dispute with its attorney are not ordinarily damages recoverable in tort, they*

are not a risk the PLF agrees to assume. In addition, if a Covered Party agrees or represents that he or she will pay a claim, reduce fees, or the like, a claim based on a breach of that agreement or representation will not be covered under the Plan.

Subsection d involves a specific type of agreement or representation: an alleged promise to obtain a particular outcome or result. One example of this would be an attorney who promises to get a case reinstated or to obtain a particular favorable result at trial or in settlement. In that situation, the attorney can potentially be held liable for breach of contract or misrepresentation regardless of whether his or her conduct met the standard of care. That situation is to be distinguished from an attorney's liability in tort or under the third party beneficiary doctrine for failure to perform a particular task, such as naming a particular beneficiary in a will or filing and serving a complaint within the statute of limitations, where the liability, if any, is not based solely on a breach of the attorney's guarantee, promise or representation.

Attorneys sometimes act in one of the special capacities for which coverage is provided under Section III.3 (i.e., as a named personal representative, administrator, conservator, executor, guardian, or trustee except BUSINESS TRUSTEE). If the attorney is required to sign a bond or any surety, guaranty, warranty, joint control, or similar agreement while carrying out one of these special capacities, Exclusion 20.a does not apply, although b, c, or d of this Exclusion may be applicable.

On the other hand, when an attorney is acting in an ordinary capacity not within the provisions of Section III.3, Exclusion 20 does apply to any CLAIM based on or arising out of any bond or any surety, guaranty, warranty, joint control, indemnification, or similar agreement signed by the attorney or by someone for whom the attorney is legally liable. In these situations, attorneys should not sign such bonds or agreements. For example, if an attorney is acting as counsel to a personal representative and the personal representative is required to post a bond, the attorney should resist any attempt by the bonding company to require the attorney to co-sign as a surety for the personal representative or to enter into a joint control or similar agreement that requires the attorney to review, approve, or control expenditures by the personal representative. If the attorney signs such an agreement and a CLAIM is later made by the bonding company, the estate, or another party, Exclusion 20 applies and there will be no coverage for the CLAIM.

#### [BANKRUPTCY TRUSTEE EXCLUSION]

**21.** This Plan does not apply to any CLAIM arising out of YOUR activity (or the activity of someone for whose conduct you are legally liable) as a bankruptcy trustee.

#### [CONFIDENTIAL OR PRIVATE DATA EXCLUSION]

**22.** This Plan does not apply to any CLAIM arising out of or related to the loss, compromise or breach of or access to confidential or private information or data. If the PLF agrees to defend a SUIT that includes a CLAIM that falls within this exclusion, the PLF will not pay any CLAIMS EXPENSE relating to such CLAIM.

#### COMMENTS

*There is a growing body of law directed at protecting confidential or private information from disclosure. The protected information or data may involve personal information such as credit card information, social security numbers, drivers licenses, or financial or medical*

information. They may also involve business-related information such as trade secrets or intellectual property. Examples of loss, compromise, breach or access include but are not limited to electronically stored information or data being inadvertently disclosed or released by a Covered Party; being compromised by the theft, loss or misplacement of a computer containing the data; being stolen or intentionally damaged; or being improperly accessed by a Covered Party or someone acting on his or her behalf. However, such information or data need not be in electronic format, and a data breach caused through, for example, the improper safeguarding or disposal of paper records would also fall within this exclusion.

There may be many different costs incurred to respond to a data breach, including but not limited to notification costs, credit monitoring costs, forensic investigations, computer reprogramming, call center support and/or public relations. The PLF will not pay for any such costs, even if the PLF is otherwise providing a defense.

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## SECTION VI — LIMITS OF COVERAGE AND CLAIMS EXPENSE ALLOWANCE

### 1. Limits for This Plan

**a. Coverage Limits.** The PLF's maximum liability under this Plan is \$300,000 DAMAGES and EXCESS CLAIMS EXPENSE for all CLAIMS first made during the COVERAGE PERIOD (and during any extended reporting period granted under Section XIV). The making of multiple CLAIMS or CLAIMS against more than one COVERED PARTY will not increase the PLF's Limit of Coverage.

**b. Claims Expense Allowance Limits.** In addition to the Limit of Coverage stated in Section VI.1.a above, there is a single CLAIMS EXPENSE ALLOWANCE of \$50,000 for CLAIMS EXPENSE for all CLAIMS first made during the COVERAGE PERIOD (and during any extended reporting period granted under Section XIV). The making of multiple CLAIMS or CLAIMS against more than one COVERED PARTY will not increase the CLAIMS EXPENSE ALLOWANCE. In the event CLAIMS EXPENSE exceeds the CLAIMS EXPENSE ALLOWANCE, the Limit of Coverage will be reduced by the amount of EXCESS CLAIMS EXPENSE incurred. The CLAIMS EXPENSE ALLOWANCE is not available to pay DAMAGES or settlements.

**c. No Consequential Damages.** No person or entity may recover any damages for breach of any provision in this Plan except those specifically provided for in this Plan.

### 2. Limits Involving Same or Related Claims Under Multiple Plans

If this Plan and one or more other Plans issued by the PLF apply to the SAME OR RELATED CLAIMS, then regardless of the number of claimants, clients, COVERED PARTIES, or LAW ENTITIES involved, only one Limit of Coverage and one CLAIMS EXPENSE ALLOWANCE will apply. Notwithstanding the preceding sentence, if the SAME OR RELATED CLAIMS are brought against two or more separate LAW ENTITIES, each of which requests and is entitled to separate defense counsel, the PLF will make one CLAIMS EXPENSE ALLOWANCE available to each of the separate LAW ENTITIES requesting a separate allowance. For purposes of this provision, whether LAW ENTITIES are separate is determined as of the time of the COVERED ACTIVITIES

that are alleged in the CLAIMS. No LAW ENTITY, or group of LAW ENTITIES practicing together as a single firm, will be entitled to more than one CLAIMS EXPENSE ALLOWANCE under this provision. The CLAIMS EXPENSE ALLOWANCE granted will be available solely for the defense of the LAW ENTITY requesting it.

#### COMMENTS

*This Plan is intended to provide a basic “floor” level of coverage for all Oregon attorneys engaged in the private practice of law whose principal offices are in Oregon. Because of this, there is a general prohibition against the stacking of either Limits of Coverage or CLAIMS EXPENSE ALLOWANCES. Except for the provision involving CLAIMS EXPENSE ALLOWANCES under Subsection 2, only one Limit of Coverage and CLAIMS EXPENSE ALLOWANCE will ever be paid under any one Plan issued to a COVERED PARTY in any one PLAN YEAR, regardless of the circumstances. Limits of Coverage or CLAIMS EXPENSE ALLOWANCES in multiple individual Plans do not stack for any CLAIMS that are “related.” As the definition of SAME OR RELATED CLAIMS and its Comments and Examples demonstrate, the term “related” has a broad meaning when determining the number of Limits of Coverage and CLAIMS EXPENSE ALLOWANCES potentially available. This broad definition is designed to ensure the long-term economic viability of the PLF by protecting it from multiple limits exposures, ensuring fairness for all Oregon attorneys who are paying annual assessments, and keeping the overall coverage affordable.*

*Anti-stacking provisions in the PLF Plan may create hardships for particular COVERED PARTIES who do not purchase excess coverage. COVERED PARTIES who represent clients in situations in which single or multiple CLAIMS could result in exposure beyond one Limit of Coverage should purchase excess professional liability coverage.*

*Effective January 1, 2005, the PLF has created a limited exception to the one-limit rule for SAME OR RELATED CLAIMS. When such CLAIMS are asserted against more than one separate LAW ENTITY, and one of the LAW ENTITIES is entitled to and requests a separate defense of the SUIT, then the PLF will allow a separate CLAIMS EXPENSE ALLOWANCE for that LAW ENTITY.*

*The coverage provisions and limitations provided in this Plan are the absolute maximum amounts that can be recovered under the Plan. Therefore, no person or party is entitled to recover any consequential damages for breach of the Plan.*

*Example No. 1: Attorney A performed COVERED ACTIVITIES for a client while Attorney A was at two different law firms. Client sues A and both firms. Both firms request separate counsel, each one contending most of the alleged errors took place while A was at the other firm. The defendants are collectively entitled to a maximum of one \$300,000 Limit of Coverage and two CLAIMS EXPENSE ALLOWANCES. For purposes of this provision, Attorney A (or, if applicable, her professional corporation) is not a separate LAW ENTITY from the firm at which she worked. Accordingly, two, not three, CLAIMS EXPENSE ALLOWANCES are potentially available.*

*Example No. 2: Attorney A is a sole practitioner, practicing as an LLC, but also working of counsel for a partnership of B and C. While working of counsel, A undertook a case which he concluded involved special issues requiring the expertise of Attorney D, from another firm. D and C work together in representing the client and commit errors in handling the case. Two CLAIMS EXPENSE ALLOWANCES are potentially available. There are only two separate firms – the BC partnership and D’s firm.*

## SECTION VII — NOTICE OF CLAIMS

1. The COVERED PARTY must, as a condition precedent to the right of protection afforded by this coverage, give the PLF, at the address shown in the Declarations, as soon as practicable, written notice of any CLAIM made against the COVERED PARTY. In the event a SUIT is brought against the COVERED PARTY, the COVERED PARTY must immediately notify and deliver to the PLF, at the address shown in the Declarations, every demand, notice, summons, or other process received by the COVERED PARTY or the COVERED PARTY'S representatives.
2. If the COVERED PARTY becomes aware of facts or circumstances that reasonably could be expected to be the basis of a CLAIM for which coverage may be provided under this Plan, the COVERED PARTY must give written notice to the PLF as soon as practicable during the COVERAGE PERIOD of:
  - a. The specific act, error, or omission;
  - b. DAMAGES and any other injury that has resulted or may result; and
  - c. The circumstances by which the COVERED PARTY first became aware of such act, error, or omission.
3. If the PLF opens a suspense or claim file involving a CLAIM or potential CLAIM which otherwise would require notice from the COVERED PARTY under subsection 1. or 2. above, the COVERED PARTY'S obligations under those subsections will be considered satisfied for that CLAIM or potential CLAIM.

### COMMENTS

*This is a Claims Made Plan. Section IV.1.b determines when a CLAIM is first made for the purpose of triggering coverage under this Plan. Section VII states the COVERED PARTY'S obligation to provide the PLF with prompt notice of CLAIMS, SUITS, and potential CLAIMS.*

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## SECTION VIII — COVERAGE DETERMINATIONS

1. This Plan is governed by the laws of the State of Oregon, regardless of any conflict-of-law principle that would otherwise result in the laws of any other jurisdiction governing this Plan. Any disputes as to the applicability, interpretation, or enforceability of this Plan, or any other issue pertaining to the provision of benefits under this Plan, between any COVERED PARTY (or anyone claiming through a COVERED PARTY) and the PLF will be tried in the Multnomah County Circuit Court of the State of Oregon which will have exclusive jurisdiction and venue of such disputes at the trial level.
2. The PLF will not be obligated to provide any amounts in settlement, arbitration award, judgment, or indemnity until all applicable coverage issues have been finally determined by agreement or judgment.
3. In the event of exceptional circumstances in which the PLF, at the PLF's option, has paid a portion or all Limits of Coverage toward settlement of a CLAIM before all applicable coverage issues have been finally determined, then resolution of the coverage dispute as set forth in this Section will occur as soon as reasonably practicable following the PLF's payment. In the event it is determined that

this Plan is not applicable to the CLAIM, or only partially applicable, then judgment will be entered in Multnomah County Circuit Court in the PLF's favor and against the COVERED PARTY (and all others on whose behalf the PLF's payment was made) in the amount of any payment the PLF made on an uncovered portion of the CLAIM, plus interest at the rate applicable to judgments from the date of the PLF's payment. Nothing in this Section creates an obligation by the PLF to pay a portion or all of the PLF's Limits of Coverage before all applicable coverage issues have been fully determined.

**4.** The bankruptcy or insolvency of a COVERED PARTY does not relieve the PLF of its obligations under this Plan.

#### COMMENTS

*Historically, Section VIII provided for resolution of coverage disputes by arbitration. After 25 years of resolving disputes in this manner, the PLF concluded it would be more beneficial to YOU and the PLF to try these matters to a court where appeals are available and precedent can be established.*

*Until the dispute over coverage is concluded, the PLF is not obligated to pay any amounts in dispute. The PLF recognizes there may occasionally be exceptional circumstances making a coverage determination impracticable prior to a payment by the PLF of a portion or all of the PLF's Limit of Coverage toward resolution of a CLAIM. For example, a claimant may make a settlement demand having a deadline for acceptance that would expire before coverage could be determined, or a court might determine on the facts before it that a binding determination on the relevant coverage issue should not be made while the CLAIM is pending. In some of these exceptional circumstances, the PLF may at its option pay a portion or all of the Limit of Coverage before the dispute concerning the question of whether this Plan is applicable to the CLAIM is decided. If the PLF pays a portion or all of the Limit of Coverage and the court subsequently determines that this Plan is not applicable to the CLAIM, then the COVERED PARTY or others on whose behalf the payment was made must reimburse the PLF, in order to prevent unjust enrichment and protect the solvency and financial integrity of the PLF. For a COVERED PARTY'S duties in this situation, see Section IX.3.*

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#### SECTION IX — ASSISTANCE, COOPERATION, AND DUTIES OF COVERED PARTY

**1.** As a condition of coverage under this Plan, the COVERED PARTY will, without charge to the PLF, cooperate with the PLF and will:

- a.** Provide to the PLF, within 30 days after written request, sworn statements providing full disclosure concerning any CLAIM or any aspect thereof;
- b.** Attend and testify when requested by the PLF;
- c.** Furnish to the PLF, within 30 days after written request, all files, records, papers, and documents that may relate to any CLAIM against the COVERED PARTY;
- d.** Execute authorizations, documents, papers, loan receipts, releases, or waivers when so requested by the PLF;
- e.** Submit to arbitration of any CLAIM when requested by the PLF;

- f.** Permit the PLF to cooperate and coordinate with any excess or umbrella insurance carrier as to the investigation, defense, and settlement of all CLAIMS;
  - g.** Not communicate with any person other than the PLF or an insurer for the COVERED PARTY regarding any CLAIM that has been made against the COVERED PARTY, after notice to the COVERED PARTY of such CLAIM, without the PLF's written consent;
  - h.** Assist, cooperate, and communicate with the PLF in any other way necessary to investigate, defend, repair, settle, or otherwise resolve any CLAIM against the COVERED PARTY.
- 2.** To the extent the PLF makes any payment under this Plan, it will be subrogated to any COVERED PARTY's rights against third parties to recover all or part of these sums. When requested, every COVERED PARTY must assist the PLF in bringing any subrogation or similar claim. The PLF's subrogation or similar rights will not be asserted against any non-attorney employee of YOURS or YOUR law firm except for CLAIMS arising from intentional, dishonest, fraudulent, or malicious conduct of such person.
- 3.** The COVERED PARTY may not, except at his or her own cost, voluntarily make any payment, assume any obligation, or incur any expense with respect to a CLAIM.
- 4.** In the event the PLF proposes in writing a settlement to be funded by the PLF but subject to the COVERED PARTY's being obligated to reimburse the PLF if it is later determined that the Plan did not cover all or part of the CLAIM settled, the COVERED PARTY must advise the PLF in writing that the COVERED PARTY:
- a.** Agrees to the PLF's proposal, or
  - b.** Objects to the PLF's proposal.

The written response must be made by the COVERED PARTY as soon as practicable and, in any event, must be received by the PLF no later than one business day (and at least 24 hours) before the expiration of any time-limited demand for settlement. A failure to respond, or a response that fails to unequivocally object to the PLF's written proposal, constitutes an agreement to the PLF's proposal. A response objecting to the settlement relieves the PLF of any duty to settle that might otherwise exist.

#### COMMENTS

*Subsection 4 addresses a problem that arises only when the determination of coverage prior to trial or settlement of the underlying claim is impracticable either because litigation of the coverage issue is not possible, permissible, or advisable, or because a pending trial date or time limit demand presents too short a period for resolution of the coverage issue prior to settlement or trial. In these circumstances, to avoid any argument that the PLF is acting as a volunteer, the PLF needs specific advice from the COVERED PARTY (or anyone claiming through the COVERED PARTY) either unequivocally agreeing that the PLF may proceed with the proposed settlement (i.e., waiving the volunteer argument) or unequivocally objecting to the proposed settlement (i.e., waiving any right to contend that the PLF has a duty to settle). While the PLF recognizes the requirement of an unequivocal response in some circumstances forces the COVERED PARTY (or anyone claiming through the COVERED PARTY) to make a difficult judgment, the exigencies of the situation require an unequivocal*

*response so the PLF will know whether it can proceed with settlement without forfeiting its right to reimbursement to the extent the CLAIM is not covered.*

*The obligations of the Covered Party under Section IX as well as the other Sections of the Plan are to be performed without charge to the PLF.*

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## **SECTION X — ACTIONS BETWEEN THE PLF AND COVERED PARTIES**

- 1.** No legal action in connection with this Plan will be brought against the PLF unless the COVERED PARTY has fully complied with all terms of this Plan.
- 2.** The PLF may bring legal action in connection with this Plan against a COVERED PARTY if:
  - a.** The PLF pays a CLAIM under another Plan issued by the PLF;
  - b.** A COVERED PARTY under this Plan is alleged to be liable for all or part of the damages paid by the PLF;
  - c.** As between the COVERED PARTY under this Plan and the person or entity on whose behalf the PLF has paid the CLAIM, the latter has an alleged right to pursue the COVERED PARTY under this Plan for contribution, indemnity, or otherwise, for all or part of the damages paid; and
  - d.** Such right can be alleged under a theory or theories for which no coverage is provided to the COVERED PARTY under this Plan.
- 3.** In the circumstances outlined in Subsection 2, the PLF reserves the right to sue the COVERED PARTY, either in the PLF's name or in the name of the person or entity on whose behalf the PLF has paid, to recover such amounts as the PLF determines appropriate, up to the full amount the PLF has paid under one or more other Plans issued by the PLF. However, this Subsection will not entitle the PLF to sue the COVERED PARTY if the PLF's alleged rights against the COVERED PARTY are premised on a theory of recovery that would entitle the COVERED PARTY to indemnity under this Plan if the PLF's action were successful.

### **COMMENTS**

*Under certain circumstances, a CLAIM against YOU may not be covered because of an exclusion or other applicable provision of the Plan issued to YOU. However, in some cases the PLF may be required to pay the CLAIM nonetheless because of the PLF's obligation to another COVERED PARTY under the terms of his or her Plan. This might occur, for example, when YOU are the attorney responsible for a CLAIM and YOU have no coverage due to YOUR intentional or wrongful conduct, but YOUR partner did not engage in or know of YOUR wrongful conduct but is nevertheless allegedly liable. In these circumstances, if the PLF pays some or all of the CLAIM arising from YOUR conduct it is fair that the PLF has the right to seek recovery back from YOU; otherwise, the PLF would effectively be covering YOUR non-covered CLAIMS simply because other COVERED PARTIES were vicariously liable.*

*Example No. 1: Attorney A misappropriates trust account funds belonging to Client X. Attorney A's partner, Attorney B, does not know of or acquiesce in Attorney A's wrongful conduct. Client X sues both Attorneys A and B. Attorney A has no coverage for the CLAIM under his Plan, but Attorney B has*



coverage for her liability under her Plan. The PLF pays the CLAIM under Attorney B's Plan. Section X.2 of Attorney A's Plan makes clear the PLF has the right to sue Attorney A for the damages the PLF paid under Attorney B's Plan.

*Example No. 2: Same facts as the prior example, except that the PLF loans funds to Attorney B under terms that obligate Attorney B to repay the loan to the extent she recovers damages from Attorney A in an action for indemnity. Section X.2 of Attorney A's Plan makes clear that the PLF has the right pursuant to such arrangement with Attorney B to participate in her action against Attorney A.*

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## **SECTION XI — SUPPLEMENTAL ASSESSMENTS**

This Claims Made Plan is assessable. Each PLAN YEAR is accounted for and assessable using reasonable accounting standards and methods of assessment. If the PLF determines that a supplemental assessment is necessary to pay for CLAIMS, CLAIMS EXPENSE, or other expenses arising from or incurred during either this PLAN YEAR or a previous PLAN YEAR, YOU agree to pay YOUR supplemental assessment to the PLF within 30 days of request.

The PLF is authorized to make additional assessments against YOU for this PLAN YEAR until all the PLF's liability for this PLAN YEAR is terminated, whether or not YOU are a COVERED PARTY under a Plan issued by the PLF at the time the assessment is imposed.

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## **SECTION XII — RELATION OF PLF COVERAGE TO INSURANCE COVERAGE OR OTHER COVERAGE**

If the COVERED PARTY has valid and collectible insurance coverage or other obligation to indemnify that also applies to any loss or CLAIM covered by this Plan, the PLF will not be liable under the Plan until the limits of the COVERED PARTY'S insurance or other obligation to indemnify, including any applicable deductible, have been exhausted, unless such insurance or other obligation to indemnify is written only as specific excess coverage over the CLAIMS EXPENSE ALLOWANCE and Limits of Coverage of this Plan.

### *COMMENTS*

*As explained in the Preface, this Plan is not an insurance policy. To the extent that insurance or other coverage exists, this Plan may not be invoked. This provision is designed to preclude the application of the other insurance law rules applicable under Lamb-Weston v. Oregon Automobile Ins. Co. 219 Or 110, 341 P2d 110, 346 P2d 643 (1959).*

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## **SECTION XIII — WAIVER AND ESTOPPEL**

Notice to or knowledge of the PLF's representative, agent, employee, or any other person will not effect a waiver, constitute an estoppel, or be the basis of any change in any part of this Plan nor will the terms of this Plan be waived or changed except by written endorsement issued and signed by the PLF's authorized representative.

## SECTION XIV — AUTOMATIC EXTENDED CLAIMS REPORTING PERIOD

1. If YOU:
  - a. Terminate YOUR PLF coverage during the PLAN YEAR, or
  - b. Do not obtain PLF coverage as of the first day of the next PLAN YEAR,

YOU will automatically be granted an extended reporting period for this Plan at no additional cost. The extended reporting period will commence on the day after YOUR last day of PLF coverage and will continue until the expiration of the time allowed for any CLAIM to be made against YOU or any other COVERED PARTY listed in SECTION II of this Plan, or the date specified in Subsection 2, whichever date is earlier. Any extension granted under this Subsection will not increase the CLAIMS EXPENSE ALLOWANCE or the Limits of Coverage available under this Plan, nor provide coverage for YOUR activities which occur after YOUR last day of PLF coverage.

2. If YOU terminate YOUR PLF coverage during this PLAN YEAR and return to PLF coverage later in this same PLAN YEAR:
  - a. The extended reporting period granted to YOU under Subsection 1 will automatically terminate as of the date YOU return to PLF coverage;
  - b. The coverage provided under this Plan will be reactivated; and
  - c. YOU will not receive a new Limit of Coverage or CLAIMS EXPENSE ALLOWANCE on YOUR return to coverage.

### COMMENTS

*Subsection 1 sets forth YOUR right to extend the reporting period in which a CLAIM must be made. The granting of YOUR rights hereunder does not establish a new or increased CLAIMS EXPENSE ALLOWANCE or Limits of Coverage, but instead merely extends the reporting period under this Plan which will apply to all covered CLAIMS made against YOU during the extended reporting period. The terms and conditions of this Plan will continue to apply to all CLAIMS that may be made against YOU during the extended reporting period. This extended CLAIMS reporting period is subject to other limitations and requirements, which are available from the PLF on request.*

*Attorneys with PLF coverage who leave the private practice of law in Oregon during the PLAN YEAR are permitted to terminate their coverage mid-year and seek a prorated refund of their annual assessment under PLF Policy 3.400. Attorneys who do so will receive extended reporting coverage under this section effective as of the day following their last day of PLF coverage. For attorneys who engage in the private practice of law in Oregon through the end of the current PLAN YEAR but do not obtain PLF coverage at the start of the next PLAN YEAR, their extended reporting coverage begins on the first day after the current PLAN YEAR.*

*Example No. 1: Attorney A obtains regular PLF coverage in 2010 with a CLAIMS EXPENSE ALLOWANCE of \$50,000 and Limits of Coverage of \$300,000. One CLAIM is asserted in 2010 for which a total of \$200,000 is paid in indemnity and expense (including the entire \$50,000 CLAIMS EXPENSE ALLOWANCE). The remaining Limits of Coverage under the 2010 Plan are \$150,000. Attorney A leaves the private practice of law on December 31, 2010 and obtains extended reporting*

coverage at no charge. The 2010 Plan will apply to all CLAIMS made in 2011 or later years, and only \$150,000 in Limits of Coverage (the balance left under Attorney A's 2010 Plan) is available for all CLAIMS made in 2011 or later years. There is no remaining CLAIMS EXPENSE ALLOWANCE for any new CLAIMS.

*Example No. 2: Attorney B obtains regular PLF coverage in 2010, but leaves private practice on March 31, 2010 and obtains a prorated refund of her 2010 assessment. Attorney B will automatically obtain extended reporting coverage under her 2010 Plan as of April 1, 2010. Attorney B returns to PLF coverage on October 1, 2010. Her extended reporting coverage terminates as of that date, and she will not receive new Limits of Coverage or CLAIMS EXPENSE ALLOWANCE. If a CLAIM is made against her in November 2010, her 2010 Plan will cover the CLAIM whether it arises from an alleged error occurring before April 1, 2010 or on or after October 1, 2010.*

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## SECTION XV — ASSIGNMENT

The interest hereunder of any COVERED PARTY is not assignable.

EXHIBIT A -- FORM ORPC 1

Dear [ Client ]:

*This letter confirms that we have discussed [specify the essential terms of the business transaction that you intend to enter into with your client and your role in the transaction. Be sure to inform the client whether you will be representing the client in the transaction. This is required by ORPC 1.8(a)(3)]. This letter also sets forth the conflict of interest that arises for me as your attorney because of this proposed business transaction.*

*The Oregon Rules of Professional Conduct prohibit an attorney from representing a client when the attorney's personal interests conflict with those of the client unless the client consents. Consequently, I can only act as your lawyer in this matter if you consent after being adequately informed. Rule 1.0(g) provides as follows:*

*(g) "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.*

*Although our interests presently appear to be consistent, my interests in this transaction could at some point be different than or adverse to yours. Specifically, [include an explanation which is sufficient to apprise the client of the potential adverse impact on the client of the matter to which the client is asked to consent, and any reasonable alternative courses of action, if applicable].*

*Please consider this situation carefully and decide whether or not you wish to enter into this transaction with me and to consent to my representation of you in this transaction. Rule 1.8(a)(2) requires me to recommend that you consult with another attorney in deciding whether or not your consent should be given. Another attorney could also identify and advise you further on other potential conflicts in our interests.*

*I enclose an article "Business Deals Can Cause Problems," which contains additional information. If you do decide to consent, please sign and date the enclosed extra copy of this letter in the space provided below and return it to me.*

*Very truly yours,*

**[Attorney Name and Signature]**

*I hereby consent to the legal representation, the terms of the business transaction, and the lawyer's role in transaction as set forth in this letter:*

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**[Client's Signature]**

**[Date]**

*Enclosure: "Business Deals Can Cause Problems," by Jeffrey D. Sapiro.*

***BUSINESS DEALS CAN CAUSE PROBLEMS (Complying With ORPC 1.8(a))***

*By Jeffrey D. Sapiro, Disciplinary Counsel, Oregon State Bar*

Something that clients often lose sight of is that attorneys are not only legal advisors, but are business people as well. It is no secret that most practitioners wish to build a successful practice, rendering quality legal services to their clients, as a means of providing a comfortable living for themselves and/or their families. Given this objective, it is not surprising that many attorneys are attracted to business opportunities outside their practices that may prove to be financially rewarding. The fact that these business opportunities are often brought to an attorney's attention by a client or through involvement in a client's financial affairs is reason to explore the ethical problems that may arise.

ORPC 1.8(a) and 1.0(g) read as follows:

*Rule 1.8 Conflict of Interest: Current Clients: Specific Rules*

*(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:*

*(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;*

*(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and*

*(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.*

*ORPC 1.0 Terminology*

*(g) "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.*

The rationale behind this rule should be obvious. An attorney has a duty to exercise professional judgment solely for the benefit of a client, independent of any conflicting influences or loyalties. If an attorney is motivated by financial interests adverse to that of the client, the undivided loyalty due to the client may very well be compromised. (See also ORPC 1.7 and 1.8(c) and (i)) Full disclosure in writing gives the client the opportunity and necessary information to obtain independent legal advice when the

attorney's judgment may be affected by personal interest. Under ORPC 1.8(a) it is the client and not the attorney who should decide upon the seriousness of the potential conflict and whether or not to seek separate counsel.

A particularly dangerous situation is where the attorney not only engages in the business aspect of a transaction, but also furnishes the legal services necessary to put the deal together. In *In re Brown*, 277 Or 121, 559 P2d 884, rev. den. 277 Or 731, 561 P2d 1030 (1977), an attorney became partners with a friend of many years in a timber business, the attorney providing legal services and the friend providing the capital. The business later incorporated, with the attorney drafting all corporate documents, including a buy-sell agreement permitting the surviving stockholder to purchase the other party's stock. The Oregon Supreme Court found that the interests of the parties were adverse for a number of reasons, including the disparity in capital invested and the difference in the parties' ages, resulting in a potential benefit to the younger attorney under the buy-sell provisions. Despite the fact that the friend was an experienced businessman, the court held that the attorney violated the predecessor to ORPC 1.8(a), DR 5-104(A), because the friend was never advised to seek independent legal advice.

Subsequent to *Brown*, the Supreme Court has disciplined several lawyers for improper business transactions with clients. Among these cases are *In re Drake*, 292 Or 704, 642 P2d 296 (1982), which provides a comprehensive analysis of ORPC 1.8(a)'s predecessor, DR 5-104(A); *In re Montgomery*, 292 Or 796, 643 P2d 338 (1982), in which the fact that the client was a more sophisticated business person than the attorney did not affect the court's analysis; *In re Germundson*, 201 Or 656, 724 P2d 793 (1986), in which a close friendship between the attorney and the client was deemed insufficient reason to dispense with conflict disclosures; and *In re Griffith*, 304 Or 575, 748 P2d (1987), in which the court noted that, even if no conflict is present when a transaction is entered into, subsequent events may lead to a conflict requiring disclosures or withdrawal by the attorney.

Even in those situations where the attorney does not furnish legal services, problems may develop. There is a danger that, while the attorney may feel he or she is merely an investor in a business deal, the client may believe the attorney is using his or her legal skills to protect the client's interests in the venture. Indeed, this may be the very reason the client approached the attorney with a business proposition in the first place. When a lawyer borrows money from a client, there may even be a presumption that the client is relying on the lawyer for legal advice in the transaction. *In re Montgomery*, 292 Or 796, 643 P2d 338 (1982). To clarify for the client the role played by the attorney in a business transaction, ORPC 1.8(a)(3) now provides that a client's consent to the attorney's participation in the transaction is not effective unless the client signs a writing that describes, among other things, the attorney's role and whether the attorney is representing the client in the transaction.

In order to avoid the ethical problems addressed by the conflict of interest rules, the Supreme Court has said that an attorney must at least advise the client to seek independent legal counsel (*In re Bartlett*, 283 Or 487, 584 P2d 296 (1978)). This is now required by ORPC 1.8(a)(2). The attorney should disclose not only that a conflict of interest may exist, but should also explain the nature of the conflict "in such detail so that (the client) can understand the reasons why it may be desirable for each to have independent counsel. . ." (*In re Boivin*, 271 Or 419, 424, 533 P2d 171 (1975)). Risks incident to a transaction with a client must also be disclosed (ORPC 1.0(g); *In re Montgomery*, 297 Or 738, 687 P2d 157 (1984); *In re Whipple*, 296 Or 105, 673 P2d 172 (1983)). Such a disclosure will help ensure that there is no misunderstanding over the role the attorney is to play in the transaction and will help prevent the attorney from running afoul of the disciplinary rule discussed above.

## **PLF Policy 3.500 -- PLAN FOR SPECIAL UNDERWRITING ASSESSMENT**

(A) Plan for Special Underwriting Assessment: Lawyers will be subject to a Special Underwriting Assessment (SUA) to be assessed under the following terms and conditions. This Plan for Special Underwriting Assessment may be changed or amended in the future.

(B) Special Underwriting Assessment:

(1) The surcharge assessed on January 1 of each year will be based upon the total of all payments for indemnity and expense (including Claims Expense Allowance) paid on a claim or group of related claims in excess of an aggregate amount of \$75,000 per claim. If a claim is part of a group of related claims for which responsibility is allocated pursuant to 3.500(D), the SUA will be based on the amount in excess of \$75,000 of the indemnity and expense allocated to each Covered Party (the "Base Amount"). SUA will be assessed for all claims which are settled or closed by the PLF by September 30 of the prior year. The surcharge for each claim will be equal to 1% of the Base Amount so calculated and will be charged for each of the next five years.

(2) All present and former Covered Parties will be assessed according to these provisions, but a Covered Party will be required to pay the SUA only if the Covered Party maintains current coverage with the PLF at the time of the SUA assessment.

(C) Reductions to Indemnity and Expense: Net amounts actually received by the PLF (net of collection costs and not including interest or any increase in value) will be treated as reductions to the indemnity and expense paid by the PLF on behalf of a Covered Party and will be deducted in determining the Base Amount. The value of non-cash reductions will be determined by the PLF Board of Directors. Reinsurance payments will not be treated as reductions to indemnity.

(D) Allocation and Vicarious Liability:

(1) The Covered Party causing or responsible for the claim or group of related claims will be assessed. When more than one PLF-covered attorney is involved, SUA will be allocated in proportion to each PLF-covered attorney's degree of responsibility or fault. The SUA allocation will be based on any indemnity payments made and defense costs expended, except that a PLF-covered attorney assigned his or her own defense attorney will be deemed responsible for those expenses. SUA may be allocated to a Covered Party even though no claim was made against the Covered Party if it appears that a claim would or could have been made but for the final disposition of the claim giving rise to the SUA under consideration. However, the SUA allocated to such Covered Party will be waived if the Covered Party was not informed by the PLF prior to the final disposition:

(a) of the claim giving rise to the SUA,

(b) of the possibility of a claim from the claimant or another party or of a cross-claim from another Covered Party, and

(c) of the potential of a SUA allocation from the claim.

In such cases, a separate PLF file will be opened in the name of each Covered Party facing a potential SUA allocation.

(2) **Initial Allocation of Responsibility:** The CEO of the PLF will make an initial allocation of responsibility among the PLF-covered attorneys involved upon settlement or closing of the claim or group of related claims. Where responsibility is equal or no reasonable basis is available to determine the appropriate percentage of responsibility, responsibility will be allocated equally among the PLF-covered attorneys.

(3) SUA will not be assessed against a Covered Party if the Covered Party's liability was purely vicarious. However, notwithstanding that the basis of the Covered Party's liability is purely vicarious, a PLF-covered attorney assigned his or her own defense attorney will be deemed responsible for those expenses unless the assignment of a separate defense counsel is legally required (e.g. conflict of interest). For this purpose, pure vicarious liability means liability imposed solely by law, (e.g., partnership liability) on a claim in which the Covered Party had no involvement whatsoever. SUA relief for pure vicarious liability will not be allowed when the Covered Party had some involvement in the legal matter, even if other attorneys in the Covered Party's firm (partners, associates, or employees) or outside the firm were also involved and committed greater potential error. Likewise, SUA relief for pure vicarious liability will not be granted when the alleged error was made by a secretary, paralegal, or other attorney working under the Covered Party's direction or control or who provided research, documents, or other materials to the Covered Party in connection with the claim.

(E) **Billing:** The SUA will be added to the regular billing for the basic assessment.

(F) **Petition for Review:**

(1) The Covered Party may petition the Board of Directors in writing for review of the SUA only upon the basis that:

(a) The allocation made under 3.500(D)(1), (2), or (3) was incorrect  
or

(b) The claim was handled by the PLF or its employees and agents (including assigned defense counsel) in a negligent or improper manner which resulted in an increased SUA to the Covered Party  
or

(c) The assignment of separate counsel pursuant to 3.500(D)(3) was necessary.

A SUA arising from a claim will not be reassigned to the attorney for the claimant who brought the claim if the reason given for the reassignment by the appealing attorney is that the claimant's attorney should not have asserted the claim, should have asserted the claim in a more economical fashion, should have asserted the claim against someone else, or other similar reason.

(2) The basis for review will be set forth in the petition, and the PLF-covered attorney, or attorneys if more than one, to whom the Covered Party seeks to reassign responsibility for the claim will be requested to participate and submit a response. A SUA appeal must be filed in the first year during which the SUA is assessed and paid. Other details of the review process will be provided to attorneys at the time of SUA assessment. The Board of Directors or its representative will review each petition and response and make such adjustment, if any, as is warranted by the facts. An adjustment may include reallocation of responsibility for a claim to another attorney (whether or not the attorney responds to the request to participate in the SUA review process), that could result in assessment of a SUA against the attorney. In the event a refund is made, it will include statutory interest. A pending Petition for Review will not relieve the Covered Party from compliance with the assessment notice.