2015 LEGISLATION ALERTS

This issue of In Brief focuses on some of the significant changes made by the 2015 Oregon Legislature. Bills are listed by area of law. Some bills pertain to more than one practice area, so practitioners are encouraged to read through all the sections.

See the Table of Contents on pages 7-10. The summaries of the bills are located online at www.osbplf.org. Under the Practice Management tab, select Publications, then In Brief.

The new legislation takes effect January 1, 2016, unless otherwise noted. In addition, the PLF published “2015 Oregon Legislative Session – ‘Emergency Legislation’” in the September 2015 issue of In Brief, focusing on some of the bills that became effective last year.

Resources

The 2015 Oregon Revised Statutes are available for purchase from the Legislative Counsel office. To order, visit http://apps.oregon.gov/ECommerce/LCC/?category=ORS, call 503.986.1243, or email lc.estore@state.or.us.

To view legislation online, visit www.oregonlegislature.gov.

The 2015 Oregon Legislation Highlights, published by the Oregon State Bar, is a comprehensive discussion of the new legislation. It is available to download, free of charge, from the OSB online library, BarBooks, at www.osbar.org. BarBooks is made possible by the contribution of the PLF.

2016 PLF Assessment

The PLF assessment will remain at $3,500 for the plan year 2016. This is the sixth consecutive year that the assessment has remained stable.

As in prior years, the actuaries predict that a $3,500 assessment in 2016 will provide sufficient income during the year to cover the costs of claims and operating expenses. The cost-of-claims figure is based on predictions of the number of cases and the projected cost of those cases.

If you have any questions about the PLF’s basic assessment for 2016, please call Jeff Crawford or Emilee Preble at the PLF at 503.639.6911 or 1.800.452.1639.
As many Oregon lawyers are aware, Oregon is the only state that requires malpractice coverage for lawyers. Any Oregon lawyer engaged in the private practice of law, and whose principal office is in Oregon, must obtain malpractice coverage through the Professional Liability Fund (ORS 9.080). This coverage is individual to each lawyer and currently provides coverage limits of $300,000 per claim/aggregate of claims, plus a $50,000 claims expense allowance.

The PLF Primary Coverage Plan and limits of coverage are approved each year by the PLF Board of Directors and the OSB Board of Governors as the minimum malpractice coverage requirement for Oregon lawyers. Those $300,000 limits have remained the same for nearly thirty years. Naturally, the cost of claims has steadily increased over that period and so has the frequency of claims in excess of the mandatory limits. Claims have become more complex, and the value of matters handled by lawyers has increased. Certain areas of law – personal injury, business, real estate and estate planning – now present a much higher risk for excess claims.

What Is Excess Coverage?

Excess coverage is professional liability coverage that provides coverage limits above, or in excess of, the statutorily required coverage limits of $300,000. Since it is not mandatory, excess coverage is underwritten – that is, law firms must submit an application for review in order to obtain a quote for coverage. Unlike the mandatory PLF coverage, which is individual to each attorney, excess coverage is purchased to cover law firms (including sole practitioner firms). The cost of excess coverage can vary depending on a variety of factors, including firm size, claims history, areas of practice, coverage limits, deductible amount, and so on.

Excess coverage can be obtained from the PLF or from insurers in the commercial market. The PLF created an excess program in 1992 to address the difficulty that solo, small, and midsized firms faced while trying to obtain reasonably priced coverage above the mandatory limits in the mid to late 1980s. After the PLF entered the excess market in 1992, the cost of excess coverage for Oregon law firms dropped by nearly 50%. The PLF’s entry into the market stabilized the cost of coverage for firms and provided a source of excess coverage for those firms overlooked by the commercial market – namely, small and solo firms. In 2015, the PLF covered approximately 700 law firms and 2,100 attorneys at excess levels between $700,000 and $9.7 million. Of those firms, 85% were firms with one to four attorneys.

Does My Firm Need Excess Coverage?

Likely, yes.

In addition to evaluating the risk exposure for legal work undertaken, it is important to consider to what extent personal assets are at risk in the event of a large claim. Many lawyers feel that the mandatory $300,000 does not afford enough protection.

What Are the Benefits of Excess Coverage?

In addition to providing lawyers with coverage for large claims and protecting personal assets, excess coverage is a good idea for other reasons as well.

One of the consequences of holding the mandatory limits at $300,000 is the ever more limited protection available when multiple lawyers and firms are implicated in a same or related claim. The availability of the $50,000 expense allowance does give some relief in this situation, but all lawyers and law firms must ultimately share the same $300,000 limits for the claim. Excess coverage addresses this problem by providing each firm with its own set of excess limits for such a claim.

Excess coverage can also provide coverage for activities excluded under the PLF Primary Coverage Plan. For example, claims resulting from cyber liability or a data

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1 Limits were increased from $200,000 to $300,000 in 1987. The claims expense allowance has changed some over time. For example, the limit was raised from $25,000 to $50,000 in 2005.

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PLF Contribution to OSB BarBooks™

The OSB BarBooks™ online library is a membership service available free of charge to all members of the Oregon State Bar. The library contains all OSB Legal Publications in numerous practice areas, The Ethical Oregon Lawyer, OSB Oregon Legislation Highlights, and more. It also contains the Oregon Statutory Time Limitations Handbook, jointly published by the PLF and the OSB Legal Publications Department.

BarBooks™ is made possible by the contribution of the Professional Liability Fund. You can access BarBooks™ by logging in to www.osbar.org.
breach are excluded in the PLF Primary Coverage Plan, Section V.23. In contrast, the PLF Excess Plan provides coverage for these claims under a Cyber Liability and Data Breach Endorsement. The PLF added this endorsement to its excess coverage in 2013 to address the increasing vulnerability of law firms in protecting firm and client data.

The PLF Primary coverage also excludes defense against bar complaints made against a lawyer. PLF excess coverage also does not cover ethics complaints, but some commercial insurers do offer this coverage.

**Conclusion**

When assessing whether excess coverage is appropriate for your firm, consider these questions: Do your current malpractice coverage limits match the risk of exposure in your law practice? Are your personal assets protected in the event of an excess claim? If the answer to either of those questions is “maybe” or “no,” then obtaining excess coverage should be a priority.

The PLF generally recommends that law firms have excess coverage as protection against larger claims — whether that excess coverage is through the PLF or a commercial carrier.

If you have questions about PLF excess coverage, call Jeff Crawford or Emilee Preble at 503.639.6911, or 1.800.452.1639.

EMILEE PREBLE
PLF LEAD UNDERWRITER

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**ABA Techshow 2016**

On March 16-19, 2016, the ABA will sponsor its annual legal technology conference and expo. The ABA Techshow includes over 50 educational and training sessions in 15 different tracks and a two-day expo of more than 100 technology companies. For more information, go to [www.techshow.com](http://www.techshow.com).

Register using the PLF’s program promoter code EP1623 and receive an exclusive discount on the standard registration rate. Call DeAnna Z. Shields for more information at 503.639.6911.

Be an “early bird” and save another $200 – register by February 8, 2016. Multiple attendees from the same firm may qualify for even deeper discounts using a “Superpass.”

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Changes to 2016 PLF Primary Claims Made Plan

A number of changes were made to the 2016 PLF Primary Claims Made Plan. The majority were ministerial – simplifying terms, removing outdated language, and streamlining plan commentary. More significant changes were made to Exclusions 2, 4, 8, 10, and 11.

Exclusion 2 – Wrongful Conduct Exclusion

Exclusion 2 is now broken into subsections that more specifically describe the activities to be excluded. These changes are meant to explain existing policy and practice rather than to create new exclusions. Excluded from coverage are claims for actual or alleged criminal, dishonest, knowingly wrongful, fraudulent, and malicious acts or conduct, as well as intentional violations of the Oregon Rules of Professional Conduct. Also now specifically excluded from coverage are claims arising out of non-payment of a valid and enforceable lien if actual notice of such lien was provided to you, or anyone in your office, prior to payment of the funds to a person or entity other than the rightful lien-holder.

Exclusion 4 – Punitive Damages and Cost Award Exclusions

Exclusion 4 now specifies that claims arising from false or unwarranted certification in a pleading, or for monetary sanctions for improper conduct, are excluded from coverage. These changes are meant to define existing policy and practice rather than to create new exclusions.

Exclusion 8 – ORPC 1.8 Exclusion (Business Transactions with Clients)

When Oregon lawyers engage in a business transaction with a client, they have an ethical duty to make certain disclosures to the client pursuant to ORPC 1.0(g) and 1.8(a). In prior plan years, covered parties were required to make the appropriate disclosures and provide the PLF with copies of such disclosure letters or risk exclusion of coverage. The reporting requirement to the PLF has been removed. You are no longer required to provide the PLF with copies of disclosure and consent letters when engaging in business transactions with clients. Caveat: Your ethical duty of disclosure and consent is unchanged. For the convenience of practitioners, a sample disclosure and consent letter for engaging in business transactions with clients is available on the PLF website at www.osbplf.org. Under Practice Management, select Forms, then search for the Disclosure of Potential Malpractice category.

Although the reporting requirement to the PLF was eliminated, Exclusion 8 still stands. The Plan excludes from coverage any claim arising from a business transaction subject to ORPC 1.8(a) in which you participate with a client, unless any required written disclosure has been properly executed in compliance with the rule and fully executed by you and the client before the business transaction giving rise to the claim.

Exclusion 10 – Law Practice Business Activities or Benefits Exclusion

Exclusion 10 was changed to further distinguish covered activities – the practice of law – from activities that relate to the business of practicing law, which are excluded from coverage.

Exclusion 10 is now broken out into more specific subsections. Excluded from coverage are claims for amounts paid, incurred, or charged as fees, costs, or disbursements, including amounts claimed as restitution, forfeiture, financial loss, or set-off. Also excluded from coverage are claims arising from or related to the negotiation, securing, or collection of fees, costs, or disbursements, and claims for damages or the recovery of funds or property that will benefit you. These changes are meant to clarify existing policy and practice rather than to create new exclusions.

If the PLF defends a claim that includes any claim within the scope of this exclusion, the PLF can settle or attempt to dismiss the other claims not falling within this exclusion and can withdraw from defense following the settlement or dismissal of those claims. In essence, the PLF has no obligation to defend claims that are entirely excluded under Exclusion 10. This amendment represents a change in PLF policy.

Exclusion 10 does not apply to claims based on your malpractice regarding your client’s right or ability to recover fees, costs, or expenses; the PLF will defend those claims.

Exclusion 11 – Family Member and Ownership Exclusion

Exclusion 11 was amended to prevent coverage through vicarious liability for otherwise excluded claims. Now excluded from coverage are any claims against you arising out of another lawyer having provided legal services or representation to his or her own spouse, parent, child, stepchild, sibling, or member of his or her household, or on behalf of a business entity in which any of them individually or collectively, have a controlling interest. The other exclusion for claims based on your legal work for your own family members or their business interests remains unchanged.

A complete copy of the 2016 PLF Primary Claims Made Plan may be found on the PLF website at www.osbplf.org.

If you have questions about the PLF Primary Claims Made Plan or changes in coverage, call Jeff Crawford or Emilee Preble at 503.639.6911 or 1.800.452.1639.
Oregon eCourt Updates

Oregon eCourt Traps

We occasionally remind practitioners about traps for the unwary while practicing in eCourt. The following pitfalls are not new changes to eCourt but pose potential stumbling blocks for lawyers.

Created Date = Entry Date:

The “Created Date” of an event is the entry date for purposes of ORS 7.020(2). Don’t be fooled by the date appearing in the “Date Column” in the Oregon eCourt Case Information system Register of Actions. Look for the Created Date and time stamp in the description of the specific court event. Calculate deadlines from this date.

See the login page for the OECI system: https://publicaccess.courts.oregon.gov/PublicAccessLogin/Login.aspx?ReturnUrl=%2fPublicAccessLogin%2fdefault.aspx. This landing page explains the meanings of all the headings and fields used in the OECI Register of Actions, including the meaning of “Created Date.”

eService Is a Separate Step:

A filer can submit documents electronically without receiving service electronically. To receive service electronically, you must take the separate step of ensuring you are on the Case Service Contact List for each matter that is e Filed. Refer to UTCR 2.010(8) and (9) for definitions of Service Contacts and Other Service Contacts, and to UTCR 2.100(2) and (3) regarding entry of contact information and selecting service contacts. You cannot add yourself to a Case Service Contact List if you have never filed into the case. The opposing party cannot select you as a Service Contact if you have not added yourself.

Once you have eFiled into a case, it is mandatory to enter your contact information in the Case Service Contact List to ensure that you will receive notification of the e-service of any documents by others in the case. See UTCR 21.100(2), eService is covered in the Odyssey eFile & Serve live training sessions. There are sessions coming up in each of the next few successive months: https://attendee.gotowebinar.com/rt/513749923422282242.

Provided the filer properly chooses his or her service contacts at the time of eFiling, service is completed automatically. UTCR 21.100(4) states: “When the court accepts an electronic document for filing under UTCR 21.060(1) (a), the electronic filing system sends an email to the email address of each person whom the filer selected as a service contact. Transmission of the email by the electronic filing system to the selected service contacts in the action constitutes service.” UTCR 21.100(5) states: “Electronic service is complete when the electronic filing system sends the email to the selected service contacts in the action.”

Changes to Oregon eCourt

Practitioners should be aware of the following recent changes to eCourt.

Court Signature Lines

After November 13, 2015, all documents (e.g., proposed orders, judgments, writs) submitted to the court for signature must comply with UTCR 21.040(3). This includes having a blank space of not less than 1.5 inches and a blank signature line following the last line of text to allow space for judicial signature. There should be no title or name listed underneath the line, such as “Circuit Court Judge.”

If you use templates to create documents for judicial signature, be sure to update them accordingly. Allow the appropriate amount of space before the signature line and remove any name/title information from below the signature line.

Example:

Petitioner’s motion for a stay is granted. The proceedings in this action are held in abeyance pending further notification from petitioner of completion of the conditions set out in this order.

(at least 1.5 inches of blank space following the last line of text)

Electronic Notices of Signed Orders

Beginning November 16, 2015, all Oregon circuit courts using the Oregon eCourt system will notify attorneys by email when orders are entered on their cases. When the court enters an order in the register of actions, the case management system will generate and email a notice to all attorneys on the case. The email will be sent to the email address where the attorney already receives notices of hearings and trials. The system will send the email from Court_Notifications@ojd.state.or.us. Make sure this email address is whitelisted in your email settings.

Provided the filer properly chooses his or service contacts at the time of eFiling, service is completed automatically. UTCR 21.100(4) states: “When the court accepts an electronic document for filing under UTCR 21.060(1) (a), the electronic filing system sends an email to the email address of each person whom the filer selected as a service contact. Transmission of the email by the electronic filing system to the selected service contacts in the action constitutes service.” UTCR 21.100(5) states: “Electronic service is complete when the electronic filing system sends the email to the selected service contacts in the action.”

Beverly Michaelis
PLF Practice Management Advisor

Daniel Parr, JD
Oregon Judicial Department
Office of Education, Training, and Outreach
PLF Coverage for Marijuana-Related Claims

As a result of recent legislation, Oregon law now allows businesses to engage in some forms of growing and selling marijuana. In response to the legalization of recreational marijuana and the resulting growing demand for legal services, Oregon has amended its Rules of Professional Conduct, following other states that have done the same. ORPC 1.2(c) is the ethical rule prohibiting a lawyer from assisting a client in conduct that the lawyer knows is illegal or fraudulent. In 2015, ORPC 1.2(d) was added: “Notwithstanding paragraph (c), a lawyer may counsel and assist a client regarding Oregon’s marijuana-related laws. In the event Oregon law conflicts with federal or tribal law, the lawyer shall also advise the client regarding related federal and tribal law and policy.”

Some practitioners have asked whether the PLF will cover lawyers who advise clients regarding business transactions involving the legal sale of marijuana and related activities in Oregon, or whether there is any jeopardy to PLF coverage when a lawyer does legal work related to the sale or distribution of marijuana.

The PLF does not provide coverage for any provision of legal services that assist the client to engage in illegal activity, regardless of the nature of the activity. PLF Claims Made Plan Section V.2. (Wrongful Conduct Exclusion). Notwithstanding this exclusion, generally speaking, if a covered party is accused of negligence in providing legal services for a client, the PLF will typically defend such a claim. The mere fact that the negligence claim arose out of the providing of legal services involving legal marijuana-related transactions or activities would not, by itself, be a basis to exclude coverage.

Although legal in Oregon, marijuana is still a Schedule I controlled substance under the federal Controlled Substances Act (CSA). In 2013, the Department of Justice issued a memorandum known as the “Cole Memo,” which outlines eight priorities that drive federal marijuana enforcement policy: (1) No distribution to minors; (2) No revenue to criminals; (3) No diversion of marijuana to “anti-” states; (4) No state-authorized marijuana activity as a pretext to traffic or other illegal drugs; (5) No violence and use of firearms; (6) No drugged-driving or other adverse public health consequences; (7) No growing on federal lands; and (8) No possession or use on federal property. Currently, the DOJ will not enforce the CSA with regard to states that comply with these priorities. However, practitioners should be aware that the federal enforcement policy could change at any time.

Given the emerging nature of retail marijuana businesses, we recommend that lawyers write a letter to clients making them aware of the limitations on operating a marijuana business. The letter should advise the client of federal and tribal law and policy, as well as advise them that their retail marijuana activities must comport with Oregon law. It would also be good practice to have the client sign the letter acknowledging receipt and understanding.

As with every coverage determination, the facts of each situation are different, so this should not be interpreted as any representation that defense or coverage would be available under the facts of a specific situation. As this area of the law develops, the PLF may reassess its coverage determinations. Given the evolving nature of this area of the law and the federal prosecutorial discretion, covered parties should take all the circumstances into account in deciding whether to advise clients regarding the legal sale of marijuana and related activities in Oregon.

If you have particular questions regarding coverage, please call Jeff Crawford or Emilee Preble at the PLF at 503.639.6911 or 1.800.452.1639.
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<td>Reconnection</td>
<td>ORS Ch. 238A, 305, 314, 315, 316, 317, 348, 458, 657</td>
<td>442 (SB 63)</td>
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<tr>
<td>Business Personal Property Tax Lien Disclosure</td>
<td>ORS 311.605 to 311.635, 311.806</td>
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<tr>
<td>Residence of Active-Duty Military Personnel</td>
<td>ORS 316.027</td>
<td>701 (HB 2171)</td>
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<tr>
<td>Hardship Exception from Pay-to-Play Rule</td>
<td>ORS 305.419</td>
<td>45 (HB 2334)</td>
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</table>

**DEADLINE FOR PERSONAL PROPERTY TAX RETURNS**

<table>
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<tr>
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<tr>
<td>Deadline for Personal Property Tax Returns</td>
<td>ORS 308.250 to 308.300</td>
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**TORTS** *(See also Construction Law; Civil Procedure)*

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<tr>
<td>Personal Injury Protection and Uninsured Motorist Coverage</td>
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<td>ORS 12.160</td>
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<tr>
<td>Claims Against State for Wrongful Death</td>
<td>ORS 30.265</td>
<td>419 (HB 2644)</td>
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**WORKERS’ COMPENSATION**

<table>
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<tr>
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<tr>
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<td>ORS Ch. 656</td>
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<td>Temporary Disability Compensation</td>
<td>ORS 656.262</td>
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<tr>
<td>Rejection of Health Benefit Plan Claim</td>
<td>ORS 656.265</td>
<td>259 (HB 3114)</td>
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MAIL DELIVERY: Some law offices have recently encountered longer-than-average delivery times for mail delivered with the U.S. Postal Service. Given that some deadlines are based on date of receipt rather than the date postmarked, this situation illustrates the dangers of waiting to file at the last moment and relying on quick mail delivery. Practitioners should take extra precautions to avoid missing deadlines. The most important step you can take is to be proactive and file early! Additionally, lawyers may opt to supplement mail delivery with an email or phone call alert and/or to use a private messenger service to courier documents.

Thanks to Troy S. Bundy, Hart Wagner, LLP, and the PLF Practice Management Advisors, for their assistance with this tip.

CASES OF NOTE

DOMESTIC RELATIONS: In the case of Pollack and Pollack, 357 Or 575 (July 30, 2015), the Oregon Supreme Court held that ORS 107.105(1)(f)(F) imposes a mandate on courts to require full disclosure of the parties’ assets in making a just and proper division. That statutory duty endures until the court enters a dissolution judgment that effects a just division of the parties’ assets. In short, the court said that before deciding whether the mediated agreement should be enforced, the trial court was obligated to decide wife’s motion to compel production.

POST-CONVICTION RELIEF: In Verduzco v. State, 357 Or 553 (July 30, 2015), the Oregon Supreme Court held that the escape clause in ORS 138.550(3) does not preclude a petitioner from relitigating only those grounds for relief that he was certain he could win when he filed his first post-conviction petition, but rather precludes him from raising, in his second petition, those grounds of relief that he could not reasonably have raised in his first petition. Failure to do so will bar the petitioner from later raising an omitted ground for relief.

CONTRACT LAW: In A&T Siding, Inc. v. Capitol Specialty Insurance Corporation, 358 Or 32 (October 8, 2015), the Oregon Supreme Court decided a certified question from the Ninth Circuit Court of Appeals and held that an addendum executed by the parties cannot equitably reform a settlement agreement on the basis of a mistake of law in which the parties did not foresee the legal consequences of their original agreement.

CONTRACT LAW: In Brownstone Homes Condominium Association v. Brownstone Forest Heights, LLC, 358 Or 223 (November 19, 2015), the Oregon Supreme Court concluded that Stubblefield v. St. Paul Fire & Marine, 267 Or 397 (1973), was wrongly decided and should be overruled. The court held that Stubblefield erred when it concluded that a covenant not to execute obtained in exchange for an assignment of rights, by itself, effects a complete release that extinguishes an insured’s liability and, by extension, the insurer’s liability as well.

MEDIATION CONFIDENTIALITY: In Alfieri v. Solomon, 358 Or 383 (December 10, 2015), the Oregon Supreme Court held that confidential mediation communications under ORS 36.110(7)(a) do not include private communications between a mediating party and his or her attorney outside of mediation proceedings, even if those communications are integrally related to the mediation.
THANK YOU!

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Kenneth Sherman, Jr.
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