

**Ethics for Environmental Lawyers**  
 OSB Environmental & Natural Resources Section  
 October 13, 2017  
 Amber Hollister, OSB General Counsel

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**Today's Presentation**

- The Disciplinary System
- ENR Disciplinary Cases
- Extra Credit
- Free Help!

1. Explain Newton's First Law of Motion in your own words.

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YAKKA FOOB MUG. GRIG TUBBANDP ZINK VESTTOOM GEDREK. CHUMBLE SPJZZ.

I LOVE LOOKHOLES.

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**The Disciplinary System**

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### How Does Bar Discipline Work?

- The Rules
  - Oregon Rules of Professional Conduct
  - Bar Rules of Procedure
- The Players
  - Client Assistance Office
  - General Counsel's Office
  - Disciplinary Counsel's Office
  - State Professional Responsibility Board
  - Disciplinary Board
  - New in 2018: The Adjudicator ★
  - Oregon Supreme Court

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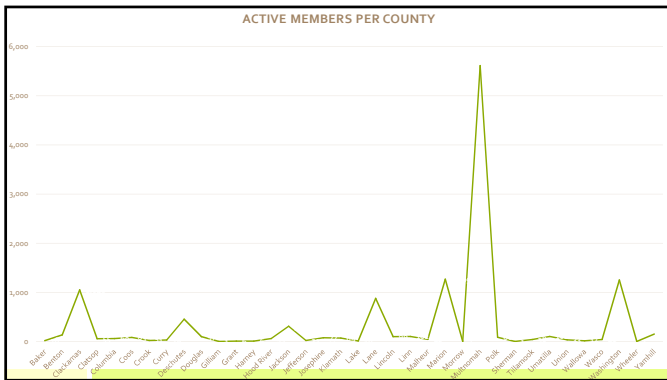
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ACTIVE MEMBERS PER COUNTY



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### The Complaint Intake System



283 Complaints Referred to Discipline for Further Investigation

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### Client Assistance Office

- Standard for Review
  - "sufficient evidence to support a reasonable belief that misconduct may have occurred" BR 2.5(b)(2)
- Process
  - CAO may ask for response and review "any other information deemed relevant"
    - Letter with Questions
  - Complaining party and subject of complaint receive copies
    - Oregon Public Records Act
  - Informal process

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### 2017 Disciplinary Complaints: Most Common Areas of Law

Criminal	430	34.18%
Domestic Relations	201	15.98%
Civil Dispute	87	6.92%
Litigation	81	6.44%
Personal Injury	54	4.29%

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### What Is an Environmental & Natural Resources Practice?

- Litigation
- Administrative law
- Corporate
- Government law
- Real Estate & Land Use

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### Environmental & Natural Resource Complaints?

Business	17	1.35%
Civil Dispute	87	6.92%
Land Use	2	0.16%
Litigation	81	6.44%
Other	47	3.74%
Real Estate	26	2.07%
Unknown	79	6.28%

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### Primary Concern raised



- Business relationship with client
- Client Conflict-Current
- Client Conflict-Former
- Communication
- Competence
- Conduct prejudicial to justice
- Conflict - self-interest
- Contact with represented party
- Criminal conduct
- Disclosing confidences/secrets
- Dishonesty & misrepresentation
- Ex parte communication
- Failure to cooperate with OSB
- False or misleading advertising
- Fee / Retainer Inquiry
- Fee dispute - excessive/legal fees
- Improper withdrawal
- Improper conduct by Prosecutor
- Judicial Fitness Commission
- Lawyer Debts
- Legal Advice
- Malpractice
- Neglect of legal matter
- Outside of legal bounds
- Preserving client funds/property
- Problem Re Firm names/letterhead
- Provide accounting
- Return client file
- Rude behavior
- Sexual relations with client
- Threatening criminal prosecution
- Trial Conduct
- UnZealous Conduct
- Unlawful practice of law

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### THE BIG THREE for the whole bar

- Communication, Oregon RPC 1.4
- Dishonesty & Misrepresentation, Oregon RPC 8.4(a)(3) and 4.1
- Competence, Oregon RPC 1.1




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### Responding to a Bar Complaint

- CAO Doesn't Always Ask for Response Before Dismissal
- Provide a Good Email Address
  - [addresschange@osbar.org](mailto:addresschange@osbar.org)
- Meet Deadline or Ask for Extension
- Provide Documents, if any, that you think are important
- Timelines are Helpful
- Keep Discourse Civil
- Review Rules Cited in Request for Response
  - Consider Reviewing Related Ethics Opinions
- Ask for Clarification if Needed
- Remember Bar is Subject to Public Records Law
- Failure to Respond is Independent Ground for Discipline, RPC 8.1

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### Request for response?

[Attorney Name and Address]

Re: **Subject: "CAO ATTY Initials and CAO #"**  
 "Accused (Complainant)"

Dear [Mr./Ms. Attorney]:

The Oregon State Bar Client Assistance Office (CAO) has received the attached correspondence from [Inquirer's First and Last Name]. The CAO is responsible for reviewing concerns regarding Oregon lawyers. Under Bar Rule of Procedure 25 and as resources permit, CAO determines the manner and extent of review required to determine whether there is sufficient evidence to support a reasonable belief that misconduct may have occurred warranting a referral to Disciplinary Counsel's Office. Misconduct means a violation of the rules of professional conduct and applicable statutes that gives cause for discipline in Oregon. [Mr./Ms. Inquirer's] concerns may implicate the provisions of ORS 9B and/or Oregon RPCs.

In order for me to conduct a fair and informed review, I am able to grant an extension of the matter no later than **insert date 21 days from today**. Please submit your response via email to [addresschange@osbar.org](mailto:addresschange@osbar.org), using the subject line "CAO ATTY Initials and CAO #". It is not necessary to also mail a paper copy of your response.

A copy of your response will be sent to [Mr./Ms. Inquirer]. If appropriate, I may request [he/she] comment on your response. All material submitted by the parties in the course of this review is public record and both parties will receive copies. Please limit your response and any documents you send to the ethics issues presented. I am confident I will receive your full cooperation in this matter. You should be aware, however, that if you fail to respond to this request, this matter will be referred to Disciplinary Counsel's Office for further review.

After I review all documentation and information gathered in this matter I will determine if there is sufficient evidence warranting a referral to Disciplinary Counsel's Office for further evaluation pursuant to BR 2.5(b)(2). CAO determines the manner and extent of review required for the appropriate disposition of complaints.

Thank you in advance for your cooperation. I look forward to a fair and expeditious review of this matter.

[Sincerely]

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### Disciplinary Dispositions

Sanction Type	2012	2013	2014	2015	2016
Disbarment	2	6	3	2	5
Form B Resignation ("The Other Disbarment")	13	4	5	3	12
Suspension	20	21	19	18	14
Suspension Stayed/Probation	3	3	12	12	11
Reprimand	17	14	7	14	14
Involuntary Inactive	0	0	2	1	2
Dismissals After Adjudication	2	2	2	1	0
Diversions	6	4	4	7	12
Admonitions	46	20	20	39	27

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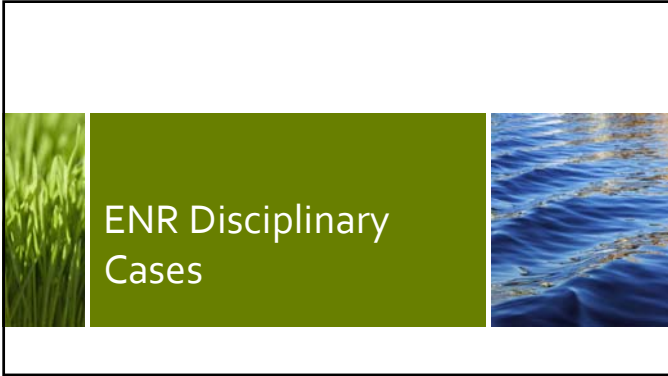
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*In re Stewart, 25 DB Rptr 106 (2011)*

- Violations of: RPC 1.4(a) (failure to keep a client reasonably informed about the status of a matter); RPC 1.4(b) (failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions); and RPC 1.7 (current client conflict of interest).
- Joint representation of insurance company and insured
- DEQ matter involving contamination from an underground storage tank at insured's former residence.
- Insurance company accepted the tender of the defense of the insured's claim with a reservation of rights.
- Attorney did not disclose to the insured that she was employed by the insurer or obtain the insured's informed consent to joint representation.
- The insured were personally represented in the DEQ matter by their own attorney, who requested to be informed of certain information related to the investigation of the property.
- Attorney had little or no communication with the insured or their attorney for a year -- did not share engineer's investigation results or corrective action plans for remediation, explain whether or how these findings and recommendations might affect the insured's responsibilities to DEQ.
- At least one of the corrective plans had the potential to call the insured's coverage into question.

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**Oregon RPC 1.4 Communication**

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

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### Oregon Rule 1.7 Current Client Conflicts

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

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

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

- (1) the lawyer reasonably believes that the lawyer will be able to provide **competent and diligent** representation to each affected client;
- (2) the representation is **not prohibited by law**;
- (3) the representation does not **obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client**; and
- (4) each affected client gives **informed consent, confirmed in writing**.

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### Conflicts when Representing Insurer and Insured

- As a general proposition, a lawyer who represents an insured in an insurance defense case has two clients: the insurer and the insured.<sup>1</sup> OSB Formal Ethics Op No 2005-77 (rev 2016); OSB Formal Ethics Op No 2005-30 (rev 2016).
- Conflicts can arise between two clients, especially when defending pursuant to a reservation of rights. OSB Formal Ethics Op No 2005-121 (rev 2016).

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### *First NBC Bank v. Murex, LLC*, No. 16 CIV. 7703 (PAE), 2017 WL 1536014 (S.D.N.Y. Apr. 28, 2017)

- Lesson Learned: Prospective waivers of client conflicts are not bulletproof.
- Initially, law firm had two clients: representing plaintiff First NBC Bank to bring fraud action, and Murex in unrelated regulatory consulting/environmental lobbying client.
- Obtained informed consent per 1.7(b), but court found it was insufficient prospective waiver.
- Why? Scope of waiver was insufficient. When Murex executed waiver, it was only lobbying client; but law firm later formed attorney-client relationship with Murex when defending EPA enforcement action.
- Law firm asked Murex to consent to representation of First NBC in lawsuit, Murex declined.
- End result was law firm disqualified by court.

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### Oregon RPC 1.0(b) & (g) Definitions

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (g) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(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.

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### *In re Foster*, 25 DB Rptr 201 (2011)

- Lawyer Suspended for 30-days, effective Sept. 3, 2011, for violating RPC 8.4(a)(3) (conduct involving dishonesty, fraud, deceit or misrepresentation).
- Attorney was ODOJ Special Counsel on Environmental Issues. Before then, he was an executive director of a nonprofit organization dedicated to protecting the Columbia River. Hood River County was criminally prosecuting a company and its owner for alleged pollution violations arising out of operations at the company. The Hood River prosecutor learned about a pool of liquid across a public road from the company and asked the nonprofit to collect and test a sample from the pool.
- The attorney and the nonprofit's water quality coordinator drove to and parked their car down the road from the pool, and the attorney walked to the pool and took a sample from it. The water quality coordinator field tested the sample, which showed a pH level high enough to be classified as hazardous waste.
- The attorney learned the ODOJ was going to rely on the sample as evidence, and contacted his colleague and suggested that the sample and test results not be used as evidence, but did not state he had collected the sample. He then misrepresented who took the sample to others at the ODOJ and the AG.
- He later voluntarily admitted to the attorney general that he had not been truthful about his role in the sample collection and resigned his position at ODOJ.

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### Oregon RPC 8.3(a)(3) Misconduct

(a) It is professional misconduct for a lawyer to:

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(3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law ....

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Extra Credit



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Don't Communicate with Represented Persons



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**The Rule**

In representing a client or the lawyer's own interests, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject...

*RPC 4.2*

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Client Not Required

- Applies when lawyer representing himself or herself
  - *In re Knappenberger*, 338 Or 341 (2005)
- Applies when lawyer is inactive
  - *In re Smith*, 318 Or 47 (1993)

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"Communicate"

- Defined broadly
- Cannot communicate through another
- Clients may negotiate with each other
  - OSB Formal Op No 2005-147
- Okay to look at websites and social media, OSB Formal Ethics Op No 2013-189
  - No "Friending" or "Posting"
  - Must be honest; see RPC 8.4(b) Covert Investigation Exceptions

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"Subject of Representation"

- Matters outside scope of representation okay
- Providing second opinion okay
  - OSB Formal Op No 2005-81
- Subject ≠ Matter
  - *In re Newell*, 348 Or 396 (2010)

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"Knowledge"

- Defined by RPC 1.0(h)
  - Actual knowledge
  - May be inferred from circumstances
  
- *In re Schwabe*, 242 Or 169 (1965)

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Exceptions

- Prior consent of the person's lawyer
- Authorized by law
  - Narrowly construed. *In re Schenck*, 320 Or 94 (1994)
  - Service of process okay. *In re Carroll*, 15 DB Rptr 48 (2001)
  - Sending the original of a letter to a person represented by counsel with a copy to attorney is not okay. *In re Hedrick*, 312 Or 442 (1993).
  - Prosecutorial investigations pre-arrest, pre-indictment, when not represented, OSB Formal Ethics Op No. 2005-126
  - Prosecutorial use of undercover agents to investigate pre-arrest, pre-indictment, even if represented, OSB Formal Ethics Op No. 2005-126

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Who is Deemed Represented in an Entity?

- Off-limits
  - Officers and directors
  - Management employees
  - Employees whose conduct is at issue
- OK
  - Current employees not in the categories above
  - Former employees
  - BUT...Beware of invading privilege

OSB Formal Op No 2005-80

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Free help!

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**Resources Available**

- **OSB BarBooks**
  - Annotated Rules of Professional Conduct
  - The Ethical Oregon Lawyer
  - Oregon Formal Ethics Opinions
  - Oregon Disciplinary Board Reporter
- Call the **Ethics Helpline** for prospective ethics guidance.  
**Ethics Helpline: 503.431.6475**
- RPC 8.6(a) allows General Counsel to provide **informal written ethics opinions** to members of the bar.




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Questions?

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