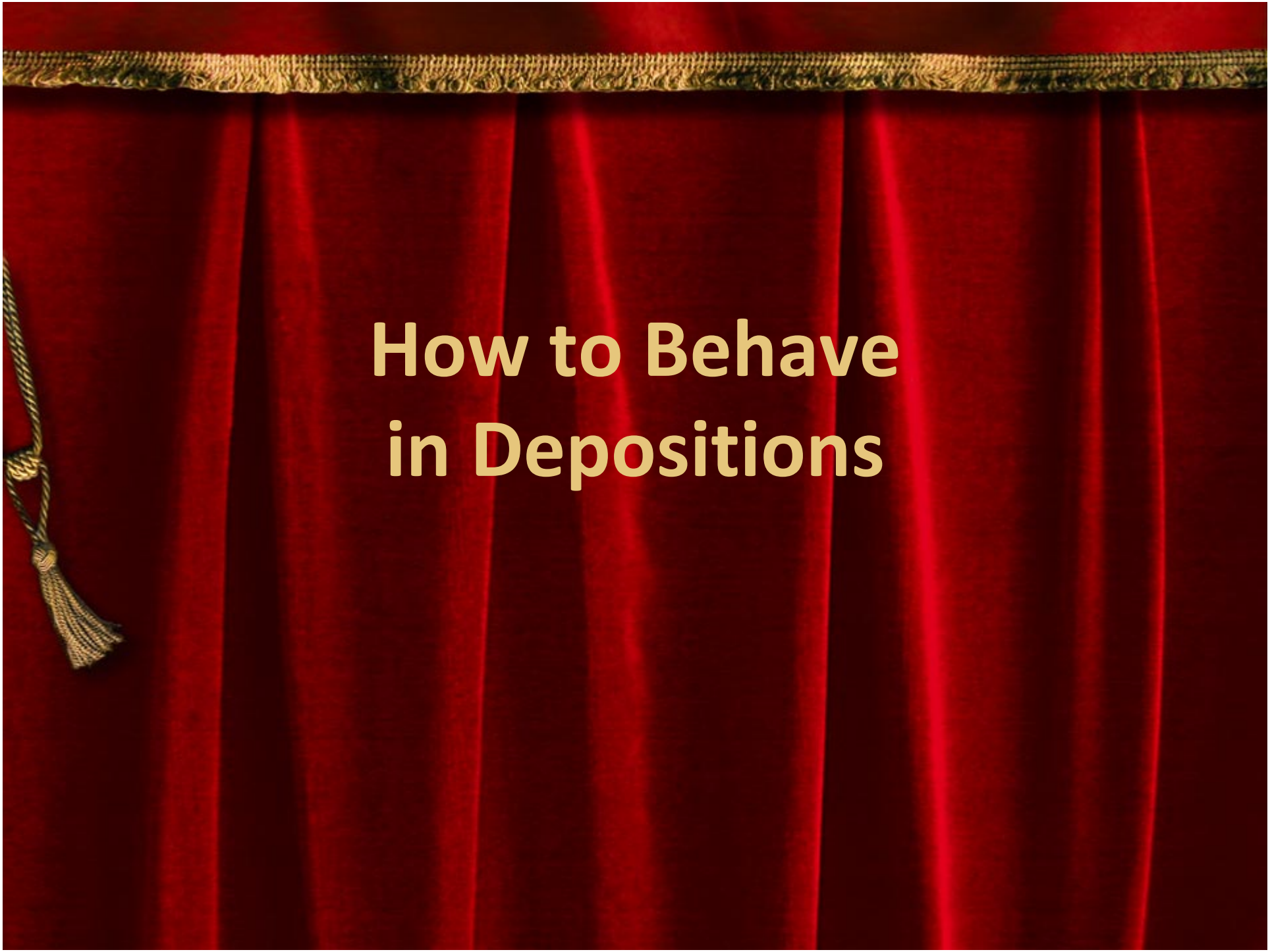
First Annual
Legal Ethics Award Show

Classy Award

Assy Award


How to Behave
in Depositions

And the first Assy of the night goes to…

ORCP 39 D(3)

All objections made at the time of the examination shall be noted on the record. A party or deponent shall state objections concisely and in a non-argumentative and non-suggestive manner. Evidence shall be taken subject to the objection, except that a party may instruct a deponent not to answer a question, and a deponent may decline to answer a question, only:

(a) when necessary to present or preserve a motion under section E of this rule;

(b) to enforce a limitation on examination ordered by the court; or

(c) to preserve a privilege or constitutional or statutory right.

ORCP 41 C(1)

Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

ORCP 41 C(2)

Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

ORCP 39 E

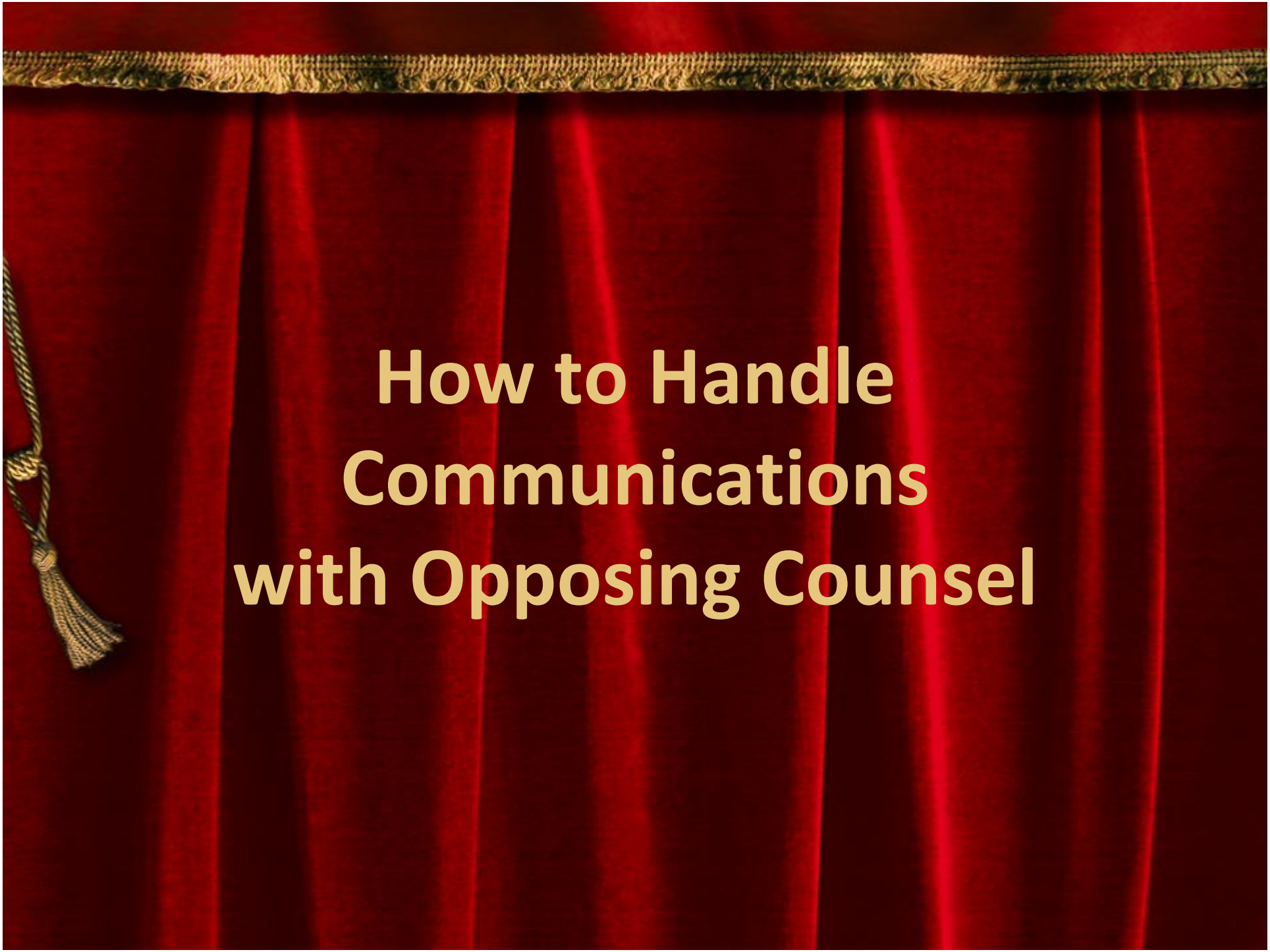
At any time during the taking of a deposition, upon motion and a showing by a party or a deponent that the deposition is being conducted or hindered in bad faith, or in a manner not consistent with these rules, or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or any party, the court may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope or manner of the taking of the deposition as provided in section C of Rule 36.

Multnomah Bar Association Deposition Guidelines

Multnomah County Motion Judges Consensus Statement

Deposition Tips:

- Know which objections have to be made at the deposition or else they are waived (see ORCP 41 C)
- Make a record of any bad behavior ("For the record, plaintiff's counsel is now standing on the table and yelling at the witness")
- Know when a witness can be instructed not to answer (see ORCP 39 E)
- Figure out before the deposition who you should call if court assistance is needed during the deposition


How to Handle
Communications
with Opposing Counsel

What to Do When Your Client
or Supervising Attorney
Wants You to Do
Something Unethical

The End

Gus J. Solomon Inn of Court
March Pupilage Group
March 19, 2019 Presentation Script

[Begin with swelling orchestral music]
* PowerPoint with Red Curtain Backdrop and Awards Show Title Only *

Margie: Good evening, ladies and gentlemen, and welcome to the First Annual Legal Ethics Awards Show, in which we recognize and honor the most ethical and professional attorney behavior with Classy Awards, and shine a light on the worst unethical and unprofessional behavior with Assy Awards. I am Margie Schroeder.

Alex: And I am Alex Hill. Welcome. We've got a great show ahead for you. This has been an exciting year for bad lawyer behavior on the national stage, with famous lawyers such as Rudy Giuliani [SLIDE OF GIULIANI] in a race to the bottom for this year's National Assy Award. The question is can our local lawyers compete with these professional asses? On the other end of the spectrum, which of our local lawyers deserve recognition for classy and professional responses in the face of unprofessional behavior?

Margie: Tonight, we will present Classy Awards and Assy Awards [SLIDE OF TROPHYS] in each of the following three categories:

1. How to behave in depositions
2. How to handle communications with opposing counsel
3. What to do when your client or your supervising attorney wants you to do something that you think is unethical.

* New PowerPoint Slide with Deposition Category Title Only *

Alex: First up, is how to behave in depositions. When we notified this year's Assy Award winner, he told us that he would see us in court if we stated his name during this broadcast.

Margie: Oh that guy, what a kidder!

Alex: Luckily we don't have to identify him by name, because videos of some of his work are freely available on YouTube. Let's watch.

* New PowerPoint Slide with Deposition Clip *

[Show excerpt of: "Angry Lawyer Goes Off the Deep End" Clip
STOP CLIP AT 7:38 (after the angry lawyer says "tell it to someone who cares"]

Margie: Wow. What a performance! I especially love all of his baseless attorney-client privilege objections, and his continued instructions for his client to not answer based on objections that do not permit such an instruction.

Alex: Since Mr. "I'll get you some tissues so you can cry" is not here in person to accept tonight's award, I hereby accept this Assy Award on his behalf [holding "Assy Award" trophy that each group gets to re-use].

Margie: Next up, is this year's Classy Award. Because he always acts professional and restrained in depositions, I am afraid we do not have any video clips to show.

Alex: Yeah. Low entertainment value.

Margie: Instead, we've asked this year's Classy Award winner to critique the video we just watched, and explain how to deal with an unprofessional lawyer in a deposition. Ladies and gentlemen, please welcome Peter Glazer!
[Hands Classy Award winner the Classy Award trophy, which each group can reuse]

Peter: Thank you for this award. In the clip we just watched, while the objecting lawyer was certainly engaging in objectionable behavior, I think the lawyer taking the deposition could have handled the situation better. Rather than engage in a debate over what objections are and are not allowed and what rules govern the deposition, I think the best way to handle this type of behavior is to calmly and professionally put your objections on the record so there is a clear record in the event you need to involve the court.

Margie: Peter, I'd like to review the objections that attorneys are allowed to make during a deposition, but before that, can you tell us where the general rules governing depositions come from?

Peter: As those of you who have taken a deposition before already know, depositions usually begin with the lawyer who is taking the deposition explaining the "rules" to the person who is going to be deposed. How many of you know where these rules are written down? (get show of hands)

The answer is that they are not, at least not explicitly.

For example, one of the "rules" that are often stated is that the witness cannot take a break if there is a question pending. The question must first be answered, and then the witness can take a break.

While this "rule" is not spelled out in the UTCRs or in the ORCPs, ORCP 39 D(1) states that the examination of deponents "may proceed as permitted at trial." This is the basis for this "deposition rule."

Margie: I did not know that. Let's talk about objections now. How do you know when to make objections, how they should be made, and when a witness can be instructed not to answer a question?

Peter: Those are all spelled out in ORCP 39 D(3). [ADVANCE TO SLIDE w/ Rule] Note that there are only three situations in which you can instruct a client not to answer a question: "(a) when necessary to present or preserve a motion under Section E of this rule; (b) to enforce a limitation on examination ordered by the court; or (c) to preserve a privilege or constitutional or statutory right."

Margie: Peter, are those the only rules governing objections?

Peter: No. You also have to look at ORCP 41, which states which objections you have to make during the deposition or else they are waived. These are set forth in ORCP 41 C(1) and (2). I'll let you read the rules.

Margie: [ADVANCE TO SLIDE w/ Rule] ORCP 41 C(1) says that "Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one that might have been obviated or removed if presented at that time."

[ADVANCE TO SLIDE w/ Rule] ORCP 41 C(2) states that "Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition."

Margie: So what do you do if the questioning lawyer is asking questions that are clearly designed to annoy or embarrass your client?

Peter: You have to get the court involved and make a motion for court assistance under ORCP 39 E. I'll let you read the rule.

Margie: ORCP 39 E says that any time during the taking of a deposition, if "the deposition is being conducted or hindered in bad faith, or in a manner not consistent with these rules, or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or any party, the court may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope or manner of the taking of the deposition as provided in section C of Rule 36."

Peter: The question is how to make that motion. According to Multnomah County Circuit Court Judge Cheryl Albrecht, the court receives an average of 1 to 2 calls every day asking for judicial assistance with depositions. The risk in doing so is that unlike in federal court where you have one judge assigned to the case and the

parties are encouraged to resolve discovery issues via telephone, in state court, you never know which judge you are going to get on the phone. Personally, I prefer to try to file a written motion and brief the issue before getting the court's involvement.

Margie: ORCP 39 E appears to give you the ability to do so. The rule says that "Upon demand of the moving party or deponent, the parties shall suspend the taking of the deposition for the time necessary to make a motion under this subsection."

Peter: If you do have to call the court, whether you are the attorney taking or defending the deposition, you should find out before the deposition who to call in the event court assistance is needed. We asked Presiding Judge Stephen Bushong what to do in Multnomah County, and he said to call presiding. They will then first see if the motions judge assigned to your case is available, and if not, will find a judge who can assist.

Margie: Peter, are there any other written rules governing Oregon depositions?

Peter: No, other than UTCR 5.010, which requires the moving party to make a good faith effort to confer with the other parties concerning the issues in dispute, which includes motions made under ORCP 39, there is nothing in the UTCR or SLRs for Multnomah, Clackamas, or Washington County governing depositions.

There are two other sources of information, however. In September of 1992, the Multnomah Bar Association issued deposition guidelines for Multnomah County. These were reviewed and approved by the MBA Board of Directors on March 7, 2012. These guidelines address objections and instructions not to answer. [put up on screen in PowerPoint]

There also is an August 2018 Multnomah County Motion Judges Consensus Statement that addresses the same issues. Both of these are available online.

Margie: Okay, so to recap, here is a list of deposition "good behavior" tips:

* New PowerPoint Slide with Summary of Deposition Tips List *

Peter: To help illustrate how it is done, let's do a quick mock deposition. I will be the examining attorney. Alex, you be the objecting attorney, and Margie, you be the witness.

Peter: When did the accident occur?

Alex: I'm going to object. Your question is both vague and ambiguous – what accident are you asking about? Are you asking what day? Are you asking what time? There's too much ambiguity there.

Peter: The day and time. And there was only one accident that your client is seeking damages for.

Alex: Well, I think it's vague and ambiguous, but go on.

Peter: To repeat, what time and day did the accident for which you are seeking damages occur?

Margie: It was the first Monday in March, and it was about 6:00 pm.

Peter: Thank you. Can you tell me what you were doing before the accident?

Alex: I have to object again. Your question is vague and ambiguous. Do you mean right before the accident? That morning? What did she have for lunch? What was she doing the second before the impact? You're leaving too much out there to guess at. I object.

Peter: I'll rephrase. You said the accident occurred at 6:00 pm. Let's start at 5:00 pm. What were you doing then?

Alex: Oh boy, well this is going to take a while. I object again. It's not relevant what she was doing at 5:00 pm. Why don't you just ask how the accident happened? [To witness] go ahead and tell the attorney here how the accident happened.

Peter: Excuse me, but this is my deposition and I'm allowed to ask my own questions. You can cross-examine the witness when it's your turn.

Now then, ma'am, please tell me what you were doing at 5:00 pm on the day of the accident.

Alex: Same objection. Not relevant. Pfft, honestly.

Margie: Should I answer the question?

Alex: It's not a relevant question so you don't have to answer it.

Peter: I'm sorry, ma'am, but your attorney is not correct. Please answer my question.

Alex: This is amateur hour. Go ahead, but I'm still objecting.

Margie: I got off work at 5:00 pm so I got in my car and started to drive to the grocery store to get dinner.

Peter: And which grocery store were you driving to?

Alex: Oh my! Objection! What the heck does this have to do with anything? She got hit by **your** client and she got hurt! That's what matters here! Ask her about her injuries! Ask her about her car! Ask her how fast your client was driving! But for Pete's Sake, **DON'T ASK HER ABOUT GROCERY SHOPPING!**

Peter: Ma'am, please answer the question.

Margie: I'm confused, so I do answer?

Alex: This is dumb. Just dumb. Are you going to ask her if she likes Safeway better than Fred Meyers?? Maybe she's a Trader Joe's gal. She sure as heck isn't shopping at Whole Foods because your client won't pay out on this claim!

Peter: Ma'am, please answer the question.

Margie: I'm a Trader Joe's gal. I was going to Trader Joe's.

Peter: Thank you. Now, which Trader's Joe's were you going to?

Margie: The one on Cesar Chavez Boulevard.

Alex: You need to pause before you answer so I can object. These questions are ridiculous.

Peter: Thank you. So, how long does it normally take you to get from your work to that Trader Joe's during rush hour?

Alex: OBJECTION. This is painful. I guess you can answer.

Margie: Well, I mean, I work down the street, so usually it just takes about 20 minutes.

Peter: So you made it to the grocery store at about 5:20 that day?

Alex: You're KILLING me. Objection. RELEVANCY.

Margie: No, I never made it to Trader Joe's.

Peter: But the accident happened at about 6:00 pm, right?

Alex: ASKED AND ANSWERED.

Margie: Yeah that's right.

Peter: So what happened on the way to Trader Joe's?

Alex: ASKED AND ANSWERED. She got in a damn accident because YOUR client decided to RAM her with her car.

Peter: Please let the witness answer. [To witness]: Please go ahead.

Margie: Well, like, a minute after I was driving to work I got a text from my girlfriend and she was at this bar that was real close, so - -

Alex: OBJECTION. This is calling for attorney-client privilege. Don't answer and stop talking.

Peter: Are you the girlfriend at the bar? How is that attorney-client privilege?

Alex: Um, no, of course I'm not the girlfriend at the bar. But she told me about this so it's attorney-client privilege.

Peter: I'm sorry counsel, but you know that's not how the privilege works. Ma'am, please continue.

Margie: So I stopped at the bar to get a drink with my girlfriend.

Alex: Is your girlfriend a lawyer by chance?

Margie: No.

Alex: Damn.

Peter: So how many drinks did you have at the bar?

Margie: Well, I was only there for like thirty minutes, so about five shots and - -

Alex: OBJECTION. This has nothing to do with the accident.

Peter: I'm sorry you disagree, counsel, but your client needs to finish her answer.

Margie: I had about six beers and five shots.

Peter: What time did you leave the bar?

Margie: About 5:50.

Peter: And then did you start driving to Trader Joe's again?

Alex: You know, this would go a lot faster if you took your head out of that outline. Why don't you just hand it to me and I'll go through it. That'll speed things up a ton.

Peter: No counsel, I am not giving you my outline. Please let your client answer the question.

Margie: Yeah, I was going to Trader Joe's but like, just a few minutes down the road the lady swerved and backed up in to me.

Peter: I'm sorry, you're saying my client swerved, and then *backed* her car into your own?

Alex: OBJECTION. Asked and answered. Just because your client can't drive doesn't mean you get to berate my client.

Margie: Yeah, she came out of nowhere. I was a little hazy at the time though, but still, it had to have been her fault. My car has one of those alert systems on it so I couldn't have caused the accident.

Peter: And did you alert system go off right before the accident?

Alex: She can't testify as to the alert system. She's not an expert.

Peter: Counsel, it's not a question that calls for an expert opinion. Either it went off or it didn't.

Margie: I heard a bunch of noises, but my head was spinning, so – oh man, I'm just picturing it now. It did go off, yeah!

Peter: Ma'am, were you intoxicated at the time of the accident?

Alex: Oh no! I'm not going to let you continue to harass my client and allege that he was drunk. You need to - -

Margie: - - Oh no, now that I think about it I was probably drunk. Holy smokes, do you think I caused the wreck?? Oh man, is that lady okay?

Peter: Counsel, do you want to take a break to speak to your client?

Alex: Um, yes please.

Peter: Any that, ladies and gentleman, is how you handle bad deposition behavior and get the answers you need in a deposition.

Margie: Now, to present the Classy and Assy Awards for "how to handle communications with opposing counsel," here is Christine Tracey.

[Play awards show transition music here]
* New PowerPoint Slide with Category Title Only *

Communications with Unethical Opposing Counsel

Christine: Thank you, Margie.

Our award ceremony now moves on to looking at Classy ways, and sadly Assy ways, to communicate with opposing counsel when they are behaving badly. Our goal should always be to remember those immortal words of Michelle Obama, "When they go low, we go high." But sadly, we are human and don't always listen to our better angels.

You have just seen outstanding examples of Classy and Assy behavior during depositions. Keep in mind what you learned there while you watch our scenarios regarding communications with opposing counsel, because you will judge who gets the awards at the end of this segment.

The unprofessional conduct in this category occurs outside the presence of the judge. More often than not, the conduct is due to a discovery dispute where the parties cannot agree on what, if anything, should be produced. Motions to compel or motions for sanctions take time to get before the court and slow your case down. If you can't resolve the issue on your own, you can at least try to always behave in a Classy way so that you have the best chance of being successful on your motion.

Oregon Rule of Professional Conduct 3.4 is titled "Fairness to Opposing Party and Counsel" and spells out conduct that is not acceptable. Such conduct includes knowingly obstructing another party's access to evidence and knowingly making a frivolous discovery request or failing to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing counsel. Additionally, Rule 4.1 requires a lawyer to be truthful in statements to others.

In addition, we have UTCR 5.010 that requires a good faith effort to confer regarding issues in dispute before filing a motion made pursuant to ORCP 21, 23 or 36 through 46.

So, how should we react when opposing counsel does not appear to be acquainted with their duties under those rules? Let's look at some scenarios…

Scenario 1 – Playing Opposing Counsel's Game

Christine: This scenario we call "Playing Opposing Counsel's Game." Our young attorney Josh is very frustrated with Opposing Counsel who won't produce discovery, won't answer phone calls or emails in anything like a timely fashion, and continually treats Josh like a neophyte lawyer. We drop in on Josh in his office, discussing Opposing Counsel and his shenanigans with fellow attorney Christine:

(Josh and Christine sit at table for discussion in Josh's office.)

Josh: So Opposing Counsel, or Old Crab as I call him, is refusing to hand over the discovery that we requested. He's claiming that it is just too much work for his client to review 2 years of emails and find any that

talk about the sale of the company. I am going to have to file a motion to compel discovery, but first I need to confer with Old Crab about the disputed issues.

Christine: **Have you talked to Opposing Counsel about using search terms to electronically sort and search the emails? Maybe you could agree to look for specified senders or recipients and use appropriate terms to reduce the number of emails that have to be reviewed.**

Josh: **Tried that, Old Crab just says no. Of course it took me two calls and three emails to get through to him. He never picks up a call from me, I always have to leave a message and wait for him to call back, maybe that day, maybe the next. Then, if I miss his call, we go through the same dance again. And emails sit for at least a day, more likely two, before he will respond.**

Old Crab says that the email production is just too burdensome for his client and that if I want any documents, I need to get the judge to tell his client to produce. He really is the most uncooperative attorney I've ever worked with. He won't listen to me, always talks over me, and lectures me on what I should know or will know after I've practiced for a while. No, I am going to have to confer with Old Crab, and that has me thinking….I have a clever plan for when Old Crab does call back to give him a taste of his own medicine, but I need your help.

Christine: **I don't know…**

Josh: **Oh, don't be such a wimp. Here's my plan – I'll call Old Crab and leave a message asking to confer about the motion to compel, but give him your number instead of mine. Then, when he calls back you can answer. You tell him that I am not available but will get back to him when I can.**

Christine: **What will you be doing?**

Josh: **Oh, I'll be in the office, I just am not going to talk to him right away. I want Old Crab to have to work to talk to me. After waiting a bit, I'll call him back. If Old Crab still won't pick up, I'll leave another message having him call your number, and you can tell him that I am not available again. I figure I won't be available to talk to him until he calls back the third time.**

Christine: **What if he decides not to call back a second or third time?**

Josh: **Then I will just say in my UTCR 5.010 certificate that I made a good faith effort to confer but Old Crab would not return my call.**

Christine: I don't know about your plan. First of all, I don't want to lie to Opposing Counsel and tell him that you are not available when you are. I'm pretty sure there is a rule against lying like that. Second of all, how can you say that you made a good faith effort to confer when all you did was play Opposing Counsel's game and make it hard for him to talk to you? I think you should just call, leave a message with your own phone number, and then confer with Opposing Counsel when he calls back. I think trying to beat him at his own game is going to end badly for you…

Josh: You are such a spoil sport. Maybe Andy in accounting will help me with my plan….(Atty Josh wanders off to find Andy)

(Christine returns to lectern.)

Christine: Well, I guess that's one way to handle opposing counsel who is not willing to communicate properly with you. I hope our young attorney Josh gets his motion to compel filed someday…

Let's move on to our next scenario…

Scenario 2 – The Unintended Blistering Email

Christine: We call this scenario "The Unintended Blistering Email." Our attorney Mohammed has just received quite the email from Opposing Counsel and is going into another attorney's office to discuss it.

(Christine sitting at table in her office, Mohammed comes in and sits down.)

Mohammed: You are not going to believe what I just got from Opposing Counsel in my email! She sent an email to me that said, I kid you not, "Mohammed is such a jerk! That pain in the neck just sent me a deposition notice for my client's MOTHER! I am afraid that if my client's MOTHER is deposed that she will say the wrong thing and our case will be over. I am going to move to quash on grounds that Mohammed is out of his mind!"
Can you believe it? Opposing Counsel listed the client's mother as a witness, why wouldn't I depose her? I can't believe that Opposing Counsel meant for that email to come to me. I wonder how I can use it to my advantage…

Christine: What do you mean, use it to your advantage?

Mohammed: Well, clearly Opposing Counsel thinks that the mother cannot stand up under questioning. I will oppose the motion to quash if it is made, I don't think the court will refuse to let me depose a listed witness. I

am going to get to take the mother's deposition. And knowing that Opposing Counsel is worried about what the mother will say, I will start strong and just keep going at the mother until she cracks under the pressure…

Christine: I'm not sure that's a good idea. What about Rule of Professional Conduct 4.4(b)? It says that a lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender. I'm pretty sure that Opposing Counsel's email is covered by Rule 4.4(b) – you said that you can't believe that Opposing Counsel meant for the email to come to you. Don't you think you should notify Opposing Counsel that you got this email from her?

Mohammed: Opposing Counsel should know who she sent the email to. And she should learn to pay more attention to what she is doing. Why do I have to help her out of her own mess?

Christine: Well, the Rule is pretty clear that you have to notify her. And think of it this way – if the mother's testimony really could derail Opposing Counsel's case, you might settle this matter soon after notifying Opposing Counsel that you got that email.

Mohammed: I guess you are right, I will notify Opposing Counsel. I'll send back the email with a note that says I think that she inadvertently sent the email to me. But it could have been fun to do that deposition…and maybe Opposing Counsel and her client will still give me the chance to depose the mother. I can hope!!

(Christine returns to lectern.)

Christine: Looks like our attorney Mohammed is going to let Opposing Counsel know that the blistering email went to the wrong recipient. This is a reminder to all of us to be aware of who we are sending emails to, and not put anything into email that could bite us if the email goes astray.

One more scenario before we give our Classy and Assy awards in this category…

Scenario 3 – The Dueling Declarations

Christine: Our final scenario in this category is "The Dueling Declarations." Our attorney Margie has been in a discovery dispute with Opposing Counsel, who filed a motion to compel with declaration that includes several emails that try to show Margie behaving uncooperatively. Of

course, Margie has her own emails to show that Opposing Counsel's behavior had been even worse, even deceptive. Margie has a copy of Opposing Counsel's motion and declaration, and is discussing his declaration in response with another attorney in her office.

(Margie and Christine sit at table for discussion in Margie's office.)

Margie: **So Opposing Counsel claims that I started this dispute by refusing to produce documents. But I didn't refuse to produce documents, I just sent an email and asked Opposing Counsel if he would agree to my proposed search terms to find responsive documents in my client's database. First Opposing Counsel called and said that he would get back to me about the search terms, then two days later he called and said that I never sent him any search terms and that I was delaying discovery and that I just needed to send all potentially responsive documents. But I have my email sending the proposed search terms right here! And sending all potentially responsive documents, without using any search terms, would be an enormous and expensive undertaking.**

Christine: **What did Opposing Counsel say when you forwarded the original email again?**

Margie: **Well, I never got to forward the original email, because Opposing Counsel called to confer and said that if I would not agree to produce all the potentially responsive documents that he would just file his motion, that he was tired of my delay.**

Christine: **Hmmm, you probably should have forward the original email to Opposing Counsel anyway to remind him that you had sent it before he filed his motion and declaration. You might have avoided a motion to compel.**

But now that he's filed his motion, you have to respond to it. Let's see what you say in your declaration. (Reading Margie's declaration.) So first you attach the original email proposing search terms, then you have your testimony about his first call saying that he would get back to you about the search terms and his subsequent call accusing you of never sending the search terms and demanding production. That all seems ok.

But then you say that you don't believe that Opposing Counsel knows how to use email and that you've never had to work with such a difficult attorney in the two years you've been practicing. I recommend that you take these statements out, they really aren't going to help the judge decide the motion. They are really your opinions, not facts.

Margie: But the judge needs to know what a difficult person Opposing Counsel is! And Opposing Counsel included plenty of less-than-flattering opinions about me in his declaration…and he started it by accusing me of failing to send him the proposed search terms!

Christine: Remember that the judge is going to try to resolve your discovery dispute in a way that lets your case move forward towards resolution. And you can help the judge by sticking to the facts as you know them and trying to keep emotion and frustration to a minimum in your declaration and response. You can show with your declaration that Opposing Counsel has not been straightforward in his declaration and supply the facts as you know them. Just do that, and leave out everything else.

Margie: Thanks, I'll think about your advice…

(Christine returns to lectern.)

Christine: Well, maybe our attorney Margie will help the judge find a way for the case to move forward and not insist on making the judge determine who started it. I can see why judges are not fond of discovery disputes…

So, we have arrived at the point where you, the audience, must decide who wins the awards for being Classy and Assy. Show of hands, please

Who thinks that our young attorney Josh in Scenario A, Playing Opposing Counsel's Game was Classy? Assy? [S/B Assy winner]

Who thinks that our attorney Mohammed in Scenario B, The Unintended Blistering Email was Classy? Assy? [S/B Classy winner]

Who thinks that our attorney Margie in Scenario C, The Dueling Declarations was Classy? Assy? [S/B neither winner]

Young attorney Josh from Scenario A, you are the Assy winner. I hope you learned something today and will let this award inspire you to do better in the future.

Attorney Mohammed from Scenario B, you are the Classy winner. If you have any spare time, you might consult with the other two nominees in this category…..

Now, to present the Classy and Assy Awards for "what to do when your client or your supervising attorney wants you to do something that you think is unethical, here are Josh Ewing and Mohammed Workicho!

[Play awards show transition music here]
* New PowerPoint Slide with Category Title Only *

Josh: Now the show moves on to the grand finale—how to deal with clients and supervising attorneys who want you to say or do something unethical. We will start with ethical issues with supervising attorneys. This scenario begins with a supervising attorney walking into the office of the firm's newest hire to tell him some good news.

Scenario Number 1: Supervising Attorneys

Peter: Hey you! I've got some good news.

Mohammed: What's the good news?

Peter: Yesterday, a client sent me a $100,000 retainer to defend him on a big criminal case…

Mohammed: Oh, nice!

Peter: But wait, that's not even the best part. I just spoke with the prosecutor, and it turns out that the client was falsely accused. This means that I can get the case dismissed in under 10 hours tops!

Mohammed: Does that mean that you will return some of the money the client gave you?

Peter: Haha, nice one! I always knew you had a sense of humor! Seriously though, let's brainstorm on how we can tell the client to go fly a kite.

Mohammed: What could I say that would be appropriate?

Peter: Well, maybe we can say this is just like a contingency case. We won, so we get to keep all the money!

Josh: Wrong! Oregon RPC 1.5(c)(2) prohibits attorneys from charging contingent fees in criminal cases. ABA Model RPC 1.5(d) (2) also prohibits contingent fees.

Just like in any area of the law, attorney fees in the realm of criminal defense must be reasonable and may not be "clearly excessive." Oregon RPC 1.5(a). The standard for determining whether fees are reasonable or clearly excessive is that of the famous "reasonable lawyer." In other words, would "a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee." Oregon RPC 1.5(b).

Determining whether a fee is reasonable involves weighing various factors, including the nature and seriousness of the criminal charges; the time and skill required to handle the case; the reputation, experience, and ability of the attorney; the fees regularly charged in similar cases in that locale; the time limitations involved in the case; and—if it is apparent to the client—whether accepting representation will prevent the attorney from taking on other work. *See* Oregon RPC 1.5(b); *see also* American Bar Association's (ABA) Model Rules of Professional Conduct (RPC) 1.5(a). The standards in Oregon RPC 1.5(b) are the same factors set forth in ORS 20.075(2).

It's also really important what is in the contract. It is good practice to have a written fee agreement in all cases.

Mohammed: Hang on a second. I suddenly think that the contingency fee approach might be unethical.

Peter: Wow, way to shoot down a genius idea. Why don't you come up with something?

Mohammed: Hmmm. Maybe we can keep all the money because it's an amazing result? And we earned it as a flat fee?

Peter: Now you're thinking!

Josh: Eeeeeeek! It's not quite so simple. Especially if there is no written contract!

Oregon law allows attorneys to charge flat fees, but those fees must still be reasonable and not clearly excessive. A flat-fee agreement is defined as one where the lawyer agrees to charge a specified amount for a given case, regardless of how much work is involved. Still, the fact that a fixed fee may result in a fee in excess of a reasonable hourly rate does not in itself make the fee unethical.

Mohammed: Wait, I'm already having second thoughts. I'm sorry to ruin the mood, but my ethical conscience tells me that charging 100k for 10 hours of work is not reasonable. We should refund a reasonable portion of the fee, no matter how tempting it is to keep it all.

Josh: Bing, bing bing! Correct answer. If a client fires an attorney before a case resolves and demands a refund, the attorney will be required to account for the work

performed and fee earned. This case is a little different, in that the outcome was exactly what the client wanted – the case was dismissed. However, it is still possible that we need to return some of the money to the client. The Oregon Supreme Court has stated that any fee that is collected for services that is not earned is clearly excessive regardless of the amount.

Here, it really depends on the fee agreement. Since we did not have one, the simplest and cleanest refund amount is the balance of unused time after attorney's hourly rates have been charged.

One idea for the future would be to have a tiered fee agreement with our client – i.e. setting out the amount of the fee that will be charged if a case is resolved through settlement, on the eve of trial, after trial, etc. The arrangement needs to be clearly outlined in the fee agreement so that everyone understands their obligations. Tiered fee structures are consistent with Oregon RPC 1.2(b), which allow lawyers to "limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."

Josh: I think we know now which of the responses to this scenario wins the Classy Award, but which one wins the Assy Award?

[Audience Response]

Scenario Number 2: Clients

Alex: Let's now move to ethical issues presented by dealing with clients. We call this scenario "The Case of the Gooey Knife." It begins with a prospective client meeting a criminal defense attorney to represent him on a murder charge.

Josh: Hey, Bigshot! I'm so glad you decided to meet with me and talk about my case before I got arrested.

Mohammed: No problem! Please, let's talk in my office. [Enters office] … Hey, before we get too far, I'm just going to ask the obvious question: Why are you holding a gallon-sized Ziploc bag with a knife in it? And why does it look like there is some red gooey stuff on the blade? Should I be concerned?

Josh: See, this is exactly why I want to hire you! You ask all the right questions. I brought this knife because I want you to get rid of it or hide from the police. I'll let you guess why it's red.

Mohammed: Uhhh… Yikes, sorry but I can't take the knife. My only advice would be to throw the knife in the Columbia River.

Josh: Okay, will do!

Alex: Not so fast! On the one hand, Oregon Rule of Professional Conduct 1.6(a) prohibits lawyers from revealing "information relating to the representation of a client unless the client gives informed consent." The only relevant exceptions are where the client intends to commit a crime and the lawyer's information is necessary to prevent the crime, RPC 1.6(b)(1), or disclosure of the client confidence is necessary "to prevent reasonably certain death or substantial bodily harm.

On the other hand, Oregon RPC 1.2(c) prohibits lawyers from "counsel[ling] a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent." Throwing the knife into the river would certainly be destroying or concealing evidence, which is a crime.

Mohammed: Wait, don't leave yet! I suddenly realized that I just advised you to commit a crime. Let me think of another option.

Josh: Why don't you just take the knife and keep it in a safe until I'm acquitted.

Mohammed: Oh boy, I don't feel great about keeping secret what might just turn out to be evidence of a crime.

Alex: Bigshot Attorney is right to feel nervous about this course of action. RPC 3.4(a) says that lawyers cannot "knowingly and unlawfully obstruct another party's access to evidence," unlawfully conceal that evidence, or counsel another person to do the same. Furthermore, "It is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice." RPC 8.4(a)(4). Keeping the knife in a safe would likely be obstructing the state's access to that evidence.

Josh: Okay, well if I can't throw the knife in the river and you won't take it, what are we supposed to do?

Mohammed: You won't like this answer, but I need to hire another attorney to anonymously turn the evidence over to law enforcement or the prosecution.

Alex: That sounds like the best answer yet. The Oregon State Bar has issued an Ethics Opinion that deals with this exact scenario: "A lawyer may not accept evidence of a crime unless the lawyer makes it available to the prosecutor. A lawyer may, however, deliver the weapon to the prosecutor anonymously or through an intermediary to avoid implicating the lawyer's client."

The District of Columbia has created an even better procedure. The District of Columbia Office of Bar Counsel may accept evidence like the bloody knife from lawyers, and turn over it over anonymously to the appropriate authorities. See D.C. RULES OF PROF'L CONDUCT R. 3.4 CMT. 5

There may be some wiggle room for the attorney to keep evidence temporarily to conduct appropriate testing, but when there is potentially evidence like blood on the weapon (which could degrade or come off) it is risky. The commentary to Model Rule of Professional Conduct 3.4 describes how, in some states, "Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances."

Furthermore, ABA Criminal Justice Standards: Prosecution Function Standard 3-2.8 (Relations With the Courts and Bar) directs prosecutors to allow defense counsel to turn over evidence without offering at trial evidence that it was the defendant's lawyer who turned it over. The Standard states: "a prosecutor should assure defense counsel that if counsel finds it necessary to deliver physical items which may be relevant to a pending case or investigation to the prosecutor, the prosecutor will not offer the fact of such delivery by defense counsel as evidence before a jury for purposes of establishing defense counsel's client's culpability."

Alex: To wrap up, I think we know which response to this scenario wins the Classy Award, but which response wins the Assy Award?

[Audience Response]

Alex: **Thank you all for attending this year's First Annual Legal Ethics Awards. We will see you next time. In the meantime, Stay Assy!**

Margie: **No, Stay Classy!**

Peter: **[If there is time leftover] Does anyone have any questions or comments concerning the topics we covered?**

Multnomah Bar Association

MULTNOMAH COUNTY DEPOSITION GUIDELINES

Presented by the Multnomah Bar Association Court Liaison Committee.

The attorneys and judges of Multnomah County have asked for clarification of local deposition practice. These guidelines are the result of a collaboration between the bench and bar, and are designed to provide uniformity and thereby reduce disputes during discovery depositions. No attempt is made to cover every potential area of dispute; instead, the intent is to cover the majority of avoidable problems arising during discovery depositions.

SCOPE OF DEPOSITION. ORCP 36B(1) provides that any matter not privileged may be inquired into during deposition if reasonably calculated to lead to admissible evidence. If unreasonable or bad faith deposition techniques are being used, the deposition may be suspended briefly, and a motion to limit pursuant to ORCP 39E may be made and heard by an available judge.

OBJECTIONS. ORCP 39D(3) creates a mechanism so that the attorney whose question is objected to may accept the objection as an invitation to correct an alleged defect in the question; rejection of the invitation may result in exclusion of the question and answer at trial. Attorneys should not state anything more than the legal grounds for the objection to preserve the record, and objection should be made without comment to avoid contamination of the answers of the witness. Argument in response to the objection is neither necessary nor desirable.

INSTRUCTIONS NOT TO ANSWER. The only basis for an instruction not to answer a question reasonably calculated to lead to the discovery of admissible evidence is in response to an attempt by the attorney taking the deposition to inquire into an area of privacy right, privilege, an area protected by the constitution, statute, work product, or questioning amounting to harassment of the witness. Any other objection to inquiry, such as lack of foundation, competence, asked and answered, etc., can be preserved with recitation of a brief objection.

DEPOSITION DISPUTES. If the parties have a problem which may be solved by assistance from the court, they should briefly suspend the deposition and contact the presiding court for hearing on the record by phone or at the courthouse. Presiding court will provide names of judges and will give preference to judges who have previously heard matters in the case or judges on the Multnomah County Motion Panel.

PENDING QUESTIONS. If a break in questioning is requested, it shall be allowed so long as a question is not pending. If a question is pending, it shall be answered before a break is taken, unless the question involves a matter of privacy right, privilege or an area protected by the constitution, statute or work product.

PERSONS PRESENT. Any party may attend a deposition. Non-party witnesses are excluded at the request of any party. Parties and non-witness may be excluded by the court upon hearing, or if they disrupt the proceedings.

Approved, MBA Board of Directors, September 1992
Revised December 1992
Reviewed and reapproved, MBA Board of Directors, March 7, 2012

MULTNOMAH COUNTY MOTION JUDGES CONSENSUS STATEMENT
AUGUST 2018

Civil Motions are heard by most of the Multnomah County Judges. These judges take on the work of hearing and deciding pretrial motions in civil actions that are not assigned specially to a judge. Periodically, the judges discuss their prior rulings and the differences and similarities in their decisions. When it appears judges have ruled similarly over time on any particular question, it is announced to the bar as a "consensus". The current consensus is set out below. The statements do not have the force of law or court rule; the statements are not binding on any judge. A consensus statement is not a pre-determination of any question presented on the merits to a judge in an action. In every proceeding before a judge of this court, the judge will exercise independent judicial discretion in deciding the questions presented by the parties.

1. ARBITRATION

A. Motions - Once a case has been transferred to arbitration, all matters are to be heard by the arbitrator, except (1) motions to amend pleadings that will add a party or parties to the case, or (2) where a party shows cause why a motion should not be decided by the arbitrator. (UTCR 13.040(3); SLR 13.035(3)) The party must file such motions in court pursuant to ORCP 23 and those motions will be heard by the Multnomah County Arbitration Judge.

B. Punitive Damages - Where the actual damages alleged are less than $50,000, the pleading of a punitive damages claim which may be in excess of the arbitration amount does not exempt a case from mandatory arbitration. For cases in mandatory arbitration, the arbitrator has the authority to decide any motion to amend to claim punitive damages. The arbitrator's decision may be reconsidered by a judge as part of de novo review under UTCR 13.040(3) and 13.100(1).

2. DISCOVERY

A. Medical Examinations (ORCP 44)

1. Vocational Rehabilitation Exams - Vocational rehabilitation exams have been authorized when the exam is performed as part of an ORCP 44 examination by a physician or a psychologist.

2. Recording Exams and Presence of Third Persons - Audio recordings have been allowed absent a particularized showing that such recording will interfere with the exam. Videotaping or the presence of a third person has been denied absent a showing of special need (e.g., an especially young plaintiff).

3. Pretrial disclosure of the percentage of a medical examiner's income received from forensic work and amount of the examiner's charges has been ordered for the prior three years. The information is permitted to be provided by an affidavit or declaration from the examiner, instead of the underlying documentation. The examination itself is not conditioned on the disclosure of the information.

B. Depositions

1. Attendance of Experts - Attendance of an expert at a deposition has generally been allowed, but has been reviewed on a case-by-case basis upon motion of a party.

2. Attendance of Others - Persons other than the parties and their lawyers have been allowed to attend a deposition, but a party may apply to the court for the exclusion of witnesses.

3. Out-of-State Parties - A non-resident plaintiff is normally required to appear at plaintiff's expense in Oregon for deposition. Upon a showing of undue burden or expense, the court has ordered, among other things, that plaintiff's deposition occur by electronic means with a follow-up personal appearance deposition in Oregon before trial. Non-resident defendants normally have not been required to appear in Oregon for deposition at their own expense. The deposition of non-resident corporate defendants, through their agents or officers, normally occurs in the forum of the corporation's principal place of business. However, the court has ordered that a defendant travel to Oregon at either party's expense, to avoid undue burden and expense and depending upon such circumstances as whether the alleged conduct of the defendant occurred in Oregon, whether defendant was an Oregon resident at the time the claim arose, and whether defendant voluntarily left Oregon after the claim arose.

4. Videotaping - Videotaping of discovery depositions has been allowed with the requisite notice. The notice must designate the form of the official record. There is no prohibition against the use of BOTH a stenographer and a video, as long as the above requirements are met.

5. Speaking Objections - Attorneys should not state anything more than the legal specific grounds for the objections to preserve the record, and objection should be made without comment. "Objections as to form" should be specific enough to allow the questioning party to rephrase and ask a non-objectionable question and sufficiently specific so that a judge can rule on the objection later. Failure to do so may not preserve the objection.

C. Experts

The scope of discovery under ORCP 36B(1) generally has not been extended to the identity of nonmedical experts.

D. Insurance Claims Files

An insurance claim file "prepared in anticipation of litigation" has been held to be protected by the work product doctrine regardless of whether a party has retained counsel. Upon a showing of hardship and need pursuant to ORCP 36B(3) by a moving party, the court has ordered inspection of the file in camera and allowed discovery only to the extent necessary to offset the hardship (i.e., not for production of entire file).

E. Medical Chart

1. Current Injury - Medical records, including chart notes and reports, have been generally discoverable in personal injury actions. These are in addition to reports from a treating physician under ORCP 44. The party who requests an ORCP 44 report has been be required to pay the reasonable charges of the practitioner for preparing the report.

2. Other/Prior Injuries - ORCP 44C authorizes discovery of prior medical records "of any examinations relating to injuries for which recovery is sought." Generally, records relating to the "same body part or area" have been discoverable. Records sought must actually relate to the presently claimed injuries**.**

In personal injury actions, the pleading of garden variety pain & suffering expressed in terms of emotional and mental stress does not generally open the door to counseling and psychological records without the allegation of a specific psychological condition or injury. In some cases such discovery has been granted based on particular facts of a claim which distinguish it from what may be considered a "garden variety" general damage claim.

F. Photographs

Photographs generally have been discoverable.

G. Social Media

Generally, relevant social media content has been discoverable, despite the privacy settings imposed by the account user. Data residing on social media platforms is subject to the same duty to preserve as other types of electronically stored information (ESI). The duty to preserve is triggered when a party reasonably foresees that evidence may be relevant to issues in litigation. All evidence in a party's "possession, custody, or control" is subject to the duty to preserve. Evidence generally is considered to be within a party's "control" when the party has the legal authority or practical ability to access it.

H. Tax Returns

In a case involving a wage loss claim, discovery of those portions of tax returns showing an earning history, i.e., W-2 forms, has been held appropriate, but not those parts of the return showing investment data or non-wage information.

I. Witnesses

1. Identity - the court has required production of documents, including those prepared in anticipation of litigation, reflecting the names, addresses and phone numbers of occurrence witnesses. To avoid having to produce documents which might otherwise be protected, attorneys have been allowed to provide a "list" of occurrence witnesses, including their addresses and phone numbers.

2. Statements - Witness statements, if taken by a claims adjuster or otherwise in anticipation

of litigation, have been held to be subject to the work-product doctrine. Generally, witness statements taken within 24 hours of an accident, if there is an inability to obtain a substantially similar statement, have been discoverable. ORCP 36B(3) specifies that any person, whether a party or not, may obtain his or her previous statement concerning the action or its subject matter.

J. Surveillance Tapes

Surveillance tapes of a plaintiff taken by defendant generally have been protected by the work-product privilege, and not subject to production under a hardship or need argument.

3. VENUE

A. Change of Venue (*forum non conveniens*) - Generally, the court has not allowed a motion to change venue within the following counties (from Multnomah to Clackamas, Washington or Columbia counties) on the grounds of *forum non conveniens*.

B. Change of Venue - FELA – Generally, the court has followed the federal guidelines regarding choice of venue for FELA cases.

4. MOTION PRACTICE

A. Conferring and Good Faith Efforts to Confer (UTCR 5.010)

1. **"Conferring."** Judges have held that "to confer" means to talk in person or on the phone. Generally, sending a text message or email is not considered to be conferring.

2. **Good Faith Efforts to Confer.** Because "confer" means to talk in person or on the phone, a "good faith effort to confer" is action designed to result in such a conversation. In various cases, motion judges have held that a letter to opposing counsel, even one that includes an invitation to call for a discussion, does not constitute a good faith effort to confer unless the moving attorney also makes a follow-up phone call to discuss the matter.

The phone call leaving a message must be specific as to the subject matter before it constitutes a good faith effort to confer. Likewise, a message that says simply: "This is Jane. Please call me about Smith v. Jones," is not enough. Last minute phone messages or FAX transmissions immediately before the filing of a motion have been held not to satisfy the requirements of a good faith effort to confer.

B. Complying with the Certification Requirement. UTCR 5.010(3) specifies that the certificate of compliance is sufficient if it states either that the parties conferred, or contains facts showing good cause for not conferring. Judges have held that the certificate is not sufficient if it simply says "I made a good faith effort to confer." It must either state that the lawyers actually talked or state the facts showing good cause why they did not.

C. Copy of Complaint - The failure to attach a marked copy of the complaint to a Rule 21 motion pursuant to UTCR 5.020(2) has resulted in denial of the motions. UTCR 1.090.

D**. Bench Copies** – The UTCR permits a court to require delivery of a copy of any electronic filings to the judge assigned to hear the motion; **Multnomah County SLR specifically requires courtesy copies to be delivered for all motions, responses and relies to the assigned judge.** If a judge does not receive a copy of the material, the hearing may be cancelled.

5. DAMAGES

A. Non-economic Cap - The court has not struck the pleading of non-economic damages over $500,000 on authority of ORS 31.710. Post-trial, the court will make a determination as to whether the amount awarded violates the Oregon Constitution**.**

B. Punitive Damages

1. All motions to amend to assert a claim for punitive damages are governed by ORS 31.725, ORCP 23A, UTCR Chapter 5 and Multnomah County SLR Chapter 5. Enlargements of time are governed by ORS 31.725(4), ORCP 15D and UTCR 1.100.

2. A party may not include a claim for punitive damages in its pleading without court approval. A party may include in its pleading a notice of intent to move to amend to claim punitive damages. While discovery of a party's ability to pay an award of punitive damages is not allowed until a motion to amend is granted per ORS 31.725(5), the court has allowed parties to conduct discovery on other factual issues relating to the claims for punitive damages once the opposing party has been put on written notice of an intent to move to amend to claim punitive damages.

3. All evidence submitted must be admissible per ORS 31.725(3); evidence to which an objection is not made is deemed received. Testimony generally is presented through deposition or affidavit; live testimony has not been permitted at the hearing absent extraordinary circumstances and prior court order. Although the evidence in support of punitive damages must be clear and convincing, the standard of proof "relates how a jury weighs the evidence, not to how a trial court assesses the capability of the evidence to establish facts."

4. If the motion is denied, the claimant has been permitted to file a subsequent motion based on a different factual record (i.e. additional or different facts) without the second motion being deemed one for reconsideration prohibited by Multnomah County SLR 5.045.

5. For cases in mandatory arbitration, the arbitrator has the authority to decide any motion to amend to claim punitive damages. However, the arbitrator's decision may be reconsidered by a judge as part of de novo review under UTCR 13.040(3) and 13.100(1).

OREGON RULE OF PROFESSIONAL CONDUCT 3.4

FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) knowingly and unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential

evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence; counsel or assist a witness to testify falsely; offer an inducement to a witness that is prohibited by law; or pay, offer to pay, or acquiesce in payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case; except that a lawyer may advance, guarantee or acquiesce in the payment of:

(1) expenses reasonably incurred by a witness in attending or testifying;

(2) reasonable compensation to a witness for the witness's loss of time in attending or testifying; or

(3) a reasonable fee for the professional services of an expert witness.

(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, knowingly make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused;

(f) advise or cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for purposes of making the person unavailable as a witness therein; or

(g) threaten to present criminal charges to obtain an advantage in a civil matter unless the lawyer reasonably believes the charge to be true and if the purpose of the lawyer is to compel or induce the person threatened to take reasonable action to make good the wrong which is the subject of the charge.

OREGON RULE OF PROFESSIONAL CONDUCT 4.1

TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting an illegal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

OREGON RULE OF PROFESSIONAL CONDUCT 4.4

RULE 4.4 RESPECT FOR THE RIGHTS OF THIRD PERSONS; INADVERTENTLY SENT DOCUMENTS

(a) In representing a client or the lawyer’s own interests, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, harass or burden a third person, or knowingly use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

UTCR 5.010

CONFERRING ON MOTIONS UNDER ORCP 21, 23 and 36-46

(1) The court will deny any motion made pursuant to ORCP 21 and 23, except a motion to dismiss:

> (a) for failure to state a claim; or,
>
> (b) for lack of jurisdiction, unless the moving party, before filing the motion, makes a good faith effort to confer with the other party(ies) concerning the issues in dispute.

(2) The court will deny any motion made pursuant to ORCP 36 through 46, unless the moving party, before filing the motion, makes a good faith effort to confer with the other parties concerning the issues in dispute.

(3) The moving party must file a certificate of compliance with the rule at the same time the motion is filed. The certificate will be sufficient if it states either that the parties conferred or contains facts showing good cause for not conferring.

(4) Upon certification that a motion is unopposed, it may be submitted ex parte.

<u>Showcase Number 1:</u> Supervising Attorneys

Rules regarding contingency fees in a criminal case:

- Oregon law does not allow attorneys to charge contingent fees in criminal cases. Oregon RPC 1.5(c)(2). Contingent fees are also prohibited by ABA Model RPC 1.5(d)(2).
- Just like in any area of the law, attorney fees in the realm of criminal defense must be reasonable and may not be "clearly excessive." Oregon RPC 1.5(a). The standard for determining whether fees are reasonable or clearly excessive is that of the famous "reasonable lawyer." In other words, would "a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee." Oregon RPC 1.5(b).
- Determining whether a fee is reasonable involves weighing various factors, including the nature and seriousness of the criminal charges; the time and skill required to handle the case; the reputation, experience, and ability of the attorney; the fees regularly charged in similar cases in that locale; the time limitations involved in the case; and—if it is apparent to the client—whether accepting representation will prevent the attorney from taking on other work. *See* Oregon RPC 1.5(b); *see also* American Bar Association's (ABA) Model Rules of Professional Conduct (RPC) 1.5(a).
- It's also really important what is in the contract. It is good practice to have a written fee agreement in all cases. *See The Ethical Oregon Lawyer* § 3.3-2 (OSB Legal Pubs 2015) ("Without an agreement, disputes about the rights and duties of the lawyer and the client will likely be resolved against the lawyer.").

Rules regarding charging flat fees in a criminal case:

- It is permissible for Oregon attorneys to charge flat fees, as long as those fees are reasonable and not clearly excessive. *See In re Biggs*, 318 Or 281, 293, 864 P2d 1310 (1994); *In re Hedges*, 313 Or 618, 623–34, 836 P2d 119 (1992). A flat-fee agreement is defined as one where the lawyer agrees to charge a specified amount for a given case, regardless of how much work is involved. OSB Formal Ethics Op No 2005-151 (rev 2011).
- "The mere fact that a fixed fee may result in a fee in excess of a reasonable hourly rate does not in itself make the fee unethical." OSB Formal Ethics Op

No 2005-151 (rev 2011) (citing *In re Gastineau*, 317 Or 545, 552, 857 P2d 136 (1993)).

Rules regarding when to refund a client's money:

- If a client fires an attorney before a case resolves and demands a refund, the attorney will be required to account for the work performed and fee earned. OSB Formal Ethics Op No 2005-151 (rev 2011) ("A lawyer who does not complete all contemplated work will generally be unable to retain the full fixed fee.").
- Generally, any fee collected must be earned. *See In re Thomas*, 294 Or 505, 526, 659 P2d 960 (1983) ("It would appear that any fee that is collected for services that is not earned is clearly excessive regardless of the amount.").

Rules regarding tiered fee agreements:

- Tiered fee structures are consistent with the Oregon Rules of Professional Conduct, which allow lawyers to "limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." *See* Oregon RPC 1.2(b).

Showcase Number 2: Clients

Rules implicated when client seeks to destroy or conceal evidence:

- Oregon Rule of Professional Conduct 1.6(a) prohibits Oregon lawyers from revealing **"**information relating to the representation of a client unless the client gives informed consent." And, the rule only sets forth exceptions where the client intends to commit a crime and the lawyer's information is necessary to prevent the crime, RPC 1.6(b)(1), or disclosure of the client confidence is necessary "to prevent reasonably certain death or substantial bodily harm." RPC 1.6(b)(2).

- But, at the same time, Oregon RPC 1.2(c) prohibits lawyers from "counsel[ling] a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent. *See also* Model Rule 1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent."). Throwing the knife into the river would certainly be destroying or concealing evidence, which is a crime. ORS 162.295 (tampering with evidence). ORS 163.325 (hindering prosecution).

Rules implicated when client wants lawyer to hide evidence:

- RPC 3.4(a) says that lawyers cannot "knowingly and unlawfully obstruct another party's access to evidence," unlawfully conceal that evidence, or counsel another person to do the same. Furthermore, "It is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice." RPC 8.4(a)(4).
- OSB Formal Ethics Op No 2005-105 deals with precisely this scenario: "A lawyer may not accept evidence of a crime unless the lawyer makes it available to the prosecutor. A lawyer may, however, deliver the weapon to the prosecutor anonymously or through an intermediary to avoid implicating the lawyer's client." (citations omitted).
- The District of Columbia has created an even better procedure. The District of Columbia Office of Bar Counsel may accept evidence like the bloody knife from lawyers, and turn over it over anonymously to the appropriate authorities. See D.C. RULES OF PROF'L CONDUCT R. 3.4 CMT. 5; *see also* Hansen, Mark, "Hand it Over," ABA Journal (Dec. 2005) (
- There may be some wiggle room for the attorney to keep evidence temporarily to conduct appropriate testing, but when there is potentially evidence like blood on the weapon (which could degrade or come off) it is risky. The commentary to Model Rule of Professional Conduct 3.4 describes how, in some states, "Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances."
- Furthermore, ABA Criminal Justice Standards: Prosecution Function Standard 3-2.8 (Relations With the Courts and Bar) directs prosecutors to allow defense counsel to turn over evidence without offering at trial evidence that it was the defendant's lawyer who turned it over. The Standard states: "a prosecutor should assure defense counsel that if counsel finds it necessary to deliver physical items which may be relevant to a pending case or investigation to the prosecutor, the prosecutor will not offer the fact of such delivery by defense counsel as evidence before a jury for purposes of establishing defense counsel's client's culpability."