

The Bad and the Ugly: Risk Management Procedures for Oregon Trial Lawyers

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Introduction: Trial Firms Face Real Risks

Every month, the Oregon State Bar Bulletin profiles attorneys in its notorious “Discipline” section. As the months go by and the Bulletins stack up, it becomes apparent that the number of lawyers subject to discipline is alarmingly high. Compared to our transactional counterparts, trial lawyers typically handle more cases with more deadlines and more adverse parties. Civil procedure rules in particular are filled with traps for the unwary. For these reasons, trial lawyers and litigation firms should take extra care to eliminate avoidable problems and manage responsibly the risks that are inherent in our work. This article is adapted closely from the Risk Management section our firm’s Procedures Manual. It reflects what we believe are risk management best practices for our firm.

Risk Management Is a Core Skill of Trial Attorneys and Staff

Many of the decisions that happen in a law firm, whether it is how to handle a particular case, a business decision, or a matter of day-to-day processes, involve identifying and weighing risks and benefits. Overlooking a risk, or failing to adequately consider risks could, result in missing a deadline or other malpractice, or in taking on a project that is too likely to fail. At the same time, unnecessary precautions can consume time and money and delay clients’ cases. Similarly, foregoing potential opportunities because they accompany risk, without adequate consideration of potential benefits, may hurt a firm’s long-term financial success. The risks that every firm must manage include:

- bar discipline
- ethics violations
- prejudice to client
- harm to reputation
- loss of money
- loss of time
- loss of opportunity/opportunity cost
- loss of work satisfaction
- “impaired attorney”/staff risk

Firms should recognize that risk management is a core area of skill and judgment, and they should have procedures in place that set standards where appropriate and help attorneys and staff improve their practices.

Conduct Regular Risk Management In-Service Trainings

Each month our firm's attorneys and staff gather for a Risk Management In-Service Training. We share knowledge and improve our awareness of malpractice and other risk management issues. Each attorney and paralegal takes turns leading the training. The agenda is based on a list of risk management topics that we have identified. The list continues to grow as our attorneys and staff encounter issues.

Risk Management Topics: The List

By cycling through this list, we reinforce these topics regularly, identify new issues and solutions that we can implement to improve how we work. In no particular order, this is our list:

- Defamation (letters; talking to the press; scope of the litigation privilege; especially pre-filing; letters from our firm to insureds asserting that the insured's insurance company is not acting fairly, etc.)
Example: Attorney Jones sent a letter to a non-party stating that the non-party's former business partner had engaged in wrongdoing. The wrongdoing was the subject of litigation and had not been admitted or proved. As a result of the letter, Attorney Jones and his firm were sued by the former partner for defamation. The defamation suit was costly, as the firm protection of a litigation privilege and ultimately sought to prove that the wrongdoing had occurred and that the statements were therefore not defamatory.
- Talking to the press (review Procedure on Media and Press Relations)
- Confirming completion and sufficiency of service of process
- Methods of sending important communications (mail, e-mail, fax, overnight, etc.): reliability and overhead issues
- Walk-in intakes, dealing with belligerent people (potential clients, clients, adverse parties, witnesses, others)
- Personal task management
- Case action item management: use of Microsoft Outlook Tasks, etc.
- General practice/case standard of care calibration (overall are we being cautious enough? are we getting bogged down with remote risks of insignificant problems?)
- How to talk about risk management concerns with teammates without creating conflict.
- Office organization
- Negligent referral
- Neglect of matters, failure to communicate with clients and potential clients
- Eroding firm reputation
- Overlooking liens
- Requiring in writing that settlement checks be made payable to firm and client only (and not to any lien holders)
- Trust account irregularities
- Accidental movement or deletion of computer files
- Computer backup integrity, including risks and benefits of keeping some backups off site
- Data theft or loss
- Password management: develop and review a procedure
- Recording time and costs on client matters, especially those that may result in a fee

petition

- Client confidentiality: talking in public places, etc.
- Metadata in MS Word documents and other computer files
- Checking for conflicts
- Proper “set up” of underinsured motorist and bad faith claims in plaintiff-side motor vehicle cases
- Unusually short deadlines (Tort Claims Act Notices; Dram Shop Notices; Response to Offers of Judgment; Affidavit/disqualification of assigned judge (MCCC SLR 7.045 makes the time to affidavit a judge even shorter than ORS 14.260 provides. In this unusual instance you cannot rely on the ORS). See article by Scott F. Kocher titled *Traps for the Unwary: Is Oregon’s Statute of Limitations for Injury Claims Really Two Years?* online at www.vangelisti.com/trial
- Workplace injuries
- Interviewing witnesses: review procedures for attorneys, paralegals and private investigators regarding contacts with represented parties, interviewing current and former employees of a party, etc.
- Review firm’s general Procedures Manual
- Sending a single email to adverse parties and your own client or team-mates at the same time: what would happen if your team-mate “replied to all” without realizing there were adverse parties on the recipient list?
- bcc’s on emails (same “reply all” risk)
- Discuss risk factors for impaired attorney/staff, concerns, OAAP resources;
- Review compliance with procedures for tracking statutes of limitations and other deadlines
- Check procedures to ensure compliance w/ ORS 742.536 and 538 certified mail notice requirement to Personal Injury Protection carriers and group health plan payors in plaintiff-side motor vehicle cases.
- Review procedures to ensure that any potential defendant public entities are identified immediately when a new case is being reviewed so that a Tort Claims Act notice can be issued. For examples: were any police officers, paramedics, OHSU doctors, etc. at fault in the course of providing services to our client? In a motor vehicle case, was the bad driver in the course of employment w/ a public entity? (If so, defendant will substitute entity for individual defendant under ORS 30.265 and then move to dismiss for lack of notice under the Tort Claims Act.)
- Review procedures for conducting background checks on individuals who may testify.

Resources

The Professional Liability Fund of the Oregon State Bar provides a wealth of risk management or “loss prevention” resources to Oregon attorneys at www.osbplf.org (OSB members only, login required). Resources available from the PLF include:

A Guide to Setting Up and Running Your Law Office

A Guide to Setting Up and Using Your Lawyer Trust Account

VANGELISTI KOCHER LLP

Oregon Statutory Time Limitations Handbook

Planning Ahead: A Guide to Protecting Your Clients' Interests in the Event of Your Disability or Death

About the Authors

Scott F. Kocher and Richard J. Vangelisti are partners in Vangelisti Kocher LLP, a trial law firm representing individuals and families in personal injury, wrongful death and other plaintiff-side civil matters in Oregon and Washington. Mr. Kocher holds degrees from Harvard Law School (J.D. 2001) and Harvard College (A.B. *magna cum laude* 1997). He currently serves as Member and Chair-elect of the Products Liability Executive Committee of the Oregon State Bar. Mr. Vangelisti holds an AV Peer Review Rating, and has been involved in trial law since he graduated from law school in 1995. He practiced at Stoel Rives LLP and Fulbright & Jaworski LLP before joining the plaintiff's bar. The authors can be reached on the internet at www.vangelisti.com or by telephone at 503-445-2100.