

PROPOSED
Paraprofessional Licensing Implementation Committee
Regulation Workgroup
Draft Landlord-Tenant Scope of Practice JMM/JD 6/4/2021

Licensed Paraprofessionals (“LPs”) may offer guidance, document preparation services, and courtroom representation on landlord-tenant matters within the scope of these guidelines. The purpose in granting authority for LPs to increase the availability of legal services to both landlords and tenants and to help close the access to justice gap. The consequences of not having access to legal assistance in landlord-tenant matters can be severe. Tenants may be evicted despite having meritorious defenses, and they may be unable to obtain basic housing rights guaranteed by the ORLTA, including freedom from illegal treatment and access to decent, safe, and sanitary housing. Landlords may not understand their rights or responsibilities. Landlords may make errors in written notices that cause them to be defective, delaying a meritorious eviction or causing them to lose eviction lawsuits and potentially become liable for tenants’ attorney fees, even when the landlord has meritorious claims.

Currently, landlords enjoy the option of being represented in circuit court FEDs by a non-lawyer agent under ORS 105.130(4). However, tenants do not enjoy a reciprocal right to non-lawyer assistance. One of the aims of these provisions is to help balance this disparity.

LPs scope of practice on landlord-tenant issues is limited to issues arising under a residential rental agreement, under the Oregon Residential Landlord Tenant Act (ORS Chapter 90, “ORLTA”), and under the Forcible Entry and Wrongful Detainer provisions found at ORS 105.126-168. The scope of practice is limited to only residential tenancies. The scope and its limitations are clarified more fully below.

Additional issue: what should happen when LPs identify that a case has an issue that is outside their scope of practice? Will they be required to withdraw entirely?? Or may they be allowed to proceed with the matter subject to the limitations of their scope? If the LP is allowed to proceed, should the LP be required to obtain Client’s informed consent? For example, if a person came to a LP with a defective termination notice after the landlord had filed an FED, but that person also had an affirmative claim for something beyond the scope could the LP advise and represent on the bad notice? If so, must the LP first be required to advise referral and obtain Client’s informed consent?

Additional issue: should there be some more complex legal areas, such as housing discrimination, where the LP is required to advise Client that it would be preferable to have an attorney’s assistance and to offer referrals, but may the proceed to the Client after obtaining Client’s informed consent?

WITHIN SCOPE

1. Advice and Guidance

Subject to the exceptions below, LPs may offer advice and guidance on any issue arising under a residential rental agreement, the Oregon Residential Landlord Tenant Act (ORS Chapter 90, “ORTLA”), and the Forcible Entry and Wrongful Detainer provisions found at ORS 105.126-168 as they relate to residential tenancies.

The issues upon which LPs may offer guidance and advice include:

- Abandoned tenant property
 - Strictly statutory, comes up a lot, not enough lawyers to do it, frequently causes LL confusion.
- Withholding rent
 - Crucial to tenant advocacy, but poorly understood by the public and if done incorrectly may lead to problems for tenants and landlords.
- Paying rent into court
 - Crucial to tenant advocacy and can preserve housing if done correctly.
- Evaluation of potential or alleged breaches of rental agreements
 - Area that causes great confusion, not enough lawyers to handle; comes up in almost every case.
- Claims and defenses under ORTLA or the rental agreement
 - Would allow litigants to understand and exert their rights and responsibilities in these expedited cases.
- **Damage claims based solely on ORTLA** (excluding personal injury claims or discrimination).
 - Personal injury and other tort claims are beyond the scope of what we can reasonably expect LPs to confront. This area of law is beyond ORTLA and requires significant specialized legal knowledge.
- **Discrimination.**
 - As noted below, this is a complex area of law. However, LPs can and should offer information about what may or may not constitute discrimination. Some forms of discrimination are specific to landlord tenant law, such as the prohibitions on discrimination towards tenants receiving a subsidy or based on a tenant’s source of income. Allowing advice on this area of law will help landlords avoid discriminatory practices, and will help tenants understand their rights better.
- Forcible Entry and Detainer/Eviction procedures
 - Area of great need for underserved communities; benefits both landlords and tenants. Not enough lawyers throughout the state to represent in many cases, which results in some people being evicted who should not have been, and in landlords not being able to evict where the statutes would allow it.
- Habitability obligations and remedies
 - Addresses major access to justice issues and benefits both landlords and tenants by instructing as to requirements under the law.
- Essential services violations and remedies.
 - Benefits landlords to understand what they should not do and provides remedies to tenants.

- Landlord entries on rental property
 - Information about lawful entries will benefit both landlords and tenants.
- Landlord's assessment of fees.
 - Many fees are limited and landlords may have liability if they exceed the permitted fees structure.
- Landlord's assessment of utility charges.
 - Utility charges are controlled by ORTLA, but often overlooked by smaller landlords.
- Landlord lockouts or reduction of services
 - Accurate and accessible information and guidance in this area will benefit both landlords and tenants
- Rent increases.
 - Percentage of allowable rent increases changes yearly and more available access to this information benefits landlords and tenants.
- Rental applications.
 - Helping people understand what they may, and may not reasonably ask benefits landlords and tenants.
- Retaliation.
- Reasonable accommodation requests
- Waiver of landlord's right to terminate a tenancy.
 - This area is a bit more complex and often poorly understood by both landlords and tenants.
- Service of notices.
- Security deposit return or disputes
 - ○ Area that comes up in many cases that tend to be lower amounts in dispute not typically handled by attorneys.
- Small claims landlord/tenant advice.
- Subsidized housing eviction notice and service requirements and defenses.
 - This is a complex area of law, but some LPs (particularly those working in the non-profit sector) will be familiar with this area and should not be precluded from offering advice and guidance regarding notice and service requirements and notice defenses that exist due to a tenant subsidy. This information would benefit both landlords and tenants..
- Potential liability for the adverse party's attorney fees.
- Issues unique to manufactured home parks and floating home marinas (ORS 90.505-875)
- Instances where ORTLA may apply to hotel or motel occupancy or RV parks.
 - Both landlords and tenants often do not understand that they have entered into a tenancy covered by ORTLA when it is outside of the conventional house/apartment setting.
- Preclusion as it relates to Tenants raising counterclaims in an FED.
 - Tenants should be warned that if they raise counterclaims, which are not mandatory in FED cases, that this may preclude later cases involving those or other issues.

2. Document Preparation

- Prepare, review, and advise on residential leases and rental agreements
 - Area that causes great confusion, not enough lawyers to handle; comes up in almost every case.
- Amendments to rental agreements
- Eviction notices.
 - Many landlords issue and move forward on bad notices every week. This causes delay to legitimate evictions, where a tenant doesn't respond it results in evictions that were unlawful, it clogs the courts with cases that should have never been brought, and may result in landlords paying significant fees if tenants are able to retain counsel.
- Landlord notices of intent to enter rental property.
 - Both landlords and tenants fail to understand this provision.
- Rent increase notices.
 - Rental increases are capped, and often ignored. This leads to tenants paying more than they should, and landlords being potentially subject to significant damages for excessive rental increases.
- Demand letters.
- Notices of violation.
- Security deposit accountings.
 - This is another area where there is often confusion and errors made.
- Reasonable accommodation requests?
 - Gets into discrimination issues, which can be thorny
- Small claims court documents, including:
 - Small Claim and Notice of Small Claim;
 - Response
 - Trial exhibits
 - Trial memoranda
- FED litigation documents, including:
 - Complaints
 - Answers (including tenant counterclaims)
 - Replies to counterclaims and affirmative defenses
 - Trial exhibits;
 - FED stipulated agreements (ORS 105.145(2));
 - Declarations of noncompliance (ORS 105.146)
 - Requests for hearing on declarations of noncompliance (ORS 105.148);
 - Notices of restitution
 - Writs of execution
 - Statements of Attorney Fees (LP fees?) ORCP 68?
 - *We should discuss attorney fees, and if LPs are going to be able to ask for them when representing in FED cases. Pro: fee shifting may help tenants get contingency assistance much like they do now from the private bar,*

which is unable to adequately serve rural communities. Con: may result in more low income tenants with significant money judgments against them as landlords may have better access to LP services due to income disparities

- Other FED trial motions and documents, including:
 - Subpoenas (will have to be signed by a lawyer or court clerk, or we'll need the Council on Court Procedures to amend ORCP 55).
 - Paying rent into court
 - Continuances
 - Discovery?

The expedited FED timelines make most discovery impractical. However, landlords may request continuances, and tenants may request continuances if they pay rent into court (ORS 105.140(2)), and this could make most discovery available. Additionally, depositions require only "reasonable notice," which federal case law has found to be satisfied with 2 days' notice, so depositions are always an option for FED litigants.

Representation in FED Proceedings

Subject to the exceptions described below, LPs may represent landlords and tenants in court in Forcible Entry and Wrongful Detainer ("FED") actions in circuit and justice courts.

The scope of in-court representation is limited to FEDs and may include:

1. Asserting landlord FED claims
2. Asserting tenant FED defenses
3. Asserting tenant FED counterclaims within the scope provided by ORS 90.370 and *Edwards v. Fenn* 308 Or 129 or other case law, including counterclaims for:
 - a. Money damages;
 - b. Injunctive relief; and
 - c. Declaratory relief.
4. Applying and arguing evidentiary and procedural rules
5. FED Stipulated Agreements (ORS 105.145(2)).
6. Hearings on landlords' declaration of noncompliance (ORS 105.146-149)

[Landlords can only seek possession in an FED, whereas tenant can counterclaim for any amount under ORTLA or the rental agreement, hence landlord damages claims are not included on this list.]

OUTSIDE SCOPE

LPs' scope of practice does not extend to issues outside of ORTLA. It is the intent of the committee to focus the work of LPs to areas that are more controlled by statute and within defined areas of law. When ORTLA issues overlap excessively with other significantly more

complex or less statutory issues those auxiliary issues, while sometimes of critical importance, are outside the scope of practice. Issues outside the scope include the following matters:

- Affirmative plaintiff cases in Circuit Court.
 - Parties can file small claims up to \$10,000; affirmative plaintiff cases often include matters beyond the scope of landlord/tenant practice in general and beyond the scope of what LPs are expected to master. Excluding these types of cases would not unduly limit the types of cases available to LPs to practice. Not as frequent and urgent as most FED cases and often include counterclaims, depositions and discovery.
- Agricultural tenancies and leasing
 - Outside scope of ORTLA based on ORS 90.110(9) and more similar to tort claims in that they are less statutory and rely on specialized knowledge. These are not common cases and often involve significant dollar amounts. Farm worker tenancies often do not fall under ORTLA, often implicate federal laws, and we believe there are other specialized resources available for advocacy.
- Direct representation in affirmative plaintiff cases in Circuit Court
 - Parties can file small claims lawsuits for damages up to \$10,000; affirmative plaintiff cases often include matters beyond the scope of landlord/tenant practice in general and beyond the scope of what LPs are expected to master. Excluding these types of cases would not unduly limit the types of cases available to LPs to practice. Not as frequent and urgent as most FED cases and often include counterclaims, depositions and discovery.
- Affirmative Discrimination Claims, except as asserted as a counterclaim or defense.
 - This is a very difficult area. Discrimination cases are critical and must be pursued. Discrimination in Oregon is common and must be addressed. The committee has struggled with this exclusion,. This area of law largely arises outside of ORTLA and requires significant specialized legal knowledge. This can be a very complex area including extensive factual development and discovery and may also implicate other areas of state and federal law. Claims may be raised in state or federal court and if raised in an FED may create preclusion issues. If a tenant wishes to counterclaim for personal injury damages, whether arising under a tort or ORLTA theory of liability, the LP must refer to an attorney.
 - One possible alternative would be to create a third practice area for LPs, Discrimination cases.
- Commercial tenancies and leasing
 - Outside of ORTLA, requires extensive knowledge of complicated business law and contract law.
- Landlord tenant claims for personal injury (i.e., personal injury claims arising under ORTLA).
 - Personal injury and other tort claims may arise during the landlord-tenant relationship and may give rise to liability under ORLTA or the rental agreement. Examples include premises liability injuries and mold-related illnesses. Claims for personal injury are beyond the scope of what we can reasonably expect LPs advise upon. This area of law is beyond ORTLA and requires significant specialized legal knowledge. This can be a very complex area including extensive

factual development and discovery and may also implicate other areas of law. Claims may be raised in circuit court and if raised in an FED may create preclusion issues. Claims may involve insurance issues. If a tenant wishes to counterclaim for personal injury damages, whether arising under a tort or ORLTA theory of liability, the LP must refer to an attorney.

- Injunctive relief in affirmative cases
- Housing provided in relationship to employment.
 - This is an area that is generally excluded from ORTLA and again implicates significant state and federal law claims. Claims may be brought in both state and federal court.
- Affirmative Subsidized housing claims.
 - This is another area that is complex and involves significant overlap with federal laws and regulations. There are a number of lawyers who have expertise with subsidized housing claims and who may provide assistance to both tenants and landlords who have those issues. A LP who is familiar with subsidized housing related issues should not be precluded from advising on DEFENSES to eviction related to the subsidized status of a unit.