


Marijuana in the Courts: a Mock Trial




Prepared and Presented By
Jeffrey S. Bennett

With Special Guests:
Anna McCormack and Bradley S. Kraus

In Conjunction With
Multifamily NW

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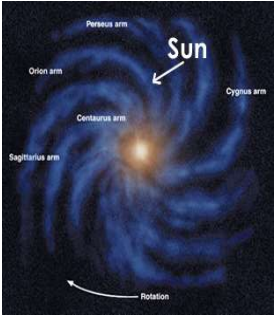
Who's Who

- ▶ **Jeffrey S. Bennett**
 - Lecturer, judge and tour guide
- ▶ **Bradley S. Kraus**
 - Tenant with an interesting perspective
- ▶ **Anna S. McCormack**
 - Unrepresented landlord
- ▶ **We're All Attorneys, *But...***
 - Brad and Anna may *intentionally stray* into areas in which pro se litigants make mistakes

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We're in the Multnomah County Circuit Court

- ▶ **Center of the FED litigation universe**
 - Hundreds of FED cases
 - Many tenants' attorneys
 - Many trials
 - "FED Court" vs. "Upstairs"



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What's This Case About?

- ▶ **Background**
 - Large apartment complex
 - Tenant has a medical marijuana card
 - Complaints about marijuana smoke
 - Landlord inspected and *found some surprises*
 - Tenant is antagonistic and uncooperative
- ▶ **Two Termination Notices**
 - 10 Day Repeat Violation Notice, and...
 - 24 Hour Notice for Outrageous Conduct

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Is This Case Going To Be Easy?

▶ Marijuana

- Medical vs. recreational
- Rental Agreement language
- Disturbances
- Permissible amounts

▶ Notices

- Did the landlord use the best one(s)?
- Will it/they survive judicial scrutiny?

▶ Other Issues

- Any FED can generate surprises
 - Defenses
 - Counterclaims



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Is There More Than One Termination Strategy Available To Landlords?

- ▶ Various strategies
- ▶ Strengths
- ▶ Weakness
- ▶ Weigh options
- ▶ Watch this case unfold



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The FED Process

- ▶ Landlord Filed FED
- ▶ First Appearance
- ▶ Parties Appeared
- ▶ No Settlement
- ▶ Tenant Filed Answer
 - ▶ Defenses
 - ▶ Counterclaims



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Today is the Trial



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Opening Statements

▶ Do

- Tell 'Em What They're Going To See And Hear
- Introduce Legal Issues

▶ Don't

- Testify
- Introduce Evidence
- Interrupt
- Make The Judge Mad
- Sound Like An Idiot



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Plaintiff's Opening Statement

- ▶ Tenant lives in my apartment complex
- ▶ Rental agreement has a no smoking addendum
- ▶ Complaints about marijuana odors
 - We have photos of the tenant's conduct
- ▶ July, 2019 30 Day For Cause Notice
 - Bong, marijuana and pot plants
 - Marijuana odors
 - Failure to comply with no smoking addendum
 - Failure to comply with "obey all laws" section
 - Interfering with other tenants' quiet use and enjoyment



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Plaintiff's Opening Statement

- ▶ 10 Day Repeat Violation Notice
 - Smoked marijuana and disturbed other tenants
 - Did the same stuff described in the For Cause Notice
- ▶ 24 Hour Notice of Termination (For Outrageous Conduct)
 - We found the following during an entry/inspection:
 - Grow operation
 - Property damage

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Plaintiff's Opening Statement

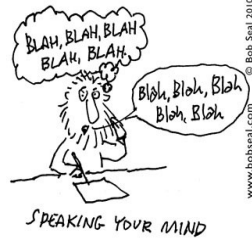
- ▶ In summary, we're here based upon two notices
 - A 10 Day Repeat Violation Notice
 - A 24 Hour Notice for Outrageous Conduct
 - Both of which expired simultaneously
- ▶ The tenant's answer is indecipherable
- ▶ We're ready to rebut the tenant's allegations

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Defendant's Opening Statement

THIS IS NOT THE TIME TO PRESENT EVIDENCE

- ▶ I have a medical marijuana card
- ▶ Recreational marijuana is legal
- ▶ People should be used to it by now
- ▶ They're a bunch of prudes
- ▶ Neighbors just don't like me, because I won't sell any marijuana to them



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Defendant's Opening Statement

- ▶ The apartment is mine, so I can do what I want with it
- ▶ Any changes I made were simply to grow marijuana, and that's legal
- ▶ I'll move out, but when I'm ready, not just because they told me to
- ▶ Landlord is...
 - Discriminating, because I'm disabled (medical marijuana)
 - Owes me money for an unlawful entry
 - Owes me money because my apartment is uninhabitable



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Evidence (The "Case-In-Chief")

- ▶ Burden of Proof
- ▶ Correct Order
 - Plaintiff > Defendant > Plaintiff
 - Each Side Can Cross Examine
 - Each Side Can Call Witnesses

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Keep Track of the Evidence


- ▶ Plaintiff's Complaint
 - Two bases for possession
 - 10 Day Repeat Violation Notice
 - 24 Hour Notice (Outrageous Conduct)
- ▶ Defendant's Answer
 - Denials
 - Counterclaims
 - Discrimination
 - Unlawful Entry
 - Habitability



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Evidence (The “Case-In-Chief”)

- ▶ **Good Presentation Techniques**
 - Chronological
 - Linear
 - Concise
 - Articulate
 - Organized
 - Exhibits Numbered



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Evidence


- ▶ **Bad Presentation Techniques**
 - Wandering
 - Babbling and Mumbling
 - Missing Witnesses
 - Missing Exhibits
 - Disorganized
 - Hearsay
 - Antagonistic



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Plaintiff’s Evidence

- ▶ Mr. Kraus is our tenant
- ▶ 123 Mary Jane Lane...
- ▶ In Multnomah County
- ▶ Written rental agreement
- ▶ *The rental agreement says...*



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The Rental Agreement Says...



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▶ Section 10 (Care of Premises)

- Resident will not ... impede proper air circulation; promote mold growth; ... or otherwise create the potential for **damage to the unit** .”
- “Resident is **responsible for all damages** to the Premises caused by his/her negligence, or beyond normal wear and tear.”

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▶ Section 22 (Conduct)

- “Conduct that **disturbs the quiet enjoyment** of any other resident ... will not be permitted at any time.”
- “The use, possession, manufacture, or distribution of **illegal substances, as defined in either federal or state law**, either on or in the vicinity of the Premises is strictly prohibited.”

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▶ Section 26 (Community Rules)

- “**Modifications** to the unit or any common areas are prohibited without Management’s prior written approval.”

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▶ Smoking Policy Addendum

- “**Smoking prohibited** – entire premises.”
- “Resident agrees that he/she **will not smoke anywhere** on the Premises or adjacent to and within 10 feet of any portion of the Premises. Resident will not permit any guests or visitors of Resident to do so.”

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The Law: ORS 90.325

“The tenant shall Behave and require other persons on the premises with the consent of the tenant to behave in a manner that **will not disturb** the peaceful enjoyment of the premises by neighbors.” (ORS 90.325(1)(g))

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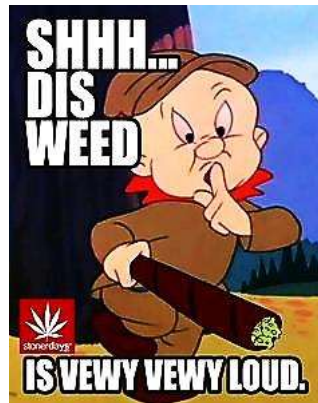
ORS 90.325

“The tenant may **not deliberately or negligently destroy, deface, damage,** impair or remove any part of the premises or knowingly permit any person to do so..” (ORS 90.325(2)(b))

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▶ Violations

- The tenant violated every provision and statute I just described



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July 5, 2019 smoking incident...

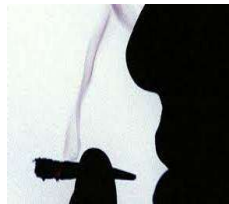


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For Cause Notice

▶ Violated...

- Rental Agreement section 22 (Conduct)
- Community Rules and Regulations Addendum
- Smoking Policy Addendum
- ORS 90.325(1)(g)



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First Notice (For Cause)

Pursuant to ORS Chapter 90, you are hereby notified that **you are in material noncompliance** with your Rental Agreement and with ORS 90.325 in the following manner:

On or about July 5, 2019 (between the approximate hours of 8:00 p.m. and 11:00 p.m.).... you, or someone within your control...

1. Smoked one or more substances in such a manner so as to violate the smoking prohibition contained in the **Smoking Policy Addendum** to your Rental Agreement.
2. Smoked one or more substances in such a manner so as to cause the smoke to exit your apartment, enter other apartments, and/or enter common areas immediately adjacent to yours or other apartments, such that it violated the peaceful enjoyment of the premises by neighbors. Said conduct violated, without limitation, **section 22 of your Rental Agreement**, the smoking prohibition contained in the **Smoking Policy Addendum** to your Rental Agreement, and/or **ORS 90.325 (including, without limitation, ORS 90.325(1)(g))**.
3. Smoked marijuana in your premises or common areas. Said conduct violated, without limitation, **section 22 of your Rental Agreement**.

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First Notice (For Cause)

To remedy said violation(s), you must make the following remedies, each of which is separate and distinct:

You, and any person/people within your control, must...

1. Cease smoking in, on or about your premises and common areas.
2. Cease violating the peaceful enjoyment of the premises by neighbors.
3. Comply with, and not violate, the smoking prohibition contained in the **Smoking Policy Addendum** to your Rental Agreement.
4. Comply with, and not violate, **section 22 of your Rental Agreement**.
5. Comply with, and not violate, **ORS 90.325**, including, without limitation, ORS 90.325(1)(g).

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First Notice (For Cause)

Said violations and/or noncompliances must be remedied by **July 20, 2019** at midnight (the end of the day). If you fail to remedy said violations by the foregoing time and date, your Rental Agreement will terminate at midnight (the end of the day) on **August 6, 2019**. If you complete the aforesaid remedies by midnight (the end of the day) on **July 20, 2019**, then your Rental Agreement will not terminate on **August 6, 2019**.

If substantially the same act or omission which caused this notice to be given **recurs within six (6) months** following the date of this notice, the Owner/Agent may terminate the Rental Agreement upon at least ten (10) days' written notice specifying the breach and the date of termination of the Rental Agreement as provided by ORS 90.

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Tenant Cured, But Couldn't Resist The Urge to...

Wait for it....

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August 7, 2019 incident...



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Ten Day Repeat Violation Notice

- ▶ Committed same violations of...
 - Rental Agreement section 22 (Conduct)
 - Community Rules and Regulations Addendum
 - Smoking Policy Addendum
 - ORS 90.325(1)(g)



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Second Notice (Ten Day)

In accordance with the Oregon Residential Landlord and Tenant Act (ORS 90), if substantially the same act or omission which constituted a prior noncompliance for which notice was given **reoccurred within six (6) months**, then the landlord may terminate the rental agreement upon at least ten (10) days written notice specifying the breach and the date of termination of the rental agreement.

The act(s) or omission(s) which constitute the violations are described as follows: ___ smoked again on August 7, 2019___
(Note: Notice would contain strong description)

This is substantially the same violation (described here) for which we gave you a prior notice on **July 6, 2019**. **Therefore, your rental agreement shall be and is terminated on August 18, 2019 (termination date) at midnight (the end of the day).**

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I Entered Again On August 15, 2019

(Three days before the latest notice expired)

- ▶ Something seemed odd, so I went in without notice
- ▶ Found some new problems



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August 15, 2019 property damage...



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August 15, 2019 property damage...



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24 Hour Notice (Outrageous Conduct)

YOU ARE HEREBY NOTIFIED THAT your right to occupy the premises described above (a.k.a., the "unit address") will terminate at midnight (end of the day) on **August 18, 2019**, and that you must vacate the premises by said deadline because...

1. You, or someone in your control, intentionally inflicted substantial damage to the premises, or your pet inflicted substantial damage to the premises on more than one occasion; and/or
2. You, or someone in your control committed an act which is outrageous in the extreme, which may include, but is not limited to the following: (a) Prostitution or promotion of prostitution; (b) Manufacture or delivery of a controlled substance (excepting for lawful medical marijuana, delivery of less than an ounce of marijuana for no consideration, or possession of prescription drugs); (c) Intimidation, as described in ORS 166.165; and/or (4) Burglary, as described in ORS 164.225.

The exact nature of your violation is as follows (*described here...*).

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Served Correctly

- ▶ Posted and mailed
- ▶ Tenant's address



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So, I Want Possession



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Other Court Matters

- ▶ In a trial, the Plaintiff testifies about...
 - Landlord/tenant relationship
 - Tenant's address
 - Jurisdiction
 - Possession of premises
 - Service of notice(s)
- ▶ Cross examination
- ▶ Motions



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Status Check

- ▶ Plaintiff's Complaint
 - Two bases for possession
 - 10 Day Repeat Violation Notice
 - 24 Hour Notice (Outrageous Conduct)
- ▶ Defendant's Answer
 - Denials
 - Counterclaims
 - Discrimination
 - Unlawful Entry
 - Habitability



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Skip to the Tenant's Side of the Case



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Attempted Defenses (Denials)

- ▶ I didn't do it
- ▶ What I did was not a violation
- ▶ The facts are misstated
- ▶ The notice is wrong
- ▶ The notice wasn't served correctly
- ▶ We're in the wrong county

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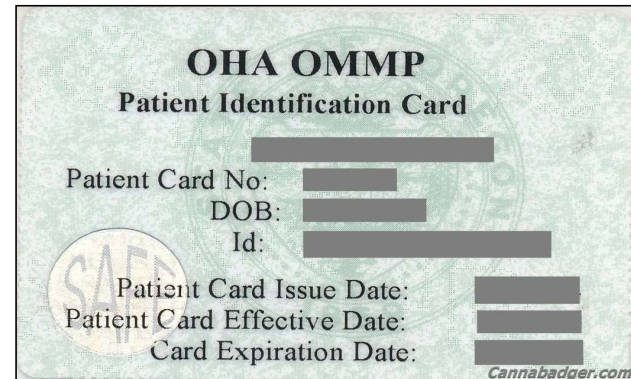
Attempted Defenses: Marijuana is Legal

- ▶ Oregon Medical Marijuana Act
 - ORS 475.300 – ORS 475.346
- ▶ Recreational Marijuana is Legal
 - Measure 91
 - HB 3400



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OMMP Card



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More Attempted Defenses

- ▶ I've never seen these notices, because I don't open any envelopes from the manager
- ▶ I have both medical and recreational marijuana in my apartment
- ▶ All of the seedlings came from Clackamas County, so you'd be ruling against marijuana from a different county

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I Was "Vaping," Not "Smoking"



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My Buddy Knows Electrical Stuff



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There Was No Damage... I Covered the Walls With Plastic



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I Even Made Sure I Ventilated Everything Correctly



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Counterclaims

- ▶ Discrimination
- ▶ Unlawful Entry
- ▶ Habitability



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Unlawful Entry Counterclaim

- ▶ Landlord failed to give me a notice of intent to enter, prior to entering and inspecting my apartment the second time
- ▶ Owes me one month's rent: \$1,000.00



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Unlawful Entry Counterclaim

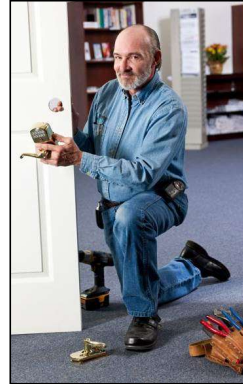
- ▶ He also freaked out my companion animals, so I want another \$1,000.00 for their therapy.



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Habitability Counterclaim

- ▶ **ORS 90.320 Landlord to maintain premises in habitable condition; agreement with tenant to maintain premises.** (1) A landlord shall at all times during the tenancy maintain the dwelling unit in a habitable condition. * * *



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Plaintiff's Rebuttal

(Plaintiff's Defenses Against Counterclaims)

- ▶ **Discrimination**
 - Not a permissible counterclaim
 - ORS 105.132
- ▶ **Unlawful Entry**
 - We admit that we failed to give notice
- ▶ **Habitability**
 - The whole plastic and venting story is absurd. We pulled it back, and found this...

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I want \$9,000.00 for damages



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Closing Arguments: Plaintiff

- ▶ **Rental Agreement** prohibits smoking, disturbances and property damage
- ▶ **Too many plants** under any of the Oregon marijuana laws
- ▶ **Measure 91 doesn't apply** to landlord/tenant relationship
- ▶ Federal law supersedes state law
- ▶ The notices were correct and served properly
- ▶ Request a judgment in favor of the Plaintiff
 - Possession
 - \$9,000.00

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Closing Arguments: Defendant

- ▶ Vaping isn't smoking
- ▶ We're in Oregon, so federal law shouldn't apply
- ▶ I need those plants, to address my disability
- ▶ Let me keep possession, then I'll move
- ▶ I'll make sure the premises are good when I move
- ▶ No matter what, the landlord owes me and my animals money for barging into my apartment without prior notice

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The Final Decision...



AND THE WINNER IS.....

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Final Decision (Judgments)

▶ Plaintiff's Claims

- Notices can be combined
- Both were valid
- Not all judges agree

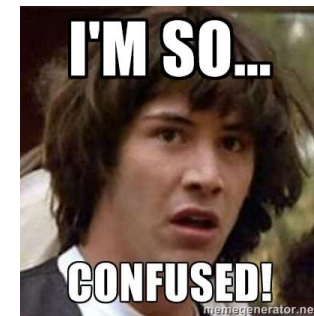


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Final Decision (Judgments)

▶ Defendant's Claims

- Discrimination claim fails
- Defendant's habitability claim fails
- There was an unlawful entry



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Multiple Prevailing Parties



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Plaintiff is awarded possession

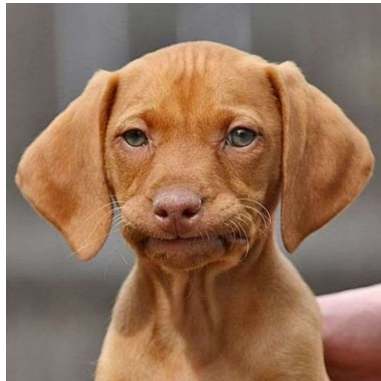


...But no money for damages

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Multiple Prevailing Parties

Nothing for the animals' therapy, but...



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Multiple Prevailing Parties

\$1,000.00 to Tenant for Unlawful Entry



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Jeffrey S. Bennett

▶ Jeffrey S. Bennett is a partner in the Portland law firm of Warren Allen, LLP. Licensed in Oregon and Washington, he has specialized in landlord tenant law for the past twenty five years. Mr. Bennett's clients include many of the region's premier residential and commercial property management companies, and his firm also assists clients with everything from business formations and complex transactions to litigation based matters.

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