

UPL TASK FORCE REPORT  
August 18, 2011

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## I. Summary & Introduction

In early 2010, the Oregon State Bar (“OSB”) Board of Governors appointed an Unlawful Practice of Law Task Force to evaluate the current statute and bylaws relating to the unlawful practice of law in Oregon and to make proposals for changes where appropriate.

The Task Force is comprised of a diverse group of 11 individuals from throughout the state of Oregon all of whom have had some experience in the enforcement of prohibitions against the unlawful practice of law. Theresa Wright served as the Task Force chair. The Task Force met several times over the last year and a half, engaging in lengthy, spirited and thoughtful discussions about the current state of the unlawful practice of law in Oregon. The Task Force began by identifying perceived problems with the current process and explored many possible solutions. Each proposed solution was evaluated to determine if there was consensus and if it was a viable and appropriate measure to undertake.

The Task Force makes the following recommendations for adoption and implementation by the Board of Governors:

1. Allow the Unlawful Practice of Law Committee (“UPL Committee”) to issue advisory opinions in order to provide guidance about what constitutes the unlawful practice of law;
2. Implement a rule that prohibits inactive or retired lawyers from identifying themselves as “lawyers” or “attorneys” unless they also state that they are inactive or retired;
3. Eliminate the admonition letter and replace it with a warning letter;
4. Seek an amendment to the Unlawful Trade Practices Act (“UTPA”), ORS 646.608 et seq. to add that a violation of ORS 9.160 constitutes a violation of the UTPA;
5. Explore, in conjunction with the Court, possible rule changes that would allow the OSB to pursue contempt against disbarred lawyers who continue to practice law directly in the Oregon Supreme Court;
6. Expand the Oregon State Bar website information relating to the unlawful practice of law, and;
7. Expand public outreach and education.

The reasoning behind these recommendations follows in Sections III and IV, below. The Task Force also has made recommendations for the Court’s consideration, which are outlined in Section V, below. Finally, the Task Force identified several problems and possible solutions that it decided not to address or recommend, which are mentioned at the end of this report.

## **II. Background**

### **A. Regulation of the Practice of Law**

The purpose of licensing requirements for lawyers is to protect the public from the consequences that flow from efforts to provide services by those who are neither trained nor qualified to do so. *See Oregon State Bar v. Security Escrows, Inc.*, 233 Or 80, 87 (1962). The Oregon Supreme Court has acknowledged its inherent power to regulate the practice of law, saying that “[n]o area of judicial power is more clearly marked off and identified than the courts’ power to regulate the conduct of the attorneys who serve under it.” *Ramstead v. Morgan*, 219 Or 383, 399 (1959). At the same time, the Court recognized that the legislature has the power to regulate “some matters which affect the judicial process.” *Id.* Thus, in the absence of legislative enactments defining the practice of law, Oregon courts have exercised their authority to regulate not just members of the Oregon State Bar, but the practice of law by non-lawyers.

Except in limited circumstances, a person who wants to practice law within the state of Oregon must be an active member of the Oregon State Bar. ORS 9.160. Although the language of ORS 9.160 does not distinguish between lawyers and other persons, the statutory prohibition was for many years focused principally on non-lawyers. It had little impact on lawyers licensed in other jurisdictions because lawyers traditionally practiced only in the states in which they were licensed. As our entire society has become more mobile, however, there has been a corollary increase in the reach of law practices, driven by the demands of clients whose legal needs are not confined to a single state.

In 2003, ORS 9.241 was amended to permit the Supreme Court to adopt rules to allow temporary practice in Oregon by lawyers not licensed here, notwithstanding ORS 9.160. When the Oregon Rules of Professional Conduct were adopted effective January 2005, they included a temporary practice rule. *See* RPC 5.5. Lawyers licensed outside of Oregon may provide legal services in Oregon on a temporary basis if 1) the out-of-state lawyer associates with a lawyer who is admitted in Oregon and who actively participates in the matter; 2) the lawyer is admitted to appear pro hac vice in a proceeding before a tribunal; 3) the services arise out of or are related to the out-of-state lawyers home jurisdiction practice and do not require pro hac vice admission; or 4) the services are provided to the lawyer’s employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission. Even so, out-of-state lawyers may not establish a “systematic or continuous presence” in the state of Oregon or hold themselves out to the public as being admitted to practice in Oregon without being an active member of the Oregon State Bar. What constitutes a “systematic and continuous presence” and “temporary basis” has not been determined in Oregon.

## **B. Procedure for Investigating and Prosecuting Complaints**

### **1. Statutory Process**

Upon written complaint by any person or on its own initiative, the OSB Board of Governors has authority to investigate alleged violations of ORS 9.160. *See* ORS 9.164.<sup>1</sup> If the board finds reason to believe a person is practicing law without a license, the board is authorized to maintain a suit for injunctive relief against that person. An injunction may be issued without proof of actual damage sustained by any person and a person so enjoined may be punished for contempt by the court issuing the injunction if the injunction is not obeyed. The court may also order restitution to any victim and the prevailing party in the lawsuit may recover its costs and lawyer fees. *See* ORS 9.166.

ORS 9.990 also makes the violation of ORS 9.160 a crime subjecting violators to fines up to \$500 or imprisonment up to six months, or both. Criminal prosecutions for the unlawful practice of law, however, have been extremely rare. District attorneys have not as a general rule made enforcement of this law a priority.

### **2. State Bar Procedures**

The OSB Board of Governors has delegated its responsibilities under ORS 9.164 to the Unlawful Practice of Law Committee (“UPL Committee”) and has adopted Article 20 in the OSB Bylaws to guide the UPL Committee in its investigation of complaints.

The UPL Committee may investigate individuals who are not active members of the state bar if they: use stationery describing themselves as a lawyer or otherwise represent themselves to the public as authorized to practice law; appear on behalf of another in a court or administrative proceeding without statutory authority; issue demand letters; negotiate on behalf of another for the settlement of a pending or possible legal action; draft or select documents for another or give advice regarding such documents when an informed or trained discretion must be exercised in the selection or drafting of such documents; or exercise “an intelligent choice or informed discretion in advising another of his or her legal rights or duties.” OSB Bylaw 20.2.

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<sup>1</sup> ORS 9.162 - 9.166 (Or. Laws 1987, ch 860) was enacted to add substance to the mechanics of enforcing ORS 9.160. After discussions with the Oregon Supreme Court and the Attorney General, the OSB determined legislation was needed to codify the process used for the enforcement of ORS 9.160. The Supreme Court was reluctant to adopt enforcement procedures by court rule. The attorney general did not wish to undertake this activity as a component of his consumer protection authority. This vacuum resulted in the development of a procedure by the bar’s Unlawful Practice of Law Committee. The procedure was refined by the OSB Board of Governors and changed by the legislative process, culminating in the procedure that was ultimately passed into law and became effective September 27, 1987.

The UPL Committee may decline to investigate allegations of unlawful practice in two circumstances: (1) when the allegations are not made to the committee in writing; and (2) when the allegations consist only of printed or electronic materials, advertisements or other solicitations which describe services “that cannot reasonably be construed as legal services.” OSB Bylaw 20.3.

The UPL Committee may refer cases to the board of governors for action under ORS 9.166(1), when there is at least one identifiable person who has been injured by the person alleged to be engaging in the unlawful practice of law, who has received legal services from that person, or who has personal knowledge of facts constituting the unlawful practice of law or that the unlawful practice of law is an ongoing activity. OSB Bylaw 20.4.

After investigation, the UPL Committee may decline to request authorization to pursue prosecution if 1) the alleged unlawful practice is not an ongoing practice; 2) the investigator has been unable to obtain sufficient evidence to substantiate the allegation of unlawful practice; or 3) the investigator has been unable to obtain sufficient evidence to support a lawsuit for injunctive relief. In addition, the UPL Committee has the discretion to not pursue prosecution if other good cause exists. OSB Bylaws 20.4 & 20.5.

Unlawful practice of law complaints received by the OSB which meet the criteria set forth in OSB Bylaw 20.2 are assigned to a UPL Committee member to investigate the complaint and report back to the UPL Committee. The reports must contain proposed findings and a recommended disposition. OSB Bylaw 20.700. In addition to referring the matter to the Board of Governors for prosecution, the UPL Committee may also dispose of complaints by dismissal, issuing a notice or admonition letter, negotiating a cease and desist agreement or referring the matter to another agency for action. OSB Bylaws 20.702 & 20.703.

Matters that are approved for court action by the Board of Governors under ORS 9.166(1) are referred to volunteer bar counsel for the filing and litigation of the bar’s claims. OSB staff reports periodically to the UPL Committee and the Board concerning the status of each such matter. The UPL Committee is to be available to bar counsel to assist in the preparation of the lawsuit and the continued investigation of the matter. OSB Bylaw 20.704.

### **III. Problems with the Status Quo**

The Task Force began its work by identifying problems with the current process for addressing the unlawful practice of law in Oregon. First, despite decades of enforcement efforts by the Oregon State Bar and decades of Oregon Supreme Court opinions that identify what constitutes the unlawful practice of law, non-lawyers

continue to provide legal services, often causing severe harm to the public. The OSB's process for enforcement is long, cumbersome, and sometimes seems ineffective in actually stopping the unlawful practice of law. Meanwhile, the consumers of legal services, those the UPL regulations are meant to protect, continue to seek out non-lawyers for legal assistance, seemingly oblivious to the potential dangers of doing so. Finally, identifying what exactly constitutes the practice of law often can be difficult for lawyers and judges as well as for the general public.

#### **IV. Recommendations for OSB Implementation**

##### **A. Allow the UPL Committee to issue advisory opinions<sup>2</sup>**

Certain types of activities come before the UPL Committee regularly. For example, the UPL Committee regularly sees complaints about non-lawyers preparing legal forms for individuals. The line between acting as a mere scrivener and engaging in the practice of law when completing a document for an individual can be murky. If the UPL Committee was permitted to issue advisory opinions similar to those issued by the Legal Ethics Committee, it could provide guidance to lawyers, judges, and the general public about the types of activities that it would likely consider to be the unlawful practice of law. This would require the Board of Governors to amend the OSB Bylaws. Attached is a proposed bylaw amendment that would authorize the UPL Committee to issue advisory opinions.

##### **B. Implement a rule that prohibits inactive or retired lawyers from identifying themselves as “lawyers” or “attorneys” unless they also state that they are inactive or retired**

One specific issue that the UPL Committee spends an inordinate amount of time resolving is the use of letterhead and cards by retired, inactive or out-of-state attorneys. The UPL Committee's resources would be better allocated if the OSB promulgated a rule clearly allowing letterhead and cards that accurately and completely indicate a description of a person's status. For example, a rule could provide that a retired lawyer may say “attorney/lawyer, retired” or “attorney/lawyer, inactive member of X state bar.”

##### **C. Eliminate the “admonition letter” and replace it with a “warning letter.”**

The current OSB bylaws permit the UPL Committee to dispose of investigations into allegations concerning the unlawful practice of law by dismissing the complaint,

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<sup>2</sup> While a majority of Task Force members support the recommendation regarding advisory opinions, the support is not unanimous. A couple of members expressed concerns about an enforcement entity issuing advisory opinions.

sending a notice letter, sending an admonition letter, entering into a cease and desist agreement or referring the matter to the Board of Governors for prosecution. OSB Bylaw 20.702. In order to issue an admonition letter, the bylaws require the UPL Committee to make a finding that the accused has engaged in the unlawful practice of law. Because the UPL Committee makes a “finding” of wrongdoing and purports on some level to “sanction” the accused with its letter, issuance of an admonition arguably triggers due process requirements, particularly for out-of-state lawyers. Consequently, the current bylaws require that UPL admonition letters be accepted by the accused.

If an accused rejects an admonition, the UPL Committee must choose an alternate disposition. This puts the UPL Committee in the position of having to make a choice between two equally untenable options: dismissing a complaint where someone has clearly engaged in the unlawful practice of law, or; referring the matter to the board for prosecution, knowing that prosecution would be a waste of the bar’s resources.

This recommendation would require the Board of Governors to amend the bylaws. Attached is a proposed bylaw amendment that would implement this recommendation.

**D. Seek amendment of the Unlawful Trade Practices Act, ORS 646.608 et seq. to add that a violation of ORS 9.160 constitutes a violation of the UTPA**

The OSB does not allocate any funds specifically for enforcement of the UPL statute. Instead, the OSB relies on volunteer bar counsel for representation on these cases. While the statute provides for attorney fees to the prevailing party, the reality is that many of these non-lawyer practitioners have few resources from which to collect any fees awarded. With limited resources to devote to UPL prosecutions, many cases are left without remedy.

The immigrant community remains a primary target for non-lawyer practitioners. They are often afraid to come forward with a complaint to any governmental entity. Amending the Unlawful Trade Practices Act (“UTPA”) would give a private right of action and therefore a remedy to a large group of consumers who currently have none. Under the UTPA, moreover, the prevailing party can be entitled to recover attorney fees and could seek punitive damages.

**E. Explore, in conjunction with the Court, possible rule changes that would allow the OSB to pursue contempt against disbarred lawyers who continue to practice law directly in the Oregon Supreme Court.**

Disbarred lawyers and lawyers who submit a Form B resignation have been stripped of their license to practice law and ordered by the Oregon Supreme Court to cease practicing law. For those who continue to practice law illegally, BR 1.4(a) gives the Oregon Supreme Court jurisdiction over “matters involving the practice of law by an

attorney...whether or not the attorney retains the authority to practice law in Oregon.” Further, BR 6.3(c) provides that Disciplinary Counsel may petition the Supreme Court to hold a disbarred attorney in contempt for continuing to practice law after disbarment, and states that the “court may order the attorney to appear and show cause, if any, why the attorney should not be held in contempt of court and sanctioned accordingly.”

As a matter of practice, however, the OSB does not seek contempt directly in the Oregon Supreme Court.<sup>3</sup> Instead, if a disbarred or resigned lawyer continues to practice law, the OSB has utilized the process provided by ORS 9.166, first seeking injunctive relief, and pursuing contempt only if the disbarred lawyer continues to practice after the injunction is entered. This process takes significant time and allows only for restitution to the victim; it does not allow for the imposition of a penalty or jail time.

While the Oregon Supreme Court does not have fact-finding capability, these cases could be channeled through the Disciplinary Board trial panels. Development of the procedure could be done by a joint committee with representatives from the Oregon State Bar, the Oregon Supreme Court, the court administrator and the attorney general’s office. See Section V.C., below.

**F. Expand the Oregon State Bar website information relating to the unlawful practice of law**

There seems to be a general lack of understanding about what constitutes UPL. This is exacerbated by the fact that there is no central location where a person can look for the definition of the “practice of law,” and what activities might fall within that definition. The OSB website currently includes a single page with limited information about what constitutes UPL.

1. Expand the UPL page to include links to the current laws relating to UPL, including the statutes, OSB bylaws, bar opinions and Oregon Supreme Court caselaw (where possible);
2. Include information about the limitations of what paralegals can and cannot do on the public information section of the website;
3. Incorporate information about the dangers of hiring a nonlawyer for representation in the public information pamphlets on particular areas of law, like immigration;

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<sup>3</sup>The OSB tried to seek contempt directly with the Oregon Supreme Court about 15 years ago, but its efforts were frustrated. According to institutional memory, the Court initially issued an order directing the Oregon Department of Justice (“DOJ”) to bring the contempt proceeding, reasoning that only a district attorney’s office or DOJ could bring criminal contempt proceedings in accordance with ORS 33.015-33.155. DOJ agreed to handle the case, but only if paid. The OSB was not willing to pay, so the Supreme Court dismissed the proceeding. The OSB has not attempted this direct contempt route since.

4. Include the names of individuals against whom the bar has obtained injunctions, contempt orders and cease and desist agreements;
5. Include a link to the DOJ Assurances of Voluntary Compliance where UPL involved;
6. Consider other ways to expand the information about UPL on the website;
7. Include materials in Spanish and English regarding Notarios<sup>4</sup> and/or links to such materials on other websites (e.g. NCIS)

#### **G. Expand public outreach and education**

1. Create a series of public service announcements (“PSAs”) for radio and TV relating to UPL. These PSAs should include information on why persons should use lawyers and not use persons who are not authorized to practice law. They should also give examples where persons who did not heed that advice were harmed.
2. Make materials available to courts and lawyers for distribution to the public.
3. Conduct a CLE on the topic of what constitutes UPL and how to properly and effectively supervise non-lawyers to avoid UPL. Make it accessible on-line.
4. Do an article, or several, for the Bar Bulletin, including descriptions of UPL cases in which the bar obtained injunctions.

### **V. Recommendations for Court Consideration**

Three separate issues relating to the courts were discussed. The first relates to what the law prohibits or limits in relation to court staff assisting self represented persons. Second, there are some scattered practices in some courts that may facilitate the unlawful practice of law and/or appear to give implied approval to those who may be engaging in the unlawful practice of law. Third, there is no quick and effective procedure for contempt proceedings in cases where persons are violating a Supreme Court order of disbarment. Proposed ways to address these issues are set forth below.

#### **A. Court Staff Assisting Self-Represented Parties**

This issue arises mainly in the Family Court Facilitation Programs; however, it certainly arises every time a self represented person interacts with court staff. The family court facilitators’ assistance varies between judicial districts, based upon concerns about the staff practicing law. The differences include what paperwork the parties receive, whether help with the form is provided and whether child support calculations are done by staff.

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<sup>4</sup> In Latin American countries, Notarios have the authority to perform many of the same legal services that lawyers do in the United States. Using this term can create confusion about the extent of authority that Notarios have to provide legal services in Oregon.

The Task Force believes that these programs provide a valuable service for the courts and the public. To the extent that a difference in services is related to concerns about what the law prohibits, this could be eliminated by the court directly or by the UPL Committee working with the court administrator to clarify what is or is not prohibited. A clarification could provide uniformity of services and procedures and enhance this valuable work.

### **B. Reviewing Court Practices Which May Facilitate UPL**

The Task Force identified a number of situations involving some local court practices which may be facilitating the unlawful practice of law. Specifically, some court staff communicate with third persons who are not lawyers or parties in a manner which elevates their status. For example, staff may contact these persons regarding the status of or deficiencies in pleadings they have prepared in a specific case or regarding scheduling issues, or give them a place in the courthouse to pick up correspondence, like those provided to lawyers. These problems could be resolved if rules or guidelines were issued. This could be done in conjunction with the UPL Committee or training of court staff within the court system.

### **C. Contempt Procedure for Disbarred Attorneys**

Once the Supreme Court orders an attorney disbarred or accepts a Form B resignation, there is no effective procedure to hold the former lawyer in contempt for violating this order. While it is true that the OSB can file for injunctive relief in the Circuit Court this takes time and the only penalty is a financial one. It would be more effective to file a contempt proceeding and have at least the possibility for jail time as a sanction to stop these egregious violators from harming more people. This would provide for a more timely response and the threat of jail, we would hope, could stop the conduct. This procedure could be developed by a joint committee with participation of the Oregon State Bar, the court administrator and the attorney general's office. See OSB Recommendation IV.E., above.

## **VI. Matters Discussed But Left Without Recommendation**

- A. Defining the "practice of law" through legislation, UTCR, court rules, bylaws, etc.
- B. Out-of-state lawyer issues
- C. Disbarred lawyers working in law offices
- D. Dedicated funding and/or CLE credit for representation of the bar in UPL cases