

Oregon State Bar
Meeting of the Board of Governors
August 26, 2011
Red Lion Hotel Pendleton
304 SE Nye Avenue
Pendleton, OR 97801
Open Session Agenda

The Open Session Meeting of the Oregon State Bar Board of Governors will begin at 1:00 p.m. on August 26, 2011.

Friday, August 26, 2011, 1:00 p.m.

- 1. Call to Order/Finalization of the Agenda**
- 2. Department Presentations**
 - A. General Counsel [Ms. Hierschbiel]
 - B. Facilities and Operations [Mr. Wegener]
- 3. Report of Officers**
 - A. Report of the President [Mr. Piucci] Written Exhibit
 - B. Report of the President-elect [Ms. Naucner] Written Exhibit
 - C. Report of the Executive Director [Ms. Stevens] Inform Exhibit
 - D. Director of Diversity & Inclusion [Ms. Hyland] Inform
 - E. MBA Liaison Report [Mr. Knight] Inform
- 4. Professional Liability Fund [Mr. Zarov] Inform**
 - A. General Update
 - B. Financial Report Inform Exhibit
 - C. Retirements and Hiring
 - D. Board Selection
 - E. Preview of Action Items for Next Board Meeting
 1. Budget
 2. Coverage Plan Changes
- 5. Professionalism Commission Request [Ms. Stevens]**
 - A. Proposed Amendment to Statement of Professionalism Action Exhibit

6. Rules and Ethics Opinions

A. Legal Ethics Committee

- | | | | |
|----|--|--------|---------|
| 1. | FORMAL OPINION NO. 2011-XXX | Action | Exhibit |
| a. | Competency: Disclosure of Metadata | | |
| 2. | FORMAL OPINION NO. 2011-XXX | Action | Exhibit |
| a. | Withdrawal from Litigation: Client Confidences | | |

7. OSB Committees, Sections, Councils and Divisions

- | | | | |
|----|--|---------|---------|
| A. | Oregon New Lawyers Division Report | Written | Exhibit |
| B. | Accept UPL Task Force Report and Adopt Recommendations | Action | Exhibit |

8. BOG Committees, Special Committees, Task Forces and Study Groups

A. Budget and Finance Committee [Mr. Kent]

- | | | | |
|----|--|--------|---------|
| 1. | 2012 Executive Summary Budget Report | Action | Exhibit |
| 2. | Selection of Auditors for 2010-2011 Financial Statements | Action | Exhibit |

B. Member Services Committee [Ms. Johnnie]

- | | | | |
|----|--|--------|---------|
| 1. | 2011 OSB President's Awards and Award of Merit | Action | Handout |
| 2. | Waiver of Section Administrative Assessments | Action | Exhibit |

C. Policy and Governance Committee [Ms. Naucler]

- | | | | |
|----|--|--------|---------|
| 1. | Changes to Bylaw 16.200 - Scope of Complimentary CLE | Action | Exhibit |
| 2. | Changes to Election Bylaws Article 9 | Action | Exhibit |

9. Consent Agenda

A. Approve Minutes of Prior BOG Meetings

- | | | | |
|----|--------------------------------------|--------|---------|
| 1. | Open Session – June 24, 2011 | Action | Exhibit |
| 2. | Judicial Proceedings – June 24, 2011 | Action | Exhibit |
| 3. | Executive Session – June 24, 2011 | Action | Exhibit |
| 4. | Special Meeting – July 29, 2011 | Action | Exhibit |

B. Appointments Committee

- | | | | |
|----|---|--------|---------|
| 1. | Appointments to Various Bar Committees, Boards and Councils | Action | Handout |
|----|---|--------|---------|

- C. Policy and Governance Committee
 - 1. Fee Arbitration Rule Establishing Advisory Committee Action Exhibit
- D. Client Security Fund Claims Recommended for Payment Action Exhibit
 - 1. No. 2010-38 HAYES (Guerrero) \$2,000.00

10. Default Agenda

- A. Minutes of Interim Committee Meetings
 - 1. Access to Justice Committee
 - a. July 29, 2011 Exhibit
 - 2. Budget and Finance Committee
 - a. June 24, 2011 Exhibit
 - b. July 29, 2011 Exhibit
 - 3. Member Services Committee
 - a. June 24, 2011 Exhibit
 - b. July 29, 2011 Exhibit
 - 4. Policy and Governance Committee
 - a. June 24, 2011 Exhibit
 - b. July 29, 2011 Exhibit
 - 5. Public Affairs Committee
 - a. June 24, 2011 Exhibit
 - b. July 29, 2011 Exhibit
 - 6. Unclaimed Lawyer Trust Account Special Committee
 - a. June 24, 2011 Exhibit
- B. CSF Claims Financial Report Exhibit
- C. Affidavits for PLF Covered Claim
 - 1. David Lokting and Steve Larson (00306190) Exhibit
 - 2. David Wade and Scott McCleery Exhibit
- D. Campaign for Equal Justice Audit and Annual Report Exhibit

11. Closed Sessions ([Click here to access the Closed Session Agenda](#))

- A. Judicial Session (pursuant to ORS 192.690(1) – Reinstatements
- B. Executive Session (pursuant to ORS 192.660(1)(f) and (h)

General Counsel/UPL Report

12. **Good of the Order (Non-action comments, information and notice of need for possible future board action)**
- A. Fraser--BarBooks Exhibit
 - B. Schenck Complaint About CAO Exhibit
 - C. Solicitors Regulation Authority Exhibit
 - D. Articles of Interest
 - 1. Abbott Mgmt Solutions Newsletter 29Jun11 Exhibit
 - 2. Average Starting Pay for Law Grads Is on Downward Shift
- *ABA Journal* Exhibit
 - 3. Law Job Stagnation May Have Started Before the Recession,
And It May Be a Sign of Lasting Change - *ABA Journal* Exhibit
 - 4. Law School Economics - Job Market Weakens, Tuition Rises
- *NYTimes* Exhibit
 - 5. Legal Services Wanted Lawyers Need Not Apply – *Miller-McCune* Exhibit
 - 6. Pay Freezes Prompt More Judges to Leave Bench,
Go Back to Practice - *ABA Journal* Exhibit

President Report June 2011 - August 2011

Date	Event	Location
June 30, 2011	National Counsel of Bar Presidents planning conference call for ABA. Toronto panel discussion on "keeping members happy."	Portland, OR
July 5, 2011	Second planning conference call re: ABA panel discussion - interview by Melody Finnemore re: Daily Journal of Commerce "Briefly Legal" issue regarding "your first case."	Portland, OR
July 6, 2011	<ul style="list-style-type: none"> - Meeting with the Chief Justice - Meeting with DA representative about conflicts/discipline panels - Meeting with Jim Rice regarding OSB support for debate between John Yoo and Steve Wax 	<ul style="list-style-type: none"> - Salem, OR - Salem, OR - Portland, OR
July 11, 2011	<ul style="list-style-type: none"> - Meeting with Jim Rice & Sylvia Stevens about Yoo - Wax debate. - Meeting with Phil Bentley, Sen. Courtney's Chief of Staff 	<ul style="list-style-type: none"> - Portland, OR - Portland, OR
July 12, 2011	<ul style="list-style-type: none"> Out of state lawyer regional HOD meeting - ONLD Practical Skills through Public Service kick off event - Stoel Rives 	<ul style="list-style-type: none"> - Portland, OR - Portland, OR
July 29, 2011	<ul style="list-style-type: none"> BOG Committee meeting - Short Bog meeting 	OSB
August 3 - 7, 2011	ABA	Toronto, Canada
August 12 - 13, 2011	OTLA Convention	7 th Mountain Resort
August 17, 2011	New Lawyer Mentor Committee Meeting	OSB
August 18, 2011	Orientation U of O Law School	Eugene, OR
August 19, 2011	PLF Board Meeting	Salishan
August 22, 2011	Conference with Mariann Hyland	Portland, OR

Report of the President Elect

Feb. 17, 2011	Lunch with Supreme Court& Ct. of Appeals	Salem
Feb. 17-18, 2011	BOG meetings	Salem
Feb. 22, 2011	CEJ lunch	Portland
March 4, 2011	WUPILP auction	Salem
March 9-12, 2011	ABA-BLI	Chicago
March 15, 2011	Meet with Chief Justice	Salem
March 16, 2011	Legislators Reception	Salem
March 18, 2011	BOG mtgs., 50-year member lunch, ONLD dinner	Tigard
March 29-April 3	Western States Bar Conference	Maui
April 8, 2011	Investiture of Kathryn Villa-Smith	Portland
April 21, 2011	PLF finance committee meeting	Tigard
April 21, 2011	BOG-PLF dinner	Portland
April 22, 2011	BOG meetings	Tigard
May 2-3, 2011	Northwestern Bar meeting	Salt Lake City
May 5, 2011	Linn County Judicial Appointment interviews	Albany
May 6, 2011	New Lawyer Swearing-In	Salem
May 12, 2011	OSB Lobby day	Salem
May 13, 2011	Oregon Law Foundation mtg.	Phone
May 31, 2011	Meet with Chief Justice	Salem
June 8-10, 2011	Southern OR and Coast visits: Roseburg, Coos Bay, Brookings, Medford, Ashland	
June 10, 2011	PLF meeting	Ashland
June 24, 2011	BOG meetings	Tigard
June 24, 2011	BOG Alumni Dinner	Portland
July 6, 2011	Meet with Chief Justice	Salem
July 14, 2011	HOD delegates meeting	Albany
July 27, 2011	Meet with Dennis Rawlinson	Portland
July 29, 2011	BOG meetings	Tigard
August 5, 2011	Lunch with Sandra Hansberger, CEJ	Albany
August 12, 2011	Investiture of Deanna Novotney, Linn Circuit Ct.	Albany

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: August 26, 2011
From: Sylvia E. Stevens, Executive Director
Re: Operations and Activities Report

OSB Programs and Operations

Department	Developments
Accounting & Finance/Facilities (Rod Wegener)	<ul style="list-style-type: none"> • Staff have begun working on the department and program line item budgets for the next phase of the 2012 budget development. • We have hired a Business Analyst & Project Manager. This is a new position designed to assist all departments in analyzing and streamlining processes, many of which require updated technology. The successful candidate starts 9/6. • The plans for the tenant improvements in the vacant space are being finalized by the architect. Once done the plans will be sent to three contractors for bids. • The subleases at the former PLF space ended July 31 and the bar is working with the subtenants and Shorenstein to wrap up the terms of the leases. The bar collected the full amount of rent from all three tenants.
Admissions (Jon Benson)	<ul style="list-style-type: none"> • <u>New exam venue</u> – The July exam was held at a new site – Jantzen Beach Red Lion (good facility!). • <u>ADAAA – applicants with disabilities</u> – Oregon participated with a national group in developing new forms we will utilize for applicants requesting testing accommodations. The forms specifically incorporated changes prompted by DOJ rules recently promulgated under ADAAA. • <u>1L visits to Oregon law school</u> – The Admissions Director and members of the BBX will be going to Oregon law schools to speak with 1Ls about the “Character & Fitness” component of bar admissions. • <u>Character & Fitness</u> – The BBX continues to see an uptick in applicants with significant negative issues in their background. Currently, we have one contested matter pending before the Supreme Court and 2 others in which a Special Investigator (analogous to a Special Prosecutor in the BBX cases) has been appointed for evidentiary hearings. • <u>Grading session</u> – August 19-28 • <u>Important dates</u> – Release of July exam results Sept. 23rd; Swearing-in Oct. 6th
Communications (Kay Pulju)	<ul style="list-style-type: none"> • The July edition of the Bulletin featured articles on criminal law (a reader priority) and civil rights. The August/September edition will include articles on the Lawyer Referral Service changes and upcoming Convocation on Equality. • Revision of all public legal information materials is underway; the update

Department	Developments
	<p>process follows each legislative session. In addition to website material, pamphlets and Tel-Law the handbook Legal Information for Older Adults will be updated this year.</p>
<p>CLE Seminars (Karen Lee)</p>	<ul style="list-style-type: none"> • Began providing all CLE course materials to attendees electronically (PDF) mid-June. Print is currently the default option until 12/31/11. Effective 1/1/12, electronic materials will be the default. Effective 7/1/12 printed materials will be available only by purchase. • Provided webcasting services for three PLF seminars • Organized a half-day seminar for current and potential participants in the New Lawyer Mentoring Program (Sept. 29, 9:00 a.m. to 12:30 p.m.; Chief Justice De Muniz will give a welcome and NLMP overview) • Met with IDT staff to establish a time line for moving the CLE Seminars website onto the bar’s server • Met with IDT to discuss building a free online library of current and archived CLE course materials • Held the CLE Seminars annual staff retreat to discuss strategic planning, including increasing online on-demand programming (webcast replays and individual video segments of seminars); evaluating the closure of certain video replay sites due to lack of registrants; the financial impact of eliminating sales of printed course materials as a result of the free online library (\$10,000 in revenue); and producing a series of seminars for OSB members to satisfy reciprocal admission in Washington.
<p>Diversity & Inclusion (Mariann Hyland)</p>	<ul style="list-style-type: none"> • Department Name Change: effective August 1 The “Affirmative Action Department” was renamed to the “Diversity and Inclusion Department.” The purpose of this change is to reflect a broader mission and scope of work. Discussions are underway with the AAC to conform its name to the new program brand. • Successful 2011 OLIO Orientation: The 14th annual OLIO Orientation was held August 4-7 in Hood River, Oregon. Participants included 55 diverse law students from 15 states and six countries. Over 44 volunteer attorneys and state and federal court judge and over eight OSB staff members helped with the event. Board of Governor representative Tom Kranovich and OSB Executive Director Sylvia Stevens attended. Event evaluations were overwhelmingly positive , and the event came in under budget. BOG members are highly encouraged to attend next year’s event. • New Pipeline Program – Explore the Law: The OSB is working in collaboration with PSU to develop a pilot program, which will be launched this fall, that exposes diverse undergraduate students at PSU to the legal profession. We are in the process of identifying volunteer judges and lawyers to serve as role models for informational interviews and job shadowing. • Diversity Branding and Strategic Planning: Mariann will be leading an effort to create a new diversity brand and diversity strategic plan for the OSB. This will include developing a diversity definition, business case statement for diversity and launching a strategic planning effort with key stakeholders. The

Department	Developments
	<p>President of the BOG will appoint two to three BOG members to participate in this process. Other stakeholders will include the Affirmative Action Committee and leaders from the OSB’s Diversity, Disability, New Lawyer’s Sections and New Lawyer Mentoring Program.</p>
<p>General Counsel (including CAO) (Helen Hirschbiel)</p>	<ul style="list-style-type: none"> • GCO has begun work on the Fee Arbitration Mediation Pilot Project, with Judge La Mar’s assistance. We are also enlisting the help of the ADR section in developing a training program for our volunteer arbitrators and mediators. • The UPL Task Force has completed its work and is submitting its report and recommendations to the BOG. • Progress continues on the CAO Paperless Project. • Chris Mullmann is on sabbatical for a month.
<p>Human Resources (Christine Kennedy)</p>	<ul style="list-style-type: none"> • Carolyn McRory has accepted our offer for the position of Business Systems Analyst and Project Manager. She starts September 6, 2011. • We are recruiting for a Diversity and Inclusion Coordinator and a bilingual RIS Assistant. • We have completed the mid-year performance evaluation review process for all employees. • The workers’ compensation insurance policy was renewed for an annual premium of \$9,425.15 reflecting a 2.16% decrease.
<p>Information & Design Technology (Anna Zanolli)</p>	<p>Recent IDT efforts have been focused around the following areas:</p> <ul style="list-style-type: none"> • new equipment deployment (new PCs in Legal Pubs, Bulletin and Discipline, recycled the Legal Pubs equipment to replace older PCs in Member Services; advancements in technology have allowed us to move from a 3-year to a 5-year replacement cycle), • preparation of new contracts for the bar’s outside programming contractors, • initial planning and design work for the Convocation on Equality in November, • continuing work on the new Mentoring Program, parlaying the success of its data collection feature into use with the 2011-12 volunteer opportunities program. • continued work in the cloud with the new BBX grading program, which is in use now during the current session. No IDT presence required in Bend and by the time the session started last Friday, one grader had already completed his assignments. The new graphing feature allows co-graders to view each other’s progress, mean and median scores.
<p>Legal Publications (Linda Kruschke)</p>	<ul style="list-style-type: none"> • One BarBooks™ web conference has been held, with 45 bar members registered to attend. • Three BarBooks web conferences are scheduled, on 8/25, 9/21, and 10/25, with 31 bar members already registered for the 8/25 session. • Twelve chapters of <i>Labor and Employment: Private Sector</i>, one updated Formal Ethics Opinion, and three new or revised <i>Uniform Civil Jury Instructions</i> have been posted to BarBooks.

Department	Developments
	<ul style="list-style-type: none"> • Pre-order marketing via email and the <i>OSB Bulletin</i> for the new edition of <i>Labor and Employment: Private Sector</i> has generated the sale of 104 copies of that book, for total revenue of \$14,089. The revenue budget was \$1,190. The book is scheduled to go to the printer the week of 8/22. • On 6/15, we began gathering statistics regarding page views at BarBooks. It has been very challenging to get the summary data, but we have determined that for the two-month period from 6/15 to 8/15: <ul style="list-style-type: none"> ○ 310,258 – Number of individual page views by bar members ○ 3,342 – Number of unique bar members who used BarBooks ○ 773 – Number of individual page views at county law library terminals ○ 11 – Number of county law libraries where BarBooks was accessed • Kay Pulju conducted a BarBooks user focus group on 8/19 to get input on potential future upgrades to BarBooks into a wiki format. More on the results of that focus group in a future report. • Linda Kruschke and Cheryl McCord attended the ACLEA Annual Meeting in Boston, Mass., and received the ACLEA Award for our <i>Rights of Foreign Nationals</i> publication. We also learned some great ideas, and I took the reins as co-editor of ACLEA’s newsletter <i>In the Loop</i>. • Online versions of the third PLF book are complete and will be posted as soon as the PLF completes the final review. (PLF forms will not be posted because the PLF wants users to go to the PLF website to ensure they access the most up-to-date forms.)
<p>Legal Services/OLF (Judith Baker)</p>	<p>Legal Services Program:</p> <ul style="list-style-type: none"> • The two statewide legal aid programs, Oregon Law Center and Legal Aid Services of Oregon, are keeping staff updated regarding budget deficits and staff layoffs. Legal aid predicts the current deficit situation to last 3 to 5 years. • The LSP Committee recommended that staff investigate communication from a Lane County legal aid lawyer to a number of state legislators. • The Pro Bono Fair is scheduled for October 25th and will be held at the World Trade Center. There will 3 free CLE’s – Consumer Law, Representing Children, & Small Business/Non Profit 101. Staff is engaged in continued marketing of the Pro Bono Fair. • Staff has been working with the PLF and a new certified pro bono program application has been completed. • Staff is working with a new publicity committee to encourage the BOG to create a pro bono specific life-time achievement award <p>Oregon Law Foundation</p> <ul style="list-style-type: none"> • The OLF continues to work with banks to maintain the highest possible interest rates on IOLTA accounts. However, because of record low interest rates, which will in all likelihood continue through 2013, the OLF has lost 75% of its IOLTA revenue and anticipates cutting grants by an additional 35% for 2012.

Department	Developments
Member Services (Dani Edwards)	<ul style="list-style-type: none"> • Board and committee member recruitment ended in July resulting in an increase of 40% more volunteers over last year while public member volunteers are down 28% this year. • Distributed annual meeting compliance information to sections for 2011.
Minimum Continuing Legal Education (Denise Cline)	<ul style="list-style-type: none"> • The MCLE Committee met on Friday, July 29, and (1) denied a request for accreditation of a program on volunteer opportunities for government lawyers, (2) provided clarification for staff regarding processing requests for legal research/writing credit, and (3) discussed the MCLE/Pro Bono Joint Subcommittee that is considering whether to award MCLE credit for representing a client in a pro bono civil legal matter. The next meeting of the MCLE Committee will be Friday, September 9, 2011. • Active members whose MCLE reporting period ends 12/31/2011 were sent courtesy reminders on July 12. Forty-one members have already filed their 2011 compliance reports. • Processed 4,648 program accreditation applications and 719 applications for other types of CLE credit (teaching, legal research, etc.) since the first of the year.
New Lawyer Mentoring (Kateri Walsh)	<ul style="list-style-type: none"> • 76 new lawyers are enrolled and all but 25 are matched with a mentor. The remainder of the 163 successful bar applicants are exempt, have sought a deferral, or are delaying bar admission. We have 364 volunteer mentors; more will be need for October. • A no-charge CLE for mentors is scheduled for September 29. Chief Justice De Muniz will open the program, which will cover various topics to assist mentors. • The NLMP Committee is developing additional standards and eligibility criteria for mentor applicants who have a disciplinary history.
Public Affairs (Susan Grabe)	<ul style="list-style-type: none"> • The 2011 session ended June 30th. The bar passed 16 out of 18 of its law improvement measures, including a late addition to change the lawyer referral statute to update the webpage contact info. • The courts took an approximately 10% across the board cut which translates into a 15% reduction at the trial court level and a 20% reduction at the Appellate court level. Since 90% of the rest of the budget is personnel these reductions will be dramatic and will impact how court services are provided in the future. • We are preparing the Legislation Highlights Notebook and coordinating with the PLF to ensure our members are informed of important changes to the practice and relevant deadline changes. The book will be available online through BarBooks™ and also available print on demand. • The Legislation Highlights Seminar will be held Thursday , October 27 at the OSB in the afternoon. • The Public Affairs Department is gearing up for the formal transition to Annual Sessions. Legislation Interim Committee hearings are scheduled for the third week of September.

Department	Developments
Referral & Information Services (George Wolff)	<ul style="list-style-type: none"> • The Lawyer Referral Service (LRS) registration renewal period has gone well. Revenue for the current program year (July 1, 2011-June 30, 2012) is at 96.25% of budget or \$132,820. RIS currently has 1,061 participating panelists. 342 have not renewed, which is fairly typical for this time of year. More panelists will remember to renew in the fall. • All current panelists received an email notice of the pending changes in program funding. A panelist survey on implementation issues and options will follow.
Regulatory Services (Jeff Sapiro)	<ul style="list-style-type: none"> • The SPRB continues to meet monthly to review the results of disciplinary investigations and make probable cause decisions in those matters. The board last met on August 12, 2011, at which time there were 22 disciplinary matters on the agenda. • Due to some resignations from the Disciplinary Board, including the state chairperson, a few case settlements were delayed this summer. (The state chair must approve settlements involving low-level discipline.) The Supreme Court made new appointments in late July, so the Disciplinary Board now has a complete roster. Bill Crow of Portland is the new state chairperson. • On July 14, 2011, staff lawyers from Disciplinary Counsel, General Counsel and the Client Assistance Office met with approximately a dozen lawyers who regularly handle disciplinary defense work to discuss issues of common interest or concern. The session was informative and collegial. • DCO and CAO staff continue to develop the curriculum for Ethics School, the first session of which will occur later this year. • The Regulatory Services staff continue to process a steady volume of membership status changes, <i>pro hac vice</i> applications and public records requests.

Executive Director’s Activities June 24 through August 24, 2011

Date	Event
6/30	Meeting with Dir. of Diversity & Inclusion and AAC Chair
6/30	OMLA Spring Social
7/5	Meeting with Chief Justice
7/5	Meeting with ODAA representatives about disqualification of DAs from Disciplinary Board
7/6	NLMP Committee meeting
7/11	Meeting with S. Piucci and J. Rice re: co-sponsoring Yoo/Wax debate
7/12	Region 4 HOD Meeting
7/12	ONLD “PSPS” Kickoff Reception
7/12	Oregon ABA Delegation meeting
7/13	Region 7 HOD Meeting
7/13	Region 5 HOD Meeting

7/14	Region 2 HOD Meeting
7/15	LEC Meeting-Bend
7/19	Supreme Court public meeting
7/20	Non-Profit ED's Meeting
7/20	Discrimination/Harassment Task Force Meeting
7/21	Law Firm Lunch: Landye Bennett
7/21	OMLA Summer Social
7/23	CSF Committee Meeting
7/28	Betty Roberts Memorial
7/29	BOG Committees
8/2	Law Firm Lunch: Lindsay Hart
8/3	Law Firm Lunch: Tonkon Torp
8/4-8/6	OLIO
8/8	Law Firm Lunch: Lane Powell
8/17	Willamette Law School Professionalism Program
8/19	Chambers at the Pittock Mansion (Federation of Philippine American Chambers)
8/24	Lewis & Clark Law School Professionalism Program



Professional Liability Fund

Ira R. Zarov
Chief Executive Officer

Board of Directors
and Officers

Frederick C. Ruby
Salem
Chairperson

William G. Carter
Medford
Vice Chairperson

Tim Martinez
Salem
Public Member
Secretary-Treas.

Lisa Almasy Miller
Clackamas

Laura E. Rackner
Portland

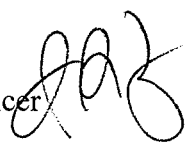
Valerie D. Fisher
Portland

Guy B. Greco
Newport

John A. Berge
Bend

Valerie D. Saiki
Salem
Public Member

August 23, 2011

To: OSB Board of Governors
From: Ira R. Zarov, Chief Executive Officer 
Re: May 31, 2011 Financial Statements

I have enclosed the PLF May 31, 2011 Financial Statements.

These statements show a Primary Program net income of about \$1.6 million for the first five months of 2011. There were excellent investment results for the first four months of the year. Unfortunately, declines in equity markets started during May and continue through today.

Although we continue to be concerned about the current volatility in the equity markets, the PLF has been well served by its investment policy, which emphasizes maintaining a diverse portfolio. The Investment Policy target for combined US equities and International Equities is 42%.

Claim expense as of May 31, 2011 was about \$540,000 under budget. Unfortunately, the most recent actuary report resulted in the addition of \$2.5 million dollars in claims expenses, which are not reflected in the May statement. While this is not good news, it is not unprecedented as swings of this magnitude, positive and negative, have happened in the past. The frequency of new claims slowed during the past three months but continues to be relatively high.

While the 2012 assessment has not yet been set, based on the current financial picture, we do not expect to request an increase.

**Oregon State Bar
Professional Liability Fund
Financial Statements
5/31/2011**

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4	Primary Program Operating Expenses
5	Excess Program Income Statement
6	Excess Program Operating Expenses
7	Combined Investment Schedule

**Oregon State Bar
Professional Liability Fund
Combined Primary and Excess Programs
Balance Sheet
5/31/2011**

ASSETS

	<u>THIS YEAR</u>	<u>LAST YEAR</u>
Cash	\$996,233.37	\$770,901.65
Investments at Fair Value	43,999,095.13	37,622,695.82
Assessment Installment Receivable	5,887,685.91	5,349,352.34
Due from Reinsurers	135,904.64	76,578.84
Other Current Assets	83,194.66	75,108.95
Net Fixed Assets	1,062,504.75	1,234,804.59
Claim Receivables	79,307.88	51,463.83
Other Long Term Assets	<u>10,000.00</u>	<u>10,780.00</u>
TOTAL ASSETS	<u>\$52,253,926.34</u>	<u>\$45,191,686.02</u>

LIABILITIES AND FUND EQUITY

	<u>THIS YEAR</u>	<u>LAST YEAR</u>
Liabilities:		
Accounts Payable and Other Current Liabilities	\$80,541.17	\$28,129.62
Due to Reinsurers	\$810,598.17	\$894,153.87
Liability for Compensated Absences	368,657.76	349,618.37
Liability for Indemnity	14,090,475.84	12,937,779.49
Liability for Claim Expense	12,079,973.35	10,524,509.96
Liability for Future ERC Claims	2,400,000.00	2,400,000.00
Liability for Suspense Files	1,400,000.00	1,300,000.00
Liability for Future Claims Administration (AOE)	2,300,000.00	2,200,000.00
Excess Ceding Commission Allocated for Rest of Year	418,150.73	438,023.94
Assessment and Installment Service Charge Allocated for Rest of Year	<u>14,438,878.42</u>	<u>13,134,741.08</u>
Total Liabilities	<u>\$48,387,275.44</u>	<u>\$44,206,956.33</u>
Fund Equity:		
Retained Earnings (Deficit) Beginning of the Year	\$2,349,430.48	\$1,720,386.49
Year to Date Net Income (Loss)	<u>1,517,220.42</u>	<u>(735,656.80)</u>
Total Fund Equity	<u>\$3,866,650.90</u>	<u>\$984,729.69</u>
TOTAL LIABILITIES AND FUND EQUITY	<u>\$52,253,926.34</u>	<u>\$45,191,686.02</u>

**Oregon State Bar
Professional Liability Fund
Primary Program
Income Statement
5 Months Ended 5/31/2011**

	YEAR TO DATE <u>ACTUAL</u>	YEAR TO DATE <u>BUDGET</u>	<u>VARIANCE</u>	YEAR TO DATE <u>LAST YEAR</u>	<u>ANNUAL BUDGET</u>
<u>REVENUE</u>					
Assessments	\$10,153,157.08	\$10,294,166.65	\$141,009.57	\$9,236,382.92	\$24,706,000.00
Installment Service Charge	160,327.50	147,916.65	(12,410.85)	145,575.00	355,000.00
Other Income	24,998.00	0.00	(24,998.00)	27,714.76	0.00
Investment Return	<u>1,536,797.19</u>	<u>921,605.85</u>	<u>(615,191.34)</u>	<u>(297,062.12)</u>	<u>2,211,854.00</u>
TOTAL REVENUE	<u>\$11,875,279.77</u>	<u>\$11,363,689.15</u>	<u>(\$511,590.62)</u>	<u>\$9,112,610.56</u>	<u>\$27,272,854.00</u>
<u>EXPENSE</u>					
Provision For Claims:					
New Claims at Average Cost	\$7,995,000.00			\$7,429,000.00	
General Expense	52,151.51			21,607.32	
Less Recoveries & Contributions	(30,077.45)			(2,747.10)	
Budget for Claims Expense		<u>\$8,553,158.35</u>			<u>\$20,527,580.00</u>
Total Provision For Claims	<u>\$8,017,074.06</u>	<u>\$8,553,158.35</u>	<u>\$536,084.29</u>	<u>\$7,447,860.22</u>	<u>\$20,527,580.00</u>
Expense from Operations:					
Administrative Department	\$913,128.32	\$972,912.85	\$59,784.53	\$820,015.05	\$2,334,991.00
Accounting Department	258,432.37	276,310.80	17,878.43	234,793.84	663,146.00
Loss Prevention Department	684,325.66	742,599.35	58,273.69	664,208.95	1,782,238.00
Claims Department	914,902.39	995,499.15	80,596.76	928,855.95	2,389,198.00
Allocated to Excess Program	<u>(562,543.25)</u>	<u>(562,543.25)</u>	<u>0.00</u>	<u>(508,933.70)</u>	<u>(1,350,104.00)</u>
Total Expense from Operations	<u>\$2,208,245.49</u>	<u>\$2,424,778.90</u>	<u>\$216,533.41</u>	<u>\$2,138,940.09</u>	<u>\$5,819,469.00</u>
Contingency (2% of Operating Exp)	\$0.00	\$59,746.25	\$59,746.25	\$9,441.70	\$143,391.00
Depreciation and Amortization	\$90,694.97	\$96,250.00	\$5,555.03	\$88,424.61	\$231,000.00
Allocated Depreciation	<u>(18,181.65)</u>	<u>(18,181.65)</u>	<u>0.00</u>	<u>(14,850.40)</u>	<u>(43,636.00)</u>
TOTAL EXPENSE	<u>\$10,297,832.87</u>	<u>\$11,115,751.85</u>	<u>\$817,918.98</u>	<u>\$9,669,816.22</u>	<u>\$26,677,804.00</u>
NET INCOME (LOSS)	<u>\$1,577,446.90</u>	<u>\$247,937.30</u>	<u>(\$1,329,509.60)</u>	<u>(\$557,205.66)</u>	<u>\$595,050.00</u>

**Oregon State Bar
Professional Liability Fund
Primary Program
Statement of Operating Expense
5 Months Ended 5/31/2011**

<u>EXPENSE:</u>	<u>CURRENT MONTH</u>	<u>YEAR TO DATE ACTUAL</u>	<u>YEAR TO DATE BUDGET</u>	<u>VARIANCE</u>	<u>YEAR TO DATE LAST YEAR</u>	<u>ANNUAL BUDGET</u>
Salaries	\$322,269.98	\$1,593,069.48	\$1,616,762.90	\$23,693.42	\$1,575,044.18	\$3,880,231.00
Benefits and Payroll Taxes	93,994.22	446,404.48	512,658.40	66,253.92	431,697.13	1,230,380.00
Investment Services	0.00	6,513.75	11,250.00	4,736.25	6,529.50	27,000.00
Legal Services	2,711.41	24,223.39	8,333.35	(15,890.04)	577.00	20,000.00
Financial Audit Services	5,200.00	20,200.00	10,416.65	(9,783.35)	23,800.00	25,000.00
Actuarial Services	0.00	6,457.50	7,916.65	1,459.15	7,091.20	19,000.00
Claims Audit Services	0.00	0.00	6,250.00	6,250.00	0.00	15,000.00
Claims MMSEA Services	850.00	4,900.00	5,000.00	100.00	4,850.00	12,000.00
Information Services	9,555.19	41,782.48	39,499.95	(2,282.53)	57,832.34	94,800.00
Document Scanning Services	3,399.13	7,504.47	41,666.65	34,162.18	59,582.74	100,000.00
Other Professional Services	4,152.58	31,935.31	19,687.50	(12,247.81)	15,416.40	47,250.00
Staff Travel	570.93	1,578.64	5,312.50	3,733.86	1,325.43	12,750.00
Board Travel	1,532.54	5,867.01	16,250.00	10,382.99	3,881.02	39,000.00
NABRICO	0.00	0.00	5,416.65	5,416.65	0.00	13,000.00
Training	1,044.22	1,729.52	5,416.65	3,687.13	3,640.15	13,000.00
Rent	40,908.58	203,636.03	204,542.90	906.87	200,711.59	490,903.00
Printing and Supplies	7,976.71	31,250.46	38,333.30	7,082.84	35,692.15	92,000.00
Postage and Delivery	1,927.97	13,300.64	15,541.65	2,241.01	14,449.95	37,300.00
Equipment Rent & Maintenance	2,072.11	11,796.38	17,916.70	6,120.32	13,585.81	43,000.00
Telephone	2,923.88	14,468.29	14,166.65	(301.64)	13,494.34	34,000.00
L P Programs (less Salary & Benefits)	34,226.81	141,556.13	201,333.50	59,777.37	137,311.33	483,200.00
Defense Panel Training	0.00	56.70	8,625.00	8,568.30	3,657.45	20,700.00
Bar Books Grant	25,000.00	125,000.00	125,000.00	0.00	0.00	300,000.00
Insurance	0.00	9,049.00	25,857.90	16,808.90	8,619.00	62,059.00
Library	2,481.28	9,036.97	10,833.35	1,796.38	9,775.77	26,000.00
Subscriptions, Memberships & Other	1,471.42	19,472.11	13,333.35	(6,138.76)	19,309.31	32,000.00
Allocated to Excess Program	(112,508.65)	(562,543.25)	(562,543.25)	0.00	(508,933.70)	(1,350,104.00)
TOTAL EXPENSE	<u>\$451,760.31</u>	<u>\$2,208,245.49</u>	<u>\$2,424,778.90</u>	<u>\$216,533.41</u>	<u>\$2,138,940.09</u>	<u>\$5,819,469.00</u>

**Oregon State Bar
Professional Liability Fund
Excess Program
Income Statement
5 Months Ended 5/31/2011**

	YEAR TO DATE <u>ACTUAL</u>	YEAR TO DATE <u>BUDGET</u>	<u>VARIANCE</u>	YEAR TO DATE <u>LAST YEAR</u>	<u>ANNUAL BUDGET</u>
<u>REVENUE</u>					
Ceding Commission	\$298,679.10	\$316,666.65	\$17,987.55	\$312,874.24	\$760,000.00
Prior Year Adj. (Net of Reins.)	1,041.01	0.00	(1,041.01)	1,270.95	0.00
Installment Service Charge	37,242.00	17,500.00	(19,742.00)	41,655.00	42,000.00
Investment Return	<u>222,663.25</u>	<u>102,400.40</u>	<u>(120,262.85)</u>	<u>32,787.77</u>	<u>245,761.00</u>
TOTAL REVENUE	<u>\$559,625.36</u>	<u>\$436,567.05</u>	<u>(\$123,058.31)</u>	<u>\$388,587.96</u>	<u>\$1,047,761.00</u>
<u>EXPENSE</u>					
Operating Expenses (See Page 6)	\$601,670.19	\$609,001.65	\$7,331.46	\$552,188.70	\$1,461,604.00
Allocated Depreciation	<u>\$18,181.65</u>	<u>\$18,181.65</u>	<u>\$0.00</u>	<u>\$14,850.40</u>	<u>\$43,636.00</u>
NET INCOME (LOSS)	<u>(\$60,226.48)</u>	<u>(\$190,616.25)</u>	<u>(\$130,389.77)</u>	<u>(\$178,451.14)</u>	<u>(\$457,479.00)</u>

**Oregon State Bar
Professional Liability Fund
Excess Program
Statement of Operating Expense
5 Months Ended 5/31/2011**

	<u>CURRENT</u> <u>MONTH</u>	<u>YEAR</u> <u>TO DATE</u> <u>ACTUAL</u>	<u>YEAR</u> <u>TO DATE</u> <u>BUDGET</u>	<u>VARIANCE</u>	<u>YEAR</u> <u>TO DATE</u> <u>LAST YEAR</u>	<u>ANNUAL</u> <u>BUDGET</u>
<u>EXPENSE:</u>						
Salaries	\$66,489.74	\$333,029.35	\$332,815.00	(\$214.35)	\$322,241.65	\$798,756.00
Benefits and Payroll Taxes	20,077.42	100,432.07	103,920.80	3,488.73	89,878.61	249,410.00
Investment Services	0.00	986.25	1,458.35	472.10	970.50	3,500.00
Office Expense	0.00	0.00	0.00	0.00	0.00	0.00
Allocation of Primary Overhead	32,411.49	162,057.45	162,057.50	0.05	132,490.00	388,938.00
insurance Placement & Travel	1,957.72	3,764.41	5,000.00	1,235.59	5,335.44	12,000.00
training	0.00	0.00	416.65	416.65	0.00	1,000.00
Printing and Mailing	0.00	1,145.66	2,083.35	937.69	772.50	5,000.00
Program Promotion	0.00	0.00	208.35	208.35	500.00	500.00
Other Professional Services	255.00	255.00	1,041.65	786.65	0.00	2,500.00
Software Development	<u>0.00</u>	<u>0.00</u>	<u>0.00</u>	<u>0.00</u>	<u>0.00</u>	<u>0.00</u>
TOTAL EXPENSE	<u>\$121,191.37</u>	<u>\$601,670.19</u>	<u>\$609,001.65</u>	<u>\$7,331.46</u>	<u>\$552,188.70</u>	<u>\$1,461,604.00</u>

**Oregon State Bar
Professional Liability Fund
Combined Investment Schedule
5 Months Ended 5/31/2011**

	CURRENT MONTH <u>THIS YEAR</u>	YEAR TO DATE <u>THIS YEAR</u>	CURRENT MONTH <u>LAST YEAR</u>	YEAR TO DATE <u>LAST YEAR</u>
Dividends and Interest:				
Short Term Bond Fund	\$13,344.19	\$120,963.04	\$10,147.78	\$80,956.95
Intermediate Term Bond Funds	22,519.06	108,522.11	17,067.70	88,245.33
Domestic Common Stock Funds	0.00	8,333.95	0.00	8,690.46
International Equity Fund	0.00	0.00	0.00	0.00
Real Estate	0.00	53,891.91	0.00	24,479.80
Hedge Fund of Funds	0.00	0.00	0.00	0.00
Real Return Strategy	<u>0.00</u>	<u>45,257.35</u>	<u>0.00</u>	<u>36,770.49</u>
Total Dividends and Interest	<u>\$35,863.25</u>	<u>\$336,968.36</u>	<u>\$27,215.48</u>	<u>\$239,143.03</u>
Gain (Loss) in Fair Value:				
Short Term Bond Fund	\$5,542.88	\$161,841.87	(\$57,663.28)	\$147,008.85
Intermediate Term Bond Funds	21,506.17	150,059.64	(19,828.09)	196,786.40
Domestic Common Stock Funds	(143,423.87)	420,191.69	(638,155.84)	(260,334.66)
International Equity Fund	(224,457.26)	314,997.19	(750,648.97)	(752,669.00)
Real Estate	0.00	47,236.06	0.00	(3,534.86)
Hedge Fund of Funds	(33,695.24)	61,321.19	(112,633.31)	52,530.87
Real Return Strategy	<u>(45,218.78)</u>	<u>266,844.44</u>	<u>(62,230.96)</u>	<u>116,795.02</u>
Total Gain (Loss) in Fair Value	<u>(\$419,746.10)</u>	<u>\$1,422,492.08</u>	<u>(\$1,641,160.45)</u>	<u>(\$503,417.38)</u>
TOTAL RETURN	<u>(\$383,882.85)</u>	<u>\$1,759,460.44</u>	<u>(\$1,613,944.97)</u>	<u>(\$264,274.35)</u>
Portions Allocated to Excess Program:				
Dividends and Interest	\$2,872.65	\$41,085.24	\$2,506.55	\$30,140.97
Gain (Loss) in Fair Value	<u>(33,621.66)</u>	<u>181,578.01</u>	<u>(151,150.88)</u>	<u>2,646.80</u>
TOTAL ALLOCATED TO EXCESS PROGRAM	<u>(\$30,749.01)</u>	<u>\$222,663.25</u>	<u>(\$148,644.33)</u>	<u>\$32,787.77</u>

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: August 26, 2011
From: Sylvia E. Stevens, Executive Director
Re: Proposed Amendment to the Statement of Professionalism

Action Recommended

Consider the request of the Oregon Bench/Bar Commission on Professionalism that the attached proposed amendment to the Statement of Professionalism be submitted to the House of Delegates for approval at the October 2011 meeting.

Background

The Commission proposes amending the Statement of Professionalism to include support for a diverse bench and bar. In 2010, Judge Richard Baldwin asked the Commission to consider adding language about the importance of diversity in the Statement. He suggested adding "I will work to build a diverse bench and bar."

The Commission appointed a subcommittee headed by Judge Angel Lopez to study the idea and recommend appropriate language. It was initially thought that development of the new language could be a project of the Convocation on Equality. Ultimately, however, the Commission agreed that the goal of addressing diversity in the Statement could be achieved by adding a new, additional, bullet point, "I will support a diverse bench and bar." Judge Baldwin concurred. The Commission voted unanimously to recommend the addition of the new language to the HOD and, if it is adopted, to announce the amendment at the Convocation on Equality in November.

The Statement of Professionalism was originally approved by the membership and the Court in 1990-91. It was revised in 2006 to make the statement simpler and more inspirational. The Commission uses it and promotes its use in teaching professionalism.

OREGON STATE BAR
STATEMENT OF PROFESSIONALISM

Approved by the OSB House of Delegates September 16, 2006

Adopted by the Oregon Supreme Court November 16, 2006

As lawyers, we belong to a profession that serves our clients and the public good. As officers of the court, we aspire to a professional standard of conduct that goes beyond merely complying with the ethical rules. Professionalism is the courage to care about and act for the benefit of our clients, our peers, our careers, and the public good. Because we are committed to professionalism, we will conduct ourselves in a way consistent with the following principles in dealing with our clients, opposing parties, opposing counsel, the courts, and the public.

- I will promote the integrity of the profession and the legal system.
- I will work to ensure access to justice for all segments of society.
- I will support a diverse bench and bar.
- I will avoid all forms of unlawful or unethical discrimination.
- I will protect and improve the image of the legal profession in the eyes of the public.
- I will promote respect for the courts.
- I will support the education of the public about the legal system.
- I will work to achieve my client's goals, while at the same time maintain my professional ability to give independent legal advice to my client.
- I will always advise my clients of the costs and potential benefits or risks of any considered legal position or course of action.
- I will communicate fully and openly with my client, and use written fee agreements with my clients.
- I will not employ tactics that are intended to delay, harass, or drain the financial resources of any party.
- I will always be prepared for any proceeding in which I am representing my client.
- I will be courteous and respectful to my clients, to adverse litigants and adverse counsel, and to the court.
- I will only pursue positions and litigation that have merit.
- I will explore all legitimate methods and opportunities to resolve disputes at every stage in my representation of my client.
- I will support pro bono activities.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: August 26, 2011
From: Sylvia E. Stevens, Executive Director
Re: Proposed Formal Ethics Opinions

Action Recommended

Consider the recommendation of the Legal Ethics Committee that the attached be issued as Formal Ethics Opinions. The LEC believes both opinions will provide helpful guidance to a wide range of practitioners.

Background

Disclosure of Metadata

The proposed opinion addresses the duties of lawyers who send and receive documents containing metadata. It is the result of many hours of discussion and debate by the Legal Ethics Committee over the course of several months and has undergone numerous revisions before being presented to the BOG.

As used in the opinion, “metadata” refers to the embedded information in electronic documents. It may include the details of who drafted the document, when it was created and revised, what changes were made, and comments by drafters and revisers. For the most part, metadata is routine and insignificant information. At times, however, it can be very helpful to an adverse party (such as, for example, when the drafter’s client’s bottom-line settlement position is referenced).

The opinion holds that a lawyer’s duty of competence requires familiarity with the concept of metadata and the exercise of reasonable care to protect the inadvertent disclosure of sensitive client information contained in metadata. Reasonable care may consist of “scrubbing” the document with special software designed for that purpose, or transmitting it in a format that prevents the viewing of metadata (i.e., as a PDF).

The part of the opinion that gave the committee the most trouble was establishing the duties of a lawyer who receives a document containing metadata. Views were divergent during early discussions. Ultimately, however, the committee was in unanimous agreement with the approach taken in the opinion. Relying on RPC 4.4(b), the opinion holds that if the receiving lawyer knows or reasonably should know that the document containing metadata was sent inadvertently, the receiving lawyer must promptly notify the sender. It is then the responsibility of the sender to determine what steps should be taken to retrieve the document or limit or prohibit its use.

The opinion ends with a warning that the receiving lawyer should be cautious about using specially designed software to thwart the sender’s reasonable efforts to remove or screen

metadata from the receiving lawyer. Doing so is analogized to breaking in to another lawyer's files, possibly constituting dishonesty in contravention of RPC 8.4(a)(3).

Disclosures on Withdrawal

This opinion addresses the permissible disclosures a lawyer may make when withdrawing from a representation because of difficulties with the client.

The opinion emphasizes the broad duty of confidentiality and the obligation not to disclose information that could prejudice a client. The opinion also makes it clear that the situations presented do not constitute "a controversy between the lawyer and the client" which would justify disclosure under RPC 1.6(b)(4).

The opinion concludes with a discussion of what a lawyer may do in response to an inquiry from the court and, citing comment from ABA Model Rule 1.6 and THE ETHICAL OREGON LAWYER, suggests that "a statement that professional considerations require termination" should be sufficient. However, if the court orders disclosure, the lawyer may do so to the extent reasonably necessary to comply with the court's order.

FORMAL OPINION NO. 2011-XXX

Competency: Disclosure of Metadata

Facts:

Lawyer A emails to Lawyer B a draft of an Agreement they are negotiating on behalf of their respective clients. Lawyer B is able to use a standard word processing feature to reveal the changes made to an earlier draft (“metadata”). The changes reveal that Lawyer A had initially placed his client’s “bottom line” negotiating points in the draft, and then subsequently deleted them.

Same facts as above except that shortly after opening the document and displaying the changes, Lawyer B receives an urgent request from Lawyer A asking that the document be deleted without reading it because Lawyer A had mistakenly not removed the metadata.

Same facts as the first scenario except that Lawyer B has software designed to thwart the metadata removal tools of common word processing software and wishes to use it to see if there is any helpful metadata in the Agreement.

Questions:

1. Does Lawyer A have a duty to remove or protect metadata when transmitting documents electronically?
2. May Lawyer B use the metadata information that is readily accessible with standard word processing software?
3. Must Lawyer B inform Lawyer A that the document contains readily accessible metadata?
4. Must Lawyer B acquiesce to Lawyer A’s request to delete the document without reading it?
5. May Lawyer A use special software to reveal the metadata in the document?

Conclusions:

1. See discussion.
2. Yes, qualified.
3. No.
4. No, qualified.
5. No.

Discussion:

Metadata generally means “data about data.” As used here, metadata means the embedded data in electronic files that may include information such as who authored a document, when it was created, what software was used, any comments embedded within the content, and even a record of changes made to the document.¹

Lawyer’s Duty in Transmitting Metadata

Oregon RPC 1.1 requires a lawyer to provide competent representation to a client, which includes possessing the “legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.” Oregon RPC 1.6(a) requires a lawyer to “not reveal information relating to the representation of a client” except where the client has expressly or impliedly authorized the disclosure.² Information relating to the representation of a client may include metadata in a document. Taken together, the two rules indicate that a lawyer is responsible for acting competently to safeguard information relating to the representation of a client contained in communications with others. Competency in relation to metadata requires a lawyer utilizing electronic media for communication to maintain at least a basic understanding of the technology and the risks of revealing metadata or to obtain and utilize adequate technology support.³

A lawyers must use reasonable care to avoid the disclosure of confidential client information, particularly where the information could be detrimental to a client.⁴ With respect to metadata in documents, reasonable care includes taking steps to prevent the inadvertent disclosure of metadata, to limit the nature and scope of the metadata revealed, and to control to whom the document is sent.⁵ What constitutes reasonable care will change as technology evolves.

¹ Joshua J. Poje, *Metadata Ethics Opinions Around the U.S.*, AMERICAN BAR ASSOCIATION, May 3, 2010, http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts-fyis/metadatchart.html.

² There are several exceptions to the duty of confidentiality in RPC 1.6, but none are relevant here.

³ The duty of competence with regard to metadata also requires a lawyer to understand the implications of metadata in regard to documentary evidence. A discussion of whether removal of metadata constitutes illegal tampering is beyond the scope of this opinion, but RPC 3.4(a) prohibits a lawyer from assisting a client to “alter, destroy or conceal a document or other material having potential evidentiary value.”

⁴ Jurisdictions that have addressed this issue are unanimous in holding lawyers to a duty of “reasonable care.” See e.g. State Bar of Arizona Ethics Opinion 07-03. By contrast, ABA Formal Opinion 06-442, does not address whether the sending lawyer has any duty, but suggests various methods for eliminating metadata before sending a document. *Id.* But see ABA Model Rule 1.6, comment [17], which provides that “[w]hen transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients.”⁵ Such steps may include utilizing available methods of transforming the document into a non-malleable form, such as converting it to a PDF or “scrubbing” the metadata from the document prior to electronic transmittal.

⁵ Such steps may include utilizing available methods of transforming the document into a non-malleable form, such as converting it to a PDF or “scrubbing” the metadata from the document prior to electronic transmittal.

The duty to use reasonable care so as not to reveal confidential information through metadata may be best illustrated by way of analogy to paper documents. For instance, a lawyer may send a draft of a document to opposing counsel through regular mail and inadvertently include a sheet of notes torn from a yellow legal pad identifying the revisions to the document. Another lawyer may print out a draft of the document marked up with the same changes as described on the yellow notepad instead of a “clean” copy and mail it to opposing counsel. In both situations, the lawyer has a duty to exercise reasonable care not to include notes about the revisions (the metadata) if it could prejudice the lawyer’s client in the matter.

Lawyer’s Use of Received Metadata

If a lawyer who receives a document knows or should have known it was inadvertently sent, the lawyer must notify the sender promptly. Oregon RPC 4.4(b). Using the examples above, in the first instance the receiving lawyer may reasonably conclude that the yellow pad notes were inadvertently sent, as it is not common practice to include such notes with document drafts. In the second instance, however, it is not so clear that the “redline” draft was inadvertently sent, as it is not uncommon for lawyers to share marked-up drafts. Given the sending lawyer’s duty to exercise reasonable care in regards to metadata, the receiving lawyer could reasonably conclude that the metadata was intentionally left in.⁶ In that situation, there is no duty under RPC 4.4(b) to notify the sender of the presence of metadata.

If, however, the receiving lawyer knows or reasonably should know that metadata was inadvertently included in the document, RPC 4.4(b) requires only notice to the sender; it does not require the receiving lawyer to return the document unread or to comply with a request by the sender to return the document.⁷ OSB Formal Op. No. 2005-150. Comment [3] to ABA Model Rule 4.4(b) notes that a lawyer may voluntarily choose to return a document unread and that such a decision is a matter of professional judgment reserved to the lawyer. At the same time, the Comment directs the lawyer to Model Rules 1.2 and 1.4. Model Rule 1.2(a) is identical to Oregon RPC 1.2(a) and requires the lawyer to “abide by a client’s decisions concerning the objectives of the representation” and to “consult with the client as to the means by which the objectives are pursued.”⁸ Oregon RPC 1.4(a)(2), like its counterpart Model Rule, requires a lawyer to “reasonably consult about the means by which the client’s objectives are to be accomplished.” Thus, before deciding what to do with an inadvertently sent document, the receiving lawyer should consult with the client about the risks of returning the document versus the risks of retaining and reading the document and its metadata.

⁶ See *Goldsborough v. Eagle Crest Partners*, 314 Or 336 (1992) (In the absence of evidence to the contrary, an inference may be drawn that a lawyer who voluntarily turns over privileged material during discovery acts within the scope of the lawyer’s authority from the client and with the client’s consent.).

⁷ Comment [2] to ABA Model Rule 4.4(b) explains that the rule “requires the lawyer to promptly notify the sender in order to permit that person to take protective measures.” It further notes that “[w]hether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived.”

⁸ Although not required by the Oregon RPCs, parties could agree, at the beginning of a transaction, not to review metadata as a condition of conducting negotiations.

Regardless of the reasonable efforts undertaken by the sending lawyer to remove or screen metadata from the receiving lawyer, it may be possible for the receiving lawyer to thwart the sender's efforts through software designed for that purpose. It is not clear whether uncovering metadata in that manner would trigger an obligation under Oregon RPC 4.4(b) to notify the sender that metadata had been inadvertently sent. Searching for metadata using special software when it is apparent that the sender has made reasonable efforts to remove the metadata may be analogous to surreptitiously entering the other lawyer's office to obtain client information and may constitute "conduct involving dishonesty, fraud, deceit or misrepresentation" in violation of RPC 8.4(a)(3).

Approved by Board of Governors, August 2011.

PROPOSED FOR BOG REVIEW

FORMAL OPINION NO. 2011-XXX

**Withdrawal from Litigation:
Client Confidences**

Facts:

During litigation, Lawyer and Client have a dispute concerning the representation. Lawyer and Client cannot resolve the dispute and Lawyer files a motion to withdraw in which Lawyer wishes to state one of the following:

- My client won't listen to my advice;
- My client won't cooperate with me;
- My client hasn't paid my bills in a timely fashion; or
- My client has been untimely and uncooperative in making discovery responses during the course of this matter.

Question:

May Lawyer chose unilaterally to provide the court any of the client information noted above in the motion to withdraw?

Conclusion:

No, qualified.

Discussion:

Oregon RPC 1.0(f) provides:

Information relating to the representation of a client denotes both information protected by the attorney-client privilege under applicable law, and other information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

Oregon RPC 1.6(a) provides:

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is

impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

Oregon RPC 1.6(b) provides, in part:

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

* * *

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(5) to comply with other law, court order, or as permitted by these Rules;

* * *

Lawyer's obligation not to reveal information relating to the representation of a client continues even when moving to withdraw from representing Client. *See* Oregon RPC 1.6(a). To the extent the withdrawal is based on "information relating to the representation of a client," then Lawyer may not reveal the basis for the withdrawal to the court unless disclosure is permitted by one of the narrow exceptions in RPC 1.6(b).¹

Depending upon the specific factual circumstances involved, the four statements noted above seem likely to constitute information relating to the representation of a client because if the information "would be embarrassing or would be likely to be detrimental to the client." *See also* THE ETHICAL OREGON LAWYER § 4.3 (OSB CLE 2006) (providing that an event "such as the nonpayment of fees, may have confidential aspects to it, and therefore may constitute information protected by Oregon RPC 1.6").²

For example, a client's inability and/or refusal to pay may prejudice the client's ability to resolve the dispute with an opposing party; likewise, a party's unwillingness to cooperate with discovery may lead the plaintiff to file additional pleadings or seek sanctions. Consequently,

¹ This opinion does not address the situation that would occur where a client terminates a lawyer's services. Pursuant to Oregon RPC 1.16(a)(3), a lawyer is required to withdraw from the representation of a client if "the lawyer is discharged." Under those circumstances, it would be appropriate to inform the court that the lawyer's motion is being brought pursuant to Oregon RPC 1.16(a)(3).

² This opinion assumes that the dispute between Lawyer and Client does not concern whether Lawyer should take action in violation of the RPCs. For an analysis of such a situation, see OSB Formal Ethics Opinion 2005-34, which notes that if a client will not rectify perjury, "the lawyer's only option is to withdraw, or seek leave to withdraw, from the matter without disclosing the client's wrongdoing." *See also In re A.*, 276 Or 225, 554 P2d 479 (1976).

Lawyer cannot unilaterally and voluntarily decide to make this information public unless an exception to Oregon RPC 1.6 can be found.

Neither a disagreement between Lawyer and Client about how the client's matter should be handled nor the client's failure to pay fees when due constitute a "controversy between the lawyer and the client" within the meaning of RPC 1.6(b)(4). While there may be others, the two most obvious examples of such a controversy are fee disputes and legal malpractice claims. A client's dissatisfaction with the lawyer's performance may ultimately ripen into a controversy, but at the point of withdrawal, such a controversy is inchoate at best. In a fee dispute or malpractice claim fairness dictates that the lawyer be on equal footing with the client regarding the facts. Such is not the case under the facts presented here.

Suppose, however, that the court inquires regarding the basis for the withdrawal or orders disclosure of such information.³ Comment [3] to ABA Model Rule 1.16 offers guidance and provides, in part:

The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.⁴

If the court orders disclosure, Lawyer may reveal information relating to the representation of Client under Oregon RPC 1.6(b)(5) but may only do so to the extent "reasonably necessary" to comply with the court order. Lawyer should therefore take steps to limit unnecessary disclosure of confidential information by, for example, offering to submit such information under seal (or outside the presence of the opposing party) so as to avoid prejudice or injury to the client.⁵

Approved by Board of Governors, August 2011

³ See, e.g., Oregon RPC 1.16(c), which provides that a lawyer wishing to withdraw must "comply with applicable law requiring notice to or permission of a tribunal when terminating a representation." See also Uniform Trial Court Rule 3.140 (discussing resignation of attorneys); USDC LR 83-11 (discussing withdrawal from a case).

⁴ Similarly, the OREGON ETHICAL LAWYER provides that "[i]n most instances, it should be sufficient to state on the record or in public pleadings that the situation is one in which withdrawal is appropriate and to offer to submit additional information under seal if the court so desires." THE OREGON ETHICAL LAWYER § 4.3 (OSB CLE 2006).

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: August 26, 2011
Memo Date: August 11, 2011
From: Tamara Kessler, Oregon New Lawyers Division Chair
Re: ONLD Report

The ONLD Executive Committee last met in Hood River on August 6 in conjunction with the OLIO Orientation. This was the second year the ONLD coordinated their meeting with OLIO and they were excited to sponsor a social event with the OLIO students. Participating in OLIO has allowed the ONLD to build a strong relationship with the AAP and the Executive Committee looks forward to working with Mariann Hyland.

This summer ONLD continued their monthly after-work socials by hosting an informal golf event at McMenamins Edgefield on July 27, and a gathering at 900 Wall in Bend on August 10th.

Lunch CLE programs have been well attended this year with more than 50 attendees at the Ethics program in June and the Jury Selection program in July. The CLE subcommittee is gearing up for the fall lunch programs in Multnomah County and the ONLD's full-day annual program 'Super Saturday' held at the OSB center in October.

Again this year the ONLD is sponsoring an information booth at the Lane County Fair. Utilizing more than 30 volunteers, the ONLD will distribute Legal Links brochures, Lawyer Referral Business Cards, Bill of Rights posters, U.S. Constitution books, and several other law-related give-away items during the 5 day event.

The ONLD's Practical Skills Subcommittee had a busy summer organizing the 38 Practical Skills through Public Service volunteers into their placement agencies. Training sessions were held and a social was sponsored by Stoel Rives for all participants as well. The ONLD would like to thank the Board for their support of this program and recognize Steve Piucci and Steve Larson for attending the social on July 12.

The ONLD sent two members to the ABA Young Lawyers Division Annual Meeting during which time the ONLD was honored with two awards for the Practical Skills through Public Service project: Award of Achievement for Service to the Bar in its bar-size category and Most Outstanding Service the Bar Award among all bar size categories.

2011 ONLD Master Calendar

Last updated July 22, 2011

Date	Time	Event	Location
August 17-21	All Day	Lane County Fair	Lane County Fairgrounds
August 18	Noon	IP CLE	Multnomah Co. Courthouse
August 18	5:00 p.m.	Bend After-work social	900 Wall, Bend
August 25-26	All Day	Legal Aid Training for PSPS	OSB, Tigard
August 26-27	9:00 a.m.	BOG Board Meeting	Red Lion, Pendleton
August 31	5:00 p.m.	After-work social	TBD, Portland
September 15	Noon	IP law CLE	Multnomah Co. Courthouse
September 16	5:30 p.m.	CLE Program & Social	TBD, Medford
September 17	9:00 a.m.	Executive Committee Meeting	Rogue Regency, Medford
September 23	9:00 a.m.	BOG Board & Committee Meetings	OSB, Tigard
September 28	5:00 p.m.	After-work social	TBD, Portland
October 6	1:30 p.m.	Swearing In Ceremony & Reception	Willamette University, Salem
October 13-15	All Day	ABA Fall Conference	Seattle, WA
October 18	4:00 p.m.	Prof. CLE and social	TBD, Eugene
October 20	Noon	Family law CLE	Multnomah Co. Courthouse
October 22	9:00 a.m.	Executive Committee Meeting	OSB, Tigard
October 22	6:00 p.m.	BOWLIO	Pro 300 Lanes, SE Portland
October 25	2:00 p.m.	Pro Bono Fair	World Trade Center, Portland
October 26	5:00 p.m.	After-work social	TBD, Portland
October 28	TBD	HOD Annual Meeting	OSB, Tigard
October 29	All Day	Super Saturday	OSB, Tigard
November 4	5:30 p.m.	Annual Meeting	Hotel Monaco, Portland
November 9	TBD	OSB Awards	Governor Hotel, Portland
November 17	Noon	Products liability CLE	Multnomah Co. Courthouse
November 17-19	All Day	BOG Retreat	The Allison, Newberg
December 15	Noon	Professionalism	Multnomah Co. Courthouse

Bold indicates an update since the last version

UPL TASK FORCE REPORT
August 19, 2011

Submitted by the UPL Task Force: Marcia Buckley, Frederic Cann, David Elkanich, Hon. Ted E. Grove, Shea Gumusoglu, Hon. Terry Ann Leggert, Joan-Marie Michelsen, Bruce Rubin, John Sorlie, Simon Whang, and Theresa Wright.

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 9.164.¹ 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.

¹ 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, whom 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 opinions²

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 amendment to OSB Bylaw 20.705 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,

² 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 are proposed amendments to OSB Bylaws 20.700—20.702 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.³ 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;

³The 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 information about UPL on the website; and
7. Include materials in Spanish and English regarding Notarios⁴ 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.

⁴ 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

Subsection 20.705 Prevention and Education

The unlawful practice of law statutes cannot be adequately enforced by investigation and prosecution alone. Prevention of unlawful practice of law is also a focus of committee activity. When the Committee becomes aware of a person or entity engaged in activities likely to involve the unlawful practice of law based on the Committee's experience, the Committee may send a cautionary letter to the person or entity regarding the limits of the law on the provision of legal services.

The committee may also, in its discretion, write informal advisory opinions on questions relating to what activities may constitute the practice of law. Such opinions are not binding, but are intended only to provide general guidance to lawyers and members of the public about activities that may be of concern to or investigated by the committee. All such opinions must be approved by a majority vote and submitted to the Board of Governors for final approval prior to publication.

Subsection 20.700 Investigation

On receiving a complaint of unlawful practice of law meeting the requirements of Section 20.2 of the Bar's Bylaws, the committee chairperson will assign the complaint a case number and assign it to a committee member for investigation. The committee member will review the documentation accompanying the complaint and will contact the complainant, affected parties and witnesses. The committee member may not employ any methods in his or her investigation that do not comply with the Rules of Professional Conduct. Within 60 days after receiving a complaint of unlawful practice of law, the investigator will submit a written report to the Committee with an analysis of the relevant facts and law and a recommendation for disposition findings in writing. The chairperson of the Committee may grant extensions of time to submit a report of investigation as the chairperson deems reasonable. ~~The investigator's final report must contain proposed findings and a recommended disposition.~~

~~Subsection 20.701 Findings~~

~~The accused did not commit the unlawful practice of law, the accused committed the unlawful practice or the Committee was unable to obtain sufficient information to make an informed recommendation without further assistance from a person who is not a member of the Committee or from an agency other than the Bar.~~

Subsection ~~20.702~~ 20.701 Dispositions

Actions to be taken at the discretion of the committee:

(a) Dismissal without prejudice.

This disposition is appropriate when the accused ~~is found~~ did not ~~to have~~ committed the unlawful practice of law. ~~Actions to be taken at the discretion of the committee:~~

(b) Notice Letter.

This disposition is appropriate when insufficient facts exist to establish that the accused has committed the unlawful practice of law, but the accused's activities are such that the Committee believes it appropriate to notify the accused of the provisions of ORS 9.160

(c) ~~Admonition letter.~~

~~This disposition is appropriate when the accused is found to have committed the unlawful practice of law, but the practice is neither ongoing nor likely to recur.~~

Cautionary Letter.

This disposition is appropriate when the Committee asserts that the accused is engaged in activities involving the unlawful practice of law, but either 1) the practice is neither ongoing nor likely to recur, or 2) the Committee determines that the matter is inappropriate for prosecution.

(d) Resolution by agreement.

This disposition is appropriate when the Committee asserts that the accused ~~is found to have~~ committed the unlawful practice of law, but is willing to enter into an agreement to discontinue the unlawful practice of law. The agreement is subject to and does not become effective until approved by the Board of Governors.

(e) Referral to Board of Governors for prosecution under ORS 9.166.

This disposition is appropriate when the Committee asserts that the accused ~~is found to have~~ committed the unlawful practice of law, the practice is ongoing or likely to recur and the accused is unwilling to enter an agreement to discontinue the unlawful practice of law; or, for any other reason, the Committee concludes that prosecution under ORS 9.166 is warranted.

(f) Appointment of Outside Investigator or Referral to Other Agency.

This disposition is appropriate when the Committee is unable to obtain sufficient information to make an informed recommendation ~~and or when the Committee otherwise~~ elects to ~~continue with the investigation; refer the matter to another investigator or agency.~~

(g) Referral to Bar Counsel

When a complaint of unlawful practice of law involves an accused against whom the Board has already authorized prosecution, the Committee may refer the matter directly to bar counsel without obtaining prior authorization from the Board. Bar counsel may ask the Committee to conduct an investigation into the new complaint and has discretion to determine whether to include the facts alleged in the new complaint in the prosecution against the accused.

Subsection ~~20.703~~ 20.702 Actions of Unlawful Practice of Law Committee

The Committee will consider reports of investigations at its first meeting after submission of a report. On a vote of a majority of members, a quorum being present, the Committee must: Adopt the report as written or modify the report or continue the matter for further investigation and revisions to the report. The committee chairperson must document in writing the Committee's final findings and disposition of each complaint. The chairperson or his or her delegate, must, in writing, inform the complainant and the accused of dismissals without prejudice. ~~An admonition~~ **A cautionary** letter authorized by the Committee gives notice to the accused that the Committee ~~found has~~ evidence ~~of a violation of ORS 9.160 that the accused is engaged in activities that the Committee maintains involve the unlawful practice of law. The cautionary letter may provide information on the limits of the law and may demand that the accused cease activities that the Committee asserts constitute the unlawful practice of law. The letter further advises an accused that the accused may, in writing, refuse to accept the admonition or request the Committee to reconsider its conclusion that ORS 9.160 was violated. If an accused rejects an admonition or requests reconsideration, the Committee may dismiss the complaint without prejudice, issue a notice letter, issue a revised admonition letter acceptable to the accused or refer the complaint to the Board for prosecution under ORS 9.166.~~ On a vote of a majority of members of the Committee, a quorum being present, a complaint of unlawful practice of law must be referred to the Board for authorization to file an action under ORS 9.166.

EXECUTIVE SUMMARY BUDGET

*Report to the Board of Governors
August 26, 2011*

PURPOSE OF THIS REPORT

The purpose of the Executive Summary budget is a “first look” at the 2012 budget and identify and evaluate the fiscal implications in developing next year’s budget and subsequent years’ forecasts and to consider:

- new or revised policy approved by the board;
- planning or recommendations of the various board committees;
- new programs or modifications to current programming;
- the projected year and amount of the next member fee increase;
- the impact of financial decisions today on future budgets.

This 2012 budget summary and forecasts are developed on anticipated trends, percentage increases, and various assumptions with the 2011 budget as the base, and no amount is interpreted to be a final amount for 2012.

The Budget & Finance Committee reviewed the Executive Summary Budget at its July 29 meeting and its recommendations are incorporated into this version of the report.

C ONTENTS

1. Budget Development Calendar
2. Summary of 2010 and 2011 Budgets
3. Assumptions in Developing 2012 Budget
4. Program, Policy, and Operational Considerations for 2012
5. Fanno Creek Place
6. Summary of the 2012 Budget Projection
7. Issues to Address in the 2012 Budget Summary and Five-year Forecast
8. Reserves and Other Contingency Funds
9. Recommendations of the Budget & Finance Committee to the Board of Governors
Exhibit A – 2012 Budget and Five-Year Forecast
Exhibit B – 2012 Salaries, Taxes & Benefits at Various Salary Pool Options

1 BUDGET DEVELOPMENT CALENDAR

Date	Process
July 29	Budget & Finance Committee reviewed the 2012 Executive Summary Budget
August 25-26	The Board of Governors reviews the Budget & Finance Committee's report of the 2012 Executive Summary Budget
Mid August to mid September	Bar staff prepare 2012 line by line program/department budgets
September 23	Budget & Finance Committee reviews the 2012 Budget Report. Decision on Member Fee increase.
Mid September to late October	Bar staff refine 2012 budget
October 28	House of Delegates meeting. Action on Fee resolution (if increase approved by the BOG).
November 17	Budget & Finance Committee review revised 2012 Budget Report
November 17-18	Board of Governors reviews and approves 2012 Budget

2 SUMMARY OF 2010 AND 2011 BUDGETS

Before we look at 2012, here is a summary of the last two budget years and any significant additions, deletions, or changes from the previous year.

2010 Financial Report
<ul style="list-style-type: none"> ▶ Net Operating Revenue was \$620,830 – almost 4-1/2 times higher than the budget with the biggest variance in non-personnel costs being 15% under budget. ▶ The Fanno Creek Place Net Expense was \$687,386 - about \$13,000 under budget. ▶ The bar's investment portfolio for its reserves was transferred to two investment management firms and at year end were \$3.950 million.
Additions, Deletions, Changes
<ol style="list-style-type: none"> 1. <i>The bar exam application fee was increased by \$100.</i> 2. <i>The service fee to sections was increased by \$1.25 to \$6.50 (the first increase in three years).</i> 3. <i>The ethics school was added - \$27,000</i> 4. <i>The number of participants in the Leadership College was reduced; thus decreasing this program budget.</i> 5. <i>The PERS Contingency was increased by \$192,000.</i>

2011 Budget

- ▶ The operation budget is a \$337,984 net revenue.
- ▶ Non-personnel costs decrease 1% partly due to the lack of printing of Legal Publications and general continued movement to electronic distribution of information.
- ▶ The Fanno Creek Place net expense is \$764,540.

Additions, Deletions, Changes

1. *Revenue included a \$600,000 grant from the PLF to be received over three years with \$300,000 forthcoming in 2011.*
2. *Reserves totaling \$400,000 are allocated to revenue to offset the loss of revenue from BarBooks available to all members online at no cost beginning January 1, 2011.*
3. *The Leadership College is eliminated*
4. *Funding of \$18,000 approved for the Mandatory Mentoring (now New Lawyer Mentoring Training) program.*
5. *The white pages are not included in the traditional Membership Directory which is replaced by a Resource Directory.*
6. *The membership fee statement is to be distributed by email (first such method of distribution was November 2010).*
7. *Funding approved for Senior Lawyers and Remote Communications Task Forces.*
8. *The costs of the Ethics School were incorporated into the Disciplinary Council budget.*

3 ASSUMPTIONS IN DEVELOPING THE 2012 BUDGET

The 2012 budget and the forecasts for bar operations are prepared with these assumptions:

■ Member Fee Revenue

There is no increase in the active member fee in the 2012 budget.

A 2.5% increase in Membership Fee revenue is projected due to the increase the number of members. This is the same projected growth as last year and adds \$170,000 in revenue.

The forecast assumes a \$50.00 active member fee increase in 2013.

■ Program Fee Revenue

There are a number of likely changes to the 2012 Program Fee revenue. These are included in this draft of the 2012 budget.

- ... The 2012 budget anticipates a swap of years in the allocation of \$400,000 from three reserves. The mid-year projection for 2011 suggests net revenue will be large enough so the reserve dollars are not needed in 2011.

- The \$400,000 then is allocated to the 2012 revenue budget.
- ... The grant from the PLF for BarBooks declines by \$100,000.
 - ... Sales of print legal publications are less than 2011 sales, but the number is an unsubstantiated amount for 2012 and is expected to continue to decline over time.
 - ... CLE Seminars revenue is dropped by 5% from the 2011 budget as that revenue has been falling below budget the past few years.
 - ... There is a 10% reduction in Lawyer Referral revenue caused by some participants not renewing due to the new funding plan.
 - ... The other program fee activities increase 2% a year as programs like Admissions and MCLE consistently have generated higher revenue.
 - ... A new source of revenue included is \$60,000 which is the \$100.00 fee from 600 members who have completed the New Lawyers Mentoring Training program.

■ Investment Income

Investment income is projected to be about the same as 2011 based on the Federal Reserve’s statement in early August that rates will remain at the current levels through mid 2013. The returns (interest and dividends) on the funds managed by the investment managers also are projected to be similar to 2011.

■ Salaries, Taxes & Benefits

The salary pool in this version of the 2012 budget is 3%. This pool is the recommendation of the bar Executive Director and the PLF CEO.

- The salary pool has been: 2011 – 3%; 2010 – 3%; 2009 - 3% (although a smaller rate for exempt and higher rate for non-exempt employees); 2008 - 4%; 2007 - 5%.

At its July 25 meeting, the Budget & Finance Committee instructed the bar’s CFO to prepare a schedule of salaries, taxes & benefits with pool rates at 3%, 2%, 1%, and no increase. See Exhibit B for the detailed schedule.

- A 1% change in the pool equals \$75,000 in salaries, taxes, and benefits.
- No increase in the salary pool in 2012 indicates a cost reduction in this budget summary by almost \$225,000.

The biggest cost impact on the 2012 budget is the increased rate in the employer’s share of PERS. In the last four cycles, the employer rate has jumped back and forth considerably – see the chart below.

Beginning			64% of OSB salaries are at the Tier 1&2 rate. That % declines consistently with a change in personnel
July 1 /Rate	Tier 1&2	OPSRP	
2005	12.30%	8.04%	
2007	4.33%	5.82%	
2009	2.06%	2.84%	
2011	9.55%	8.05%	

■ **Direct Program and General & Administrative Expenses**

For the sake of this summary budget, these costs vary between no change to a 1-1/2% increase. These costs have declined the past two years, but whether that continues into 2012 will not be known until the line item budgets are prepared.

... The only new added cost is \$18,000 for funding the next economic survey.

4 **PROGRAM, POLICY, AND OPERATIONAL CONSIDERATIONS FOR 2012**

The items in this section are a continuation of funding from 2011, or changes to the 2011 budget.

The BOG should provide direction to staff whether all items should transfer to the 2012 budget.

◆ **Carryover Activities from Prior Budgets**

These items have been in the budget in recent years, some for several years.

1. *Grant to Campaign for Equal Justice - \$45,000*

The first commitment of \$50,000 was made in 2001. For 2007 through 2011 the grant was \$45,000.

2. *Grant to Classroom Law Project - \$20,000*

The first commitment of \$20,000 was made in 1999, and has been that amount every year except 2006 when the grant was reduced to \$10,000.

3. *Council on Court Procedures - \$4,000*

The bar has committed \$4,000 per year since 1994.

4. *Fastcase Online Legal Research Library - \$99,000*

The bar's three-year contract with Fastcase ends in September 2012. The contract can renew on an annual basis unless it is renegotiated. An amount is included in the 2012 budget for a research library for members, but this inclusion makes no decision on which library is offered by the bar.

5. *Senior Lawyer Task Force – Placeholder amount of \$10,000*

The 2011 budget includes funding for this task force with a placeholder amount of \$10,000. To date, no funds have been expended.

6. *Remote Communications Task Force – Placeholder amount of \$10,000*

The 2011 budget includes funding for this task force with a placeholder amount of \$10,000. To date, no funds have been expended.

◆ **New Programs/Activities**

There is the only new item in the first draft of the 2012 budget.

7. *Economic Survey - \$18,000*

An economic survey has been completed every four or five years

since 1989. Following the same format as the last four surveys, a one-page questionnaire would be sent to one-third of all active members after April 15, 2012. For the sake of cost and ease of compilation it is expected the survey will be sent via email.

5 FANNO CREEK PLACE

NOTE: Any references to a line or page hereafter are from Exhibit A.

The 2011 budget for Fanno Creek Place (*page 2*) and the Funds Available forecast (*page 3*) have been amended to incorporate the changes in the leases and operation costs of the bar center in the first half of 2011.

The 2012 budget for Fanno Creek Place is prepared with these assumptions:

- The bar receives a full year's rent from the PLF, Joffe Medi-Center, and Zip Realty. Of the currently vacant 4,000 s.f. on the first floor, the forecast includes two of the three spaces leased for the full year.
- With the termination of the 20/20 Institute and Opus NW in early 2011, the projected 2012 rental income is \$37,000 less than what 2011 would have been if those leases remained.
- The forecast includes three or six month vacancies within the five-year period.
- Operating costs increase minimally although the facilities agreement cost of approximately \$54,000 was eliminated January 31, 2011.
- The annual debt service (principal and interest) for the fifth year of the

30-year mortgage is \$891,535 (\$733,185 interest and \$201,123 principal) (*page 2, column D, lines 75 and 92*). Depreciation is a non-cash expense of \$520,600 (*line 85*).

- The net expense is \$728,670 (*line 81*) and the cash flow is a negative \$409,000 (*line 94*), both of which are in line with the forecasts leading to the development of the building and slightly less than the forecasts made with the 2011 budget. The 2011 budget net expense and negative cash flow were \$764,540 and \$422,191 respectively.

6 SUMMARY OF THE 2012 BUDGET PROJECTION

The result of this draft of the 2012 budget with the assumptions and trends listed in this report lead to a **Net Operating Expense of \$87,830** for 2012. (*page 1, line 45, column D*)

- Including the bar's Net Operating Expense and the FCP Net Expense, the total net expense in 2012 is \$816,500 (accrual basis, *line 138*). Converting to the cash basis, the net negative cash flow is \$80,823 (*line 119*), but the funds available exceed the amount required in the bar's reserves.
- With this budget and five-year forecast, the bar could experience small net operating expenses off and on through the next five years and even fall below the level of the operating fund reserves.
- In the development of the 2011 budget, an active member fee

increase of \$50.00 was projected for 2012. No increase is included in this report. If an active member fee increase of \$50.00 were included, \$705,000 in additional fee revenue is added to the budget; thereby eliminating the net expense in 2012.

If there is no active member fee increase in 2012, it would be the seventh consecutive year with no change in the fee.

That has happened only twice in the bar's history – from 1943 to 1949 and 1963 to 1969.

However, when those seven year cycles ended, the total bar membership was 2,132 and 3,364 (it's 18,475 at June 30, 2011) and the active member fee was \$6.00 and \$50.00 respectively.

- There is little change in revenue from Lawyer Referral in the first years of the new funding model. If the percentage fee program is implemented in mid 2012, the forecast is for this new source of revenue to show results beginning in 2013 and the program to break-even by 2016. Those forecasts are based on expectations from data from other bar associations.
- PLF management does not believe there will be an increase in the PLF assessment in 2012, but probably an increase in 2013.

7 ISSUES TO ADDRESS IN THE 2012 2012 BUDGET SUMMARY AND FIVE- AND FIVE-YEAR FORECAST

A net operating expense of \$87,830 is tolerable in 2012 if the \$400,000 in reserves is transferred from 2011 to 2012. Doing so assumes 2011 will meet or exceed its budgeted bottom line.

The Committee and board have numerous options and flexibility in achieving a strong fiscal position in 2012 and the near future. Below are a number of issues for the Committee and board to consider - some the bar can control with specific actions or plans, and some depend on factors not controllable by the bar.

1. Should the **active member fee** increase be made in 2012? Doing so creates a net revenue in 2012 and means many of the following issues need not be addressed this year.
2. If a fee increase is approved for 2012, the **\$400,000 reserves** can remain in the investment portfolio and be allocated to revenue in a future year. Otherwise those reserves are needed in 2012 to create a balanced budget.
3. Should the bar **borrow \$200,000+** in 2011 for the tenant improvements and use the Landlord Contingency dollars allocated for these improvements in 2012 instead of in 2011? This action would reduce the negative cash flow projected for 2012.
4. Can the new **Lawyer Referral** funding model generate a growing sum of revenue and create enough revenue that it breaks even by 2016?

5. Should the **inactive member fee** be increased in 2012 or a future year? The last inactive fee increase was from \$80.00 to \$110.00 in 2002.
6. Will the **investment portfolio** continue to show steady growth in income and market value? The forecast includes a modest 3.5% average annual market value increase.
7. Will the current and the newly developed **space for leases** attain the occupancy and revenue levels in the forecasts? Three or six month vacancies are included three times in the forecast.
8. Should access to **BarBooks** be available only to those members willing to pay an annual subscription? This would convert BarBooks from a free all-member benefit to a pay for service.
9. Can **CLE Seminars** revenue increase – or at least not decline as it has the past few years?
10. What should the **salary pool** be in 2012?
11. Should **costs (personnel, program, and/or administrative)** be reduced by a certain percent, or specific activities or costs identified for reduction or elimination?

8 RESERVES AND OTHER CONTINGENCY FUNDS

The two reserves connected to the operating budget are the Operating Reserve and the Capital Reserve.

The *Operating Reserve* policy is fixed at \$500,000 since the approval of the Executive Summary Budget in 1999. The *Capital Reserve* is \$500,000 (reduced by \$100,000 for 2011) and is based on the expected equipment and capital improvement needs of the bar in the future.

All other reserves, fund balances, and contingencies – *fund balances for Affirmative Action, CSF, Legal Services, LRAP, and sections* and the *contingencies for legal fees, landlord, and PERS* - are not factored into this budget summary and forecasts since they are either restricted or reserved by board action.

The accumulated total at January 1, 2011 of the reserves and contingencies which are controlled by board action are:

Fund, Reserve or Contingency	Balance January 1, 2011
LRAP	\$ 64,614
Contract Legal Fees (<i>net of \$150,000</i>)	66,079
Landlord Contingency (<i>net of \$100,000</i>)	447,557
PERS Contingency	349,288
Operating Reserve	500,000
Capital Reserve (<i>net of \$150,000</i>)	500,000
Total	\$ 1,927,538

Additionally, the Board of Governors has some control over section fund balances which were \$674,763 at January 1, 2011.

9 RECOMMENDATIONS OF THE BUDGET & FINANCE COMMITTEE TO THE BOARD OF GOVERNORS

Action or direction on the following highlighted in the summary budget:

1. Decision on the current fees and assessments: general membership fee (\$447.00), the Affirmative Action Program assessment (\$30.00), and the Client Security Fund assessment (\$15.00), for a total fee of \$492.00 (all fees are 2011 fees for the two-year and over members).
2. Action on program or policy considerations for 2012 in Section 4.
3. Action on any issues in Section 7.
4. Response to assumptions in this report.
5. Guidance to bar staff budget preparers for the 2012 budget.

	A	B	C	D	E	F	G	H	I	J	
1	2012 Budget		Oregon State Bar					Five-Year Forecast			
2	Operations										
3	August-11										
4	Proposed Fee increase for Year →		\$0	\$50	\$0	\$0	\$0	\$0	\$0	\$0	
5	Operations		BUDGET	BUDGET	F O R E C A S T						
6			2011	2012	2013	2014	2015	2016	2017		
7	REVENUE										
8	MEMBER FEES										
9	General Fund	\$6,778,300	\$6,948,000	\$7,104,000	\$8,020,000	\$8,200,000	\$8,405,000	\$8,594,000			
10	Active (\$50); Inactive (\$0) Increase			720,000							
11	% of Total Revenue		63.7%	62.9%	67.9%	68.1%	67.7%	66.9%	67.1%		
12	PROGRAM FEES:										
13	CLE Seminars	1,394,080	1,324,000	1,337,240	1,350,612	1,370,872	1,391,435	1,412,306			
14	Legal Publications										
15	Print Book Sales	167,137	100,000	50,000	20,000	20,000	20,000	20,000			
16	Reallocation of Reserves	0	400,000	0	0	0	0	0			
17	PLF Contribution	300,000	200,000	100,000	0	0	0	0			
18	All Other Programs	1,866,480	1,949,000	1,988,000	2,027,800	2,068,400	2,109,800	2,135,100			
19	New RIS Model			55,000	125,000	170,000	330,000	330,000			
20	Total Program Fees	3,727,697	3,973,000	3,530,240	3,523,412	3,629,272	3,851,235	3,897,406			
21											
22	OTHER INCOME										
23	Investment Income	113,300	115,700	157,100	216,400	263,200	281,900	301,400			
24	Other	15,900	15,900	17,100	17,800	18,500	19,200	20,000			
25	TOTAL REVENUE	10,635,197	11,052,600	11,528,440	11,777,612	12,110,972	12,557,335	12,812,806			
26											
27	EXPENDITURES										
28	SALARIES & BENEFITS										
29	Salaries - Regular (Pool at 3% in 2012)	5,365,541	5,497,900	5,654,600	5,815,800	5,981,600	6,152,000	6,327,300			
30	Benefits - Regular	1,866,300	2,149,700	2,272,300	2,412,700	2,472,500	2,542,900	2,615,400			
31	Salaries - Temp	78,763	50,000	40,000	50,000	40,000	50,000	40,000			
32	Taxes - Temp	7,876	5,000	3,600	4,500	3,600	4,500	3,600			
33	Total Salaries & Benefits	7,318,480	7,702,600	7,970,500	8,283,000	8,497,700	8,749,400	8,986,300			
34	% of Total Revenue		68.8%	69.7%	69.1%	70.3%	70.2%	69.7%	70.1%		
35	DIRECT PROGRAM:										
36	CLE Seminars	582,630	582,630	594,283	606,168	618,292	630,657	643,271			
37	Legal Publications	55,216	55,200	37,000	39,000	40,000	41,000	42,000			
38	All Other Programs	2,220,566	2,272,000	2,328,800	2,375,376	2,434,760	2,507,803	2,583,037			
39	Total Direct Program	2,858,412	2,909,830	2,960,083	3,020,544	3,093,052	3,179,461	3,268,308			
40											
41	GENERAL & ADMIN	495,321	503,000	515,575	528,464	544,318	560,648	577,467			
42											
43	CONTINGENCY	25,000	25,000	25,000	25,000	25,000	25,000	25,000			
44	TOTAL EXPENSES	10,697,213	11,140,430	11,471,158	11,857,009	12,160,070	12,514,509	12,857,075			
45	NET REVENUE/(EXPENSE) - OPERATIONS	(\$62,016)	(\$87,830)	\$57,282	(\$79,396)	(\$49,099)	\$42,826	(\$44,269)			
46											

	A	B	C	D	E	F	G	H	I	J
47	2012 Budget								Five-Year Forecast	
48	Fanno Creek Place									
49										
50	Fanno Creek Place		BUDGET	BUDGET	F O R E C A S T					
51			2011	2012	2013	2014	2015	2016	2017	
52	REVENUE									
53	RENTAL INCOME <i>(2011 revised)</i>									
54	PLF	\$490,903	\$497,346	\$504,807	\$512,379	\$520,065	\$527,865	\$535,783		
55	Opus Master Lease <i>(Termination Fee)</i>	140,645								
56	20/20 Institute <i>(incl Termination Fee)</i>	245,736								
57	First Floor Tenant - Zip Realty	49,165	50,640	52,160	28,460	48,200	49,200	50,200		
58	First Floor Tenant - Joffe	31,579	126,789	128,683	130,599	132,580	138,144	140,900		
59	New Tenants <i>(three)</i>		86,600	91,800	93,200	69,300	94,600	96,000		
60	OLF	26,904	27,711	28,500	29,400	30,300	31,200	32,100		
61	Meeting Rooms	21,000	18,000	18,000	21,000	24,000	24,000	24,000		
62	Operating Expense Pass-through	0	0	3,000	3,100	3,200	3,300	3,400		
63	INTEREST	3,100	3,100	4,000	5,000	6,000	3,000	4,000		
64										
65	TOTAL REVENUE	1,009,032	810,186	830,950	823,138	833,645	871,309	886,383		
66										
67	EXPENDITURES									
68	OPERATING EXPENSE									
69	Salaries & Benefits	106,200	110,400	113,700	117,100	120,600	124,200	127,900		
70	Opus Management Fee	4,085								
71	Operations	323,993	332,100	342,100	352,400	363,000	373,900	385,100		
72	Depreciation	520,600	520,600	520,600	520,600	520,600	530,600	530,600		
73	Other	30,200	1,000	1,000	1,000	5,000	1,000	1,000		
74	DEBT SERVICE									
75	Interest	744,850	733,185	720,901	707,655	693,699	678,884	663,158		
76	Principal	0	0	0	0	0	0	0		
77	ICA to Operations	(158,429)	(158,429)	(158,429)	(162,400)	(162,400)	(162,400)	(162,400)		
78										
79	TOTAL EXPENSES	1,571,499	1,538,856	1,539,872	1,536,355	1,540,499	1,546,184	1,545,358		
80										
81	NET REVENUE/(EXPENSE) - FC Place	(\$562,467)	(\$728,670)	(\$708,922)	(\$713,217)	(\$706,854)	(\$674,875)	(\$658,975)		
82										
83	ACCRUAL TO CASH ADJUSTMENT									
84	SOURCES OF FUNDS									
85	Depreciation Expense	520,600	520,600	520,600	520,600	520,600	530,600	530,600		
86	TI Allowance from Opus	34,155								
87	Landlord Contingency Fund	230,000					200,000			
88	Loan Proceeds									
89	USES OF FUNDS									
90	Assign PLF Subtenants' Leases (Net)	(85,463)								
91	TI's - First and Third Floors	(230,000)								
92	Principal Pmts - Mortgage	(189,458)	(201,123)	(213,507)	(226,653)	(240,609)	(255,424)	(271,150)		
93										
94	NET CASH FLOW - FC Place	(\$282,633)	(\$409,193)	(\$401,829)	(\$419,270)	(\$426,863)	(\$199,699)	(\$399,525)		
95										

	A	B	C	D	E	F	G	H	I	J	
96	2012 Budget						Five-Year Forecast				
97	Funds Available/Reserve Requirement										
98											
99			BUDGET	BUDGET	F O R E C A S T						
100			2011	2012	2013	2014	2015	2016	2017		
101	FUNDS AVAILABLE										
102	Funds Available - Beginning of Year		\$ 1,376,000	\$1,468,351	\$1,387,528	\$1,374,970	\$1,068,503	\$719,342	\$547,169		
103	SOURCES OF FUNDS										
104	Net Revenue/(Expense) from operations		(62,016)	(87,830)	57,282	(79,396)	(49,099)	42,826	(44,269)		
105	Depreciation Expense		271,300	271,300	276,700	282,200	287,800	290,700	293,600		
106	Provision for Bad Debts		25,000	25,000	25,000	25,000	25,000	25,000	25,000		
107	Increase in Investment Portfolio MV		145,000	71,000	77,000	90,000	0	117,000	140,000		
108	Allocation of PERS Reserve		111,000	222,000	112,288						
109	Projected HIGHER Net Operating Revenue		131,000								
110	USES OF FUNDS										
111	Capital Expenditures		(111,400)	(100,000)	(80,000)	(100,000)	(80,000)	(120,000)	(80,000)		
112	Capital Reserve Expenditures		(17,800)	(20,000)	(25,000)	(50,000)	(50,000)	(75,000)	(50,000)		
113	Capital Expenditures - New Building		(18,000)	(50,000)	(50,000)	(50,000)	(50,000)	(50,000)	(50,000)		
114	Capital Reserve Expenditures - New Building							(200,000)			
115	Landlord Contingency Interest		(3,100)	(3,100)	(4,000)	(5,000)	(6,000)	(3,000)	(4,000)		
116	Net Cash Flow - Fanno Creek Place		(282,633)	(409,193)	(401,829)	(419,270)	(426,863)	(199,699)	(399,525)		
117	Addition to PERS Reserve		(96,000)								
118	Projected LOWER Net Operating Revenue		0								
119	CHANGE IN FUNDS AVAILABLE		92,351	(80,823)	(12,559)	(306,466)	(349,162)	(172,173)	(169,194)		
120											
121	Funds Available - End of Year		\$1,468,351	\$1,387,528	\$1,374,970	\$1,068,503	\$719,342	\$547,169	\$377,975		
122											
123	RESERVE REQUIREMENT										
124	Operating Reserve		500,000	500,000	500,000	500,000	500,000	500,000	500,000		
125	Capital Reserve		500,000	500,000	500,000	525,000	550,000	575,000	600,000		
126											
127	Total - Reserve Requirement		\$1,000,000	\$1,000,000	\$1,000,000	\$1,025,000	\$1,050,000	\$1,075,000	\$1,100,000		
128											
129	RESERVE VARIANCE										
130	Over/(Under) Reserve Requirement		\$468,351	\$387,528	\$374,970	\$43,503	(\$330,658)	(\$527,831)	(\$722,025)		
131											
132											
133	Reconciliation		BUDGET	BUDGET	F O R E C A S T						
134	Cash to Accrual		2011	2012	2013	2014	2015	2016	2017		
135	NET REVENUE/(EXPENSE) - Operations		(62,016)	(87,830)	57,282	(79,396)	(49,099)	42,826	(44,269)		
136	NET REVENUE/(EXPENSE) - FC Place		(562,467)	(728,670)	(708,922)	(713,217)	(706,854)	(674,875)	(658,975)		
137											
138	NET REVENUE/(EXPENSE) - OSB		(\$624,483)	(\$816,500)	(\$651,640)	(\$792,613)	(\$755,953)	(\$632,049)	(\$703,244)		
139											

2012 Salaries, Taxes & Benefits at Various Salary Pool Options

Pool Increase		2011 Budget			\$ Incr fr 2011 Budget	\$ Svgs If __ % Pool	Projected 2012 Net Revenue
		Salaries	Tax/Bene	Total			
		\$5,365,541	\$1,868,300	\$7,233,841			
2	3.0%	\$5,497,900	\$2,149,700	\$7,647,600	\$413,759		\$ (87,830)
0	2.0%	\$5,444,300	\$2,128,700	\$7,573,000	\$339,159	(\$74,600)	\$ (13,230)
1	1.0%	\$5,390,600	\$2,107,700	\$7,498,300	\$264,459	(\$149,300)	\$ 61,470
2	0.0%	\$5,337,000	\$2,086,800	\$7,423,800	\$189,959	(\$223,800)	\$ 135,970

8/11/2011

Exhibit B

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: August 26, 2011
Memo Date: August 15, 2011
From: Chris Kent, Chair, Budget & Finance Committee
Re: Selection of Auditors for 2010-2011 Financial Statements

Action Recommended

Approve the Budget & Finance Committee's recommendation to select Moss Adams to perform the audit of the bar's financial statements for fiscal years 2010 and 2011.

Background

The bar's financial statements for 2010 and 2011 are scheduled to be audited as the practice for several years has been to audit the bar's statements every two years per bylaw 7.102: "(T)he books of the bar must be audited at least biennially, unless otherwise directed by the Board."

Moss Adams has performed the audit for the two previous two-year cycles and has impressed the committee and staff with its report, recommendations, and professionalism. The audit fee for the last audit was \$33,500 and the fee for the next audit is expected to be slightly higher. At its July 29 meeting, the committee recommended Moss Adams be selected rather than send a RFP soliciting other auditors and bids.

Even though the bar's audit is not performed by the state's Audits Division, the bar is required to send its annual financial reports to the Chief Justice and had a long history of the audit performed by the Audits Division of the Secretary of State's office. In 2007, the Audits Division wrote: "(W)e authorize the Oregon State Bar to contract directly with a firm to audit the Oregon State Bar's financial statements. This authorization is granted for a period of five years, through the report for the period ending December 31, 2012." So the bar will need to approach the Office of the Secretary of State next year to receive permission for the bar to seek independent auditors.

[enter comm. name]

[enter meeting date]

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: August 26, 2011
Memo Date: August 12, 2011
From: Member Services Committee
Re: Waiver of section administrative assessment

Action Recommended

Waive the bar's per-member administrative assessment on sections for law students who are offered complimentary section membership.

Background

The bar's Animal Law Section would like to offer free membership to law students without financial loss to the section. Their first idea, charging a "law student" fee equal to the OSB's per-member assessment, is not an option right now due to limitations of the bar's accounting software. An alternative approach that would achieve the section's goal is for OSB to waive the assessment for law-student members of sections who offer free membership to law students.

The section per-member assessment represents the bar's cost for section services including: dues collection, accounting services, roster maintenance, law improvement costs, and administrative support for communications. As a policy issue the BOG decided in 1992 to assess sections 50% of the bar's actual cost to provide these services. The current section assessment is \$6.50 per member.

In April 2006 the BOG adopted a policy encouraging sections to offer complimentary membership to lawyer-legislators, judges and judge's lawyer staff. Later that year, the board agreed to waive the per member assessment charged for those membership categories, as well as 50-year members. The total number of complimentary members for 2010 was 318, which resulted in waiver of \$2,037 in assessment fees to the bar.

[enter comm. name]

[enter meeting date]

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: August 26, 2011
From: Mitzi Naucler, Chair, Policy & Governance Committee
Re: Proposed Changes to Bylaw 16.200

Action Recommended

Consider the Policy & Governance Committee's motion to amend Bylaw 16.200 regarding complimentary CLE seminars registration and discounted CLE seminars products.

Background

Over the years, advances in technology have led to the development of a wide variety of our CLE seminars delivery formats. There has also been growth in the number of sources of CLE content. In recent years, the BOG has elected to offer reduced or complimentary seminar registration to several categories of members.

When Bylaw 16.200 was first drafted, live seminars were the primary source of CLE for members. Today, the CLE Seminars Department offers no less than seven formats for delivering CLE. While all the content is approved for Oregon credit, not all the content is developed and provided by the CLE Seminars Department. Providing complimentary copies and registration is not always possible due to pricing restrictions and the cost of non-CLE Seminars Department content. The proposed bylaw changes are designed to identify and clarify the available complimentary registration and pricing discounts to seminars and seminar products made available to members by the CLE Seminars Department.

Summary of Changes:

- Title – Adds “CLE Discounts” to the bylaw.
- (a) Clarifies the type of CLE program eligible for complimentary registration and who provides the program's content.
- (b) Clarified for text consistency.
- (c) NEW – provides reduced registration for seminar webcasts when the CLE Seminars provides the seminar content.
- (d) Renumbered and sentence structure corrected.
- (e) Renumbered and clarified for text consistency.
- (f) Renumbered and clarified for text consistency; moves “complimentary copies” to new 16.200 (g).
- (g) NEW – provides discounts and complimentary copies of any archived CLE product where the CLE Seminars Department is the content provider.

- (h) NEW – provides that discounts, complimentary copies, and complimentary registration for seminars and seminar products are not available when the CLE Seminars Department is not the content provider except at the discretion of the CLE Seminars Director.

Proposed new language:

Subsection 16.200 Reduced and Complimentary Registrations; Product Discounts

(a) Complimentary ~~admission to~~registration for live CLE seminars and scheduled video replays where the CLE Seminars Department is the content provider is available to the following OSB lawyer members: Active Pro Bono members, lawyer-legislators, 50-year members, judges, and judicial clerks.

(b) Complimentary ~~admission~~registration does not include the cost of lunch or other fee-based activities held in conjunction with a CLE seminar.

(c) Reduced registration for webcasts where the CLE Seminars Department is the content provider is available the following lawyer members: Active Pro Bono members, lawyer-legislators, 50-year members, judges, and judicial clerks.

(e-d) For purposes this policy, “judges” means full or part-time paid judges and referees of the Circuit Courts, the Court of Appeals, the Tax Court, the Supreme Court, and of tribal and federal courts within Oregon. Complimentary registration at any event for judicial clerks will be limited to one clerk for each trial court judge and two clerks for each appellate court judge.

(e) Complimentary ~~admission~~registration for Active Pro Bono members is limited to eight (8) hours of programming in any one calendar year, which may be used in increments.

(e-f) Reduced registration ~~fee,~~and tuition assistance and complimentary copies of programs may be available to certain other attendees, ~~in~~at the sole discretion of the CLE Seminars Director.

(g) Discounts for and complimentary copies of archived CLE Seminars products in any format where the CLE Seminars Department is the content provider may be available at the sole discretion of the CLE Seminars Director.

(h) Seminars and seminar products in any format where the CLE Seminars Department is not the content provider are not subject to any discounts, complimentary registration or complimentary copies except at the sole discretion of the CLE Seminars Director.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: August 26, 2011
From: Mitzi Naucler, Policy and Governance Committee Chair
Re: Amendments to OSB Elections Bylaws

Action Recommended

Consider the Policy & Government Committee's motion to amend OSB Bylaws 9.1, 9.2, 9.3, and 9.4 as set forth herein. The Committee also recommends that the BOG waive the one meeting notice requirement and enact these changes immediately.

Background

In 2010, the BOG and HOD voted to eliminate the requirement for members to submit a nominating petition when filing as a candidate. The Bar Act was amended by the 2011 Legislature to reflect those decisions. The proposed amendments to Bylaws 9.1 and 9.2 will conform the bylaws to the new procedure and also eliminate the nominating petition requirement for ABA House of Delegates candidates.

Further amendments to 9.2 and to 9.4 allow the bar to continue online voting for elections and polls and make it clear that online voting is the default process.¹ Bylaw 9.3 is eliminated because online voting does away with the problem of providing new ballots to members who change their address between the opening and closing of the voting. Going to nearly-universal online voting will save the bar approximately \$7000 in printing and mailing costs annually and promotes the goal of sustainability.

Section 9.1 Date of Elections

The election for members of the Board of Governors will be held annually on the third Monday in October. Bar members who wish to appear on the ballot must present a ~~nominating petition signed by at least 10 members entitled to vote for the nominee~~ candidate statement to the executive director of the Bar at least 160 days before the election.

In the case of an uncontested election for the Board of Governors, a candidate will be declared elected thirty-one days after the final day on which nominating petitions for the Board are required to be filed, provided that a challenge has not been filed pursuant to ORS 9.042. If a challenge has been filed, the candidate will be declared elected at the end of that process unless the challenge is successful.

¹ The few members who are exempt from the requirement to provide an e-mail address will continue to receive paper ballots. For the present, staff plans send a postcard notice that voting is open to those (approximately 400) members who are not exempt but who have nevertheless declined to provide an e-mail address.

The election for members of the OSB House of Delegates will be held annually on the third Monday in April. Bar members who wish to appear on the ballot must present a ~~nominating petition signed by at least 10 members entitled to vote for the nominee candidate statement~~ to the executive director of the Bar at least 30 days before the election. ~~The nominating petition for a delegate from the region composed of all areas not located in this state need only be signed by the candidate for the position~~

The election for representatives to the ABA House of Delegates will be held annually on the third Monday in April in conjunction with the election to the OSB House of Delegates. Bar members who wish to appear on the ballot must present a ~~nominating petition signed by at least 10 members entitled to vote for the nominee candidate statement~~ to the executive director of the Bar at least 30 days before the election.

Section 9.2 Ballots

The Executive Director will prepare ballots whenever a contest exists and the ballots will be accompanied by ~~a the one page candidate~~ statement that includes the candidate's name, law firm, principal office address, current full-face photograph, law school from which graduated, date of admission in Oregon, state and local bar activities, offices and other pertinent information. The statements must be ~~provided submitted~~ on a ~~uniform~~ form prepared by the Bar, which will also indicate that the information supplied by the candidate has not been edited or verified by the Bar. A request for a ~~nominating petition and candidate's~~ statement or the submission thereof will be considered public information. When a member entitled to vote has not received a ballot or when the ballot has been lost or destroyed, the Executive Director will supply another ballot on receipt of satisfactory proof of non-receipt, loss or destruction of the original ballot. Ballots will be electronic.

Section 9.3 Change in Region

~~If a member changes his or her principal office address to another region between the time the ballot is sent and the date of the election, prior to the distribution of ballots and the member supplies the Executive Director with satisfactory notice and proof of the change, within 15 days before the date of the election, the member will be entitled to vote from the region of his or her new principal office address. The member will surrender the written ballot, if any, that was previously mailed to the member. The Executive Director will, on request and receipt of the notice and proof of change of address, supply the member with a proper written ballot or access to the bar's electronic voting process for the member's new region.~~

Section 9.4.3 Voting

~~Paper ballots must be deposited with the Executive Director in an envelope marked "ballot", but which bears no other distinguishing marks. The envelope must be sealed and enclosed in an envelope addressed to the Executive Director on which there will be blanks for the member's name, principal office address and signature. The Executive Director will have the custody of the ballots after they are submitted. Any member of the Bar will be permitted to be present while the ballots are canvassed. The Executive Director will announce the results of the balloting and will notify each candidate of the results of the election. Electronic ballots will be available to members. Members eligible to vote will be provided by using a secure link to the candidates statements and an online ballot. The candidate statements and photos will be electronically distributed. Ballots will be tabulated electronically using a secure voting system to assure no duplicate entries. Any member of the Bar will be permitted to be present while the~~

ballots are canvassed. The Executive Director will announce the results of the balloting and will notify each candidate of the results of the election.

Oregon State Bar
Meeting of the Board of Governors
June 24, 2011
Open Session Minutes

The meeting was called to order by President Stephen Piucci at 11:02 a.m. on June 24, 2011, and adjourned at 2:03 p.m. Members present from the Board of Governors were Jenifer Billman, Barbara Dilaconi, Ann Fisher, Michelle Garcia, Michael Haglund, Gina Johnnie, Matt Kehoe, Christopher Kent, Ethan Knight, Tom Kranovich, Steve Larson, Audrey Matsumonji, Kenneth Mitchell-Phillips, Mitzi Naucler, and Maureen O'Connor. Staff present were Sylvia Stevens, Helen Hierschbiel, Jeff Sapiro, Susan Grabe, George Wolff, Kay Pulju, Mariann Hyland, and Camille Greene. Also present were: ONLD Chair-Elect Jason Hirshon; ABA HOD Delegate Christine Meadows; PLF liaison, Fred Ruby and PLF CEO, Ira Zarov; former BOG President, Gerry Gaydos; Diversity Section Chair, Diane Schwartz Sykes; and Lauren Paulson.

Friday, June 24, 2011, 11:00 a.m.

1. Department Presentation

- A. Ms. Grabe presented an overview of the Public Affairs program and staff. The department's mission is to apply the knowledge and experience of the legal profession to the public good by advocating for the legal profession, the judicial system and the public. The department has impact on the legislature, sections and committees, workgroups, and the public.

2. Report of Officers

- A. Report of the President

As written.

- B. Report of the President-elect

As written.

- C. Report of the Executive Director

As written.

Ms. Stevens introduced Mariann Hyland, the new Director of Diversity and Inclusion and showed an example of how ads will look on BarBooks®.

- D. Report of the BOG Liaison to MBA

Mr. Kent reported on the May 3 meeting of the MBA. They have no issues for the bar.

3. Professional Liability Fund

A. General Update

Mr. Zarov reported that the PLF board is considering whether to eliminate the Special Underwriting Assessment. Any recommendation to do so will be presented to the BOG. The PLF is also looking at a way to allow members to pay their assessment with credit cards that doesn't result in passing on the bank fees to other members. The PLF Board will have two lawyer vacancies for BOG appointment; nominees will be presented by the end of October. Mr. Zarov also gave a brief update on the PLF Defense Panel Training, case count, and staffing issues.

B. Financial Report

As written.

C. 2012 Assessment

The PLF does not anticipate an increase in the assessment for 2012 but the final recommendation will be submitted to the BOG in due course.

4. Special Appearances

A. Update on Convocation on Equality

Mr. Gaydos introduced Diane Schwartz Sykes who gave an update on the history and status of the November 4, 2011 Convocation on Equality (COE.) Mr. Gaydos expressed his gratitude to the bar employees, Diversity Section members and others who are working on the 2011 COE.

Ms. Schwartz Sykes presented the Diversity Section's resolution for BOG support of the 2011 Convocation on Equality.**[Exhibit A]**

Motion: Mr. Piucci moved, Ms. O'Connor seconded, and the board voted unanimously to adopt the resolution supporting the COE.

B. ABA Delegate Report

Ms. Meadows informed the board of the issues for the ABA Annual Meeting in August in Toronto. Additional details will be provided as they are available.

C. Member Request to Support Lawyers in China

Ms. Stevens presented a request from a member, who wishes to remain anonymous, to protect colleagues in China.**[Exhibit B]**

Motion: Mr. Kent moved, Mr. Haglund seconded, and the board voted to express its solidarity with lawyers in China in response to recent arrests and detention of Chinese rights lawyers. Ms. Matsumonji abstained.

5. Rules and Ethics Opinions

A. Legal Ethics Committee

Ms. Stevens presented the Legal Ethics Committee's recommendation to revise Formal Ethics Opinion No. 2005-151 that deals with "fixed fees," including those collected in advance and frequently referred to as "earned on receipt." The opinion was based on RPC 1.5 and 1.15-1 as they existed in January 2005 as well as existing case law governing "earned on receipt" fees. **[Exhibit C]**

Motion: Ms. Fisher moved, Ms. Matsumonji seconded and the board voted unanimously to issue a revised Formal Opinion No. 2005-151 to conform it to recent changes in the Rules of Professional Conduct.

6. OSB Committees, Sections, Councils and Divisions

A. Oregon New Lawyers Division Report

Mr. Hirshon reported on a variety of ONLD projects and events described in the written report and presented the updated 2011 ONLD calendar of events. Recently the ONLD board discussed the ONLD goals and mission, at the board's request. The division will be participating with the *Daily Journal of Commerce* to give monthly ONLD updates. ONLD members are advocating in their local school districts for iCivics, as requested by Chief Justice DeMuniz. The ONLD graded the high-school essays and chose winners. Their new program, Practical Skills through Public Service, is aimed at pairing up unemployed or under-employed new lawyers with public service opportunities.

Mr. Hirshon presented the ONLD's request to seek federal funding for the Law College Program. They are asking for \$4,000 and the first item on their agenda will be on Social Security Law.

Motion: Mr. Kent moved, Ms. Matsumonji seconded, and the board voted unanimously to approve the ONLD's request to seek federal funding for the Law College Program.

7. BOG Committees, Special Committees, Task Forces and Study Groups

A. Access to Justice Committee

Ms. Johnnie presented the Public Service Advisory Committee Recommendation to implement a percentage fee model for LRS. **[Exhibit D]** Ms. Fisher questioned whether there is a clear understanding of what the proposed change will mean to access to justice. Ms. Johnnie explained that the current program screens calls makes referrals as appropriate to Legal Aid or Modest Means; all we are looking at is changing the fee structure. Mr. Haglund identified five reasons why changing the

funding is a good idea: (1) Call wait-time due to staff overload can be reduced, enhancing the service ; (2) It may enable us to make the RIS programs self-sufficient; (3). Oregon is often a trailblazer, but in this case we are looking at a model that 23 states and 16 local bars already use and have not abandoned once adopted; (4) We have our own very-qualified bar committee that recommends this model based on extensive research; and (5) Concerns about liability for negligent referral not supported by evidence from other programs and any ethical issues are easily addressed through our Legal Ethics Committee. Mr. Haglund urged as a matter of good policy that the BOG approve shifting the LRS to a model that includes percentage fees and leave it to staff and the PSC to work out the details. Mr. Kent agreed that the new model will increase the funding for the department, but is it a public service or a money-maker? He expressed concern about liability for negligent referral , and also that the program may violate ORS 9.505 and result in a possible legal challenges in the future. Mr. Kent and Mr. Kehoe agreed that this should be debated with the membership at the HOD meeting. Mr. Kranovich predicted that we will hear from the HOD if we pass this funding model. Ms. Naucler expressed the view that lawyer referral is a public service as it is currently structured, so the new funding model will not change the access to justice. Ms. O'Connor stated that as a non-attorney, she would rely on the bar for a referral and does feel what we currently have is a public service. Ms. Billman stated that she the PSC proposal for the following reasons: (1). It addresses the needs of the current financial situation; (2) It will maintain the Modest Means program mission; and 3. It will expand to the middle-income population with time.

Motion: Mr. Haglund moved that the BOG approve and authorize the OSB LRS to shift to a percentage-fee model, and have staff and the PSAC make recommendations through the P&G Committee to develop its appropriate features. Ms. Johnnie seconded and the motion passed 9-6. (Aye: Ms. Billman, Ms. Garcia, Mr. Haglund, Ms. Johnnie, Mr. Knight, Ms. Matsumonji, Mr. Mitchell-Phillips, Ms. Naucler, and Ms. O'Connor. Nay: Mr. Kranovich, Mr. Larson, Ms. Dilaconi, Mr. Kent, Ms. Fisher and Mr. Kehoe.)

B. Appellate Screening Committee

Mr. Larson explained that the governor's office has asked the committee to work with county bars to help make their appointment screening processes uniform throughout the state.

Mr. Larson reported that the Appellate Screening Committee recommended all candidates for the current appellate court vacancy.

Motion: The board voted unanimously to approve the committee motion to approve the recommendations for the appellate court vacancy.

C. Budget and Finance Committee

Mr. Kent reported on the financial position of the bar. He gave a summary of various capital improvement matters at the bar center including building out the 3d floor space for RIS and Admissions, improving the unfinished 1st floor space to enhance is rental potential, budgeting for tenant improvements, installing an "Oregon State Bar" sign on the building, and replacing the reception area floor. The committee recommends authorizing the expenditure of approximately \$240,000 to make these improvements. The options to fund these improvements were discussed, and the committee would like to authorize the CFO to explore funding before they make the decision to use current reserve funds.

Motion: The board voted unanimously to approve the committee motion to take action on the tenant improvements for the vacant space on the first and third floor and other capital improvements at the bar center, to authorize the bar's CFO to continue exploring a loan for funding the tenant and other capital improvements, and to engage Macadam Forbes as brokers for leasing the vacant space at the bar center.

D. Member Services Committee

In Ms. Johnnie's absence Ms. O'Connor presented the Member Services Committee's recommendation to sunset the Law Practice Management Section.

Motion: The board voted unanimously to approve the committee motion to sunset the Law Practice Management (LPM) Section as requested, transferring its assets (list serve and fund balance) to the PLF's practice management program.

Ms. Pulju presented a timeline for Annual OSB Awards and shared some members' reactions to changes in the membership directory distribution format.

E. Policy and Governance Committee

Motion: Ms. Naucler presented the committee motion to repeal of RPC 1.15-2(m) in light of the legislature's approval of SB 380 which makes failure to certify IOLTA compliance an administrative matter. This will be a BOG resolution on the HOD Agenda. The board voted unanimously to approve the committee motion.

Motion: Ms. Naucler presented the committee's motion to consolidate the 16 LPRC committees into 7 according to BOG regions. No rule changes are required, as structure of the LPRCs is within the discretion of the BOG. The board voted unanimously to approve the committee motion.

Motion: Ms. Naucler presented the amendment to the Exemption to Member email Requirement to change it to no email required if over 65 and retired or if other ADA accommodations are needed. The board voted unanimously to approve the committee motion.

F. Public Affairs Committee

During her department presentation, Ms. Grabe updated the board on the status of the legislative session. The Public Safety Budget (which encompasses the Judicial Budget) is the main issue at this time and things are moving quickly as the session winds to an end.

In Mr. Johnson's absence, Ms. Matsumonji presented the committee's request for the board to consider nominating Dave Barrows for the Professionalism Commission's Edwin J. Peterson Professionalism Award. The Commission has indicated that Mr. Barrows' inactive status will not be a problem.

Motion: The board voted unanimously to approve the committee motion to nominate Dave Barrows for the Professionalism Commission's Edwin J. Peterson Professionalism Award.

8. Consent Agenda

Motion: Ms. Fisher moved, Ms. Naucler seconded, and the board voted unanimously to approve the consent agenda including various appointments [**Exhibit E**] and the revocation of the last revision to the executive director's contract [**Exhibit F**].

9. Good of the Order (Non-action comments, information and notice of need for possible future board action)

Nothing submitted.

OREGON STATE BAR BOARD OF GOVERNORS
RESOLUTION IN SUPPORT OF
THE 2011 CONVOCATION ON EQUALITY

WHEREAS diversity within the legal profession, which is reflective of the diversity of cultures, experiences, abilities, race, and sexual orientation of Oregonians, is crucial to pursuing access to justice for all;

WHEREAS the Oregon State Bar is committed to serving and valuing its diverse communities, to advancing equality in the judicial and criminal justice systems, and to removing barriers within those systems;

WHEREAS the Oregon State Bar embraces its diverse constituencies and is committed to the elimination of bias in the Judicial and criminal justice systems;

WHEREAS the Oregon legal community has made much progress but has much more work to do to reach these important goals;

WHEREAS achieving equality in the judicial and criminal justice systems will require ongoing concerted and focused efforts by Oregon attorneys, legal professionals and community leaders;

WHEREAS the 2011 Convocation of Equality seeks to embody and advance these values and efforts, as it celebrates the 10th Anniversary of the first Convocation of Equality in 2001;

WHEREAS the programs, panels and presentations at the 2011 Convocation will advance diversity awareness in a number of communities, including attorneys wishing to increase their cultural competency and understanding of diverse communities; employers seeking to increase diversity in the workplace; diverse attorneys hoping to build leadership skills and to advance their professional and volunteer-service careers; and diversity supporters looking to support diversity efforts;

WHEREAS The 2011 Convocation on Equality is a keystone event that will bring positive attention and focus to the Oregon State Bar's efforts toward inclusion of all;

THEREFORE BE IT RESOLVED THAT:

We support the 2011 Convocation on Equality and encourage bar members and community leaders throughout the state of Oregon to attend and to participate;

We, as the leadership of the Oregon State Bar, agree to review the reports generated at the Convocation and to consider whether to adopt or implement any specific recommendations.

We recognize and support the work of the OSB Diversity Section and other organizations and agencies to implement the Convocation's objectives and goals, consistent with the Bar's commitment to advancing diversity in the Oregon legal community and access to justice for all Oregonians.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: June 24, 2011
From: Sylvia E. Stevens, Executive Director
Re: Support for Lawyers in China

Action Recommended

Consider a member's request that the OSB support lawyers in China.

Background

An OSB member¹ has asked the OSB to express its solidarity with lawyers in China in response to recent arrests and detention of Chinese rights lawyers. In support of the request, the member has submitted the following statement from the Committee To Support Chinese Lawyers:

Lawyers Urge Solidarity With Chinese Colleagues

"I'll bet that there will be others in the future who, like me, will become increasingly mute...

Maybe everyone should learn from me and be a tortoise hiding its head, for it's because I've done this

that not a single hair on my body has been harmed. Of course, perhaps there's been a huge earthquake inside my heart."

—lawyer Li Tiantian's blog entry, posted after her return home after two months of secret detention

On the 22nd anniversary of the violent crackdown on protesters in Tiananmen Square, Chinese authorities are engaged in the most severe crackdown on lawyers and human rights defenders since 1989. Just as the protestors who gathered in Tiananmen Square in 1989 called for democratic reform, today, many of China's human rights lawyers have developed a deep-rooted conviction that the rule of law is not merely a superficial gloss—that it in fact represents a framework for justice that applies equally to all, and with the power to hold even the State that created it accountable.

China has repeatedly avowed its commitment to the rule of law but in recent months has taken violent steps to silence its human rights lawyers. Lawyers are essential to the establishment and maintenance of the rule of law; they play an integral part in the mechanisms that lead to the even-handed and predictable

¹ The member has asked that her name not appear in materials connected with this discussion "since my family continues to do work in China and does not wish to place any Chinese colleagues and contacts at risk."

enforcement of laws. As United Nations General Assembly has unanimously recognized, there is nothing disloyal or subversive about a lawyer defending alleged criminals, unpopular clients, or whistleblowers working to bring official corruption to light.

Li Tiantian is among the wave of lawyers, human rights defenders, and activists who have been arbitrarily detained by the government since February, in apparent response to fears of a Chinese “Jasmine” revolution. Lawyers who have been disappeared, detained, tortured and beaten, include:

Tang Jitian, disappeared in February; after three weeks he was released to house arrest

Teng Biao, disappeared in February for 70 days

Jiang Tianyong, disappeared in February for two months

Liu Shihui, missing since February

Tang Jingling, charged with “inciting subversion of state power” in March

Li Fangping, disappeared for five days in April

Ni Yulan, criminally detained since April and held on unspecified charges

Jin Guanghong, disappeared tortured for ten days in April

Li Xiongbing, disappeared for three days in May

As fellow lawyers, we repudiate these attacks on our Chinese counterparts. At this time, when so many of our Chinese colleagues are being silenced, it is imperative that we speak out on their behalf in order to ensure that this disturbing abuse does not successfully quash their efforts to establish the rule of law in China.

The Committee to Support Chinese Lawyers (<http://www.csclawyers.org>) is a group of independent lawyers from outside China whose goal is to support lawyers in China in their quest to strengthen the rule of law there. The Committee, which is housed at the Leitner Center for International Law and Justice at Fordham Law School in New York City, seeks to strengthen the role of lawyers and to promote their independence.

Encourage your local Bar Association to support Chinese lawyers.

For more information and address information for open letters, please send a request to jchia@law.fordham.edu.

FORMAL OPINION NO. 2005-151
[REVISED 2011]

Fee Agreements:
Fixed Fees
Facts:

Lawyer wishes to use fixed fee agreements for certain types of services that Lawyer will perform for clients. Lawyer intends to obtain most or all of the fixed fee in advance of performing any services for the client.

Questions:

1. May Lawyer enter into fixed fee agreements with clients?
2. May Lawyer deposit prepaid fixed fees in Lawyer's general account?
3. May Lawyer keep all of the prepaid fixed fee even if the representation ends before all of the work is performed by Lawyer?
4. May Lawyer charge more than the fee fixed by the agreement when the matter unexpectedly involves more work than usual for the particular matter?

Conclusions:

1. Yes, qualified.
2. No, qualified
3. No, qualified.
4. No, qualified.

Discussion:

For purposes of this opinion, the term *fixed fee agreement* includes any fee agreement in which the lawyer's charge for specified services is a fixed dollar amount, regardless of when the lawyer is paid or how much work the lawyer must do and regardless of the name applied by the lawyer to the agreement—e.g., "flat fee," "nonrefundable retainer," "prepaid legal fee," etc.

1. *Propriety of Fixed Fee Agreements.*

Oregon RPC 1.5(a) and (b) provide:

(a) A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee or a clearly excessive amount for expenses.

(b) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

The Oregon RPCs do not prohibit fixed fee agreements. In addition, case law establishes that fixed fee agreements are permitted as long as they are not excessive or unreasonable. *In re Hedges*, 313 Or 618, 623–624, 836 P2d 119 (1992) (“[W]here a [nonrefundable fixed fee] arrangement is used ‘the designation of the fee as nonrefundable must be made by a clear and specific written agreement between client and lawyer.’”); *In re Biggs*, 318 Or 281, 293, 864 P2d 1310 (1994). 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. *In re Gastineau*, 317 Or 545, 552, 857 P2d 136 (1993). On the other hand, “The disjunctive use of the word ‘collect’ means that the excessiveness of the fee may be determined after the services have been rendered, as well as at the time

the employment began.” *In re Gastineau, supra*, 317 Or at 550–551; OSB Formal Ethics Op Nos 2005-15, 2005-69, 2005-97; *In re Sassor*, 299 Or 720, 705 P2d 736 (1985).

2. *May Prepaid Fixed Fees Be Deposited into the Lawyer’s General Account?*

Oregon RPC 1.5(c) provides, in part:

A lawyer shall not enter into an arrangement for, charge or collect:

(3) a fee denominated as “earned on receipt,” “non-refundable” or in similar terms unless it is pursuant to a written agreement signed by the client which explains that:

(i) the funds will not be deposited into the lawyer trust account, and

(ii) the client may discharge the lawyer at any time and in that event may be entitled to a refund of all or part of the fee if the services for which the fee was paid are not completed.

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Oregon RPC 1.15-1(a) provides, in pertinent part:

(a) A lawyer shall hold property of clients or third persons that is in a lawyer’s possession separate from the lawyer’s own property. Funds, including advances for costs and expenses and escrow and other funds held for another, shall be kept in a separate “Lawyer Trust Account” maintained in the state where the lawyer’s office is situated, or elsewhere with the consent of the client or third person. Each lawyer trust account shall be an interest bearing account in a financial institution selected by the lawyer or law firm in the exercise of reasonable care. . . .

Oregon RPC 1.15-1(c) provides:

A lawyer shall deposit into a lawyer trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

Ordinarily, fees are earned as work is performed. See OSB Formal Ethics Op No 2005-149. Without a clear written agreement between a lawyer and a client that fees paid in advance are earned on receipt, such funds must be considered client property and are, therefore, afforded the protections imposed by Oregon RPC 1.15-1. *In re Biggs, supra* (discussing former DR 9-101). If there is a written agreement with the client that complies with the requirements of Oregon RPC 1.5(c)(3), the fixed fee is earned on receipt, the funds belong to the lawyer and may not be put in the lawyer’s client trust account. If no such agreement exists, the funds must be placed into the trust

account and can only be withdrawn as earned. See, e.g., *In re Hedges, supra*; OSB Formal Ethics Op No 2005-149.

3. *Early Termination by Client and the "Nonrefundable Fee."*

A lawyer who does not complete all contemplated work will generally be unable to retain the full fixed fee. This is consistent with *In re Thomas*, 294 Or 505, 526, 659 P2d 960 (1983), in which the court stated: "It would appear that any fee that is collected for services that is not earned is clearly excessive regardless of the amount." Moreover, [Oregon RPC 1.5 \(c\)\(3\)\(ii\) requires the lawyer to inform the client in the written fee agreement that the client may be entitled to a refund of all or part of the fee if the services for which the fee was paid are not completed.](#)

Accordingly, even a fee designated as "nonrefundable" is subject to refund if the specified services are not performed. Thus, designation of a prepaid fixed fee as "nonrefundable" may be misleading, if not false, in violation of Oregon RPC 8.4(a)(3) (prohibiting conduct involving "dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law"). Whether, or to what extent, a bad-faith termination by a client near the end of a matter requires a refund of fees paid in advance is a question beyond the scope of this opinion.

4. *Charges in Excess of Fixed Fee Agreement.*

A lawyer may not charge more than the agreed-on fee, and any fee charged in excess of the agreed-on fee is excessive as a matter of law. It follows that unless either (a) the fee agreement itself allow for changes over time¹ or (b) the fee agreement is permissibly modified pursuant to OSB Formal Ethics Op No 2005-97, the agreed-on fixed amount is all that the lawyer may collect.

Approved by Board of Governors, ~~August 2005~~ ~~June 2011~~.

¹ For example, a fixed fee agreement might provide a fixed fee for each stage of a project rather than a fixed fee for the whole. Similarly, agreements that allow periodic adjustments to hourly fees or costs are also permissible unless illegal or otherwise unreasonable.

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§3.2, 3.14, 3.19 (Oregon CLE 2003); [FEE AGREEMENT COMPENDIUM CH. 11 \(UPDATED 4/2011\)](#); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§34, 38 (2003); and ABA Model Rule 1.5.

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OREGON STATE BAR

Board of Governors Agenda

Meeting Date: June 24, 2011
Memo Date: June 10, 2011
From: Public Service Advisory Committee
Re: Lawyer Referral Service -- Percentage Fee Funding

Action Recommended

Approve development of a percentage-fee funding model for the OSB Lawyer Referral Service (LRS) with the goal of raising program revenue sufficient to cover Referral & Information Services (RIS) program expenses. Direct bar staff, with assistance of the Public Service Advisory (PSA) Committee, to draft new policies and procedures for LRS that address operational and administrative issues identified by the BOG and PSA Committee. Direct the Executive Director and, as needed, the Policy & Governance Committee to proceed with any necessary changes to OSB bylaws, bar policies and the Oregon Rules of Professional Conduct.

Background

The OSB created the LRS in 1971 to match people seeking legal help with appropriate lawyers based on areas of practice, location and special services provided. Approximately 1,300 bar members currently participate as LRS panel attorneys. The basic LRS operating system supports other specialized referral panels within RIS: the Modest Means Program, Military Assistance Panel, Problem Solvers and Lawyer to Lawyer services.¹

RIS is supported through a combination of LRS panel registration fees and general bar funds. Over the past 20+ years different committees and boards have reviewed the LRS/RIS funding model, generally with the stated goal of making the program and/or department financially self-supporting. In 2009 the BOG asked the PSA Committee and bar staff to develop a new funding model for LRS, and assigned a monitoring role to the BOG's Access to Justice Committee. Since that time PSA Committee members and staff have reviewed various funding options, making regular reports to the BOG Access to Justice Committee. Other BOG committees and the full board have also discussed the topic. The PSA Committee has concluded that a percentage fee system is in the best

¹ With the exception of the Modest Means Program, these are all "pro bono" services in which lawyers provide services at no cost to the client. Lawyers participating in the Modest Means Program agree to charge a reduced fee; eligible clients earn no more than 225% of the Legal Aid/Federal Poverty Guideline income limits.

interests of the LRS and the bar, and recommends that the BOG move forward with implementation for the 2012 program year.

A percentage fee system offers the potential to make LRS self-supporting while also funding needed program improvements. It is our understanding that the vast majority of state and local bars have adopted a percentage fee model and that none have reverted back to a registration fee-only model. The other possible option is to increase panel registration fees, but the PSA Committee does not recommend this option as it is unlikely to raise substantial revenue and is instead likely to result in decreased revenue from reduced participation. In addition, a percentage-fee system is the most equitable option in that only those who *choose* to participate in LRS and *financially benefit* as a result will pay anything beyond the basic registration fees.

Implementation will be a complex process involving extensive member communications and regular reports to the BOG through its Policy & Governance Committee. Specific issues to address include:

- Determining the appropriate percentage amount(s) and whether to include thresholds and/or caps;
- Minimizing administrative burdens on panelists;
- Consideration of education/experience requirements for certain panels;
- Timeline for implementation;
- Compiling and consolidating percentage fee model best practices from around the country and drafting new policies, procedures, and rules to effectuate all of the foregoing.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: June 24, 2011
Memo Date: June 24, 2011
From: Barbara Dilaconi, Appointments Committee Chair
Re: Volunteer Appointments to Various Boards, Committees, and Councils

Action Recommended

Approve the following Appointments Committee recommendations.

Uniform Criminal Jury Instructions Committee

Recommendation: Andrew M. Lavin, term expires 12/31/2012

Disciplinary Board

Region 1 Recommendation: Jennifer Kimble, term expires 12/31/2013

Region 5 Recommendation: Nancy Cooper, term expires 12/31/2013

Region 7 Recommendation: Deanna Franco, term expires 12/31/2013

Region 7 Recommendation: Kelly Harpster, term expires 12/31/2013

Commission on Judicial Fitness and Disability

Recommendation: Robert Thuemmel, term expires 7/13/2015

Council on Court Procedures

Recommendation: Jay Beattie, term expires 8/2013

Recommendation: Brian Campf, term expires 8/2013

Recommendation: Kristen S. David, term expires 8/2013

Recommendation: Robert Keating, term expires 8/2013

Recommendation: Mark R. Weaver, term expires 8/2013

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: June 24, 2011
From: Sylvia E. Stevens, Executive Director
Re: Executive Director Contract Revision

Action Recommended

Revoke the decision at the February 17, 2011 Board meeting revising the ED contract to include an extra PERS contribution.

Background

Earlier this year, at my request, the BOG approved a revision to my contract that would have designated a small percentage of my salary as an employer contribution to my PERS Individual Account. PERS has informed me that it does not believe I qualify under the statutory provision that allows these employer contributions for "groups" of employees. I am not interested in pursuing an appeal of PERS' decision and request that the BOG revoke its prior action so that my contract remains in its original August 2010 form.

**Oregon State Bar
Board of Governors Meeting
June 24, 2011
Judicial Proceedings Minutes**

Reinstatements and disciplinary proceedings are judicial proceedings and are not public meetings (ORS 192.690). This portion of the BOG meeting is open only to board members, staff, and any other person the board may wish to include. This portion is closed to the media. The report of the final actions taken in judicial proceedings is a public record.

A. Reinstatements

1. Brian Dobie – 902490

Motion: Mr. Larson presented information concerning the BR 8.1 reinstatement application of Mr. Dobie. Mr. Larson moved, and Mr. Kent seconded, to recommend to the Supreme Court that Mr. Dobie’s reinstatement application be denied. The motion passed unanimously.

2. Maureen Flanagan – 990488

Motion: Mr. Haglund presented information concerning the BR 8.1 reinstatement application of Ms. Flanagan. Mr. Haglund moved, and Ms. O’Connor seconded, to recommend Ms. Flanagan’s reinstatement to the Supreme Court. The motion passed unanimously.

3. Fred M. Granum – 832145

Motion: Mr. Kranovich presented information concerning the BR 8.1 reinstatement application of Mr. Granum. Mr. Kranovich moved, and Ms. Matsumonji seconded, to recommend Mr. Granum’s reinstatement to the Supreme Court. The motion passed unanimously.

4. J. Pat Horton - 670523

Motion: Ms. Johnnie presented an inquiry from the Supreme Court regarding the BR 8.1 reinstatement application of Mr. Horton. Ms. Johnnie moved, and Ms. Matsumonji seconded, to affirm the board’s prior recommendation that Mr. Horton be reinstated. The motion passed unanimously. Staff will so inform the court.

5. James Kolstoe –852586

Mr. Kehoe presented information concerning the BR 8.1 reinstatement application of Mr. Kolstoe to satisfy the one meeting notice requirement of Bylaw 6.103. The application will come before the board at a later meeting.

6. Amy L. Muenchrath – 973463

Ms. Dilaconi presented information concerning the BR 8.1 reinstatement application of Ms. Muenchrath to satisfy the one meeting notice requirement of Bylaw 6.103. The application will come before the board at a later meeting.

7. Michael M. Pacheco - 910851

Motion: Mr. Kranovich presented information concerning the BR 8.1 reinstatement application of Mr. Pacheco. Mr. Kranovich moved, and Ms. Matsumonji seconded, to recommend to the Supreme Court that Mr. Pacheco's reinstatement application be denied. The motion passed unanimously.

8. John W. Walker –733145

Ms. Naucler presented information concerning the BR 8.1 reinstatement application of Mr. Walker to satisfy the one meeting notice requirement of Bylaw 6.103. The application will come before the board at a later meeting.

B. Disciplinary Counsel's Report

As written.

**Oregon State Bar
Board of Governors Meeting
June 24, 2011
Executive Session Minutes**

Discussion of items on this agenda is in executive session pursuant to ORS 192.660(2)(f) and (h) to consider exempt records and to consult with counsel. This portion of the meeting is open only to board members, staff, other persons the board may wish to include, and to the media except as provided in ORS 192.660(5) and subject to instruction as to what can be disclosed. Final actions are taken in open session and reflected in the minutes, which are a public record. The minutes will not contain any information that is not required to be included or which would defeat the purpose of the executive session.

- A. Pending UPL Litigation
 - 1. The BOG received status reports on the non-action items.

- B. Pending or Threatened Non-Disciplinary Litigation
 - 1. The BOG received status reports on the non-action items.

- C. Other Matters
 - 1. The BOG received status reports on the non-action items.

**Oregon State Bar
Special Meeting of the Board of Governors
July 29, 2011
Minutes**

The meeting was called to order by President Steve Piucci at 8:46 a.m. on July 29, 2011, and adjourned at 8:59 a.m. Members present from the Board of Governors were Jenifer Billman, Barbara Dilaconi, Hunter Emerick, Michelle Garcia, Michael Haglund, Gina Johnnie, Matthew Kehoe, Christopher Kent, Ethan Knight, Tom Kranovich, Steve Larson, Mitzi Naucler and David Wade. Staff present were Sylvia Stevens, Helen Hirschbiel and Camille Greene.

1. Reports of Officers

A. Swearing-In of New Board Members

BOG President, Steve Piucci, swore in new board member David Wade.

2. BOG Special Sponsorships

Mr. Piucci presented Jim Rice's proposal for BOG support of a debate on the legality of torture between John Yoo and Steve Wax. The Alaska State Bar sponsored a successful debate between the two lawyers and Mr. Rice would like to hold a similar program in Portland. He believes he can procure funding from two legal societies in Portland and is asking for support, not funding, from the board. Mr. Rice expects 400-500 attendees. The board agreed by consensus to non-financial support of the debate in Portland on the legality of torture.

3. New Lawyer Mentoring Program

A. The New Lawyer Mentoring Program requested the board's approval of the new list of mentors for submission to Oregon Supreme Court. **[Exhibit A]**

Motion: Mr. Piucci moved, Ms. Naucler seconded, and the board voted unanimously to submit the list of mentors to the Oregon Supreme Court.

4. Good of the Order (Non-action comments, information and notice of need for possible future board action)

None.

Mentors for BOG Approval 7/29/11 --- New Lawyer Mentoring Program

EXHIBIT A

BAR#	SALUT	F.NAME	M.NAME	L.NAME	SUFFIX	FIRM	CITY	ST	REGION
750288	Mr.	David	C.	Baum		Baum Smith & Eyre LLC	La Grande	OR	1
903049	Mr.	Bruno	J.	Jagelski		Yturri Rose LLP	Ontario	OR	1
023639	Ms.	Kristin	M.	Larson		Hansen & Larson LLC	Bend	OR	1
080404	Mr.	Andrew	S.	Mathers		Andrew S Mathers PC	Bend	OR	1
040961	Mr.	J.	Glenn	Null		Mammen & Null Lawyers LLC	La Grande	OR	1
901223	Ms.	Janet	L.	Stauffer		PO Box 365	Dufur	OR	1
770110	Judge	Frank	R.	Alley	III	US Bankruptcy Court	Eugene	OR	2
731201	Mr.	F.	Douglass	Harcleroad		Doug Harcleroad Atty at Law	Coburg	OR	2
660662	Mr.	Thomas	H.	Hoyt		Speer Hoyt LLC	Eugene	OR	2
070299	Ms.	Mary	Bridget	Smith		Leahy Van Vactor & Cox LLP	Springfield	OR	2
940308	Ms.	Debra	E.	Velure		Zipse Elkins & Mitchell	Eugene	OR	2
821404	Mr.	Mark	M.	Williams		Gaydos Churnside & Balthrop PC	Eugene	OR	2
814350	Judge	G.	Philip	Arnold		Jackson County Circuit Court	Medford	OR	3
032705	Ms.	Elizabeth	W.	Bauer		C&K Market Inc	Brookings	OR	3
962374	Mr.	Christopher		Cauble		Cauble & Cauble LLP	Grants Pass	OR	3
730653	Mr.	Malcolm	J.	Corrigall		Corrigall & McClintock LLP	Coos Bay	OR	3
842235	Mr.	R.	Paul	Frasier		Coos County DA's Office	Coquille	OR	3
792345	Mr.	Timothy	C.	Gerking		Jackson County Circuit Court	Medford	OR	3
085574	Ms.	Anne	Marie	Kirchoff		Josephine County DA's Office	Grants Pass	OR	3
773354	Ms.	Susan		Schmerer-Haacke		Umpqua Valley Public Defender	Roseburg	OR	3
975447	Ms.	Sharon	Lee	Schwartz		Legal Aid Services of Oregon	Roseburg	OR	3
931951	Ms.	Barbara	J.	Aaby		Aaby Family Law	Beaverton	OR	4
780121	Ms.	Lois	A.	Albright		Albright Kittell PC	Tillamook	OR	4
670111	Mr.	Larry	A.	Brisbee		Brisbee & Stockton LLC	Hillsboro	OR	4
952704	Mr.	Oscar		Garcia		230 NE 2nd Ave Ste D	Hillsboro	OR	4
970631	Mr.	Charles	R.	Henderson		American Family Ins Co	Portland	OR	4
923330	Mr.	Rodger	M.	Hepburn		Reinisch Mackenzie PC	Portland	OR	4
741735	Mr.	Christophe	M.	Kittell		Albright Kittell PC	Tillamook	OR	4
077070	Ms.	C.	Sarah	Lappin		Vial Fotheringham LLP	Portland	OR	4
984498	Mr.	Jason	L.	Posner		Posner Law Firm LLC	Portland	OR	4
944311	Ms.	Laura	L.	Schantz		3000 NW Stucki Pl Ste 230	Hillsboro	OR	4
873726	Ms.	Pamela	E.	Yee		Schmidt & Yee PC	Aloha	OR	4
032697	Ms.	Gretchen	S.	Barnes		Cable Huston et al	Portland	OR	5
035361	Ms.	Brittany	Ann	Berkey		St Andrew Legal Clinic	Portland	OR	5
880231	Ms.	Karen	Ann	Berkowitz		Oregon Law Center	Portland	OR	5
781421	Mr.	Charles	L.	Best		1631 NE Broadway #538	Portland	OR	5

BAR#	SALUT	F.NAME	M.NAME	L.NAME	SUFFIX	FIRM	CITY	ST	REGION
770181	Mr.	Todd		Bradley		Gaylord Eyerman Bradley	Portland	OR	5
801730	Judge	Anna	J.	Brown		US District Court	Portland	OR	5
791837	Mr.	Don	G.	Carter		McEwen Gisvold LLP	Portland	OR	5
031641	Ms.	Heather	K.	Cavanaugh		Miller Nash LLP	Portland	OR	5
061484	Ms.	Elleanor	H.	Chin		Davis Wright Tremaine LLP	Portland	OR	5
830043	Mr.	Jay	R.	Chock		Dunn Carney Allen	Portland	OR	5
942740	Mr.	John	M.	Coletti		Paulson Coletti	Portland	OR	5
970473	Mr.	Kevin		Demer		Multnomah County DA's Office	Portland	OR	5
740790	Mr.	Robert	William	Donaldson		Black Helterline LLP	Portland	OR	5
972529	Mr.	Daniel	L.	Duyck		Whipple & Duyck PC	Portland	OR	5
883490	Ms.	C.	Marie	Eckert		Miller Nash LLP	Portland	OR	5
781990	Mr.	Kimball	H.	Ferris		Miller Nash LLP	Portland	OR	5
880460	Mr.	Ronald	M.	Fishback		Calhoun & Fishback PC	Portland	OR	5
042605	Ms.	Amity	L.	Girt		Multnomah County DA's Office	Portland	OR	5
872497	Mr.	Scott	A.	Heiser		Animal Legal Defense Fund	Portland	OR	5
012912	Mr.	Nathan	Christophe	Holtey		Brindle McCaslin & Lee PC	Portland	OR	5
052576	Ms.	Holli	K.	Houston		Kilmer Voorhees & Laurick PC	Portland	OR	5
923433	Mr.	Scott	N.	Hunt		Busse & Hunt	Portland	OR	5
965737	Mr.	Edward		Johnson		Oregon Law Center	Portland	OR	5
954727	Ms.	Leslie	S.	Johnson		Kent & Johnson LLP	Portland	OR	5
965490	Mr.	Mark	A.	Jurva		Jurva Martin PC	Portland	OR	5
970728	Ms.	Lissa	K.	Kaufman		PSU Student Lgl & Med Svc-LS	Portland	OR	5
852530	Mr.	Christophe	H.	Kent		Kent & Johnson LLP	Portland	OR	5
894080	Mr.	Philip		Key		Bonneville Power Admin. GC	Portland	OR	5
962041	Mr.	Brian	J.	King		Schwabe Williamson & Wyatt PC	Portland	OR	5
982712	Mr.	Robert	C.	Kline	Jr	Kline Law Offices PC	Portland	OR	5
080980	Mr.	Deakin	Thomas	Lauer		Klarquist Sparkman LLP	Portland	OR	5
860621	Mr.	Philip		Lebenbaum		Hollander Lebenbaum et al	Portland	OR	5
033736	Mr.	Justin	D.	Leonard		Ball Janik LLP	Portland	OR	5
993145	Mr.	Jeffrey	M.	Lowe		Multnomah County DA's Office	Portland	OR	5
045286	Mr.	Joseph	M.	Mabe		Brownstein Rask Sweeney LLP	Portland	OR	5
872949	Ms.	Stacey	E.	Mark		Ater Wynne LLP	Portland	OR	5
774100	Mr.	William	R.	Meyer		4207 SE Woodstock Blvd	Portland	OR	5
973377	Mr.	Charles	R.	Mickley	Jr	Multnomah County DA's Office	Portland	OR	5
844179	Mr.	John	Casey	Mills		Miller Nash LLP	Portland	OR	5
044699	Mr.	Clifton	Kolen	Molatore		Miller Nash LLP	Portland	OR	5
780676	Mr.	Mark		Morrell		806 SW Broadway Ste 1200	Portland	OR	5
752673	Mr.	James	E.	Mountain	Jr.	Harrang Long Gary Rudnick PC	Portland,	OR	5

BAR#	SALUT	F.NAME	M.NAME	L.NAME	SUFFIX	FIRM	CITY	ST	REGION
954924	Ms.	Karen	L.	Moynahan		Portland Ofc of City Attorney	Portland	OR	5
013681	Mr.	Ryan	R.	Nisle		Miller Nash LLP	Portland	OR	5
051316	Ms.	Nicole	M.	Nowlin		Cosgrave Vergeer Kester LLP	Portland	OR	5
001665	Mr.	Jonah	H.	Paisner		Law Ofc of Jonah H Paisner PC	Portland	OR	5
003560	Mr.	J.	Michael	Porter		Miller Nash LLP	Portland	OR	5
610704	Mr.	Raymond	M.	Rask		Brownstein Rask Sweeney LLP	Portland	OR	5
701200	Mr.	Gary	E.	Rhoades		Gary E Rhoades PC	Portland	OR	5
983395	Mr.	David	P.	Rossmiller		Dunn Carney Allen	Portland	OR	5
904410	Mr.	Michael	(Sam) J	Sandmire		Ater Wynne LLP	Portland	OR	5
874012	Mr.	Arthur	E.	Schmidt		Oregon Law Center	Portland	OR	5
722318	Mr.	Philip	F.	Schuster	II	3565 NE Broadway St	Portland	OR	5
813652	Ms.	Robin	J.	Selig		Oregon Law Center	Portland	OR	5
981040	Ms.	Kirsten	Meredith	Snowden		3205 SW Patton Rd	Portland	OR	5
854165	Mr.	Charles	H.	Sparks		Multnomah County DA's Office	Portland	OR	5
983514	Mr.	C.	Robert	Steringer		Harrang Long Gary Rudnick PC	Portland	OR	5
794160	Mr.	Raymond	F.	Thomas		Swanson Thomas & Coon	Portland	OR	5
940361	Mr.	Matthew	A.C.	U'Ren		Dodge & U'Ren LLC	Portland	OR	5
014437	Mr.	Nathan	Trumon	Vasquez		Multnomah County DA's Office	Portland	OR	5
773917	Mr.	D.	Lawrence	Wobbrock		Lawrence Wobbrock PC	Portland	OR	5
881151	Mr.	Geoffrey	G.	Wren		Workers' Compensation Board	Portland	OR	5
014570	Mr.	Alexander	S.	Wylie		Preg O'Donnell & Gillett	Portland	OR	5
925123	Ms.	Stephanie	S.	Andrus		DOJ GC Reg Utility & Bus	Salem	OR	6
781682	Mr.	Michael	G.	Cowgill		Weatherford et al	Albany	OR	6
922799	Mr.	David	E.	Delsman		430 Washington St SW	Albany	OR	6
982128	Ms.	Joan		Demarest		Joan Demarest LLC	Corvallis	OR	6
901477	Mr.	David		Doyle		Doyle Law Firm PC	Dallas	OR	6
791400	Mr.	Chris	W.	Dunfield		Petersen Dunfield & Fahy	Corvallis	OR	6
970577	Ms.	Rachel		Game		Hecht and Norman LLP	Salem	OR	6
832191	Mr.	Patrick	L.	Hadlock		Ringo Stuber Ensor & Hadlock	Corvallis	OR	6
691118	Mr.	Ronald	L.	Marek		Marek & Lanker LLP	Corvallis	OR	6
820888	Judge	Mary		Mertens James		Marion County Circuit Court	Salem	OR	6
823480	Ms.	Mitzi	M.	Naucler		Legal Aid Services of Oregon	Albany	OR	6
034180	Mr.	Timothy	R.	Park		Chris L Lillegard PC	Dallas	OR	6
753239	Judge	Ellen	F.	Rosenblum		Court of Appeals Judge	Salem	OR	6
903790	Ms.	Lucille	Seibert	Salmony		DOJ Trial Corrections Lit	Salem	OR	6
031548	Mr.	Joshua	S.	Williams		Benton County DA's Office	Corvallis	OR	6
041233	Ms.	Bonnie		Carter		Bonnie Cafferky Carter PC	Lake Oswego	OR	7
922735	Mr.	Thomas		D'Amore		D'Amore Law Group	Lake Oswego	OR	7

BAR#	SALUT/	F.NAME	M.NAME	L.NAME	SUFFIX	FIRM	CITY	ST	REGION
793075	Mr.	John	W.	Lundeen		4040 Douglas Way	Lake Oswego	OR	7
832793	Ms.	Linda	L.	Marshall		3 Monroe Pkwy Ste P	Lake Oswego	OR	7
701028	Mr.	C.	Richard	Noble		2875 Marylhurst Dr	West Linn	OR	7
911005	Judge	Susie	L.	Norby		Circuit Court Judge	Oregon City	OR	7
030936	Ms.	Kali	Samaya	Tara		PO Box 23911	Portland	OR	7
051276	Mr.	Brian	Blakely	Beckwith		723 Hamilton Ave	Palo Alto	CA	8
000380	Mr.	Arin	M.	Dunn		Dunn & Sheldrick PS	Vancouver	WA	8
106348	Mr.	David	A.	Rabbino		Hunsucker Goodstein et al	Lafayette	CA	8
004393	Mr.	Jay	L.	Thoman		48 Laguna Rd	Palmyra	VA	8

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: August 26, 2011
From: Mitzi Naucler, Chair, Policy & Governance Committee
Re: Fee Arbitration Rules Amendment

Action Recommended

Consider the Policy & Governance Committee motion to amend the Fee Arbitration Rules to create an Advisory Committee.

Background

At its April 22, 2011 meeting, the Board of Governors accepted the Fee Arbitration Task Force Report and adopted its recommendations. One of the recommendations was to create a Fee Arbitration Advisory Committee to act as a continuing resource for training and recruitment of arbitrators. In order to implement this recommendation, the Policy and Governance Committee recommends amending the Fee Arbitration Rules as follows:

Section 2. Arbitration Panels and Advisory Committee

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2.1 General Counsel shall appoint members to an arbitration panel in each board of governors region, from which hearing panels will be selected. The normal term of appointment shall be three years, and a panel member may be reappointed to a further term. All attorney panel members shall be active or active pro bono members in good standing of the Oregon State Bar. Public members will be selected from individuals who reside or maintain a principal business office in the board of governors region of appointment and who are neither active nor inactive members of any bar.

2.2 General Counsel shall also appoint an advisory committee consisting of at least one attorney panel member from each of the board of governors regions. The advisory committee shall assist General Counsel with training and recruitment of arbitration panel members, provide guidance as needed in the interpretation and implementation of the fee arbitration rules, and make recommendations to the board of governors for changes in the rules or program.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: August 26, 2011
From: Sylvia E. Stevens, Executive Director
Re: CSF Claim Recommended for Payment

Action Recommended

The CSF Committee, at its meeting on July 23, 2011, voted to recommend the following claim for payment:

No. 2010-38 HAYES (Guerrero)	\$2,000.00
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Background

No. 2010-38 HAYES (Guerrero)

Claimant engaged Keith Hayes in November 2008 to assist in resolving two competing child support orders in Oregon and Arizona. He deposited a \$2000 retainer against Hayes' fees. Shortly thereafter, Guerrero received copies of letters Hayes sent to the appropriate state agencies. Guerrero called Hayes' office several times and was told by the secretary that Hayes was working on Guerrero's matter, but he never again heard from Hayes. So far as Guerrero could tell, nothing more was done on his behalf and he never received either an accounting or a refund from Hayes. Guerrero is trying to resolve the matter himself now, as he cannot afford to hire another attorney.

Hayes' primary practice was bankruptcy. In March 2009 he was suspended from practice before the Bankruptcy Court and ordered to disgorge fees in several cases. An interim disciplinary suspension order was entered against Hayes in January 2010 and he was disbarred by a trial panel in July 2010. Hayes' current whereabouts are unknown.

The CSF Committee concluded that Guerrero is entitled to a refund of the unearned fees paid to Hayes in advance, that Hayes' work for Guerrero was minimal or insignificant within the meaning of CSF Rule 2.2.2, and that Guerrero should be reimbursed the full amount of \$2000. The committee also recommends waiving the requirement for a civil judgment against Hayes as Guerrero is not in a financial position to pursue such an action and Hayes is likely judgment-proof in any event.

MINUTES

BOG Access to Justice Committee

Meeting Date: July 29, 2011
Location: Oregon State Bar Center, Tigard
Chair: Kenneth Mitchell-Phillips
Vice-Chair: Gina Johnnie
Members Present: Jennifer Billman, Hunter Emerick, Gina Johnnie (acting Chair), David Wade, Mitzy Naucler
Members Absent: Kenneth Mitchell-Phillips, Maureen McKnight
Staff Members: Susan Grabe, Judith Baker, Cathy Petrecca

ACTION ITEMS

1. **Topic:** Minutes of the May 20, 2011, meeting were approved.

INFORMATION ITEMS

2. **Topic:** National Meeting of State Access to Justice Chairs.
Cathy Petrecca gave an overview of the Access to Justice Chairs meeting which a daylong meeting was held in Las Vegas. Kenneth Mitchell-Phillips also attended the meeting. The purpose of the ATJ Chairs meeting is for participants to discuss their state's Access to Justice Commissions and activities with a focus on what is working and not working concerning those efforts.
3. **Topic:** Legal Service Program
HB 2710 repeals ORS 9.574 and ORS 21.480 and adds sections which effect how the legal services program is funded. It creates a legal aid account in the general fund of the State Treasury and provides that each biennium, the State Court Administrator will distribute to the Oregon State Bar \$11.9 million from the legal aid account in eight quarterly installments of equal amounts. The LSP Committee approved that the funds received quarterly be disbursed using the percentage of filing fee received by each provider for the first 5 months of 2011. This is the closest way to maintain the amounts currently received by each provider allowing them to maintain program continuity for 2011.
4. **Topic:** Pro Bono Committee projects.
Along with ongoing subcommittee work, the Pro Bono Committee is preparing for the annual "Celebrate Pro Bono" week in October.
5. **Topic:** Oregon Law Foundation.
U.S Bank holds more IOLTA accounts than any other bank in Oregon. They announced a drop in IOLTA interest rates from 1% to .35%. This will have a devastating impact on OLF

revenue which has been reeling from ongoing record low interest rates. The OLF sent letters to all U.S. Bank account holders asking them to contact their bank representative with the message for U.S. Bank to keep IOLTA interest rates at 1%

Minutes **Budget & Finance Committee**

June 24, 2011
Oregon State Bar Center
Tigard, Oregon

Present - Committee Members: Chris Kent, chair; Steve Larson (via telephone); Mike Haglund; Mitzi Naucler. **Other BOG Members:** Steve Pucci **Staff:** Sylvia Stevens; Helen Hirschbiel; Rod Wegener.

1. Minutes – April 22, 2011 and May 20, 2011 Committee Meeting

The minutes of the April 22 and May 20, 2011 meetings were approved.

2. Financial Report – May 31, 2011

The May 31, 2011 report had been distributed to the board prior to the meeting.

In the report Mr. Wegener highlighted the unusually high net revenue through May 31, much of which is attributed to below-budget non-personnel expenditures. A prevalent under-spending is postage costs which are much lower due to the combined delivery of the January Bulletin and the Resource Directory, no separate shipping of a Membership Directory, less shipping for Legal Publications, and generally less communication sent via U.S. mail. A number of programs' revenue exceed last year's by noticeable amounts. These changes all add to approximately \$1 million more in cash and the market value of all investments at May 31, 2011 than a year ago.

The Committee instructed the staff present to convey to the rest of the bar staff the Committee's appreciation for the good cost control of the non-personnel expenditures.

3. Proposals for Tenant and Capital Improvements at the Bar Center

Mr. Kent outlined the tenant improvements listed in the agenda to be made to prepare for new tenants on the first floor and other capital improvements at the bar center. The Committee discussed whether the improvements should be funded by a bank loan or the Landlord Contingency Fund. Mr. Wegener stated the improvements should be made to better market the space to prospective tenants since there is a larger inventory of small-office space available in the suburban Portland area. Once all the space is rented, the bar should generate \$80,000 to \$100,000 in annual rental income.

The Committee resolved to move ahead with making the tenant improvements to the undeveloped space on the first and third floors, install a sign on the building, and replace the wood floor. The funding initially will come from the Landlord Contingency with the decision about a loan to be made at a later meeting.

4. Lawyer Referral Program

This topic will be discussed and action taking on alternative funding for Lawyer Referral at the board meeting later that day. Mr. Wegener referred to the exhibit with the agenda which

indicated that almost \$20 of the 2010 active membership fee went to subsidize the lawyer referral program, and all participants in the program would have had to pay an average fee of \$380 for the program to break-even in 2010. The exhibit also reported that if the percentage fee had been in place since the 1992 report on lawyer referral, and if the program had broken-even since 1995, the bar would have received revenue of \$3.4 million.

5. Preparing for the 2012 Budget

Mr. Wegener reported he will present the first draft of the Executive Summary Budget for 2012 at the next committee meeting. That summary will include the financial impact of the items noted on the agenda and any other issues the committee will want to discuss for the development of the 2012 budget.

The Committee agreed that an economic survey should be performed during 2012 and debated the value of sending the survey as an email as was done for the first time in 2007, or as a paper survey to the randomly selected members. That decision will be made after more information about cost and survey validity is gathered during the budget development.

6. Next Committee meeting

The next meeting is scheduled for July 29, 2011 at the bar center in Tigard.

Minutes
Budget & Finance Committee
July 29, 2011
Oregon State Bar Center
Tigard, Oregon

Present - Committee Members: Chris Kent, chair; Steve Larson; Hunter Emerick; Michelle Garcia; Mike Haglund; Mitzi Naucler; David Wade. **Other BOG Members:** Tom Kranovich
Staff: Sylvia Stevens; Helen Hirschbiel; Rod Wegener.

1. Minutes – June 24, 2011 Committee Meeting

The minutes of the June 24, 2011 meeting were approved.

2. Selection of Auditor for Audit of OSB 2010 and 2011 Financial Statements

By consensus the Committee selected Moss Adams to perform the bar's audit for the 2010 and 2011 financial statements.

3. Update on Tenant and Capital Improvements at the Bar Center

Nothing to report other than what is noted in the agenda.

4. Financial Report – June 30, 2011

Mr. Wegener stated the mid-year net revenue slightly over \$1 million is very positive yet unusual, but will decline in the second half of the fiscal year. The end of the year net revenue is expected to be higher than the budget and using the seven-year average based on second-half-of-the-year activity, the net revenue for 2011 will approximate \$468,000.

This net revenue means the bar will not need to use the \$400,000 in reserves allocated to the budget in 2011. Mr. Wegener also stated the projected cash flow prepared by staff for the second half of the year indicates the bar has enough liquid funds so the reserves dollars are not needed in 2011.

Lastly he referred the Committee to the chart on the bar's reserves. The chart indicates the bar has approximately one-half million dollars more in the investment portfolio than the total of restricted funds, contingencies, and reserves. The committee agreed to review the investment policy and a report of the investment managers at an upcoming committee meeting.

5. 2012 Executive Summary Budget

In the review of the Executive Summary budget, the Committee discussed the impact of declining CLE Seminars revenue, the pros and cons of the economic survey, the increasing cost of PERS and the impact on the budget (Mr. Wegener reported that beginning July 1, the weighted rate to the bar is 9% compared to approximately 2-1/2% prior to the increase), and the value of Fastcase and BarBooks to membership.

To prepare for the next stage of the budget review, the Committee agreed to the following:

- No active member fee increase is needed in 2012.
- The executive staff is to prepare a schedule of the dollar amount for 0, 1, 2, and 3% salary increases and the impact of those increases on the budget.
- If needed, the reserves could be added to the 2012 revenue budget.

The summary report will be updated for the board review at the August 26 meeting, and the committee will review the next draft of the budget which includes the bar staff line-by-line budget at the September 23 meeting.

6. Next Committee meeting

The next meeting is scheduled for August 26, 2011 prior to the Board of Governors meeting in Pendleton.

MINUTES

BOG Member Services Committee

Meeting Date: June 24, 2011
Location: Oregon State Bar Center, Tigard
Chair: Gina Johnnie
Vice-Chair: Maureen O'Connor
Members Present: Maureen O'Connor (acting Chair), Ann Fisher, Audrey Matsumonji, Ken Mitchell-Phillips, Matt Kehoe (by phone)
Members Absent: Gina Johnnie
Guests: Steve Piucci (BOG)
Staff Members: Karen Lee, Kay Pulju, Anna Zanolli

ACTION ITEMS

1. **Topic:** Approved minutes of the May 20, 2011, committee meeting.

INFORMATION ITEMS

2. **Topic:** OSB Program Review. Acting Chair Maureen O'Connor led a discussion on selected program areas for the ongoing committee review.

CLE Seminars: Karen Lee provided budget details for the CLE Seminars program. The program has a net expense when ICA is factored in, and a net profit without ICA. Live program revenues have been declining in recent years, and staff have responded by hosting more programs at the bar to reduce facility costs and also reducing paper and printing expenses. Hosted video replay sites will also be phased out in favor of webcasting. The program is faced with growing competition from outside groups and online providers that offer opportunities for very affordable MCLE credits. A big challenge for the bar is serving a market that is increasingly segmented along generation lines, with the prevailing trend against live programming. The CLE Seminars department is exploring increased webcasting and "studio" shooting of seminar content for electronic distribution. Ann Fisher noted the importance of providing social and networking opportunities for members as CLE delivery moves away from live events.

OSB Facility Rentals: Rod Wegener prepared a handout of the bar's history with facility rentals. This topic will be discussed more fully at a future meeting.

3. **Topic:** OSB Membership Directory Feedback. Kay Pulju reviewed the BOG's decision to discontinue the print version of the membership directory and summarized member response to date. Committee members discussed possible enhancements to the print options now offered as well as continuing upgrades to the

online directory.

MINUTES

BOG Member Services Committee

Meeting Date: July 29, 2011
Location: Oregon State Bar Center, Tigard
Chair: Gina Johnnie
Vice-Chair: Maureen O'Connor
Members Present: Gina Johnnie, Matt Kehoe, Ethan Knight
Members Absent: Ann Fisher, Audrey Matsumonji, Ken Mitchell-Phillips, Maureen O'Connor
Guests: Jenifer Billman, Steve Piucci (BOG)
Staff Members: Kay Pulju

ACTION ITEMS

1. **Topic:** Due to lack of quorum no actions were taken.

INFORMATION ITEMS

2. **Topic: OSB Awards.** Committee members discussed the nominations in each category and developed a slate of recommendations for approval at the next committee meeting. Nominations will then be submitted to the full board. The annual awards event will be a luncheon, which allows for lower ticket prices. The luncheon will be held on Wednesday, November 9th at The Governor Hotel in Portland.
3. **Topic: Section Membership for Law Students.** The members present agreed to recommend waiver of the bar's administrative assessment for complimentary law student memberships. The recommendation will be on the next meeting agenda for approval and submission to the full board.

MINUTES

BOG Policy & Governance Committee

Meeting Date: June 24, 2011
Location: OSB Center, Tigard, Oregon
Chair: Mitzi Naucler
Vice-Chair: Michael Haglund
Members Present: Barbara Dilaconi, Ann Fisher, Michael Haglund, Chris Kent, Tom Kranovich, Mitzi Naucler
Members Absent: Michelle Garcia
Staff Present: Sylvia Stevens, Helen Hierschbiel, Denise Cline
Guests: Hon. Kristena LaMar

ACTION ITEMS

- | |
|---|
| 1. Approval of April 22, 2011 minutes. |
| 2. Amend of RPC 1.15-2(m). The committee discussed staff's recommendation that an amendment deleting RPC 1.15-2(m) be presented to the HOD in November, subject to the Governor signing SB 380 which will make failure to file IOLTA certification a matter for administrative suspension rather than discipline. Mr. Kent moved, seconded by Mr. Haglund to present the recommendation to the BOG. The motion passed unanimously. |
| 3. Amend BR 2.3 Regarding LPRC Composition. The committee discussed Disciplinary Counsel's suggestion, in light of the legislature's unwillingness to eliminate LPRCs, that they be organized along BOG regions. Mr. Sapiro suggested that this change will make administering the LPRCs easier and may increase the number of volunteers available to conduct investigations. Ms. Dilaconi moved, seconded by Mr. Haglund, to recommend the change to the BOG. The motion passed unanimously. |
| 4. Exemption to Member E-Mail Requirement. The committee discussed a proposed amendment to BR 1.11 to create an exemption for some older and disabled bar members who cannot provide an e-mail address. It was suggested that the exemption should be broader, and perhaps left entirely to the discretion of the ED. After discussion, Mr. Kranovich moved, seconded by Ms. Dilaconi, to recommend the change as proposed by staff. The motion passed unanimously. |

MINUTES

BOG Policy & Governance Committee

Meeting Date: July 29, 2011
Location: OSB Center, Tigard, Oregon
Chair: Mitzi Naucler
Vice-Chair: Michael Haglund
Members Present: Mitzi Naucler, Michael Haglund, Chris Kent, Barbara Dilaconi, Michelle Garcia, Tom Kranovich
Members Absent: Ann Fisher
Guests: None
Staff Members: Sylvia Stevens, Helen Hirschbiel, Dani Edwards

ACTION ITEMS

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|---|
| <p>1. Topic: Approval of Minutes from June 24, 2011. On motion of Mr. Haglund, seconded by Mr. Kent, the minutes were approved as submitted unanimously.</p> |
| <p>2. Topic: Amendment of Bylaw Article 9. On motion of Ms. Garcia, seconded by Ms. Dilaconi, the committee unanimously approved amendments to Bylaws 9.1 and 9.2 to substitute “candidate statement” for “nominating petition” for BOG elections; and to Bylaws 9.3 and 9.4 to allow for electronic ballots.</p> |
| <p>3. Topic: Scope of Complimentary CLE. The committee reviewed staff’s information about changing delivery methods for CLE and how the current bylaw doesn’t provide clear guidance about what products are eligible for complimentary registration. On motion of Mr. Haglund, seconded by Mr. Kent, the committee unanimously approved the proposed changes to Bylaw 16.200 that extend complimentary registration to video replays and provide reduced registration to webcast programs where the OSB CLE Seminars Department provides the content. Additional discounts and complimentary products may be available at the sole discretion of the CLE Seminars Director.</p> |
| <p>4. Topic: Fee Arbitration Rule Establishing Advisory Committee. In April, the BOG, on the committee’s motion, approved the concept of a fee arbitration advisory committee. On motion of Ms. Dilaconi, seconded by Mr. Haglund, the committee approved an amendment to the Fee Arbitration Rules establishing the advisory committee.</p> |

MINUTES

BOG Public Affairs Committee

Meeting Date: June 24, 2011
Location: Oregon State Bar Center, OR
Chair: Derek Johnson
Vice-Chair: Audrey Matsumonji
Members Present: Audrey Matsumonji (by phone), Hunter Emerick, Maureen O'Connor, Gina Johnnie
Members Absent: Derek Johnson, Kenneth Mitchell-Phillips, Ethan Knight
Guests:
Staff Members: Susan Grabe

ACTION ITEMS

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| 1. Minutes: The minutes were approved by consensus. |
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INFORMATION ITEMS

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|---|
| 2. Fee Bills. HB 2710 and 2712 are wrapped up in the final end game related to the Judicial Department and Public Safety budget. The final result will be decided at the close of the legislative process. |
| 3. OJD Budget. The OJD budget looks like it will take approximately an 8-10% cut; however, with mandated payments subtracted that translate to about a 10% across the board, but a 15% cut at the trial court level and a 20% cut at the appellate court level. This is due primarily to the restrictions on mandated payments and the fact that 98% of OJD's budget is personnel costs. eCourt funds will be meted out according to strict terms with significant legislative oversight. The momentum behind the additional ct of appeals panel stalled in the end. |
| 4. Dueling section positions re SB 827. PAC discussed how the bar dealt with the situation presented when two sections with divergent opinions on the same bill. By presenting each bar section's respective position on the issue to the House Rules Committee with one cover letter from the bar stating that there were divergent opinions on the issue and the decisionmakers would have to determine the policy issue at hand, the bar was able to ensure the legislators had the information at hand to make a good decision. More importantly, neither group was able to preempt the other from presenting its position on the matter before the legislature. |

MINUTES

BOG Public Affairs Committee

Meeting Date: July, 29 2011
Location: Oregon State Bar Center, OR
Chair: Hunter Emerick
Vice-Chair: Audrey Matsumonji
Members Present: Hunter Emerick, Audrey Matsumonji (by phone), Gina Johnnie, Ethan Knight, David Wade
Members Absent: Kenneth Mitchell-Phillips, Maureen O'Connor
Guests: Steve Piucci, Jenifer Billman
Staff Members: Susan Grabe

ACTION ITEMS

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| 1. Minutes: The corrected minutes noting that Gina Johnnie and Hunter Emerick were not in attendance at the June meeting, were approved by consensus. |
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INFORMATION ITEMS

- | |
|---|
| 2. 2011 Session in review. HB 2710 and 2712, the fee bills, and the end game decisions regarding the Public Safety budget and the Judicial Department were all woven together at the end of the process. |
| 3. OJD Budget/eCourt. The OJD budget looks like it will take approximately an 8-10% cut across the board; however, with mandated payments such as judicial salaries, juror payments and court interpreter services subtracted that translates to about a 15% cut at the trial court level, and a 20% cut at the appellate court level. This is due primarily to the restrictions on mandated payments and the fact that over 90% of OJD's budget is personnel costs. eCourt funds will be meted out according to strict terms with significant legislative oversight. The momentum behind the additional ct of appeals panel stalled in the end. |

Future issues.

- The legislature has scheduled interim hearing days in September where many of the policy issues for the February session will be previewed.
- There are pending amendments in congress to further reduce Legal Services Corporation Funding which will be devastating to the local programs which are already making reductions due to the loss of IOLTA revenue.
- Other issues on the horizon include whether DA's can serve in an adjudicative function with the OSB or does that create a separation of powers issue (in particular with respect to the SPRB).

Minutes

BOG Unclaimed Lawyer Trust Account Special Committee

Meeting Date: June 24, 2011
Location: OSB Center, Tigard
Members Present: Jennifer Bilman and Michael Haglund
Members Absent: Ethan Knight
Guests: None
OSB Liaison: Helen Hierschbiel

ACTION ITEMS

1. Approval of Minutes. The Committee approved the minutes for the May 20, 2011 ULTA Committee meeting.	
2. Douglas, Conroyd & Gibb Claim. Michael Haglund moved, and Jennifer Bilman seconded, to approve Douglas, Conroyd & Gibb's request for return of funds delivered to the bar. Approval of the claim was unanimous.	
3. Clifford G. Soderback Claim. Jennifer Bilman moved, and Michael Haglund seconded, to approve Mr. Soderback's request for return of funds delivered to the bar, to the Estate of Dorothy L. Soderback. Approval of the claim was unanimous.	

CLAIM #	NAME	ATTORNEY	CLAIM	PENDING	AMOUNT PAID	DATE PAID	DATE DENIED W/DRAWN	UNPAID BALANCE	ASSIGNED TO
09-38	Johnson, Steven R	Dalrymple, Richard	\$852.00	852.00				852.00	Foster
10-16	Bazurto, Cecilia	Fields, Stanley	\$25,000.00	25,000.00				25,000.00	Gouge
10-19	Rawson, Kathryn Eilene	Dickerson, Daniel	5,000.00	5,000.00				5,000.00	Howard
10-21	Sisney, Bryan	Harrison, Pamela	8,142.50	8,142.50				8,142.50	Gouge
10-25	Kiker, Jeffrey Allen	Ginsler, B. William	8,868.03	8,868.03				8,868.03	Howard
10-28	Myers, Teresa	Hayes, Keith	3,020.00	3,020.00				3,020.00	Barrack
10-31	Johns, Frank and Chongnak	Connall, Des	25,300.00	25,300.00				25,300.00	Wright
10-32	Ryan, Lynn	Connall, Shannon	18,500.00	18,500.00				18,500.00	Wright
10-36	Kitchens, Michael M	Ginsler, B. William	16,925.91	16,925.91				16,925.91	Wright
10-38	Guerrero, Daniel J	Hayes, Keith	2,000.00	2,000.00	Going to BOG			2,000.00	
10-40	Stockberger, Dale D	Dalrymple, Richard	1,945.00	1,945.00				1,945.00	Bennett
11-02	Risch, Stephen R	Connall, Des & Shannon	57,000.00	57,000.00				57,000.00	Wright
11-05	Raske, Karen	Connall, Shannon	3,250.00	3,250.00				3,250.00	Wright
11-06	Reis, Ryan Walter	Connall, Shannon	5,000.00	5,000.00				5,000.00	Wright
11-07	Stratton, Laurence Eugene	Connall, Shannon and Des	10,000.00	10,000.00				10,000.00	Wright
11-11	Roberts, Kevin Neal	Cardwell, Timothy	500.00	500.00				500.00	Cousineau
11-13	Suanders, Ima Jean Lousie	Burns, Suan Ford	400.00	400.00				400.00	Calderon
11-15	Bichsel, Ruth J	Harrison, Pamela	5,624.00	5,624.00				5,624.00	Kekel
11-16	Szal, Dennis	Harrison, Pamela	6,822.20	6,822.20				6,822.20	Kekel
11-17	Schweickart, Joni Rae	Barker, Mitchell	5,000.00	5,000.00				5,000.00	Angus
11-18	Miller, Diana Lynn	Hayes, Keith	2,500.00	2,500.00				2,500.00	Barrack
11-19	Pantalone, John and Linda Ray	Hayes, Keith	4,000.00	4,000.00				4,000.00	Barrack
11-20	Milich, Forrest Dale	Ettinger, Marie	1,000.00	1,000.00				1,000.00	McGean
11-21	Roelle, Brian D	Connall, Des	23,000.00	23,000.00				23,000.00	Wright
				239,649.64				239,649.64	
						Fund Excess		407,647.36	
	Funds available for claims and indirect costs allocation as of July 2011								
						Total in CSF Account		647,297.00	

2011 JUDGMENTS COLLECTED

Date	Attorney	Payment Received
1/6/2011	Kelley, Phil	360.00
2/4/2011	Kelley, Phil	360.00
3/16/2011	Correll, Jon	500.00
4/4/2011	Kelley, Phil	360.00
4/8/2011	Long, Michael	430.00
6/3/2011	Kelley, Phil	720.00
7/5/2011	Kelley, Phil	360.00
8/5/2011	Kelley, Phil	360.00

TOTAL

\$3,450.00

OREGON STATE BAR
Client Security - 113
For the Seven Months Ending July 31, 2011

Description	July 2011	YTD 2011	Budget 2011	% of Budget	July Prior Year	YTD Prior Year	Change v Pr Yr
REVENUE							
Interest	\$239	\$1,784	\$4,300	41.5%	\$218	\$1,871	-4.6%
Judgments	385	6,475	4,000	161.9%	360	5,212	24.2%
Membership Fees	540	215,160	220,300	97.7%	397	210,226	2.3%
TOTAL REVENUE	1,164	223,419	228,600	97.7%	975	217,309	2.8%
EXPENSES							
SALARIES & BENEFITS							
Employee Salaries - Regular	2,754	19,629	23,900	82.1%	2,397	17,896	9.7%
Employee Taxes & Benefits - Reg	1,024	6,254	8,300	75.4%	723	5,245	19.3%
TOTAL SALARIES & BENEFITS	3,778	25,883	32,200	80.4%	3,119	23,140	11.9%
DIRECT PROGRAM							
Claims	5,000	91,315	225,000	40.6%		134,694	-32.2%
Collection Fees		1,714	500	342.8%	20	1,006	70.4%
Committees			100				
Travel & Expense			1,300			2,887	-100.0%
TOTAL DIRECT PROGRAM EXPENSE	5,000	93,029	226,900	41.0%	20	138,588	-32.9%
GENERAL & ADMINISTRATIVE							
Photocopying			150				
Postage	8	120			20	119	0.8%
Professional Dues			200				
Telephone	7	27			9	83	-67.1%
Training & Education		200	450	44.4%			
Staff Travel & Expense	531	1,000	772	129.6%	543	571	75.2%
TOTAL G & A	546	1,347	1,572	85.7%	573	773	74.4%
TOTAL EXPENSE	9,325	120,259	260,672	46.1%	3,712	162,501	-26.0%
NET REVENUE (EXPENSE)	(8,160)	103,160	(32,072)		(2,737)	54,808	88.2%
Indirect Cost Allocation	1,079	7,553	12,942		1,092	7,644	-1.2%
NET REV (EXP) AFTER ICA	(9,239)	95,607	(45,014)		(3,829)	47,164	102.7%
Fund Balance beginning of year		551,690					
Ending Fund Balance		647,297					
Staff - FTE count		.35	.35			.35	

AFFIDAVIT OF DAVID A. LOKTING

STATE OF OREGON)
) ss.
County of Multnomah)

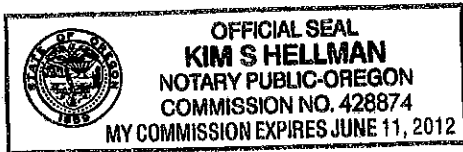
I, David A. Lokting, having been duly sworn do hereby depose and say:


I am a partner with the law firm of Stoll Stoll Berne Lokting & Shlachter PC. My partner, Steve D. Larson, will not in any way participate in the representation of my client, Machine Works, LLC, in a matter involving a Professional Liability Fund covered claim. He has not and will not be involved in this matter. There have been no discussions with Steve about this representation, and all staff members have been instructed to not discuss this matter with him.



David A. Lokting

SUBSCRIBED AND SWORN TO before me this 18th day of July, 2011.





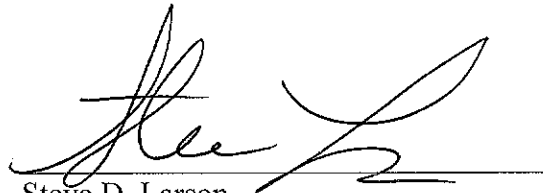
Notary Public for Oregon
My commission expires: 6-11-2012

AFFIDAVIT OF STEVE D. LARSON

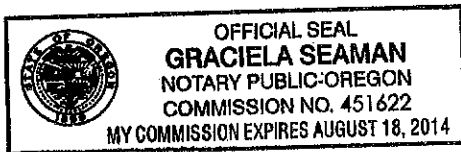
STATE OF OREGON)
) ss.
County of Multnomah)


I, Steve D. Larson, having been duly sworn do hereby depose and say:

I am a partner with the law firm of Stoll Stoll Berne Lokting & Shlachter PC. My partner, David A. Lokting, has agreed to represent Machine Works, LLC in a matter involving a Professional Liability Fund covered claim. I will not participate in the matter or the representation and will not discuss the matter or the representation with any other firm member or staff person.


Steve D. Larson

SUBSCRIBED AND SWORN TO before me this 19th day of July, 2011.




Notary Public for Oregon
My commission expires: 8/18/14



Gartland, Nelson, McCleery,
Wade & Walloch, P.C.

Attorneys at Law
44 Club Road, Suite 200
Eugene, Oregon 97401

gartlandnelsonlaw.com

P 541.344.2174
F 541.344.0209

davidw@gartlandnelsonlaw.com

August 8, 2011

Ms. Sylvia E. Stevens
Oregon State Bar
16037 S.W. Upper Boones Ferry Road
P. O. Box 231935
Tigard, OR 97281

RECEIVED

AUG 10 2011

RE: Oregon State Bar Board of Governors
Our File No. 5052-11A

Oregon State Bar
Executive Director

Dear Sylvia:

Confirming our several telephone calls and emails, enclosed please find Affidavits signed by me and by Scott McCleery regarding my Firm screening me from PLF defense matters (but not repair matters).

Confirming my separate discussions with you and Helen Hierschbiel, given the number of PLF matters this Firm handles every year, the Firm and I will file further affidavits only at the end of my term on the BOG.

Sincerely,

DAVID WADE

DW:jb

Enc.

**OREGON STATE BAR BOARD OF GOVERNORS
INITIAL AFFIDAVIT OF P. SCOTT McCLEERY CONCERNING PLF
MATTERS**

STATE OF OREGON)
) ss.
County of Lane)

I, P. Scott McCleery, being first duly sworn, do depose and say that:

1. I am a shareholder and President of the Board of Gartland, Nelson, McCleery, Wade & Walloch, P.C. (the "Firm").

2. All shareholders and attorneys in the Firm are aware of the requirement that David Wade be screened from participating in or discussing any PLF defense matters or other representation in any PLF defense matters.

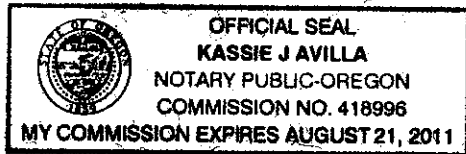
3. The Firm has a long history of representing the PLF in numerous matters. This year alone, I have been assigned 23 matters by the PLF. It is therefore not practical for the Firm to file Compliance Affidavits upon final disposition of each PLF matter. However, upon the termination of David Wade's term as a member of the Oregon State Bar Board of Governors, the Firm will file a Compliance Affidavit for all PLF defense matters assigned during his term on the Board.

DATED this 9th day of August, 2011.



P. SCOTT McCLEERY

SUBSCRIBED AND SWORN to before me this 9th day of August, 2011, by P. Scott McCleery.





NOTARY PUBLIC FOR OREGON


**OREGON STATE BAR BOARD OF GOVERNORS
INITIAL AFFIDAVIT OF DAVID WADE CONCERNING PLF MATTERS**

STATE OF OREGON)
) ss.
County of Lane)

I, David Wade, being first duly sworn, do depose and say that:

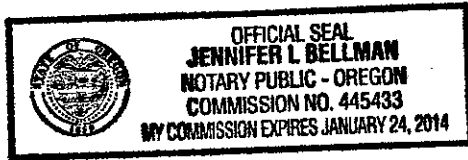
1. On July 29, 2011, I was sworn in as a member of the Oregon State Bar Board of Governors.
2. I make this Affidavit pursuant to subsection 23.503 of the Oregon State Bar Bylaws.
3. I am a shareholder in Gartland, Nelson, McCleery, Wade & Walloch, P.C. (the "Firm"). The Firm has a long history of representing the Oregon State Bar Professional Liability Fund ("PLF") in defense of PLF claims and in repairs on behalf of a covered party's former client in circumstances where the covered party has made a potential correctable error.
4. This year alone, the Firm has been assigned 23 PLF matters. It is therefore not practical for me to file an Affidavit each time the Firm receives a PLF assignment.
5. This is to attest that while the Firm is handling a PLF defense claim, I will not participate in any manner in the matter or the representation and will not discuss the matter or the representation with any other shareholder or attorney in the Firm.
6. Due to the number of PLF matters handled by the Firm, it is not practical for me to file a Compliance Affidavit describing actual compliance with these understandings upon final disposition of each PLF matter. However, at the termination of my term as a member of the Oregon State Bar Board of Governors, I will file a Compliance Affidavit for all such matters.
7. This is also to attest that all shareholders and attorneys in the Firm are aware of the requirement that I be screened from participating in or discussing PLF defense matters or other representation in PLF defense matters.

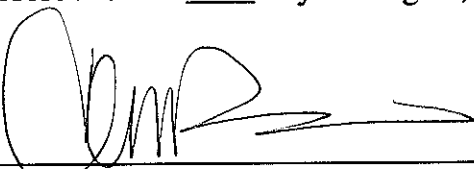
DATED this 8th day of August, 2011.



DAVID WADE

SUBSCRIBED AND SWORN to before me this 8th day of August, 2011, by
David Wade.





NOTARY PUBLIC FOR OREGON

THE LAWYERS'
CAMPAIGN
for EQUAL JUSTICE

August 10, 2011

Rod Wegener
Oregon State Bar
PO Box 231935
Tigard, OR 97281

Dear Rod:

I am enclosing a copy of CEJ's audit, along with a copy of our Annual Report, our "Year in Review," and last year's HOD Resolution. We greatly appreciate the support of the Oregon State Bar in helping address the justice gap in Oregon. As you may have heard, Oregon's legal aid programs are facing budget cuts in the amount of 15-22% because of decreased federal funding (for the second half of 2011), low interest rates causing a drop in IOLTA revenues, and the loss of \$1 million in general fund support. We also anticipate declines in foundation support because of the economic downturn.

CEJ is continuing to step up our efforts in fundraising from the private bar, and we also work on state and federal funding and foundation support.

As you likely recall, in 2005 we increased our annual campaign to \$1 million per year, and we have remained at that level despite the difficult economy. Our long range goal is to reach \$1.25 million from private lawyers by 2013-14. In addition, we will be stepping up our efforts to protect state and federal funding and foundation support. (Of course, increases in funding from other sources are not directly reflected in our financial statements, but are noted in our audit and tax returns.) In the past 20 years, the Campaign has raised almost \$20 million in support of legal aid--- and we have done so with the assistance of the Oregon State Bar, the Oregon Law Foundation, and our partners from around the state.

The \$45,000 the Oregon State Bar pledged to the Campaign helps us expand our efforts on behalf of legal aid. On behalf of the Campaign's board, we thank you for your support. If you have any questions, please do not hesitate to contact me. We hope that the OSB will continue to provide support during some the very challenging funding battles that are before us.

Sincerely,


Sandra Hansberger
Executive Director

Enclosures

c: Sylvia Stevens, Executive Director ✓

COMMITTEE

Trudy Allen
Howard G Arnett
Hon Thomas A Balmer
Ernest Bonyhadi
Hon Kate Brown
Hon David V Brewer
Larry A Brisbee
Thomas W Brown
Christine P Brown
Hon Neil R Bryant
Timothy J Calderbank
Barry P Caplan
Jeff J Carter
William G Carter
Linda D Clingan
Nena Cook
Charles E Corrigan
Laurie Craghead
William B Crow
Sarah Crooks
Keith Cunningham-Parmeter
William V Deatherage
Timothy S DeJong
David R Denecke
Emi A Donis
Michael Dotten
Michelle S Druce
Jeffrey M Edelson
Amy Edwards
Paul R Ehrlich
Ernest E Estes
Kathleen A Evans
Linda K Eyerman
Brien Joseph Flanagan
Stuart E Foster
Norma S Freitas
Mark A Friel
Gerry Gaydos
John Gartland
Timothy C Gerking
Peter Glade
Phil Goldsmith
S Ward Greene
Ronald L Greenman
William N Gross
Michael E Haglund
Jessica T Hamilton
Marilyn J Harbur
Edwin A Harnden
James D Hennings
Henry H Hewitt
Jason Hirshon
Hon Mary James
Hon Edward J Jones
Nicholas A Kampars
Dennis C Karnopp
Paul J Kelly Jr
Keith A Kettering
Dean Robert Klunoff
James L Knoll
Peter H Koehler Jr
Frank V Langfitt III
Steven D Larson
Lisa M LeSage
Rodney E Lewis Jr
Eric B Lindauer
Ann Linger
Linda C Love
Mervyn H Loya
Don H Marmaduke
Susan D Marmaduke
Donald W McCann
Albert A Menashe
Sonia A Montalbano
Joel A Mullin
Hon Hardy Myers
Carl R Neil
Hon Adrienne C Nelson
William F Nessly Jr
Darcy M Norville
Mary J Oberst
Dean Margaret L Paris
Beverly Pearman
Joseph E Penna
Stephen V Piucci
Guy A Randies
Dennis P Rawlinson
Lawrence H Reichman
Cecil A Reniche-Smith
Peter C Richter
Thomas C Sand
Daniel P Santos
Louis D Savage
Douglass H Schmor
Andrew Schpak
Michael D Schunk
Lane P Shetterly
Charmin B Shiely
Michael R Silvey
Michael H Simon
Beth R Skillern
Kelly Skye
Vicki L Smith
N Robert Stell
Cory Streisinger
Edward J Sullivan
Dean Symeon C Symeonides
Charles S Tauman
Valerie Athena Tomasi
E Walter Van Valkenburg
Michelle Vlach-Ing
Mark R Wada
James T Waldron
Christopher M Walters
Robert C Weaver Jr
James N Westwood
Michael L Williams
Charles R Williamson
Hon Robert Wohlheim
Theresa L Wright
Richard S Yugler



RECEIVED

AUG 12 2011

Oregon State Bar
Executive Director

CAMPAIGN FOR EQUAL JUSTICE
Fiscal Year End Progress Report
May 20, 2011

This report is broken down into CEJ's four program areas:

- Annual Fund/Endowment
- Education and outreach
- Other funding initiatives (state, federal and grant funding)
- Administration (management and general)



Many of CEJ's activities cover several different programs. To avoid duplication in this report, we have listed each activity only once.

I. ANNUAL FUND

This year marked the 75th Anniversary of Legal Aid in Oregon and the 20th Anniversary of the Campaign for Equal Justice. Over \$1,095,000 was raised from 2,525 donors.

A. Goals

- \$1,000,000 in lawyer contributions
 - We raised approximately \$1,095,000.
 - That is an \$87,000 increase in net giving over last year – an 8.6% increase in contributions.
 - Notable increases
 - Washington County: \$31,800 increase
 - OWLS members: \$23,477 increase (104 additional donors)
 - More than 800 lawyers were identified as "Pillars of Justice"---lawyers who had contributed for 15 or more of the Campaign's 20 annual fund drives.
 - Defenders of Justice: 50 individual donors who had contributed \$20,000 or more since the Campaign began 20 years ago.
 - The Campaign continues to make inroads in areas outside of Portland, often by enlisting the assistance of county bar associations and other bar groups.
- 3,000 donors – still working to achieve (2,525 donors this year)
 - Oregon remains a state with one of the highest levels of private attorney contributors to civil legal aid which is not using a bar dues check off for contributions. About 20% of active bar members contributed. We take pride in that and hope to maintain it into the future.



B. Matches

Leadership match and OWLS match encouraged giving.

- Matching funds once again were instrumental to the Campaign – both the leadership match (32 Campaign leaders pooled \$65,000) and the OWLS match (\$25,000) encouraged giving to the Campaign.

C. Direct Mail and E-Mail Campaigns

- Over 40 email blasts sent, with astounding response
 - We subscribe to an email blast service that allows us to create and track blast emails. We sent emails with lots of pictures that directed people to our website where they can donate online and/or sign up for events. Many constituents clicked the links to our website, especially for the Annual Luncheon and the Hollywood Theatre movie event.
- Over 46,000 pieces of paper mail
 - We sent out eight direct mail solicitations – some to all Oregon attorneys, others targeted to attorneys in specific regions or groups and signed by CEJ supporters who are prominent in the region we are targeting.
 - We also had brochures included in two editions of the OSB Bulletin and one edition of the OTLA Trial Lawyer.

D. Committees - the backbone of the Campaign's fundraising activities

We have over ten organizational committees that meet several times during the course of the annual campaign, solicit donations, and publicize events. These committees include three Portland committees: the Large Firm Partner Committee, the mid-sized firm committee, and the Associates/Young Lawyer Committee. Peer-to-peer contact remains our most effective fundraising technique, and the lawyers on our committees are the first step in that contact.

E. Events

We held luncheons in Marion County, Lane County, and Jackson County, with good responses in all counties. Instead of a luncheon in Bend, we held a CLE and reception with Court of Appeals Judge Schuman. We should consider what approach we should take in Bend in the coming fundraising year.

- 14th Annual Marion & Polk County CEJ luncheon



- About 315 lawyers and judges attended
- Secretary of State Kate Brown was the keynote speaker
- Senator Peter Courtney received the Public Access to Justice Award
- Tom Elden received the Partner in Access to Justice Award
- Sponsored by Pioneer Trust Bank and Mountain West Investment Corp.
- Marion-Polk County lawyers raised over \$65,000 this year, the bulk of it at the luncheon

- Second Annual Lane County CEJ luncheon



- Sponsored by Pacific Continental Bank
- About 142 lawyers and judges attended
- Court of Appeals Chief Judge David Brewer was the keynote speaker
- Lane County lawyers raised over \$82,000 with 272 donors—a new record

- Second Annual Jackson County CEJ luncheon



- More than 115 lawyers and judges attended
- Court of Appeals Chief Judge David Brewer was the keynote speaker



CAMPAIGN FOR EQUAL JUSTICE
Fiscal Year End Progress Report
May 20, 2011

- Sponsored by Naegeli Reporting, Naegeli Trial Technologies, and Bank of the Cascades
- Jackson County attorneys raised over \$21,000 this campaign

F. Endowment

Our Endowment was created as a joint venture between the CEJ, the OSB and the OLF. The Endowment merged with CEJ in 2007 to save on administrative expenses. The primary work on our endowment is through planned gifts.

- Ned Clark's \$100,000 bequest. During the early formation of the endowment, Ned Clark pledged \$100,000. We received the \$100,000 check in October 2010.
- Ned's gift should act as a catalyst for endowment giving. During the summer of 2011, CEJ will step up its endowment efforts.
- We continue to comply with UPMIFA and accounting standards. We look forward to setting up a separate fund within the Endowment for the Herbold Fund in order to make the accounting piece easier.
- Continued policy work on the endowment by the board subcommittee is needed to set long term goals.

II. EDUCATION & OUTREACH

The 2010-2011 Campaign began on September 2, 2010, with the Advisory Committee and Campaign Leadership Meeting. Young lawyers participated in the annual Party Under the Stars, an Associates Committee Movie Night, and a Young Lawyers Reception at Mahonia Hall. Governor Ted Kulongoski and First Lady Mary Oberst hosted young lawyers and major donors at two receptions at Mahonia Hall. The Campaign held its 20th Anniversary Annual Awards Luncheon in Portland. During all of our events, the Campaign continued to discuss the importance of equal access to justice, that "where you bank matters", and more broadly, our Call to Action.

A. Advisory Committee and Campaign Leadership Meeting



- Featured Representative Chris Garrett, a legal aid update from David Thornburgh, Leslie Kay, and legal aid attorney Meghan Collins, a historical retrospective from Supreme

Court Justice Balmer, remarks from OSB President Kathleen Evans, and Justice Jeopardy! hosted by Justice Balmer.

- Sponsored by Bank of the Cascades and the Daily Journal of Commerce.

B. Young Lawyers at Party Under the Stars



The sixth annual Party Under the Stars was held at Ater Wynne and had an excellent turnout of about 50 attendees. It was sponsored by Beovich Walter & Friend.

C. Young Lawyers at Mahonia Hall



The third Mahonia Hall Event for Young Lawyers allowed young lawyers to visit Mahonia Hall and converse with Governor Kulongoski and First Lady Mary Oberst.

D. Associates Committee Showing of "12 Angry Men" at Hollywood Theatre in Portland



About 70 people attended the movie screening, and the event raised about \$10,000 through sponsorships.

E. Mahonia Hall Major Donors Reception



The event was bittersweet, as it may be the last time we are at Mahonia Hall. First Lady Mary Oberst invited Governor Kitzhaber's companion Cylvia Hayes, who attended and was introduced to the tradition of supporting CEJ. Many judges were present, including Supreme Court Chief Justice De Muniz, Justices Robert Durham and Virginia Linder, the newest Court of Appeals Judge, Lynn Nakamoto, and Court of Appeals Judges Becky Duncan and Ellen Rosenblum. CEJ presented the Governor and First Lady with a photo book thanking them for their dedication to access to justice.

F. 20th Anniversary Annual Awards Luncheon



- Speakers included Justice Tom Balmer, Senator Jeff Merkley, Henry Hewitt, and Senator Ron Wyden (by video)
- Ed Harnden received the Henry Hewitt award
- Sponsored by adidas and NIKE
- Almost 400 people attended

G. Continuing Legal Education (CLE) Presentations

This year we updated the CLE to include more information about client stories and priority setting. The goal of the update was to emphasize the difficulty of being able to satisfy less than 20% of the need for legal services and the gravity of the need, and to personalize the clients. It was well received. The CLEs involved legal aid directors and/or staff attorneys, as well as the CEJ Executive Director and/or Associate Director.

Organization / Event	Date
Washington County Bar Association	September 8, 2010
Oregon New Lawyers Division Super Saturday CLE	October 16, 2010
Linn-Benton County Bar Assn	October 13, 2010
Oregon State Bar Pro Bono Fair	October 28, 2010
K&L Gates	November 2, 2010
Kell Alterman	December 6, 2010
Stoel Rives	December 8, 2010
Ater Wynne	December 9, 2010

Davis Rothwell	January 7, 2011
Bend – Deschutes County Bar Assn	February 25, 2011

H. Other Efforts

- Regional newsletters and other written materials including the Annual Report
- Oregon State Bar House of Delegates Resolution calling for funding for legal aid, and specifically supporting state civil court filing fees for legal aid – passed nearly unanimously once again
- Collaboration with Oregon Law Foundation
- Articles in OSB Bulletin, Multnomah Lawyer, OTLA Magazine and publications, and county bar publications, and advertising in the Daily Journal of Commerce

III. OTHER FUNDING INITIATIVES

A. Foundation Support

CEJ provided technical assistance for a number of LASO and OLC grants. The Campaign continued to seek funding for legal aid programs from foundations, but our involvement was slightly less during 2010-11 than it has been in previous years, because so much of our energy was devoted to maintaining the state dedicated filing fee funding.

Our role is to locate potential funders for legal aid programs, to coordinate applications with LASO and OLC, and provide assistance in grant writing. Campaign staff provides some grant support work directly and through the use of an independent contractor. When we undertake large projects, LASO and OLC reimburse us for the grant writer’s services. The Campaign coordinates the work of the grant writer. Next year, we hope to purchase software that will assist us in targeting more foundations for legal aid support.

B. Federal & State Legislative Advocacy

The Campaign continued to seek funding for legal aid programs in the state legislature and Congress.



ABA Lobby Day 2011



CAMPAIGN FOR EQUAL JUSTICE
Fiscal Year End Progress Report
May 20, 2011

- **Federal Funding**
 - Every year we attend ABA Lobby Day in Washington, D.C. to lobby our Federal delegation to increase funding to the Legal Services Corporation.
 - This year, attended along with OSB President Steve Pucci, OSB Executive Director Sylvia Stevens, Ct. of Appeals Judge Ellen Rosenblum, Ed Harnden, OSB Public Affairs Director Susan Grabe, and OLC Executive Director David Thornburgh. We were able to meet all Oregon House and Senate members.
 - Oregon's federal funding for legal aid was cut during the second half of 2011 by \$170,000. Although these cuts are deep, legal aid was not as hard hit as some agencies receiving federal funding.
 - Restrictions: Work on removing the LSC restrictions has been temporarily put on hold.
 - We have been pursuing forming a NW coalition in support of increased LSC funding and for the second year have hosted other legal aid and bar groups for lunch on Washington, D.C. this year we met with representatives from Idaho and Montana, and maintained contacts with Washington.
 - Oregon's US Senator Jeff Merkley was honored with the ABA's Congressional Award for his work in extending FDIC insurance for IOLTA accounts. CEJ supporters and the OSB have been instrumental in working with Senator Merkley on issues relating to legal aid. (Senator Merkley also spoke at CEJ's annual awards luncheon.) All Oregon representatives voted against a measure that would have essentially defunded LSC field work grants.

- **State Funding**
 - 2010-11 was a big year for state legislative funding
 - Legal aid currently predicts a \$2.5 million deficit between 2011-2013 because of loss of general fund money, low interest rates (IOLTA/OLF), and federal cuts.
 - CEJ staff worked with legal aid and the OSB on preparing talking points and briefings for key legislative leaders regarding maintaining dedicated filing fee funding.
 - CEJ attended, monitored and testified at the meetings of the Interim Joint Justice Revenues Committee regarding the restructuring of state court filing fees. Met with Committee leadership and constituents in Eugene.
 - Met with House Judiciary staff once the bill moved to House Judiciary. Provided testimony before the House Judiciary Committee on HB 2710 relating to civil filing fees.
 - Met with the Chief Justice and Chair of the Courts Task Force Filing Fees (Martha Walters).
 - Attended OSB Lobby Day in Salem, and provided updated talking points on the filing fee bill.
 - Participated in the OSB's Task Force on State Court Filing Fees.



CAMPAIGN FOR EQUAL JUSTICE
Fiscal Year End Progress Report
May 20, 2011

- The Joint Committee on Ways & Means had several hearings across the state in the Spring of 2011 and we had CEJ supporters testify at all of the hearings. The hearings rooms were so crowded that supporters didn't always get to speak, but everyone also submitted written testimony to the committee, and signed in at the Committee hearing.

IV. Administration/Management and General

- Accounting
 - This year we completed a historical view of our allowance for doubtful accounts have slightly increased the allowance slightly (from 2.12% to 2.5%). In reality, our allowance is decreasing, but the new figure takes into account 2006 and 2007, which had a higher amount of writeoffs.
 - We are constantly reviewing our internal controls and making changes and improvements when necessary.
 - Audit. We have completed our fourth annual audit that had no adjustments, and no material weaknesses. Our auditors reported that they are pleased with CEJ's internal controls.
- We finalized our Board Policy Handbook this year, and the Handbook is updated on a regular basis.
- CEJ adopted an Employee Handbook.
- Technology:
 - As of July 2009 we have a new Website that we have continued to update on an almost a weekly basis;
 - In addition to accepting credit card donations, individuals can now register and pay for events online;
 - We used the online payment option much more this year, especially for the Annual Luncheon and the Associates Committee Movie Night, and it worked very well in conjunction with email blasts including links directly to registration pages on our website.
 - My Emma e-mail blast service links to our website
 - We have a Facebook page and it is linked to our website
 - We have a Twitter account which is linked to Facebook – Facebook posts are also tweeted.
 - Sage Fundraising Online, new this year, has allowed us to enable donors to donate directly on our website, rather than on an outside site like PayPal. It has made online donation and event registration simpler and allows information to be imported directly into our database, saving on staff time and reducing data entry errors. In appropriate cases, donors immediately receive their tax receipt for charitable deduction purposes.
 - CEJ won a competition this fall for having the second largest credit card volume for non-profits using Sage Fundraising Online, and was awarded \$1,000.

2010
HOD RESOLUTION NO. 1
Passed 10/29/10

Resolution in Support of Adequate Funding for Legal Services to Low-Income Oregonians

Whereas, providing equal access to justice and high quality legal representation to all Oregonians is central to the mission of the Oregon State Bar;

Whereas, equal access to justice plays an important role in the perception of fairness of the justice system;

Whereas, programs providing civil legal services to low income Oregonians are a fundamental component of the Bar's effort to provide such access;

Whereas, legal aid programs in Oregon are currently able to meet less than 20% of the legal needs of Oregon's poor;

Whereas, federal funding for Oregon's civil legal services programs, adjusted for inflation, is substantially less than it was in 1980 and there have been severe restrictions imposed on the work that programs, receiving LSC funding, may undertake on behalf of their clients;

Whereas, the Oregon State Bar provides oversight regarding the use of state court filing fees to help fund legal aid and this funding now comprises one-third of legal aid's overall funding and is critical in providing equal access to justice;

Whereas, assistance from the Oregon State Bar and the legal community is critical to maintaining and developing resources that will provide low-income Oregonians meaningful access to the justice system.

Resolved, that the Oregon State Bar;

- (1) Strengthen its commitment and ongoing efforts to improve the availability of a full range of legal services to all citizens of our state, through the development and maintenance of adequate support and funding for civil legal services programs for low-income Oregonians.
- (2) Request that Congress and the President of the United States make a genuine commitment to equal justice by adequately funding the Legal Services Corporation.
- (3) Actively participate in the efforts of the Campaign for Equal Justice to increase contributions by establishing goals of a 100% participation rate by members of the House of Delegates and of a 50% contribution rate by all lawyers.
- (4) Actively participate in and support the fundraising efforts of those non-profit low-income legal service providers in Oregon that are not supported by the Campaign for Equal Justice.
- (5) Support the Oregon Law Foundation and its efforts to increase resources through the interest on Lawyers Trust Accounts (IOLTA) program.
- (6) Encourage Oregon lawyers to support civil legal services programs through enhanced pro bono work.
- (7) Work to preserve the dedicated court filing fee funding for legal aid that has been in place since 1977 and which has been monitored and distributed by the Oregon State Bar Legal Services Program since 1997.

**BACKGROUND INFORMATION RELATING TO PROPOSED HOD RESOLUTION
IN SUPPORT OF LEGAL AID FUNDING**

“The mission of the Oregon State Bar is to serve justice by promoting respect for the rule of law, by improving the quality of legal services and by increasing access to justice.” Section 1.2 of the Oregon State Bar Bylaws. One of the four main functions of the Bar is to be, “A provider of assistance to the public. As such, the bar seeks to ensure the fair administration of justice for all * * *.” *Id.*

The Board of Governors and the House of Delegates have adopted a series of resolutions supporting adequate funding for civil legal services in Oregon (Delegate Resolution in 2009, Delegate Resolution No. 8 in 2008, No. 12 in 2007, No. 14 in 2006, No. 7 in 2005, BOG Resolution No. 7 in 2002, BOG Resolution No. 6 in 1999, BOG Resolution No. 3 in 1997, and Delegate Resolution No. 11 in 1996). The 2009 resolution is identical to the one being passed in 2008.

The legal services organizations in Oregon were established by the State and local bar associations to increase access for low-income clients. The majority of the boards of the legal aid programs are appointed by State and local bar associations. The Oregon State Bar operates the Legal Services Program pursuant to ORS 9.572 to distribute filing fees for civil legal services and provide methods for evaluating the legal services programs. The Bar and the Oregon Law Foundation each appoint a member to serve on the board of the Campaign for Equal Justice.

In a comprehensive assessment of legal needs study, which was commissioned by the Oregon State Bar, the Office of the Governor, and the Oregon Judicial Department found that equal access to justice plays an important role in the perception of fairness of the justice system. *The State of Access to Justice in Oregon* (2000). Providing access to justice and high quality legal representation to all Oregonians is a central and important mission of the Oregon State Bar. The study also concluded that individuals who have access to a legal aid lawyer have a much-improved view of the legal system compared with those who do not have such access. Studies in 2005 and 2009 by the national Legal Services Corporation confirm that in Oregon we are continuing to meet less than 20% of the legal needs of low-income Oregonians. Legal Services Corporation, “Documenting the Justice Gap in America: The unmet Civil Legal Needs of the Low-Income Americans” (Fall 2005). Although we have made great strides in increasing lawyer contributions to legal aid, there remains a significant deficit in providing access to justice to low-income Oregonians.

Currently, only about 20% of lawyers contribute to the Campaign for Equal Justice. The Campaign supports statewide legal aid programs in Oregon which have offices in 19 different Oregon communities. The offices focus on the most critical areas of need for low-income clients. About 40% of legal aid’s cases involve family law issues relating to domestic violence.

To: Board of Governors
From: Sylvia Stevens, Executive Director
Date: July 12, 2011
Subject: Stuff That Makes Members Happy

Below is an e-mail to Linda Kruschke following her July 12 BarBooks™ webinar:

Linda:

I conclude, rightly or wrongly, that you have spent a great deal of time working this into a very user friendly and intuitive program for all of us. Your presentation today was excellent and very helpful. It answered several questions I had developed in its use and several I did not know I had. Thanks

Robert H. Fraser



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RONALD D. SCHENCK
P. O. Box 626
Wallowa, OR 97885

Tele :(541)886-8002

July 21, 2011

Helen M. Hiershbiel
General Counsel, OSB
P. O. Box 231935
Tigard, OR 97281-1935

RECEIVED

JUL 25 2011

Oregon State Bar
Executive Director

RE: David Gordon (RDS-CAO File #1001541)

I have delayed responding to your letter of April 21, 2011, to cool down a bit, although you may not think so when you read this response!

You simply go back and repeat the Disciplinary Counsel's position which has long since been proven to be baseless!!

The same proof totally destroyed any basis for asserting that Gordon had filed a complaint against me that had a good faith basis and was not frivolous.

Gordon asserted that the mere fact title to the real property stood of recorded in my client's name even for a second was proof of ownership.

As you have stated in your letter, Gordon asserted that my client made a false statement in his affidavit when he asserted that he "never owned real property in Lane County", and further asserted that I knew that statement was false.

As I have repeatedly pointed out, my client never testified that he never held "record title to real property located in Lane County.

Also, as I have repeatedly pointed out, holding record title to real property is not absolute-conclusive proof of ownership of all or any part of the subject real property.

There is obviously a real and significant difference between asserting that:

- 1) You never owned a parcel of real property in a certain jurisdiction and;
- 2) You never held record title to a parcel of real property in a certain jurisdiction!

My client clearly stated that he never was entitled to any part of the rights of ownership:

Page Two
July 21, 2011

The right to:

Sell for personal gain
Rent for personal gain
Use for personal gain
Control in anyway,
Etc.

All of this was clearly and emphatically brought to the attention of Gordon and OSB Disciplinary Counsel well before the charges were brought against me, and after.

Gordon never asserted that the Judge hearing his case against my client was misled by an action of mine in withholding some information re the questions before the court which did or could have influenced the decision making process of the court significantly.

It is hornbook law that you must have proof of all elements of a charge to have probable cause to file that charge!!

It is absolutely clear that Gordon and the OSB Disciplinary Counsel knew that there was no factual or legal basis for the charges brought against me based on the record of the Lane County case. The Court knew everything.

Further, during the prosecution of the case I repeatedly advised Gordon and OSB Disciplinary Counsel of these facts and the law - the DR's and case law - but they pressed on, ignoring the plain and obvious falsity of their assertions.

The decision of the Trial Panel is clear there was no basis for the charge. They simply stated that the matter was for the judge to decide!!

There was never even an arguable basis for asserting probable cause existed for bringing this charge against me.

You have joined the circle to cover the incompetence and obvious purpose of the OSB Disciplinary Counsel to prosecute me, probable cause or not!!

It is obvious that if Gordon is charged, OSB Disciplinary Counsel would also have to be charged.

In your obvious effort not to charge Gordon because you know that would also involve OSB Disciplinary Counsel being charged, you simply fall back to the simplistic assertion that Gordon asserted my client made a false statement when he stated he never owned real property in Lane County and I presented that to the court.

Page Three
July 21, 2011

As I have proved to Gordon, Disciplinary Counsel, the Trial Panel, the SPRB, and now the CAO, there is no evidence in the record upon which probable cause could be found to justify Gordon's charge that I violated DR 7-102(A)(5). Or any other DR.

Your assertion that I only asserted my client's statement was not false because he only held record title for four days is asinine. You obviously have ignored the record. Your assertion totally distorts the record.

What is Gordon's good faith basis in law and fact? He took the issue to the Oregon Supreme Court and lost!

Where is the law which holds that mere record title standing in the name of a person or entity is conclusive proof of ownership? There is no such law.

Disciplinary Counsel had several years to produce such a law and continued to assert it when they had to know none existed.

Both Gordon and the OSB Disciplinary Counsel charged that I violated DR 1-102(A)(3) and DR 7-102(A)(5) without a scintilla of evidence to support the existence of probable cause.

You have now completed the circle of the OSB agencies and committees knowingly protecting the OSB and Disciplinary Counsel.

You and the others are either ignorant, incompetent or just plain unethical. Unfortunately, there is no one to appeal to for an unbiased review!! The Press is obviously not interested!!



RONALD D. SCHENCK

Copies to: David W. Hittle, SPRB Chair
Jeff Sapiro
Board of Governors - OSB
MEDIA

April 21, 2011

Ronald D. Schenck
P.O. Box 626
Wallowa, OR 97885

Re: Daniel N. Gordon (Ronald D. Schenck)
CAO File No. 1001541

Dear Mr. Schenck:

I have reviewed all of the material submitted in connection with your complaint regarding the conduct of Daniel N. Gordon and hereby affirm the Client Assistance Office's dismissal of your complaint.

As we have explained previously, the role of the Client Assistance Office is to determine whether there is sufficient evidence to form a reasonable belief that a lawyer may have violated the rules and statutes that govern their conduct so as to warrant further investigation by Disciplinary Counsel's Office. We have no authority over quality of service issues.

I find no evidence to support your allegations that Mr. Gordon filed a frivolous bar complaint against you. Mr. Gordon's complaint was that your client, Mr. White, made a false statement in an affidavit, and that you knew the statement was false at the time it was made. The statement was that Mr. White "never owned real property in Lane County, Oregon." Mr. Gordon alleged the statement was false because Mr. White was deeded property in Lane County on February 5, 2001, which he subsequently deeded to his wife on February 9, 2001. You contend that the statement was not false because the property was only in Mr. White's name for four days, and the intent all along was for his wife to get the property, not Mr. White.

I find that Mr. Gordon had a good faith basis in law and fact for filing a bar complaint against you. The fact that you disagree with Mr. Gordon's action and the fact that the trial panel ruled in your favor do not establish a knowing assertion of a frivolous claim. *See In re Leuenberger*, 337 Or 183 (2004)(charge of asserting a frivolous claim fails if there is an arguable legal basis for the action taken). I agree with the conclusion of Client Assistance Office attorney Scott Morrill: that the State Professional Responsibility Board found probable cause to authorize charges against you is sufficient evidence to find that Mr. Gordon's complaint was not frivolous.

Further, you have provided no evidence that Mr. Gordon made dishonest statements or otherwise violated Oregon RPC 3.3 or RPC 8.4.

Ronald D. Schenck

April 21, 2011

Page 2

In sum, after reviewing the evidence and materials submitted, I affirm the decision of the Client Assistance Office. The Oregon State Bar's file concerning your complaint is now closed.

Sincerely,

Helen M. Hirschbiel
General Counsel

cc: Daniel N. Gordon, Attorney at Law

December 20, 2010

Ronald D. Schenck
P.O. Box 626
Wallowa, OR 97885

Re: Daniel N. Gordon (Ronald D. Schenck)
CAO File No. 1001541

Dear Mr. Schenck:

The Oregon State Bar has received your complaint regarding Daniel N. Gordon.

The Client Assistance Office (CAO) is responsible for reviewing concerns regarding Oregon lawyers. Under Bar Rule of Procedure 2.5, CAO determines whether there is sufficient evidence to support a reasonable belief that misconduct may have occurred warranting a referral to Disciplinary Counsel's Office for further investigation. Misconduct means a violation of the rules of professional conduct and applicable statutes that govern lawyer conduct in Oregon.

It is my understanding that in the underlying legal dispute, Mr. Gordon's client alleged that your client owned a piece of real property his client intended to attach to satisfy a judgment. You argued that your client never legally owned the property. Mr. Gordon complained to the bar that you filed pleadings in the Lane County Circuit Court, including your client's affidavit, that contained false statements about your client's ownership of the property.

It is your contention that Mr. Gordon's complaint to the bar was frivolous, not supported by any evidence and was dishonest. Oregon RPC 3.1 prohibits a lawyer from asserting a position a lawyer knows is frivolous. Oregon RPC 3.3 prohibits a lawyer from knowingly making false statements to a tribunal and Oregon RPC 8.4 generally prohibits dishonest conduct.

I have reviewed the relevant portions of the bar's files relating to Mr. Gordon's complaint about your conduct. The SPRB is ultimately responsible for evaluating complaints about lawyer conduct and authorizing charges. The SPRB authorized charges against you on the issues presented by Mr. Gordon. The standard the SPRB uses to decide whether to charge a lawyer with misconduct is probable cause. This alone suggests that Mr. Gordon's complaint was not frivolous. It also strongly suggests that Mr. Gordon did not make any false statements to the bar, the trial panel or the SPRB. That the bar ultimately did not prevail on this charge only proves that it did not prove it by clear and convincing evidence, not that Mr. Gordon's allegations were frivolous or dishonest.

Ronald D. Schenck
December 20, 2010
Page 2

I recognize that you have also filed complaints about the DCO lawyer and volunteer bar counsel who handled the charges against you. Those complaints were referred to the chair of the SPRB, David Hittle. I have reviewed Mr. Hittle's finding of no misconduct and refer you to his letter of November 15. I agree with his conclusions.

Because we find no professional misconduct, we will take no further action on this matter. If you disagree with this disposition, you may have the matter reviewed by General Counsel, provided we receive your request for review in writing on or before January 8, 2011. The decision of General Counsel is final.

Very truly yours,

Scott A. Morrill
Assistant General Counsel
Extension 344

SAM/jmm

cc w/encl: Daniel N. Gordon, Attorney at Law
02h

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RECEIVED

JUL 07 2011

Oregon State Bar
Executive Director

27 June 2011

Dear Sir/Madam

The Regulatory Framework in England and Wales: An Update on Alternative Business Structures

I am writing to you in my capacity as Chair of the Solicitors Regulation Authority of England and Wales (SRA). You may be aware that the SRA is the independent regulatory arm of the Law Society of England and Wales. It was established following the passage of the Legal Services Act 2007, which also enshrines our independence from government. We are responsible for setting and overseeing entry requirements to the solicitors' profession, for authorising individuals and firms to offer legal services, for maintaining and raising standards through the code of conduct, and last but not least, for taking action against individuals and firms who fail to uphold our professional principles.

On 15 June, the SRA's application to become a licensing authority for Alternative Business Structures (ABS) was approved, subject to Parliamentary endorsement. ABS are a new form of legal entity introduced by the Legal Services Act that will permit external capital investment in law firms.

I am writing to you now because I have become increasingly conscious of the interest of other jurisdictions in the regulatory changes taking place here in England and Wales. This interest is growing as we rapidly approach the October target date for the introduction of Alternative Business Structures. Since lawyers qualified in your jurisdiction are practising in England and Wales, I thought that it might be helpful if I explained to you in more detail what is happening here. In particular I want to set out how we, as the regulator of solicitors qualified in England and Wales, are approaching the challenges of the impending reforms brought about by the Act, the impact we expect them to have on the market and most importantly, how we would like to work with you in future.

The Legal Services Act and Law Firm Ownership

First of all, I want to underline to you that the Legal Services Act sets out some fundamental regulatory objectives. These objectives require us to uphold the professional principles of independence, integrity and client confidentiality; and also to regulate in the public interest, to support the rule of law and to improve access to

justice. We assess all of our proposed actions and policies against these objectives and our performance is judged by others on this basis too. This will continue to be the case when we begin licensing Alternative Business Structures. ABS will be bound by the high professional principles which have traditionally governed solicitors in England and Wales.

Secondly, it is worth recounting what our experience has been, so far, of increased flexibility in lawyer ownership. Prior to 2009, our position was fairly conservative: only English solicitors, European lawyers, and foreign lawyers from recognised professions could be owners or partners in law firms with English solicitor partners. However, since March 2009, law firms with English solicitor partners have been permitted to form partnerships with up to 25% non-solicitors, including non-lawyer partners. This was always intended by the Legal Services Act as the first stage in a process that would result in unrestricted rights of ownership by non-lawyers in law firms.

In the two years since then, we have seen a steady, but not stellar, take-up of this option. There are now 389 Legal Disciplinary Practices (LDPs), out of nearly 11,000 law firms in this jurisdiction. In the vast majority of cases (76%), the LDPs concerned are made up of fewer than 10 partners and are based outside London. There are only 218 LDPs that include non-lawyers; and of the 245 non-lawyer partners that have been created since March 2009, 62% of these are purely engaged in internal practice management and 30% are expert advisers to clients in areas like property, planning, tax and personal injury. The remainder are mostly family members who have been made partners in small practices, no doubt largely for tax purposes.

It is, however, worth pointing out that there are two or three larger international firms who have created small LDP sub-partnerships in England and Wales, but these, almost without exception simply contain different types of qualified lawyers (e.g. barristers, foreign lawyers etc). There are also English LDPs established in a few other jurisdictions where there are no constraints on the vehicles that can be used for legal practice. But again these structures only contain qualified lawyers.

So, on the experience so far, we would conclude the following about the greater flexibility involved in our partnership model:

- It has not fundamentally changed the law firm model but it has been a useful tool for innovative small firms who wish to offer their clients specialised services.
- It has provided a mechanism for overcoming the traditional separation of the English legal profession into barristers and solicitors without requiring fusion.
- It has helped to promote the professionalisation of law firms, with the introduction of professional managers into the partnership structure.
- English law firms with international offices have not yet tried to use the non-lawyer variant of LDPs, even in jurisdictions where this would be possible.

This pattern may well repeat itself with the rollout of Alternative Business Structures. There are likely to be a small number of early adopters who will have a demand for capital, usually to fund investment (e.g. in technology), and these will come largely from the end of practice that is easily commoditisable, such as insurance work and bulk conveyancing. These firms will seek capital either from private equity investors or quite possibly, from the professional securities market, which is a part of the

London Stock Exchange that enables professional firms to issue tradable debt instruments. There may be some existing non-legal businesses who will seek to include legal advice to clients alongside their mainstream services (e.g. probate advice together with funeral services), and they will need to do so through a licensed Alternative Business Structure. Many Alternative Business Structures will not, however, involve external capital but will be built instead on partnerships that involve mixed groups of lawyers and non-lawyer executive partners. In particular we would expect there to be a continued growth of non-lawyer partners in the management of law firms, and we welcome this as it will help them to become better run businesses and allow the lawyers to focus on the legal advice they give to clients.

How will we regulate ABS?

Which brings us to the most important question - how are we going to regulate Alternative Business Structures in order to uphold the regulatory objectives and the professional principles which underpin them?

I am well aware, as a lawyer with over 44 years' experience in the profession, of the controversies surrounding the issue of non-lawyer ownership of law firms. In drawing up the regulations for the introduction of ABS, the SRA Board has had to walk a fine line between, on the one hand, encouraging the sort of innovations that will offer greater choice and quality to consumers and allow lawyers in our jurisdiction to compete with other professional services firms; and on the other hand, in ensuring that the public interest and access to justice are not only protected, but enhanced by new forms of legal business.

We have decided that there must be a single set of regulatory requirements governing all of those we regulate – whether traditional law firms or Alternative Business Structures. We have therefore spent the past two years preparing a new regulatory approach which is based on three pillars: authorisation, supervision and enforcement.

We have designed an authorisation process for the creation of Alternative Business Structures which requires prospective owners, whether lawyers or non-lawyers, to provide responses to a wide range of authorisation questions covering their proposed organisation's business model, details of personnel, insurance and client protection arrangements and other policies and procedures. We will also conduct our own risk assessment of the business proposed and require applicants to produce a statement on how their business will contribute to access to justice. Finally, we will submit managers and owners to a rigorous suitability test which will look at financial behaviour and regulatory history as well as at evidence of criminal activity.

We have decided that we will refuse applications if:

- We are not satisfied that the applicant body's managers and interest holders are suitable, as a group, to operate or control a business providing regulated legal services;
- We are not satisfied that the applicant body's management or governance arrangements are adequate to safeguard the regulatory objectives set out in the Legal Services Act, which I mentioned at the beginning of this letter;
- We are not satisfied that if the authorisation is granted the applicant will comply with the SRA's regulatory arrangements;

- The applicant has provided inaccurate or misleading information in its application or in response to any requests by the SRA for information;
- The applicant has failed to notify the SRA of any changes in the information provided in the application; or
- For any other reason the SRA considers to be against the public interest or otherwise inconsistent with the regulatory objectives.

In making a determination on a licensing application, we will take into consideration not only information about the managers, or interest holders in the ABS but also anyone with whom they are related, affiliated with, or act together with, where we have reason to believe that those individuals might influence the way in which the lawyers or management of the ABS exercise their role. It is worth noting that we do expect there to be applications involving overseas investors and so we are preparing for the need for some international due diligence. Your assistance, where appropriate, in this would be greatly appreciated.

Once an Alternative Business Structure is authorised, it will become subject to the same supervisory approach we will be taking for traditional law firms. Under this regime, following an assessment of the business model of every proposed ABS, we will determine whether it should be subject to a relationship management approach, in which firms will have a designated supervisory officer from the SRA whom they will meet regularly, or whether a less intensive desk based supervisory approach will suffice. This decision will depend on factors such as the complexity of the proposed business and the risk it poses to consumers or the wider public interest if something goes wrong. We are significantly increasing our risk assessment and supervisory capabilities to give effect to this approach.

There will also be continuing responsibilities for key individuals within both ABS and traditional law firms. Every firm or ABS we regulate will have to designate both a head of legal practice, formally known as a compliance officer for legal practice (COLP), as well as a compliance officer for financial administration (COFA). These individuals will be our key points of contact and will be responsible for ensuring regulatory compliance and control. The compliance officer for legal practice must be a lawyer of England and Wales. However, this will not reduce the responsibility of all those whom we authorise to provide legal services, whether lawyers or non-lawyers, to abide by the statutory professional principles of independence, confidentiality and adherence to the duties owed both to the courts and to clients. All of our regulated community will therefore be expected to follow the Solicitors Code of Conduct.

Because ABS will enable the establishment of multi-disciplinary practices including other regulated activities, we have also been working with a group of regulators of other professions to develop an MDP Framework Memorandum of Understanding for England and Wales, which provides a basis on which we have agreed how to share information appropriately and sets out, in principle at least, how we would resolve regulatory conflicts. We are now working with individual regulators on a bilateral basis to address these issues in more detail.

Last but by no means least, if something goes wrong in an individual ABS, we have put in place arrangements to protect both clients and the overall public interest. We will require ABS firms to have equivalent indemnity insurance cover to traditional law firms and we will also require them to be part of our consumer compensation scheme. In this way, clients will know that the same levels of protection apply to any

body that the SRA regulates, whether it is a law firm or an ABS. Alternative Business Structures will also be subject to disciplinary and enforcement procedures that are analogous to those applying to traditional law firms but which also take into account the particular nature of ABS. We will therefore be able to fine, suspend or revoke a licence for an ABS, as well as to take action against individuals within it.

What next?

Now that the SRA has been approved as a licensing body for ABS, we will begin to take formal licence applications from August and, subject to final Parliamentary approval of regulations, to issue licences from October. We have already been working for some time with a number of law firms or other organisations who wish to become ABS, so we do expect some immediate licensing activity.

We recognise that, although our approach has been designed for a specific situation in England and Wales, it could have an impact outside this jurisdiction, even though most English law firms will remain traditional partnerships without non-lawyer ownership. There will, for example, be partnerships here which are considering ABS status but which include non-English lawyers. I am also conscious of the fact that some other regulators would not wish to recognise some varieties of English ABS firms in their jurisdictions, just as we have in the past not recognised certain types of MDPs for practice in England and Wales. We need to make sure that our law firms are fully aware of this before they propose to change their structures. We are also receiving a growing number of enquiries from other regulators who are considering their own changes to the legal structures they permit and who are interested in learning from our experience. It is for these reasons that I want the SRA to have an open and frank dialogue with Bars and legal regulators in other jurisdictions. And it is for this reason that I have written to you now at such length.

I would be very happy to send periodic updates if you are interested in how our policies and practice are evolving. It would also be helpful to be able to canvass your views on relevant matters; and to exchange experience and information, where appropriate, about ABS applications which could potentially affect lawyers from your jurisdictions.

I hope this information has been of interest - you can find further information about our regulatory approach and about ABS on our website at www.sra.org.uk. I would also be delighted to answer any follow up questions you may have.

Yours sincerely



Charles Plant
Chair



Sylvia Stevens

From: Ida Abbott [ida@idaabbott.ccsend.com] on behalf of Ida Abbott [idaabbott@aol.com]
Sent: Wednesday, June 29, 2011 6:03 AM
To: Sylvia Stevens
Subject: Management Solutions 32



Management Solutions[®]



Issue 32, Summer 2011

www.idaabbott.com

This issue of Management Solutions features two programs doing a great deal to accelerate gender equity in law firms: the Hastings Leadership Academy for Women and the Women in Law Empowerment Forum's Gold Standard Certification initiative.

We are also seeing some exciting innovations in the legal profession. This issue describes innovations in three areas of the profession: a new virtual law school program that is global in scope and impact, a law firm using a new practice model to provide legal services in a flexible way, and an individual lawyer's initiative to form a national business referral network.

My schedule this summer will take me to New York, Chicago, Philadelphia, Tampa and Miami. If you would like to talk with me about my services or arrange a meeting while I am in one of those cities, please [let me know](#).

Contents of this Issue

2011 Hastings Leadership Academy for Women

WILEF Gold Standard Certification

Wonder where your future partners will come from? Don't look at young men.

Law Without Walls

Fenwick starts a FLEXible client service model

Do It Yourself Business Network

In the News

Upcoming Events

2011 Hastings Leadership Academy for Women

Do you know any women law firm partners or in-house counsel who have the potential and desire to become leaders? Are you one of those women?

The 2011 Hastings Leadership Academy for Women will be held July 20-23 at Hastings Law School in San Francisco. This unique course is designed to give successful women the skills, support and political savvy they need to become the leaders they aspire to be and that their firms and companies need them to be.

Since 2007, the Leadership Academy has been preparing women to assume leadership roles and positions of

power. The mission of the Leadership Academy is “to prepare women to assume greater leadership responsibilities, increase their visibility and value to their firms and companies, and leverage their abilities and talents more strategically for positive business results.” Each year, graduates tell us their experience in the Leadership Academy is transformative – and the stories of their success prove them right. You can read about some of those stories at <http://www.attorneyretention.org/LAW/profiles.shtml>.

With less than a month to go, we have just a few slots left for partners. So register right away to reserve a spot and to have sufficient time for the pre-course preparation, which includes a 360-degree assessment. Or forward this information to another woman and encourage her to take this career-enhancing course.

In-house women should also register without delay. One full day of the course, Friday, July 22, is open to experienced women in-house lawyers and alumnae from prior years’ Leadership Academies. In-house women will participate in hands-on programs that teach self-advocacy, career management, and leadership projection. Alumnae will spend part of the day in advanced seminars that build on the lessons they learned before.

Details about the course, curriculum, and faculty, as well as registration information are available at <http://www.attorneyretention.org/LAW/>. If you want to listen to a recorded teleconference about the benefits of the Leadership Academy, there is also a link to an mp3 recording on that page. The teleconference presents the perspectives of three Leadership Academy alumnae; Wilma Wallace, Associate General Counsel of the Gap and Leadership Academy faculty member; and Keith Wetmore, the Chair of Morrison & Foerster, which has had women attend the Leadership Academy each year since it began.

WILEF Gold Standard Certification

Earlier this month, Women in Law Empowerment Forum (WILEF) announced the names of 32 law firms that would receive WILEF certification as "Gold Standard" firms because they have a significant number of women in the highest levels of leadership and compensation. This is very good news and every one of these firms, which are listed in the sidebar, should be congratulated. The firms will be honored at a special WILEF event in New York on September 13. It was my privilege to chair the certification committee.

To be WILEF certified, a law firm had to have 100 or more lawyers and satisfy at least three of these six criteria:

1. Women account for at least 20% of equity partners.
2. Women represent at least 10% of firm chairs and office managing partners.
3. Women make up at least 20% of the firm's primary governance committee.
4. Women represent 20% or more of the firm's compensation committee.
5. Women make up at least 25% of practice group leaders and/or department heads.
6. Women represent at least 10% of the top half of the most highly compensated partners.

For purposes of certification, we considered data and percentages only for offices in the United States.

These WILEF certification criteria focus on quantitative results, not comparative policies or subjective criteria that form the basis of other surveys that label firms “best firms for women.” WILEF certified firms achieve these quantitative results in various ways and with different cultures, policies, and management structures. However they do it, they are welcoming women into top leadership and integrating them into the power structure. These women are powerful in their own right, and they also have access to decision-makers and the decision-making

processes where power is concentrated.

While not revealing details about specific firms, WILEF did disclose a percentage breakdown of firms that met each standard. Taking a close look at the data from these certified firms presents some very good news - and some news that is disturbing.

WILEF Standard	% of Certified Firms Meeting Standard
1. 20% of equity partners	42%
2. 10% of firm chairs and office managing partners	81%
3. 20% of the firm's primary governance committee	72%
4. 20% of the firm's compensation committee	75%
5. 25% of practice group leaders and/or department heads	37%
6. 10% of the top half of the most highly compensated partners	84%

The best news:

- The most surprising good news was about compensation: 84% of WILEF certified firms met the standard that women constitute at least 10% of the top half of the highest paid partners.
- 81% met the standard that women be 10% of firm chairs and office managing partners.
- 75% of certified firms met the standard that women make up at least 20% of the compensation committee.
- At 72% of certified firms, women constitute at least 20% of the firm's primary governance committee.

However, there was some disappointing news as well:

- Only 42% of the WILEF certified firms had 20% or more women equity partners.
- Only 37% of the certified firms had 25% or more women practice group leaders and department chairs. (This is the only standard that calls for 25%.)
- Only 3 firms met all six of the WILEF certification criteria.

The small number of certified firms with 20% or more women equity partners is especially troubling. What this demonstrates is that equity

Firms with WILEF Gold Standard Certification

- Covington & Burling
- Davis Wright Tremaine
- Faegre & Benson
- Finnegan, Henderson, Farabow, Garrett & Dunner
- Ford & Harrison
- Fowler White Boggs
- Fried, Frank, Harris, Shriver & Jacobson
- Frost Brown Todd
- Fulbright & Jaworski
- Gibbons
- Gibson, Dunn & Crutcher
- Hanson Bridgett
- Holland & Hart
- Holland & Knight
- Jackson Kelly
- Kilpatrick Townsend &

partnership remains far more out of reach for women than for men. Even in the best firms, disproportionately few women are making it to equity partnership. A small number of women in these certified firms who are equity partners are doing very well financially and filling many powerful positions. But since the other 5 categories are all based on women equity partners, the number of these powerful and highly compensated women is a small subset of a group that is very small to begin with.

Regarding the last bullet point above, only 3 of the certified firms met all six criteria. Firms did not need to meet all six; it took just 3 to qualify. And several firms did meet 4 or even 5 criteria. But only 3 out of more than 300 firms that were invited to apply met all six. Considering the number of women in law firms for the past three decades, the WILEF criteria set the bar pretty low - and still few firms could meet them. Hardly any firms could meet them all. That law firms have squandered so much female talent over the years is not just a costly loss; it is a disgrace.

WILEF undertook this certification initiative to recognize firms where women have achieved a good degree of success at top levels of leadership and compensation. We were pleased that 32 firms qualified for this initial period of WILEF certification and we expect the number to grow. WILEF will accept applications for certification throughout the year, so firms can be certified whenever they reach the threshold for qualification. In fact, in the short time since the certified firms were announced, we have received several additional applications from firms that qualify for certification.

Firms will also have to keep up their efforts rather than rest on their laurels. WILEF certification is good for one year, so firms will have to meet WILEF standards each year in order to remain certified. WILEF will also reconsider the criteria from time to time so that the bar for Gold Standard certification will rise.

This WILEF initiative is already having a broad and important impact. Firms of all sizes from all over the country are taking a close look at the number of women they have in leadership and asking why they do not qualify when their competitors do. Women lawyers and students considering law firm positions will look at whether a firm is WILEF certified. And many firms, desiring to be certified, are setting internal targets and reinvigorating efforts to empower and advance women, using the WILEF standards as their guide. As more firms do so and receive acknowledgement for their successes, we hope to see more movement, more quickly, toward gender parity in law firm leadership.

Stockton

- Littler Mendelson
- Manatt, Phelps & Phillips
- McCarter & English
- Morrison & Foerster
- Perkins Coie
- Pillsbury Winthrop Shaw Pittman
- Quarles & Brady
- Reed Smith
- Sherman & Howard
- Shook, Hardy & Bacon
- Sidley Austin
- Simpson Thacher & Bartlett
- Skadden, Arps, Slate, Meagher & Flom
- Steptoe & Johnson PLLC (W. Va.)
- Stoel Rives
- Thompson Hine

Wonder where your future partners will come from? Don't look at young men.

One reason most law firms have not made it a top business priority to retain and advance women is that they do not really believe they need to keep them. The prevailing law firm model depends on a certain amount of lawyer attrition, and both women and men leave their firms without becoming partner. Firms assume that even

if women leave in larger numbers, there will be a steady supply of young men eager to become partners. They also assume these young men will willingly follow the traditional path to partnership. So long as these assumptions held up, firms had little incentive to undertake any fundamental changes in the existing system. As long as plenty of young men desired partnership, were willing to dedicate themselves to pursuing it, and devoted their lives to the firm once they made it, firms could comfortably continue as they were.

But all that has changed. The desire among all associates for partnership continues to decline along with the prospects for making partner and the security of being one. Today law firm lawyers, men and women, partners as well as associates, see themselves as free agents who follow their own interests and those of their clients rather than feel any sense of loyalty to a firm or the people who work there. For associates in particular, being a lawyer in a firm is seen not as building a career but as holding a job, and doing that only until something better comes along.

In addition, firms are starting to experience a significant change in the young men they depend on. These men are no longer willing to follow the traditional path to partnership. They increasingly seek more well-rounded lives. Many of them seek meaning in their work that they do not find in law firm practice. These men are complaining about many of the same conditions that women have been dealing with since women came into the legal profession en masse, including unreasonable work demands that consume their lives but provide little fulfillment.

Just this month, A Better Balance: The Work and Family Legal Center released the report of a national study of 250 white-collar professional men with children under 16: [Beyond the Breadwinner: Professional Dads Speak Out on Work and Family](#). The study found a high degree of work dissatisfaction among fathers:

1. Most of these fathers say that balancing work and family causes frequent stress. An overwhelming majority, 85%, experience conflicts due to their need to be both a good provider and an engaged parent, and 74% worry that their jobs prevent them from having the time to be the kind of dads they want to be.
2. 85 percent say they would take advantage of family-friendly work policies if senior leaders would set the example or if they saw other male colleagues do so without negative repercussions. For now, however, a notable minority of respondents reported that men who do so experience negative treatment and disapproval at work.

These findings were echoed and reinforced by another study published this month by the Boston College Center for Work & Family. That study, entitled [The New Dad: Caring, Committed and Conflicted](#), studied white-collar workers at four Fortune 500 companies who were new fathers. It found among other things that 53% of fathers would consider not working outside the home if this option were financially feasible, suggesting that the role of stay-at-home dad is becoming more acceptable.

In both of these studies, men were found to favor policies that support workplace flexibility but emphasized the importance of supportive managers and workplace cultures, especially in encouraging men to take advantage of family-friendly policies.

Moreover, young men with families give equal or greater importance to their wives' careers rather than assume that their own will take priority. This attitudinal change reflects greater demographic changes in family structure throughout society. According to the Bureau of Labor Statistics, in 1975, 44.7% of families with children under 18 had an employed husband and stay-at-home wife. In 2008, only 20.7% of families had this traditional configuration, while 43.5% of families had married, dual-earner parents. Whether their wives work because they want to or have to, men see their wives as economic partners and do not expect to have the support at home that stay-at-home wives could offer men of previous generations.

Many other studies over the last few years have shown that young men and women today are not as centered on work as previous generations. They place as much value on family and their personal lives as on work, and they are willing to follow - or create - unconventional paths to fashion the careers they want. Law firm partners everywhere bemoan that associates of both sexes limit their time at work or refuse to stay late for a last-minute assignment. They are witnessing more male associates taking parenting leave, working reduced hours and opting for permanent associate or even contract lawyer positions. Just as women have for years rejected female role models who "sacrificed too much for their careers," partners are now seeing men reject the male role models they see for the same reason.

In this environment, law firms cannot rely primarily on men to become their future partners, leaders and rainmakers. Men make up only half the talent pool entering law firm practice, and their desire for partnership and leadership is waning. Nor can firms afford to continue wasting and losing women – the other half of the talent pool - who could fill those roles if the firm's culture, work environment and leadership opportunities supported their ambitions.

The upshot of all this is that firms are finally beginning to understand that issues like career and work flexibility are not just "women's issues" but critical business issues that apply to the entire legal workforce. Fewer and fewer lawyers, men or women, desire partnership enough to devote their whole lives to their work, much less a law firm. Firms will have to make partnership more appealing, and the road to partnership more flexible, if they hope to have the partners they need in the future.

Law Without Walls

Like other legal institutions, law schools are under pressure to innovate. One course that shows how creativity and technology can transform legal education is [Law Without Walls](#) (LWOW). By its own description, "Law Without Walls is, among other things, an attempt to eliminate the barriers between faculty and students, business and law, professors and practitioners, education and practice. It is an exciting and unique opportunity to collaborate across institutions and countries and gain invaluable experience and insight into the world of law and business."

Created by Michele DeStefano Beardslee and Michael Bossone at the University of Miami School of Law, LWOW is a mostly virtual law school class that brings together students, faculty, practitioners, and entrepreneurs from around the country and the world. For a full semester, students from 6 law schools - Fordham Law, Harvard Law, Miami Law, New York Law School, Peking University School of Transnational Law, and University College London Laws – attend live weekly classes, work together remotely in pairs and with academic faculty and outside advisors (also from around the world), and produce innovative solutions that address a problem in legal education or practice.

Students from different law schools are paired up and spend much of the course working on a "Project of Worth." These projects address a controversial or unsettled topic in legal education or practice that is assigned to each student pair. At the end of the semester, all the students travel to Miami, where they present their Projects of Worth to panels of faculty and outside mentors, advisors and subject matter experts. Some of the issues addressed by students' Projects of Worth this year included the struggle between ethics and efficiency in outsourcing legal services; pros and cons of third party litigation funding; and architecture, design and aesthetic impact of lawyers' workspace in the digital age.

I served as a mentor to a pair of students whose Project of Worth involved how to teach law students relevant business skills. Their solution was a video game that taught various principles of business and economics. The students were a young man in a 4-year JD/MBA/LLM program at the University of Miami and a young woman licensed to practice law in India who was pursuing an LLM at University College London Laws. We met almost

weekly via AdobeConnect and Skype and communicated between meetings by email.

This course was academically rigorous in a new and different way. At the same time, it required creativity and offered many kinds of resources and substantial support throughout the process. Its substance, process and means of delivery were all new, and the ideas and solutions it generated were thoughtful and exciting. The success of this enterprise holds great promise for the future of legal education.

Fenwick starts a FLEXible client service model

Fenwick & West, a Silicon Valley firm, has long had a reputation for flexibility in personnel matters. Late last year the firm rolled out an innovative new service that offers flexibility to its clients: FLEX by Fenwick. Through FLEX, the firm now offers staffing solutions for clients that have periodic or ongoing legal needs but are not yet ready or able to hire full-time legal staff. Some FLEX clients are companies that need staffing for a limited purpose or where the need is not expected to be long-term. But FLEX also serves clients that seek less expensive services for day-to-day transactional work while continuing to use Fenwick for their more complex and sophisticated legal needs.

Key to the FLEX model is the billing structure, which is predictable and yes, flexible. Clients buy legal services by blocks of time. There is a monthly plan with a minimum of 20 hours per month, and a weekly plan based on the number of days the client wants an attorney to be available each week. The price depends on the plan the client chooses and the experience level of the lawyer. FLEX lawyers have at least 8-10 years of practice experience in both in-house and law firm settings. Some are alumni of the firm but none are currently Fenwick partners or associates.

The beauty of FLEX is that it expands the services available to price-sensitive clients with specific legal needs while keeping those clients in the Fenwick fold. It is designed from the client's viewpoint, emphasizing what clients want most - practicality, value and predictability.

Do It Yourself Business Network

Carol Owen, a trial lawyer in Nashville, TN, needed a fresh approach to expand her practice. For the practice she envisioned, she needed a network of lawyers with whom she could share business referrals. Those lawyers had to be successful rainmakers with similar types of clients and high quality business to refer; they had to be top performers with top credentials; and they had to share her ambition, drive and commitment to building a successful and lucrative law practice. She realized that in order to attract the kinds of complex cases she wanted, this referral network would have to be national in scope. And she also decided that it would be easier and more comfortable if this network were comprised of other women who were not tied to existing business networks and who appreciated the issues that women face in trying to develop business.

Carol then set out to find the right women for her network. She started with three women she knew, then searched in each federal judicial district for two women, one litigator and one non-litigator, who met her criteria. She made cold calls to the women she thought would be a good fit. As she explained her vision for this network, almost every woman she approached eagerly accepted her invitation to join. She invited these women to a 3-day conference that she hosted to initiate the group, which she called simply The Roundtable. She set up programs for CLE credit. She invited a state Supreme Court justice and a federal judge from the Sixth Circuit Court of Appeals to attend the first conference; both came and spoke with the group. A former state Supreme Court justice who had returned to private practice also attended, as a Roundtable member. Some of the Roundtable members invited women clients.

Since she started it in 2008, this Roundtable of about two dozen women from 8-10 law firms around the country has taken hold just as Carol had envisioned. They continue to meet for three days every year and stay in touch throughout the year. They have been referring substantial legal matters to each other and have provided support in other ways as well. When women have had disputes with their partners over origination credit for work referred through the Roundtable, Roundtable members have spoken up to substantiate the source of the business and help their colleagues receive credit for it.

Did this take a lot of time and effort to get off the ground? Yes, but the initiative has paid off for Carol in the form of new business, greater professional visibility, and an enhanced reputation for leadership. The potential for this network to become a powerful resource is limitless.

Anyone who wants a network like Carol Owens' can have one. All it takes is initiative, purpose and the will to make it happen.

In the News

Two glowing reviews of my book, *Women on Top: The Woman's Guide to Leadership and Power in Law Firms* (Thomson Reuters 2010)

[Emily N. Masalski](#) and [Jamie Spannhake](#)

My article, "Beyond Mentors: The Need for Champions," appeared in [Peer Bulletin](#), May 3, 2011, www.peer.ca.

I was featured in Marcie Areias' article, "[Developing Talent](#)," *The Recorder*, February 15, 2011. (Subscription required)

My presentation on "Becoming Politically Savvy" at the City Bar of New York was featured in [The Glass Hammer](#)

Upcoming Events

Chicago, July 15: I'll be speaking on "Online Collaboration in a Global World" at the Professional Development Consortium

San Francisco, July 20-23: 2011 Hastings Leadership Academy for Women

Washington, DC, December: I'll be speaking on "Implementing a Successful Mentoring Program for Lawyers: Lessons from the Worldwide Law Department at IBM" at the Professional Development Institute

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Lawyer Pay

Average Starting Pay for Law Grads Is on Downward Shift; Drop Is Largest for Law Firm Jobs

Posted Jul 6, 2011 7:51 AM CDT

By [Debra Cassens Weiss](#)

Starting pay is down for 2010 law graduates, and the drop is greatest for law firm jobs.

Median starting pay dropped by nearly 13 percent for all jobs and by 20 percent for law firm positions, according to NALP, which calls itself the association for legal professionals.

The national median for 2010 law grads working full time and reporting a salary was \$63,000, compared to \$72,000 for the class of 2009, NALP says in a press release. The national median salary at law firms was \$104,000, compared to \$130,000 the previous year.

The drop in law firm pay largely reflects a shift in jobs to smaller firms, rather than a drop in salaries paid by individual employers. Fifty-three percent of the class of 2010 who obtained law firm jobs went to firms of 50 or fewer attorneys, compared to 46 percent the previous year. Only 26 percent went to firms of more than 250 lawyers, compared to 33 percent the previous year.

The drop in overall pay is also spurred by the erosion of jobs in private practice. About 51 percent of the graduates from the class of 2010 who found jobs were employed by private law firms, compared to about 56 percent of the class of 2009.

NALP executive director James Leipold says in the press release that aggregate starting salaries fell because more 2010 law grads found jobs with the smallest law firms. "This downward shift in starting salaries is not, for the most part, because individual legal employers were paying new graduates less than they paid them in the past," Leipold said.

The press release cautions that few salaries are actually at the national median of \$63,000 or the national average of \$84,111. Many salaries cluster at the \$40,000 to \$65,000 range at the lower end and at the \$145,000 to \$160,000 range at the high end. The mean and median also skew high because NALP collects more salary information from large than small law firms. When the statistics are adjusted to place greater weight on small firm salaries, national average pay is \$77,333 for all full-time jobs.

Prior coverage:

[ABAJournal.com](#): "A Record Low for 2010 Law Grads: Only 68% Have Jobs Requiring Bar Passage"

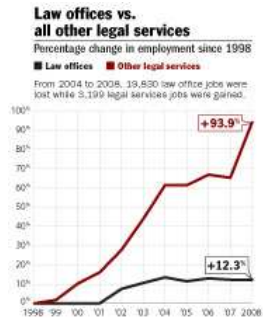
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Features

Law Job Stagnation May Have Started Before the Recession—And It May Be a Sign of Lasting Change

Posted Jul 1, 2011 4:40 AM CDT

By William D. Henderson, [Rachel M. Zahorsky](#)



Source: U.S. Bureau of Labor Statistics.

The legal profession is undergoing a massive structural shift—one that will leave it dramatically transformed in the coming years.

There's no doubt that the financial crisis beginning late in 2007 was for most lawyers a game-changer, prompting drastic measures as firms laid off thousands of associates, de-equitized partners, and slashed budgets and new hires.

But many hoped—and still do—that the effects of the recession would ebb, and that the profession, which had just witnessed a golden age of prosperity unmatched by any other industry, would re-emerge relatively unscathed.

The golden era is gone, but this is not because the law itself is becoming less relevant. Rather, the sea change reflects an urgent need for better and cheaper legal services that can keep pace with the demands of a rapidly globalizing world. The Great Recession—a catalyst for change—provided an opportunity to re-examine some long-standing assumptions about lawyers and the clients they serve.

Whether BigLaw lawyers, boutique specialists or solo practitioners, U.S. lawyers can expect slower rates of market growth that will only intensify competitive pressures and produce a shakeout of weaker competitors and slimmer profit margins industrywide. Law students will find ever-more-limited opportunity for the big-salary score, but more jobs in legal services outside the big firms. Associates' paths upward will fade as firms strain to keep profits per partner up by keeping traditional leverage down.

And those who wish to rise above the disruption will have to deal with technology that swallows billable work, a world market that takes the competition international, and a more sophisticated corporate client with vast knowledge available at the click of a mouse.

NO HISTORY

The biggest problem affecting U.S. lawyers is a failure to understand the origins of our own success. For nearly a century, industry after industry underwent dramatic transformation while lawyers continued to ply their artisan trade. Many lawyers prospered under this conservative path because the substance of what they did was too important to an increasingly complex, interconnected economy.

No more. As the balance of power shifts from traditional law firms and toward clients and a raft of tech-savvy legal services vendors, the price of continued prosperity for lawyers is going to be innovation and doing more with less.

Law touches on virtually every aspect of our social, political and economic lives. As the world becomes more interconnected and complex, new legislation, regulation and treaties bind us all together in ways that promote safety, cooperation and prosperity. Not surprisingly, over the last 25 years government data shows legal services constitute a slightly larger proportion of the nation's GDP—now nearly 2 percent—with no hint of decline.

However a very different piece of evidence is the change in total law firm employment, or lack thereof. According to payroll data collected by the U.S. Census Bureau, the multidecade surge in law firm employment hit a plateau in 2004. Between 1998 and 2004, total law firm employment grew by more than 16 percent, or 169,000. Yet between March 2004 and March 2008, several months before the Wall Street meltdown that initiated an unprecedented wave of law firm layoffs, the nation's law firm sector had already shed nearly 20,000 jobs.

This is a drop in the bucket for an industry that employed more than 1.1 million workers in 2004. But the flattened number of law firm jobs occurred at the same time major law firms in large urban areas were in a bidding war, taking entry-level salaries from \$125,000 to \$145,000 to \$160,000. The public dialogue in the legal press and blogosphere was so fixated on the rising profits per partner at the nation's top 100 law firms that the broader, systemic patterns went largely unnoticed—at least until the financial fallout descended in the fall of 2008.

By overgeneralizing how well the big firms were doing, we failed to notice a slow but fundamental economic shift affecting the majority of lawyers, who are solo practitioners or in small-to-medium-size law firms.

According to Fred Ury, a former president of the Connecticut Bar Association and a trial lawyer based in Fairfield, Conn., those mainstream lawyers had been feeling the pain for a while.

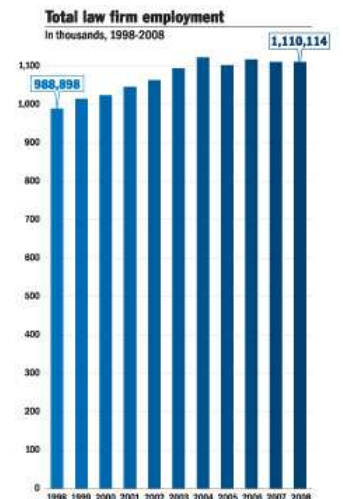
"The biggest problem," says Ury, "is that ordinary citizens cannot afford to hire a lawyer. The bread and butter of small firm practices are criminal defense work, wills and trusts, leases, closings and divorces. Yet in Connecticut, 80 to 85 percent of divorces have a self-represented party because most families can't afford to hire one lawyer, let alone two. Nearly 90 percent of criminal cases are self-represented or by a public defender because families can't scrape together a retainer."

Ury, who has practiced in a small firm for nearly 35 years, predicts the problem of unmet legal needs, if not solved by lawyers, "will be solved by technology."

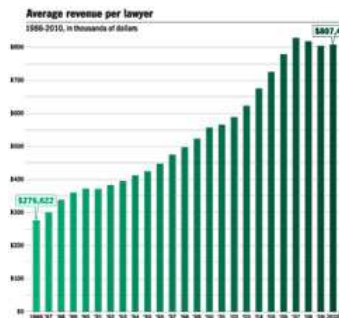
LEGAL, NOT LAW FIRM

The relative high price of legal services creates opportunities for new entrants. Although law firm employment declined from 2004 to 2008, 3,200 jobs were added in all the other legal services categories, which include U.S. jobs with legal process outsourcers and agencies for contract attorneys. But in 2008 the average law firm employee made an average of \$79,500 versus \$46,800 for a worker in the other legal services groups—and this doesn't count the wages of foreign outsource workers.

Novus Law is one of the new breed of legal services vendors that combines sophisticated technologies and work processes with an international workforce that operates 22 hours a



Source: U.S. Census Bureau.



Source: *The American Lawyer*.

day. The company specializes in electronic document review for large-scale litigation and corporate due diligence for large businesses. To ensure delivery of a virtually error-free work product on time and within budget, Novus Law engineered an intricate, metric-driven work process certified by Underwriters Laboratories.

Ray Bayley, president and chief executive officer of Novus Law, also perceives a structural shift.

“I think the legal profession has been defined as 250 law firms and lawyers that are licensed to practice law,” Bayley says, “but I view the entire profession as an industry. Over the last 20 to 30 years, virtually all industries have undergone enormous structural change because of globalization and technology.

“The changes affecting the legal services industry began in the late 1980s. They have been significantly accelerated by the recession, and it’s picking up pace. In five years, the profession will be very different.”

To date, the depth of economic dislocation for U.S. lawyers has been relatively mild, at least when compared to workers in other industries. Manufacturing is the most obvious example, but professions such as advertising, journalism and travel also have been wracked by massive structural changes affecting employment, wages and professional autonomy.

In contrast, total employment in the legal services industry has closely tracked the steady growth rate of government for the past 25 years, with only slight diminution during economic recessions. Yet, from 2006—two years before the financial meltdown—to 2010, employment in legal services began to diverge much more sharply from government.

New economic realities are affecting even the nation’s largest firms. Press releases may still report higher profits, but since 2007, revenue-per-lawyer figures have been trending sideways or down for the majority of the Am Law 100. Like the overall employment numbers for law firms, the stagnation represents a sharp break from historical patterns.

Lower revenue averages indicate slower rates of market growth, intensifying competition, shakeout and slimmer profit margins.

HOW WE GOT HERE

Over the last century, the traditional associate-partner law firm model has been one of the most enduring features of the U.S. legal profession. However, this remarkable run was made possible by a set of extraordinary economic conditions that no longer prevail.

In the early 1900s as the great industrialists and financiers built their empires, there was a shortage of sophisticated business lawyers. As law firms recruited apprentices on a larger scale to keep pace with business needs, a new question arose: Once the student became the master’s equal, how should the profits be divided?

The most famous solution came at that time from Paul Cravath, who founded the elite New York City law firm of Cravath, Swaine & Moore. Cravath recruited top graduates from leading law schools and developed their skills and acumen through a rotation system that lasted several years. The stated purpose of the Cravath system was to create “a better lawyer faster.”

Dubbed “a law factory,” Cravath’s firm was able to handle prodigious volumes of work and simultaneously train sophisticated business lawyers. As associates ascended into the higher echelon of the firm, the most lucrative reward was partnership. Those who failed to make partner there found the firm’s excellent training opened doors at other New York City firms. Unlike its competitors, the Cravath firm was stable and had the ability to scale its growth to meet the escalating needs of its clients.

Virtually all business law firms in major cities organized themselves along similar principles in the years that followed—growing and prospering from the post-World War II economic boom. Many of these firms emerged as today’s elite brands on either a regional or national level.

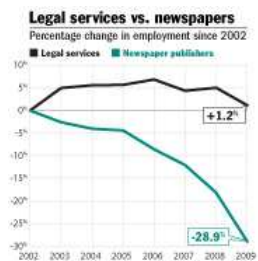
But the U.S. legal profession no longer has a shortage of sophisticated business lawyers. Increasingly, clients have become comfortable pitting one firm against another to obtain pricing discounts, and many large corporate clients no longer want to pay the billing rates of junior associates who are learning on the job, excluding first- and second-year associates from working on their matters.

In response, law firms have reduced the number of entry-level lawyers, turning the traditional pyramid structure into a diamond with many senior associates and nonequity partners composing the broad middle. While that makes sense in theory, if the entire industry attempts to shed the training costs of entry-level lawyers, it will eventually produce a shortage of midlevel attorneys and higher labor costs to stave off unwanted attrition. It will also produce a general graying of the corporate bar—a trend evident in much of the Northeast—that will stifle firms’ ability to innovate.

In many respects, the short-term needs of established law firms to generate higher revenue and profits to retain the firms’ biggest rainmakers are at odds with long-term needs to invest in a more sustainable business model tied to the changing demands of clients. The sheer size and geographic dispersion of many firms, along with the limited time horizons of their current partners, make change unlikely. Yet as firms resist change, their clients become more likely to vote with their feet: taking more work in-house, experimenting with smaller-market/lower-cost firms or giving work to legal process outsourcers, all of whom have greater flexibility to innovate.

The 21st century is sure to give rise to a new generation of legal entrepreneurs who create novel ways to adapt to the needs of clients. Successful innovators will grapple with the three interconnected forces that make change inevitable:

- 1) More sophisticated clients armed with more information and greater market power to rein in costs.
- 2) A globalized economy, which increases the complexity of legal work while exposing U.S. lawyers to greater competition.
- 3) Powerful information technology that can automate or replace many of the traditional, billable functions performed by lawyers.



Source: U.S. Bureau of Labor Statistics.

IN-HOUSE RULES

Perhaps the group most acutely aware of the drumbeat of change—and striking the tom-tom themselves—are corporate general counsel. Regardless of the size of a company’s legal budget, clients want to control their operating costs. And that includes legal services.

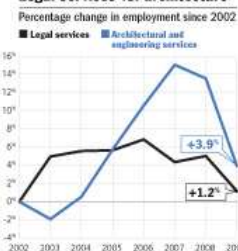
Lawyers still possess specialized knowledge only intelligible by studying case law and attending law school. But the overabundance of free, online information has created lawyer-client relationships that are more symmetrical in terms of information. Social networking tools also place the wisdom of crowds at the fingertips of individual consumers. If lawyers are good, clients will find them, but the clients will also find their closest competitors. The tactics needed to win business are thus likely to be more sophisticated and targeted.

In the corporate realm, general counsel are increasingly expected to achieve what other departments and businesses do—get better results at lower costs. No longer viewed as purveyors of the law, in-house lawyers are problem solvers and key business strategists. The multimillion-dollar budgets that flowed unchecked into the coffers of the nation’s largest law firms are now closely guarded and counted.

“There is no question that a serious recession caused a heightened sense of awareness for law firms and consumers,” says Gregory Jordan, who works out of Pittsburgh and New York City as Reed Smith’s global managing partner and chairman of the senior management team and executive committee. “As the recession starts to reverse itself, there will be some movement away from that super-heightened awareness of cost, but this recession gave buyers of legal services enough time to really appreciate that they could get the same quality of service for less than before the recession. The better, faster, cheaper concept is very much here to stay.”

Although most general counsel begin their careers at traditional law firms, they are increasingly influenced by the business practices of their fellow corporate managers. In some cases, this means new procurement practices for legal services, using technology to speed up or automate routine legal tasks, or building in-house expertise that is core to the

Legal services vs. architecture



Source: U.S. Bureau of Labor Statistics.

company's strategic objectives. When general counsel do turn to outside counsel, they have the ability to pit one law firm against another to achieve competitive rates. And although clients may continue to stay in a long-established relationship with a firm, that doesn't guarantee they'll return with new matters or refer colleagues.

General counsel should be careful, however, not to overplay their hands. Although chief legal officers want their outside counsel to have shared risk or "skin in the game," general counsel who meet their annual budget by pushing for discounted fees are unlikely to get the best long-term results. The key to doing more with less is innovation, often achieved by long-term relationships and shared information. This requires mutual trust and a willingness to share risk over time.

Some Fortune 500 companies have adopted the presumption that all legal work will be done in-house. General Electric's legal department and others have lawyers in India supervised by in-house lawyers in the U.S. And Cisco Systems built a Web-based knowledge management system that captures email conversations, facilitates secure communication with experts, and documents answers to frequently asked questions—all to boost in-house productivity and cut the law department's expenses.

On Main Street, while the average baby boomer client doesn't want to create a will or trust online, 20-year-olds, soon to become the typical legal consumers with families, are so used to conducting their business on the Internet that that's how they'll also buy their legal services, says Ury, founder of Ury & Moskow. As Generation Y and Millennials ascend the corporate ladder and amass wealth, will they be just as apt to purchase more sophisticated services online? "Probably not," Ury says, "but they will come with their own drafts."

"My clients do that now," says Ury, adding that clients are more apt to bring a contract or lease for his review rather than request a draft done by his law office.

In the future, Ury predicts, nearly all legal forms and commoditized services will be free of charge. He points to the Connecticut secretary of state's website, where hundreds of forms are available to download, including divorce petitions and business filings.

E-LAW

Technology is replacing many of the tasks formerly performed by lawyers. From a social point of view, this is very desirable because it drives down the cost of legal services and satisfies unmet legal needs. From an industry view, however, it can be a gut shot to the bottom line.

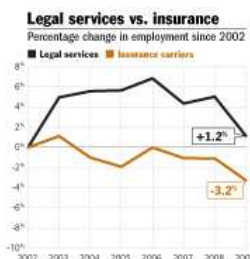
Incomes of ordinary middle-class citizens have stagnated while the relative price of legal services has risen. Unmet legal needs are on the rise, opening the door for inexpensive, Web-based legal services providers that essentially offer do-it-yourself kits for many personal or business legal needs.

One such provider, LegalZoom, has had more than 1 million customers in its 10 years online. The Practical Law Co. has created a similar line of form documents and annotations that deal with many of the most sophisticated transnational and compliance issues facing large corporate legal departments. And Cybersettle claims it has resolved more than \$1.6 billion worth of cases in the last 10 years.

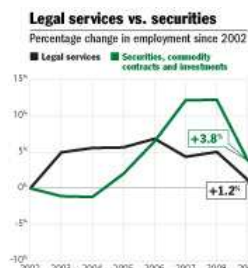
Using technology to tap into the mass consumer or business market, however, requires more than a great idea. Also necessary are access to capital and the ability to collaborate with professionals in other disciplines, such as system engineering, knowledge management, marketing, finance and project management. Few lawyers have the time, financial wherewithal or risk tolerance to play in this league.

For most lawyers, survival will depend upon their ability to harness technology to deliver greater value to clients at a cost that declines—yes, declines—over time. The biggest challenge for law firms will be transitioning away from internal firm metrics that reward billable hours and discourage or prohibit the crucial trial-and-error experimentation needed to create, refine and market more innovative work processes that do more with less.

At a minimum, law firms need to return to the concept of sharing risk among the equity shareholders and retaining earnings to finance new technologies, training, and research and development.



Source: U.S. Bureau of Labor Statistics.



Source: U.S. Bureau of Labor Statistics.

GLOBALIZATION

Moving forward, globalization represents both the greatest challenge and greatest opportunity for lawyers.

As the world becomes more interconnected, business relationships rarely will stop at national borders. Basic family law issues will inevitably bump up against immigration law. Sales of goods and services over the Internet raise complex issues of international tax. Exploiting and protecting the value of any domestic innovation requires a strong grasp of international intellectual property law. A client who opens an office or facility in a foreign country faces a dizzying array of legal issues that must be quickly and efficiently analyzed before a business decision can be made.

The flip side of this business opportunity, however, is that few clients have the ability or willingness to pay for this service under the traditional law firm model. It is either too slow, too expensive or too unpredictable. Globalization exposes clients to an international workforce that is often hungrier and completely unwedded to past practices.

As the global economy matures, the push for increased regulation will also boost demand for sophisticated business lawyers. This has a twofold effect: Prominent U.S. firms, specifically among the 250 largest firms, are expanding global operations—a costly venture that will be unobtainable for some. And U.S. lawyers, particularly young associates and freshly minted law school graduates, face fierce competition for work from overseas counterparts.

"The goal of clients in big cases is to play it safe," says William Reynolds, a professor at the University of Maryland School of Law. "And playing it safe is to hire the best lawyers—and those aren't in India."

But what if, in the coming years, they are?

U.S. lawyers underestimate the threats of foreign competition to the provision of domestic legal services. The realm of "all other legal services providers," which grew from less than \$1 billion in total revenues in 1997 to nearly \$3 billion in 2008, will continue to attract sophisticated business capitalists eager to obtain a greater portion of U.S. corporations' legal budgets.

Lower-level "commodity" legal work is already being sent to developing markets like China, India and the Philippines because wages are lower and the multiplying workforce is eager. Staff positions doing document review and slogging through discovery are highly coveted by a booming, educated middle class in a culture where law firm jobs often go to those at the top of the caste system. And quality, consistency, security and efficiency concerns have been quelled by legal services providers such as Pangea3 (acquired by Thomson Reuters), which is building facilities across the U.S. modeled after its India operations, and Chicago-based Mindcrest, which has facilities in India.

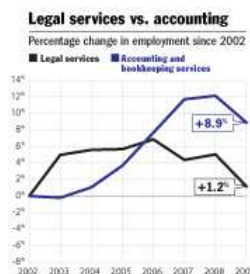
In fact, quality control is an easy concern to eliminate when working on large-scale projects for corporations because of the rigorous methodology and processes employed, which law firms often overlook, according to Ganesh Natarajan, Mindcrest's co-founder, president and CEO.

As a result, these facilities become the perfect laboratories for developing more sophisticated legal work processes. Akin to the Japanese car manufacturers who started with cheap economy cars in the 1970s and eventually created the brands that challenged Cadillac and Lincoln, foreign legal workers are destined to become a formidable economic force.

For those firms at the apex of the profession, the pressures of change may not be felt as heavily as by their midlevel counterparts, causing some law firm leaders to doubt the magnitude of the tremors affecting the industry.

"I've seen various waves of purported reform crash on our shores," says Peter Kalis, chairman and global managing partner of K&L Gates. "I see no paradigm shift in the business of law. What I see are evolutionary adaptations to changing market conditions."

Even so, Kalis says his firm's aggressive global expansion in recent years is the result of client demands for cross-border expertise—and firms that can't meet those demands could fail.



Source: U.S. Bureau of Labor Statistics.

"In a world where even modest-size clients compete in global markets, they are going to need law firms positioned to address that," says Kalis, who works out of the firm's New York City and Pittsburgh offices. "There will be a lot of casualties among firms not on the right side of history, and they will be the last to know until talent and clients start to migrate to other firms."

Whether the changes affecting the legal profession are indeed a reflection of market cycles or a complete paradigm shift will become evident in coming years. But for those betting substantive change has not happened, they are betting their practices against the future.

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July 16, 2011

Law School Economics: Ka-Ching!

By DAVID SEGAL

WITH apologies to show business, there's no business like the business of law school.

The basic rules of a market economy — even golden oldies, like a link between supply and demand — just don't apply.

Legal diplomas have such allure that law schools have been able to jack up tuition four times faster than the soaring cost of college. And many law schools have added students to their incoming classes — a step that, for them, means almost pure profits — even during the worst recession in the legal profession's history.

It is one of the academy's open secrets: law schools toss off so much cash they are sometimes required to hand over as much as 30 percent of their revenue to universities, to subsidize less profitable fields.

In short, law schools have the power to raise prices and expand in ways that would make any company drool. And when a business has that power, it is apparently difficult to resist.

How difficult? For a sense, take a look at the strange case of New York Law School and its dean, Richard A. Matasar. For more than a decade, Mr. Matasar has been one of the legal academy's most dogged and scolding critics, and he has repeatedly urged professors and fellow deans to rethink the basics of the law school business model and put the interests of students first.

"What I've said to people in giving talks like this in the past is, we should be ashamed of ourselves," Mr. Matasar said at a 2009 meeting of the Association of American Law Schools. He ended with a challenge: If a law school can't help its students achieve their goals, "we should [shut the damn place](#) down."

Given his scathing critiques, you might expect that during Mr. Matasar's 11 years as dean, he has reshaped New York Law School to conform with his reformist agenda. But he hasn't. Instead, the school seems to be benefitting from many of legal education's assorted perversities.

N.Y.L.S. is ranked in the bottom third of all law schools in the country, but with tuition and fees now set at [\\$47,800](#) a year, it charges more than Harvard. It increased the size of the class that arrived in the fall of 2009 by an astounding 30 percent, even as hiring in the legal profession imploded. It reported in the most recent US News & World Report rankings that the median starting salary of its graduates was the same as for those of the best schools in the nation — even though most of its graduates, in fact, find work at less than half that amount.

Mr. Matasar declined to be interviewed for this article, though he agreed to answer questions e-mailed through a public relations representative.

Asked if there was a contradiction between his stand against expanding class sizes and the growth of the student population at N.Y.L.S., Mr. Matasar wrote: "The answer is that we exist in a market. When there is demand for education, we, like other law schools, respond."

This is a story about the law school market, a singular creature of American capitalism, one that is so durable it seems utterly impervious to change. Why? The career of Richard Matasar offers some answers. His long-time and seemingly sincere ambition is to "[radically disrupt](#) our traditional approach to legal education," as it says on his N.Y.L.S. Web page. But even he, it seems, is engaged in the same competition for dollars and students that consumes just about everyone with a financial and reputational stake in this business.

"The broken economic model Matasar describes appears to be his own template," wrote Brian Z. Tamanaha, a professor at Washington University Law School in St. Louis, in [a blog posting](#) about Mr. Matasar last year. "Are his increasingly vocal criticisms of legal academia an unspoken mea culpa?"

A PRIVATE, stand-alone institution located in the TriBeCa neighborhood of downtown Manhattan, New York Law School was founded in 1891 and counts Justice John Marshall Harlan among its most famous graduates. The school — which is not to be confused with New York University School of Law — is housed in a gleaming new 235,000-square-foot building at the corner of West Broadway and Leonard Street.

That building puts N.Y.L.S. in the middle of a nationwide trend: the law school construction boom. As other industries close offices and downsize plants, the manufacturing base behind the doctor of jurisprudence keeps growing. Fordham Law School in New York recently broke ground on a \$250 million, 22-story building. The University of Baltimore School of Law and the University of Michigan Law School are both working on buildings that cost more than \$100 million. Marquette University Law School in Wisconsin has just finished its own \$85 million

project. A bunch of other schools have built multimillion dollar additions.

N.Y.L.S. has participated in another national law school trend: the growth in the number of enrollees. Last year, law schools across the country matriculated 49,700 students, according to the Law School Admission Council, the largest number in history, and 7,000 more students than in 2001. N.Y.L.S. grew at an even faster clip. In 2000, the year Mr. Matasar took over, the school had a total of 1,326 full- and-part-time students. By 2009, the figure had risen to 1,596.

The jump seems to contradict one of Mr. Matasar's core tenets.

"Can class size be increased without damaging quality?" he asked in a 1996 Florida Law Review article. "Can class size be increased without assurances that jobs will be available for the increased number of graduates? Can class size be increased without also providing more staff, faculty, books and service? Increase class size? No!"

Did Mr. Matasar change his mind? In an e-mail, he cited the unpredictability of yield rates, which is the percent of students who accept an offer of admission. There was more than one year of yield surprises under Mr. Matasar, the largest of which came in 2009, when the incoming class leapt by 171 students.

It was a very profitable surprise, worth about \$6.7 million in gross revenue. Mr. Matasar would not discuss the added costs of teaching what became known at the school as "the bulge class." But faculty members, some of whom were offered the chance to take on additional courses, estimate that, at most, the school had to spend about \$500,000 more that year on teaching.

This windfall, it turns out, was perfectly timed. Because as all those students were signing up for their first year at N.Y.L.S., a little-noticed drama was unfolding that involved the financing for that brand-new building.

THREE years earlier, in 2006, the school had floated \$135 million worth of bonds to finance construction of the new building, at 185 West Broadway. At the time, Moody's rated the bonds A3, placing them squarely in the "come and get 'em" category for investors. The rating reflected N.Y.L.S.'s strong balance sheet and the quality of its management, Moody's said.

Equally important, N.Y.L.S. was — and is — in a very lucrative business. Like business schools and some high-profile athletic programs, law schools subsidize other fields in universities that can't pay their own way.

"If my president were to say 'We'll never take more than 10 percent of your revenue,' I'd say 'God bless you,' and we'd never have to talk again," says Lawrence E. Mitchell, the incoming dean of the Case Western Reserve University School of Law in Cleveland. "But having just come from a two-day meeting of new and current deans organized by the American Bar Association, I can tell you that some law schools pay 25 or even 30 percent."

Among deans, the money surrendered to the administration is known informally as "the tax." Even in the midst of a merciless legal downturn, the tax still pumps huge sums into universities, in part because the price of a law degree continues to climb.

From 1989 to 2009, when college tuition rose by 71 percent, law school tuition shot up 317 percent.

There are many reasons for this ever-climbing sticker price, but the most bizarre comes courtesy of the highly influential US News rankings. Part of the US News algorithm is a figure called expenditures per student, which is essentially the sum that a school spends on teacher salaries, libraries and other education expenses, divided by the number of students.

Though it accounts for just 9.75 percent of the algorithm, it gives law schools a strong incentive to keep prices high. Forget about looking for cost efficiencies. The more that law schools charge their students, and the more they spend to educate them, the better they fare in the US News rankings.

"I once joked with my dean that there is a certain amount of money that we could drag into the middle of the school's quadrangle and burn," said John F. Duffy, a George Washington School of Law professor, "and when the flames died down, we'd be a Top 10 school. As long as the point of the bonfire was to teach our students. Perhaps what we could teach them is the idiocy in the US News rankings."

For years, it made economic sense for smart, ambitious 22-year-olds to pay the escalating price for a legal diploma. Law schools have had a monopolist's hold on the keys to corporate lawyerdom, which pays graduates six-figure salaries.

But borrowing \$150,000 or more is now a vastly riskier proposition given the scarcity of Big Law jobs. Of course, that scarcity hasn't been priced into the cost of law school. How come? In part, it's because schools have managed to convey the impression that those jobs aren't very scarce.

For instance, although N.Y.L.S. is ranked No. 135 out of the roughly 200 schools in the US News survey, it asserts in figures provided to the publisher that nine months after graduation, the median private-sector salary of alums who graduated in 2009 — which is the class featured in

the most recent US News annual law school issue — was \$160,000. That is exactly the same figure cited by Yale and Harvard, the top law schools in the country.

Mr. Matasar stood by that number, but acknowledged that it did not give a complete picture of the prospects for N.Y.L.S. grads. He noted that the school takes the over-and-above step of posting more granular salary data on its Web site.

“In these materials and in our conversations with students and applicants,” he wrote, “we explicitly tell them that most graduates find work in small to medium firms at salaries between \$35,000 and \$75,000.”

Determining exactly how many graduates make even those relatively modest salaries isn’t easy. The information posted online by N.Y.L.S. about the class of 2010 says that only 26 percent of those employed reported their salaries. The nearly 300 students who reported being employed but said nothing about their salaries — who knows?

Like all other law schools, N.Y.L.S. collects this job information without anyone else looking at the raw data or double checking the math. Which gets to another dimension of the law school business that other companies might envy: a lack of independent auditing, at least when it comes to these crucial employment stats. It’s kind of like makers of breakfast cereal reporting the nutrition levels of their products, without worrying that anyone will actually count the calories.

THOUGH astoundingly resilient as businesses, law schools have always had a glaring liability: they generally sell just one product, legal diplomas. This lack of diversification means that if enrollment drops, a school’s balance sheet will suffer.

Like all stand-alone institutions, N.Y.L.S. is even more dependent on student tuition than those attached to universities, and Moody’s highlighted this fact in its 2006 appraisal of the school’s bonds. Under a section about potential “challenges” that could lead to a downgrade, Moody’s cited “significant and sustained deterioration of student market position.”

A downgrade would be expensive for the school because it would mark the bonds as riskier, which would force the school to pay higher interest rates in the future.

In May of 2009, a month before the official end of the recession, Moody’s issued a new report and suddenly, a downgrade seemed like a real possibility. One problem was that applications to the school for the upcoming class of 2009, Moody’s reported, were down 28 percent compared with the volume the year before. The rating agency changed its outlook on the bonds from “stable” to “negative,” which is bond-speak for “If current trends continue, a downgrade is coming.”

But just three months later, the enrollment scare was over. In the fall of 2009, the incoming class was N.Y.L.S.’s largest ever — 736 students. (Only one law school in the country, Thomas M. Cooley in Michigan, matriculated a greater number.)

Some faculty members were happy to enhance their salaries by teaching another course. Others were appalled at what the super-sized class would mean for students.

“At a school like New York Law, which is toward the bottom of the pecking order, it’s long been difficult for our students to find high-paying jobs,” said Randolph N. Jonakait, a professor at N.Y.L.S. and a frequent critic of Mr. Matasar’s. “Adding more than 100 students to an incoming class harms their employments prospects. It’s always been tough for our graduates. Now it’s tougher.”

Was Mr. Matasar more worried about bond ratings than the fortunes of his new students? Several faculty members said, and he confirmed, that the bonds were part of discussions about the financial health of the school in 2009.

“However,” Mr. Matasar wrote, “N.Y.L.S. never promised (nor needed to promise) anyone that it would increase enrollment to meet debt service obligations.” The size of the 2009 class, he went on, was “unplanned,” again referring to a surprise in yield.

But given that interest in graduate school typically spikes during economic slumps, wasn’t a sharp rise in yield foreseeable? It was to N.Y.L.S.’s rivals. There are about 40 other schools in what US News has long categorized as its third tier, and the average increase in class size at those schools in 2009 was just 6 percent. (At 10 of those schools, enrollment declined.) That is dwarfed by the 30 percent uptick at N.Y.L.S.

Whether Mr. Matasar had bond ratings in mind at the time, Moody’s liked what it saw. In August of 2010, the company issued a new report that included news of the 736-student class, which was described, in the classic understated style of bond reporting, as “particularly large.” The Moody’s outlook for the N.Y.L.S. bonds changed once again — this time from negative to stable.

THE incoming class of 2009 won’t hit the job market until next year, but if the experience of recent N.Y.L.S. graduates is an indication, many of them are in for a lengthy hunt. Mr. Matasar offered an inventory of N.Y.L.S.’s career services office, which he says includes 15 employees and provides development and mentoring programs and oversees a series of networking events.

There are those, he wrote, “who rave about the career services office.” But he added that a recent poll of law schools found that a little more

than half of third-year students were unsatisfied with the job search help. “We have a similar experience,” he wrote.

Among the unsatisfied is Katherine Greenier, of N.Y.L.S.’s class of 2010. As she neared graduation, she organized an informational meeting for students interested in public-interest law, the kind of get-together she thought the career services office should have offered. To her amazement, a rep from that office showed up, took a seat and asked questions.

“She was asking about the process, like how you go about applying for public-interest fellowships,” Ms. Greenier says. “Things that you would have hoped she already knew.”

Ms. Greenier, who wound up with a job at the American Civil Liberties Union in Richmond, Va., ultimately decided that the school had what she called a “factory feel.”

The size of the incoming class of 2009 only sharpened that conclusion.

“There were people wondering, why did the school take on this many people in a job market this terrible?” she asked. “How many of these folks are going to find jobs? And what does it say about the school?”

IN April, Mr. Matasar stood in a lecture hall on the third floor at N.Y.L.S. and delivered the keynote at Future Ed, the third of three conferences about legal education that he’d helped organize, in partnership with Harvard Law School. A few dozen professors and deans were in attendance as he argued for a more student-centric approach to education.

“The focus shifts from us — we the faculty, we the administration, we the permanent employees of the school — to those we serve, our students,” he said. “Things are seen through a lens that says ‘What will this do for the students?’ ”

Nearly all the people who have worked with Mr. Matasar say he means what he says about reforming legal education. N.Y.L.S. professors recall meetings where he urged the faculty to be more responsive to students — to return calls faster, meet more often, whatever would help.

“He put a huge, beautiful student dining area in the top floor of that new building,” says Tanina Rostain, a former N.Y.L.S. professor, now at Georgetown University Law Center. “But it doesn’t have a faculty lounge. We were a little nonplussed, but it was clear that the students were Rick’s priority.”

How does one square that priority with the inexorable rise of N.Y.L.S.’s tuition, its population growth, its eyebrow-arching job data?

The question has puzzled more than a few academics and has produced a variety of theories. Perhaps the most compelling is that as both a crusader and a dean, Mr. Matasar has conflicting, even incompatible missions. The crusader thinks that law school costs too much. The dean has to raise the price of tuition or get murdered in the US News rankings. The crusader worries about the future of all those unemployed graduates. The dean has interest payments to make on a gorgeous new building.

“I’m 100 percent convinced that Matasar believes in his reformist agenda,” says Paul F. Campos, a professor at the University of Colorado at Boulder School of Law and a Future Ed attendee. “But all reformers discover that they can’t change a system by themselves. And by trying to survive in the current structure, he has ended up participating in the perpetuation of its most indefensible elements.”

The tale of Mr. Matasar’s career is not primarily about a gap between words and actions. Rather, it is a measure of how all-consuming competition in the legal academy has become, and how unlikely it is that the system will be reformed from within.

To be clear, there is little about the way N.Y.L.S. operates that is drastically different from other American law schools. What’s happened there is, for the most part, standard operating procedure. What sets N.Y.L.S. apart is that it is managed by a man who has criticized many of the standards and much of the procedure.

In fact, Mr. Matasar has been quoted about wanting to upend legal education for so long it is impossible to believe he is doesn’t mean it. But he can’t act unilaterally. And what industry has ever decided that for the good of its customers, it ought to charge less money, or shrink?

“My salary,” Mr. Campos said, “is paid by the current structure, which is in many ways deceptive and unjust to a point that verges on fraud. But as a law professor, I understand that what is good for me is that the structure stay the way it is.”

DECRYING a business and benefitting from it at the same time — it puts you in a tough spot, Mr. Campos said, and one he speculated is even tougher for a dean. But it is not a spot that Mr. Matasar will be in for much longer.

Several weeks ago, Mr. Matasar sent an e-mail to his faculty stating that he would step down in the next academic year. He was considering a few different job options, he explained, all of them “outside of legal education.”

Miller-McCune

SMART JOURNALISM. REAL SOLUTIONS.

June 28, 2011

Legal Services Wanted; Lawyers Need Not Apply

Why a globalized U.S. economy requires new legal infrastructure devised and controlled by innovators (who will probably be something or someone other than law firms or lawyers).

By Gillian K. Hadfield

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Like

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“Law is too important to be left to lawyers.”

Paraphrasing the famous adage about war and generals, Mark Chandler, general counsel at Cisco Systems Inc., shared this observation with me in the spring of 2007. We were speaking over Cisco’s stunning TelePresence video-conferencing system — he traveling on the East Coast, me on the West — while he grabbed a quick sandwich between meetings. Others had referred to Chandler as one of the most innovative senior lawyers in Silicon Valley, and I was picking his brain about the impact of law on innovation as part of the early phases of a research project that I was heading up at the University of Southern California law school.

His observation turned out to be the key lesson of the project.

During the four years following this initial interview, I have spoken with dozens of general counsel, entrepreneurs, business leaders and experts in innovation about how well the American legal system is supporting the innovative enterprise powering the global economic transformation under way since the fall of the Berlin Wall and the birth of the Internet. They have been uniformly optimistic about the pace of innovation in their industries — but uniformly despondent about the legal tools available to them to support their efforts to ride the surging waves of the new global economy. One complained about the great “DNA gap” between lawyers and business thinkers. Another bemoaned the need to resort to a patchwork of law firms around the world to manage operations that are “global from day one” in a new economy firm. A third shared his frustration with lawyers who produce reams of paper — erudite analysis memos or long complex contracts — when what is needed, and fast, is targeted business advice or short documents that memorialize key commitments.

If I had spoken instead with consumer or employee organizations, public-interest groups or government regulators, I would likely have heard a similar complaint about the mismatch between what we need from our legal system and what we get. How do you regulate global emissions or build an improved health care system or govern a 21st-century financial sector without drowning in ideological politics, 2,000-page statutes and endless litigation?

Surprisingly, the complaints I hear focus far more on the *value* of legal work than on the cost. This focus is surprising because during the last decade or so, the cost of legal services and procedures has soared. One recent industry survey concluded that law firm prices had increased 75 percent since 2000, far outstripping a 20 percent growth in non-law firm costs. The Berkeley Patent Survey of 2008 found that the average cost to obtain a patent in a technology startup firm is now \$38,000; more than a third of the survey’s respondents cited cost as the most important reason they chose not to patent.

So cost is certainly a major concern. But the cost problem only sharpens the sting of complaints about value: Clients feel that they are paying more and more for legal work that helps them out less and less.

There is a way out of the legal morass that surrounds our most innovative businesses, but it involves loosening the near total grip that lawyers have on creating the law and supplying legal services in the U.S. In America, such a notion is often dismissed as a flight of fancy, in no small part because lawyers here so jealously guard their prerogatives. But the process of opening the markets that generate legal infrastructure to investors, managers and others who aren’t lawyers is already under way in the United Kingdom, creating possibilities for legal innovation — and enormous economic advantages — that ought to interest Americans whether they are lawyers or



The process of opening the markets that generate legal infrastructure to investors, managers and others who aren't lawyers is already under way in the U.K.
(Illustration by Jim Frazier)

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In the words of famed Harvard law professor Lon Fuller, “Law is the enterprise of subjecting human conduct to rules.” And although most students head to law school with visions of social justice and important constitutional rights dancing in their heads, most legal work in modern market democracies involves the management of economic activity. For reasons that are central to my point — that law is too important to leave to lawyers — we have very little hard data about what lawyers actually do because lawyers don’t like to collect data. But based on my own research, I estimate the share of legal work geared to achieving economic objectives is on the order of 60 to 70 percent. Depending on how you count, it may be more: In one of the few studies of the distribution of legal work (this one conducted in Chicago in 1995), researchers found that only 16 percent of legal effort was devoted to representing individuals in civil rights, criminal defense, divorce, family or personal injury matters. Only 8 percent of all lawyers work in government and 1 percent in legal aid or public defender offices. Most legal work is performed for businesses and organizations. Among large law firms, which scoop up the top law school graduates, the percentage of corporate clients is pretty close to 100.

Legal rules and the work lawyers do — the advice they give, the documents they generate, the litigation they conduct, the lobbying they engage in — are basic elements of our economic infrastructure. In fact, I refer to the set of legal materials available to economic actors as “legal infrastructure.” Although most people in business think of lawyers as a necessary evil required to defend against silly lawsuits and comply with burdensome government regulation, the truth is that law is a critical piece of the economic puzzle. To know why, one only has to look to developing countries around the world as they try to build market economies: Foreign and domestic businesses and governments bemoan the absence of the rule of law to ensure contracts are kept, profits are shared, loans are paid back, intellectual property is safeguarded and regulations are followed.

To even better see why legal inputs are economic inputs, imagine that you are one of our modern-day heroes — the Internet entrepreneur. You and a few friends hatch the idea for a new social networking platform. You all decide to quit your jobs to build the idea, working around the clock and sustaining yourselves with savings and funds borrowed from family and friends. You need to lease space to work in and to pay a Web-hosting service. You need to hire and pay programmers. You need to develop terms of use for the website to ensure that you can easily do things like drop people if they are abusive. You need to know what regulatory compliance and liability risks you face. You need, perhaps most of all, to raise venture capital to grow the business, and this means managing relationships with potential investors: how much to tell people when and how, what types of control you might be willing to give up and what protections you want for your own long-term involvement in the business.

How effectively you and your friends achieve these goals and build a successful business depends on the quality and cost of the legal infrastructure available to you. Are you all willing, for example, to share your ideas with one another freely at the beginning, or is anyone worried that he or she might be cut out of the venture? That depends, in part, on the background legal rules. In most U.S. states, for example, a partnership is formed between people who start behaving like partners and, unless they agree differently, they’re all entitled to an equal share in the profits of the partnership. Similarly, trade secret statutes can protect a person who discloses commercially valuable information to someone in confidence, unless they agree differently. That “unless they agree differently” proviso means the legal impact of both partnership and trade secret law depends on contract law and what counts as an agreement: Is just going along without objection enough, or do you need a written, signed document?

Anyone who has seen the film *The Social Network* will appreciate that the question of who ends up with money in their pockets on the way from dorm-room idea to billion-dollar company turns on more than just the rules you can find in law books. What good are the rules if you can’t find or afford lawyers to decipher them? If the lawyers you turn to are uniformly risk averse and lack good business sense, how can they possibly help you decide which risks matter and which can be ignored? How useful, really, are the templates those lawyers use to draft contracts if the contracts are indecipherable by ordinary humans and hence routinely ignored — until someone files a lawsuit, at which point they contain a wealth of unwelcome surprises? What good do the rules do you if the ambiguity of the procedures worked up by courts render the cost of litigating a dispute so expensive and unpredictable that you are better off cutting your losses and moving on to something else?

The quality and cost of rules, lawyers and procedures will play a major role in the success or failure of our imagined social networking venture. Just like the broadband Internet connections that will link up the members of the network, the educational system that will generate programmers and the real estate developments that will provide office space, the available legal infrastructure is an economic factor that directly affects the calculus of profit or loss. And right now, for every Facebook that survives the legal morass and builds an Internet blockbuster, thousands of well-hatched plans are destroyed by unmanageable arguments among partners, investors and regulators, or sunk by an unwillingness among investors to put up money in the face of legal costs and uncertainty.

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Two basic types of legal inputs determine the quality and cost of our legal infrastructure. On one hand are legal rules and procedures and on the other, the legal expertise — advice, documents and representation services, for example — that implements those rules and procedures. Let’s start with legal expertise. I’ll get back to legal rules later.

It may seem perverse that I use the circumlocution “legal expertise” in describing this category. Don’t I just mean “lawyers”? Yes and no — and that’s the problem.

In any American state today, legal services must be provided by someone who has earned a doctorate in jurisprudence, or JD (in most states, from a law school accredited by the American Bar Association), and passed the bar exam. Until relatively recently, legal work had to be done by individual lawyers working, at most, in partnerships with other lawyers; it could not be provided by any corporate entity.

Today, a limited liability corporation can provide legal goods and services in many states — but only if it is owned and managed entirely by lawyers. According to regulations passed by individual bar associations and adopted by state courts, only lawyers can practice law. The definition of what counts as “practicing law” is left up to lawyers and judges to decide, but, to date, that definition has pretty much been whatever today’s lawyers do.

So, it is natural to think that when we are talking about the process for producing all the things that lawyers do today, we are talking about how lawyers are produced. Historically, this analysis has focused policy on a very narrow question: Are there enough seats in law schools? But the question of how many lawyers we have is beside the point. The number is not the real policy problem.

The real problem is that we don’t seem to be producing either people or organizations that provide legal inputs appropriate for the rapid changes of the new economy. And this failure has come about precisely because we have treated legal inputs as the province of lawyers alone.

It’s not that lawyers aren’t smart or committed enough to produce good quality legal services. The problem with the way in which U.S. markets for legal inputs are structured is that they are entirely closed off to the potential quality-improving and cost-reducing innovations that might be produced by people who are not already heavily invested in our existing ways of handling legal problems. Those existing approaches are the problem: too costly, too poorly informed about rapidly changing business and regulatory realities in a global economy, too risk averse, too slow and cumbersome.

So why not let people other than JD-trained, bar-examined lawyers and organizations that aren’t 100 percent lawyer-owned and -financed compete to supply advice about managing legal and regulatory risks, complete required document filings, design documents and organizational policies, negotiate contracts and manage legal disputes? Certainly, there are some things for which only the most experienced and conventionally trained lawyer will do. But there is also a huge landscape of legal work that could be better done by differently trained lawyers, lawyers trained out-of-state, lawyers working in partnerships with nonlawyers, and companies that are owned, managed and financed by business-minded folks, rather than (or in addition to) legally minded folks.

The potential for corporate provision of legal inputs on a national or international scale opens up many possibilities for creating legal services that match the needs of the global economy. Expanded scale, together with the more robust financing that corporations attract, could spur the development of large-scale data analysis that could be incorporated into business decision-making in any number of areas, including: how to respond to liability or regulatory risks; how much effort to put into negotiating contractual detail; and how to assess the risks of a target company in an acquisition or a new financial vehicle.

Partnership with nonlawyers makes integrated finance, accounting, tax and legal support for mergers and acquisitions possible. Access to out-of-state or even out-of-country legal advice creates the potential for an integrated solution to managing a far-flung enterprise. Integrating legal expertise with business expertise promises the potential for innovating legal solutions that are better calibrated to risk and reward. A new venture, after all, often needs and gets away with a quick and short agreement right now, rather than the overly long and detailed document that would take months to hammer out.

Once you start to think about legal inputs in the economic sphere as essentially economic inputs, you get to an idea we adopt in most other economic markets: Don’t regulate who can provide goods and services without good reason to think that the regulated market will do better than the unregulated market. And there is no good economic rationale for lawyers to have exclusive rights to supply and control all legal inputs. If the idea of allowing people and organizations other than lawyers and law firms to supply legal inputs sounds pie-in-the-sky, consider what is happening in the U.K. right now.

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The U.K. has never had an unauthorized practice-of-law rule: Anyone may provide legal advice, so long as he or she doesn’t call him- or herself a solicitor. So if a serial entrepreneur has discovered a market niche in providing advice on how to navigate venture capital agreements, he or she can provide that service. And, given his or her expertise in startup ventures, the advice may well be of higher quality and lower cost than the legal opinion available from law firms.

But even this long-standing level of legal openness hasn’t been good enough for the Brits. In 2007, on the recommendation of a commission headed by a banker rather than a lawyer, the U.K. adopted legislation pulling the regulation of the legal profession out of the English equivalent of our bar associations and placing responsibility for oversight in a Legal Services Board with a chairman and a majority of members who are nonlawyers. This regulatory body can accept applications from any entity that wishes to be recognized as an approved regulator of providers of legal services.

The definition of what counts as “legal” is relatively narrowly defined; it does not include “everything today’s lawyers do.” There are now eight different bodies authorized to license providers of legal services, all competing to serve different market niches. In addition to barristers and solicitors (who are now freer to compete with one another), there is a Legal Executives Institute, for example, that licenses people who pursue a community college track in legal training rather than conventional university-based law school. Legal executives can provide many of the same services that solicitors and barristers provide.

But the U.K. went further still, striking down restrictions on the organizational form and financing of legal entities. So now it is entirely possible for nonlawyers to partner with lawyers, or to form entities financed by either private equity or publicly held shares, or to delegate management of the organization providing the services to nonlawyers.

This new set of rules is just rolling out this year, so it’s too early to say what may result. But the possibilities are significant: A merger between an investment bank and a corporate law firm, for example, could provide integrated support for corporate acquisitions and

initial public offerings. An electronic document-processing firm might simultaneously innovate and manage the technology of document search and provide sophisticated legal advice about document retention and document production in litigation. Large retail entities could provide consumers with low-cost legal help alongside banking, eye exams and watch repair in their stores. And online advisory systems could serve up integrated data analysis, document preparation and legal advice to consumers and small business owners. None of these options is effectively available under the American regulatory regime.

There's an important implication to the U.K. shift in regulatory regime: It not only opens up competition among differently trained and specialized legal experts within the British Isles; it also opens up the U.K. markets to global competition. As a member of the European Union, the U.K. is bound to treat providers from other European countries on an equal footing. More important, by authorizing businesses that are not exclusively owned and managed by licensed lawyers to provide legal goods and services, the U.K. invites robust access to its legal markets by providers in non-European countries. This includes, for example, India, which is emerging as a major center for low-cost legal process outsourcing. LPOs conduct legal research and due diligence, manage contract compliance, review documents for litigation and so on. In the U.S., bar associations routinely require access to LPOs to be supervised by in-state licensed lawyers.

At the same time, as U.K. lawyers are likely to feel increased competition from foreign providers, they are also likely to enjoy greater access to currently closed but lucrative markets, such as India. As it stands, only Indian citizens can become licensed advocates capable of providing advice on Indian law to Indian businesses. U.K. firms are in a far better position to negotiate access to Indian markets because the U.K. government already offers open markets in return.

But the U.S. cannot dangle the prospect of access to the New York or Silicon Valley legal markets to induce reciprocal access to India. Indeed, the U.K. is several steps ahead strategically on this count, precisely because it has made legal policy an element of national economic policy. In the U.S., policy is not merely vested in lawyers; it is vested in the lawyers and supreme courts of the 50 individual states, acting independently. There is no national policy role in legal markets in the U.S. With one of the most expensive legal systems on Earth, the U.S. is putting itself even further behind the global competitive curve by letting lawyers, and only lawyers, call the shots.

In terms of cost and quality, most discussion of legal policy as an economic concern focuses not on legal expertise but on legal rules. Businesses and public-interest groups lobby legislatures heavily for rule changes: extension of or protection from tort liability or regulations, for example. Even if the cost and quality of legal expertise were significantly improved, poorly designed, excessively complex rules could still drive legal bills up and the achievement of legal objectives down.

The standard way of thinking about this problem is to think about improving political processes in legislatures and regulatory agencies. After all, these are the entities that have to produce legal rules, right? Well, maybe not right.

It is true that nearly all of our law is now produced by public entities, but this hasn't always been true. At the birth of the commercial revolution in medieval Europe, merchant guilds produced law for their members and ultimately for a wide range of commercial transactions involving nonmembers. Before the Securities and Exchange Commission was created in the 1930s, private stock exchanges set their own rules. Trade associations have long provided rules for their members; indeed, they secured federal law in 1925 to ensure that decisions issued by private arbitrators in contract disputes would be enforceable in public courts.

For law that secures political legitimacy — law protecting equality in the workplace or the right of free speech, for example — it is of course essential that the rules be produced in publicly accountable settings. But as we've seen, much of the law produced is fundamentally economic in character.

The rules governing contracts between corporations or setting up the relationships between the shareholders and managers of a corporation are examples of fundamentally economic rules. What we want from such rules is not that they be fair and just but that they be efficient, supporting investment, innovation, cost reduction and quality improvements. This is not to say that the rules should be unfair — in many cases, fairness is efficient, because it gives economic actors the confidence to risk an investment or rely on a contract. Nor is it to say that we cannot publicly regulate corporate contracts or governance systems to, for example, protect third parties from fraud or anti-competitive behavior or the exploitation of workers.

But the myriad rules that corporate entities use to protect themselves against loss of investment or control or profits are, in character, really no different from the other bits of economic structure that these parties rely on, such as communications technology or banking services or building management. These rules include such questions as: When does negotiation to set up a joint venture progress from just talking to contractual obligation? To what extent can entrepreneurs or corporate managers take advantage of economic opportunities and not share them with their partners or shareholders? What information must management share with the holders of equity or debt in the company? When is a purchaser entitled to cancel a contract, and how much, if anything, does it owe in compensation to the seller? How should the terms of a license be interpreted to decide whether it has been violated?

It's hard to see why these fundamentally economic rules are best designed by politicians, bureaucrats and judges, as most of them now are.

Many of these rules of business engagement can, at least in theory, be chosen by the people and entities involved through contract. But this is why the control of legal infrastructure is so important: Legal infrastructure sets the backdrop against which any effort to tailor the rules through contract takes place. Let's take a recurrent issue in contracting in the new economy: When does negotiation pass over from just talking to contractual obligation? This question comes up all the time in the new economy because of the velocity, complexity and fluidity of relationships in modern industries. In the stable, well-defined world that most law contemplates, negotiating parties could write

an agreement that defines exactly when their discussions should be deemed to have matured into an enforceable contract: when formal documents are executed by the negotiators' boards of directors, for example. That's a nice crisp line.

But it's also one that may not serve negotiators well in the uncertain, rapid-fire and highly competitive world in which they operate. In many cases, drafting lengthy formal agreements will delay contractual obligation long past the point at which one or both parties have to invest significant resources in the venture. But precisely because the environment is complex and fast, some legal protection is needed. So it is very likely, and happens all the time, that the parties will find themselves relying on the background contract law of California or New York or France or Slovakia (they may argue about which one applies) to decide when and if contractual obligations come into existence. And believe me — I teach this stuff — this reliance on general principles is not a pretty sight, once business specifics come into play.

But it's a picture that could easily be improved.

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There is a real role for markets to play in providing legal infrastructure that meets the needs of the new worldwide economy.

What if private companies were allowed to compete to provide the rules and procedures governing business negotiation? Maybe Private Contracting Inc. would come up with a good package: For a price, PCI will provide a set of rules and adjudicators to decide when and if a contract comes into existence. Its rules, the company advertises, are simple and clear, and adjudication costs never exceed a set price. Perhaps Modern Contracting Services offers a different package. It reaches an agreement with the negotiators up front to have all communications stored in MCS databases, where MCS's patented algorithms — constantly updated based on large-scale data analysis — search for indications that particular commitment thresholds have been crossed, generating specific obligations for one or both parties. New Age Contractors might provide ongoing counseling and mediation services to help negotiators recognize when their level of commitment is growing out of step with the written agreements they have reached. And so on.

If you're like the smart but skeptical audiences I usually talk to about these ideas, you may be itching to ask the economist's \$20 question: If profits really are lying on the sidewalk here, why isn't anyone picking them up? The reason harks back to the restrictions I identified in the markets for legal expertise. Almost any alternative system — particularly in a nascent new industry of private legal production — would have to incorporate elements of existing legal systems. A company that reviews communications, predicts liability based on large-scale data analysis and adapts contractual instruments or informs the parties accordingly is probably engaged in what bar associations would deem "the practice of law." A mediation system that monitors commitments and formal agreements to give advice about legal mismatches almost definitely is. Even an entity that offers a set of clear alternative rules for contracting may well find itself skating close to the edge with bar associations if it is offering this to the public and not just its own members.

As proof of this assertion, we need only look at what has happened with arbitration in America. Arbitration promised lower cost, more expert and more confidential adjudication from private judges than litigation conducted in public courts. While it has achieved greater expertise and confidentiality in many settings, it has not accomplished the goal of reducing cost. Why not? It has been almost impossible to dislodge procedure in arbitration from the forms of procedure that lawyers use in public courts. This is where lawyers' expertise lies and what they know; it's what they advise their clients to adopt. The private judges they seek out and recommend are retired judges from the public courts who are also expert, of course, in conventional procedure and its values. And, if that were not enough, in several states, lawyers have succeeded in establishing bar association rules that deem representation in private arbitration to be the practice of law — something only lawyers are authorized to do.

One consequence of the lock lawyers have exercised over the markets for legal expertise is a tremendous lack of diversity in the training and experience lawyers acquire. All lawyers complete a JD degree, which follows a uniform pattern in almost all law schools. Almost all lawyers work in environments in which their co-workers are also lawyers — meaning there is little opportunity to learn how other types of specialists see and solve problems. But diversity in problem-solving approaches is an essential feature of any robust system of innovation. So one reason lawyers don't invent better systems is that they all think more or less alike. (It is generally with some pride that law schools talk about teaching novitiates how to "think like a lawyer.") And if they do anything that involves the practice of law, lawyers cannot partner with nonlawyers who bring the diversity in problem-solving that they need to be truly creative.

Perhaps even more important, the evolution of innovative rule-production systems like Modern Contracting Services or Private Contracting Inc. is hampered by the rules preventing lawyers from obtaining nonlawyer equity financing. Even those lawyers who do have innovative ideas about how to solve legal problems more effectively and cheaply can't access "friends and family" investments or venture capital to bring their ideas to market. Of course, you don't need venture capital if you are just starting a slightly new form of law firm. For this, traditional bank financing is probably enough.

But the type of innovation we need in law is just as revolutionary as a new social networking platform. For that type of transformation, there is a need for startup capital investments to sustain the potentially long and certainly risky process of working out a business model and building sufficient scale to turn a profit. Legal innovation is choked off because it is isolated from this type of financing.

Overcoming these blockages in innovation in the area of private contracting and corporate governance would carry a secondary benefit: If we started in the easy realm of contracts between corporate entities, we might learn enough to figure out how to get competing private entities to come up with better ways to achieve not just transactional but also regulatory goals.

Market-based regulation is, of course, a hard nut to crack, because the public interest in regulation goes well beyond ensuring efficient transactions. But there are clearly policy options to think through here. Instead of engaging in the nitty-gritty of regulation, what if state and federal legislatures simply set out the criteria for acceptable regulatory regimes? They might set targets for workplace accidents or

health and cost outcomes or pricing efficiency. They might serve as a super-regulatory body overseeing the work of multiple approved regulators (as the regulatory scheme for lawyers in the U.K. now prescribes). Might we not benefit from the creation of a profitable industry that rewards creativity in designing regulatory systems for complex and fast-paced environments?

This idea — like the idea that we might lower the barriers to the practice of law — may also seem pie-in-the-sky, but I think it is closer to reality than most people realize. Legal scholars have for a few decades now been studying whether better systems of corporate governance are generated when corporations get to choose their state of incorporation, thus encouraging “regulatory competition” between state legislatures, courts and legal professionals. The problem of integrating international securities markets has other legal scholars ruminating about the potential for portable securities regulation: Instead of requiring all companies with stock traded on U.S. stock exchanges to be regulated under SEC rules, allow them to choose between SEC rules and the regulations provided by other countries that meet minimum standards.

Economist Paul Romer has proposed that one way for poor and developing nations to get out of the trap of bad rules would be to establish “charter cities” where generating and enforcing legal rules conducive to economic growth could be constitutionally delegated to a third-party government with a good track record. Mauritania, for example, might partner with New Zealand and Norway to establish better governance in such a variation on the concept of a special economic zone. The government of Honduras has just adopted the initial constitutional amendments necessary to create the first charter city.

Once we have recognized that one political body might be the source of legal rules for a group of people and businesses in a different jurisdiction — people and businesses that do not have political oversight of the rule-provider — it is a short step to opening up the set of potential rule providers to include private entities like my imaginary Private Contracting Inc. or Modern Contracting Services. Romer’s charter cities, for example, might not only look to foreign governments to provide a stable framework for judicial appeals or administrative action; nonprofit organizations might also be able to fulfill this role.

Such changes in the creation and enforcement of regulations are far from simple and straightforward. Indeed, I generally hesitate to give examples of what more open markets in legal expertise and more market-based production of legal rules might look like, precisely because it is their ability to harness diverse, on-the-ground, invested thinking about complex problems that makes markets valuable in the first place.

Indeed, Mark Chandler’s insight is dead-on. Law is too important to leave to lawyers because legal policy is in many respects economic policy. Although lawyers are good at lots of things, they aren’t particularly good at economic policy. If they were, after all, we’d be happy to have lawyers and courts set wages and prices in the same way we now let them control the legal infrastructure and markets that constrain — and in some cases even kill — our most promising and innovative businesses.

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Judiciary

Pay Freezes Prompt More Judges to Leave Bench, Go Back to Practice

Posted Jul 5, 2011 5:45 AM CDT

By [Molly McDonough](#)

The number of judges leaving the bench because of a growing pay gap is increasing nationwide, but especially in New York, where nearly 1 in 10 judges are leaving each year to go into private practice.

In New York, judges haven't had a pay raise in 10 years, ever widening the gap between those on the bench and those in private practice, where partner pay can be 10 times annual judicial salaries, the [New York Times](#) reports.

The Times notes that at least a dozen judges have resigned for pay reasons, the most recent being state appeals court judge James M. McGuire, who left his \$144,000 annual salary for a partnership at Dechert, where average partner pay is \$1.4 million. The 57-year-old has two young children.

"I tormented myself for the longest period of time about whether I should go, because I love the work," he tells the paper. "And then I realized, 'I've got no choice. The only responsible thing for my family is to go.'"

In the 1970s, New York judges were paid the highest in the nation. But the National Center for State Courts now ranks the state 46th, the Times notes.

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