

**Oregon State Bar
Meeting of the Board of Governors
April 27, 2012
Oregon State Bar Center
Open Session Agenda**

The Open Session Meeting of the Oregon State Bar Board of Governors will begin at 1:00 p.m. on April 27, 2012.

1. Call to Order/Finalization of the Agenda

2. Department Presentation

- A. Facilities & Operations [Mr. Wegener]
- B. Human Resources [Ms. Kennedy]

3. Reports

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|----|--|---------|---------|
| A. | Report of the President [Ms. Naucler] | Written | Exhibit |
| B. | Report of the President-elect [Mr. Haglund] | Written | |
| C. | Report of the Executive Director [Ms. Stevens] | Inform | Exhibit |
| | 1. Speaker for 2012 HOD Meeting | Inform | |
| | 2. OSB Website Redesign | Inform | |
| D. | Board Members' Reports | Inform | |
| E. | Director of Diversity & Inclusion [Ms. Hyland] | Inform | |
| F. | MBA Liaison Reports [Ms. Kohlhoff & Mr. Larson] | Inform | |
| G. | Oregon New Lawyers Division Report [Mr. Hirshon] | Inform | Exhibit |

4. Professional Liability Fund

- | | | | |
|----|-----------------------------|--------|---------|
| A. | General Report [Mr. Carter] | Inform | Exhibit |
| B. | Financial Report [Mr. Cave] | Inform | Exhibit |
| C. | 2011 PLF Annual Report | Inform | Exhibit |

5. Emerging Issues Discussion

- | | | | |
|----|---|--------|---------|
| A. | WSBA Fee Resolution [Ms. Naucler] | Inform | Exhibit |
| B. | OSB Member Fee Distribution [Mr. Wegener] | Inform | Exhibit |

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

- A. Access to Justice Committee [Ms. Baker]
 - 1. Legal Aid Accountability Report Inform Exhibit
- B. Member Services Committee [Mr. Kehoe]
 - 1. Update on Credit Card Affinity Program & Product Discounts for Members Inform
 - 2. Proposal for Member Satisfaction Survey / Poll Inform
- C. Budget and Finance Committee [Mr. Haglund]
 - 1. March 31, 2012 Financial Report Inform Exhibit
 - 2. Report on 2012 Economic Survey Inform
- D. Policy and Governance Committee [Ms. Fisher]
 - 1. Committee Assignments (one new and one revision) Action Exhibit
 - 2. MCLE Rule 3.7 Amendment Action Exhibit
 - 3. Proposed Amendments to Reinstatement Rules Action Exhibit
 - 4. Section Charitable Donations Action Exhibit
 - 5. Refunding Fees on Death Action Exhibit
 - 6. Centralized Legal Notice System [Mr. Williams] Action Exhibit
 - 7. Bylaw Housekeeping Changes Action Exhibit
- E. Public Affairs Committee [Mr. Larson]
 - 1. Legislative Update Inform
 - 2. Approve Law Improvement Proposal Package Action Exhibit
- F. New Lawyer Mentoring Program
 - 1. NLMP Mentor Selection [Mr. Schpak & Ms. Walsh] Inform
 - 2. Review and Approve Potential Mentors Action Exhibit

7. Other Action Items

- A. Courthouse Passes for OSB Members Action Exhibit
- B. CSF Claim No. 2012-01 HOWLETT (Uriarte) Appeal Action Exhibit

8. Consent Agenda

- A. Approve Minutes of Prior BOG Meetings
 - 1. Open Session – February 10 , 2012 Action Exhibit
 - 2. Closed Session – February 10, 2012 Action Exhibit
 - 3. Special Open Session – March 30, 2012 Action Exhibit

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

- C. Client Security Fund Claims Recommended for Payment Action Exhibit

9. Default Agenda

- A. Minutes of Interim Committee Meetings
 - 1. Access to Justice Committee
 - a. March 30, 2012 Exhibit
 - b. March 30, 2012 – with Budget & Finance Committee Exhibit

 - 2. Budget and Finance Committee
 - a. February 9, 2012 Exhibit
 - b. March 30, 2012 Exhibit

 - 3. Member Services Committee
 - a. February 10, 2012 Exhibit
 - b. March 30, 2012 Exhibit

 - 4. Policy and Governance Committee
 - a. February 9, 2012 Exhibit
 - b. March 30, 2012 Exhibit

 - 5. Public Affairs Committee
 - a. February 9, 2012 Exhibit
 - b. April 5, 2012 - conference call Exhibit

 - 6. Unclaimed Lawyer Trust Accounts
 - a. January 6, 2012 Exhibit

- B. CSF Financial Report Exhibit

- C. Disciplinary Counsel’s Office Annual Report Exhibit

- D. 2012 ABA Mid-Year House of Delegates Meeting Exhibit

- 10. Closed Sessions – CLOSED Agenda ([click here](#))**
- 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
- 11. Good of the Order (Non-action comments, information and notice of need for possible future board action)**
- A. Correspondence
 - 1. Thompson/Severy – Letter of Appreciation Exhibit
 - 2. Shearer Correspondence re: LRS Percentage Fees Exhibit
 - 3. OSB 50-year Member Lunch Responses Exhibit
 - B. Articles of Interest
 - 1. Welcome to the Crucible – J. Furlong Exhibit
 - 2. The Future of Legal Employment – J. Furlong Exhibit
 - 3. Declining Law School Admissions (2 articles) Exhibit
 - 4. Governance vs. Management - Solid Ground Consulting Exhibit
 - 5. Grads Can't Sue Law School – ABA 04.11.2012 Exhibit
 - 6. Litigation Funding Profitable for UK Firm – ABA 04.11.2012 Exhibit

Report of the President
February 1, 2012—April 27, 2012

2/2-5/12	NCP ABA Mid-year Meeting	New Orleans, LA
2/8/12	CEJ Lunch	Portland
2/9/12	Lunch w/ Supreme Ct and Ct of Appeals	Salem
2/9/12	BOG Committee Meetings	Salem
2/10/12	BOG Meeting—Salem/BOG dinner—Albany	
2/15/12	Linn Benton Bar Assoc. presentation	Corvallis
2/16/12	Betty Roberts Memorial	Salem
2/23/12	Oregon Minority Lawyers Assoc. Lunch	Portland
2/24/12	Oregon Law Foundation Mtg.	Tigard
2/24/12	Oregon Hispanic Bar Assoc. Dinner	Portland
3/1/12	Meet with Chief Justice	Salem
3/9/12	OWLS Dinner	Portland
3/13/12	OSB Employees Open Forum	Tigard
3/15/12	DJC Leader in Law Dinner	Portland
3/20/12	Mary Leonard Law Society	Salem
3/21-24/12	Western States Bar Conference	Las Vegas, NV
3/28/12	CEJ Reception for Tom Matusda	Portland
3/30/12	BOG committee meetings/ONLD dinner	Tigard
4/6/12	Investiture of David Leith, Marion Cir. Ct.	Salem
4/6/12	OLIO Spring Social	Salem
4/17-19/12	ABA Lobby Days	Washington, DC
4/26/12	CEJ Meeting/PLF Joint Dinner	Portland
4/27/12	BOG Meeting	Tigard

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: April 27, 2012
From: Sylvia E. Stevens, Executive Director
Re: Operations and Activities Report

OSB Programs and Operations

Department	Developments
Accounting & Finance/Facilities (Rod Wegener)	<p><i>Accounting:</i></p> <ul style="list-style-type: none"> March financial reports have been issued. The biennial audit is underway and a report is expected for the May 24 meetings. Staff is working with a B&F subcommittee to develop the 2012 economic survey, which will collect data about race and ethnicity as well as career satisfaction. <p><i>Facilities:</i></p> <ul style="list-style-type: none"> Our broker has shown the 1st floor space to several prospects, but no offers have been received. We may want to lower the rate to generate more interest.
Admissions (Jon Benson)	<ul style="list-style-type: none"> 216 applicants sat for the February 2012 bar exam, the fewest number since February 1988. Neighboring jurisdictions are seeing similar reductions. LSAT and law school applications are trending downward nationally. The February bar exam results will be released on April 27; the swearing-in will be May 10, 2012. The BBX continues to discuss the Uniform Bar Examination. Beginning in July 2012, the Oregon exam will consist of six essay questions and two MPT's, the same format as the UBE, but because Oregon has not adopted the UBE, scores will not be transferable into or out of Oregon. Jon Benson participated in an ABA accreditation review of a Minnesota law school; the intensive process produced a 50-page report.
Communications (Kay Pulju)	<ul style="list-style-type: none"> <i>Public outreach:</i> Recent projects include final editing of <i>Legal Issues for Older Adults</i>, a publication focused on elder law and related legal issues for older Oregonians. The handbook will be published on the bar's website and also available in print at cost. Department staff also coordinated publicity and video distribution for the Oregon Supreme Court Judicial Candidate Forum, co-sponsored by the American Constitution Society and the OSB Appellate Practice Section. <i>Member communication:</i> Efforts have focused on a redesign of the bar's website to make it less cluttered and more user-friendly, as well as major changes to the online career center. Recent features in the Bulletin have covered Oregon law and practice trends, as well as bar leadership priorities. <i>Media:</i> Continuing to get attention for a number of discipline cases. We've also had some opportunity recently to do some outreach on UPL issues and we are using that as a springboard for other education on the issue. Our

Department	Developments
	<p>Judicial Voters Guide has been published to the web. It was again highly sought after by editorial boards and newspapers for their research, and has been publicized as a voter resource in numerous print and web publications. That publicity and outreach effort continues. The big Bar Press Broadcasters Council event – <i>Building a Culture of Dialogue</i> - is coming up May 5 and we’re working on finalizing details. Bar Press was also going to propose a change to the UTCR dealing with cameras in the courtroom. The goal is to clear up a conflict between the UTCR and the Media Shield Law. That has been tabled until the Fall meeting of the UTCR committee.</p>
<p>CLE Seminars (Karen Lee)</p>	<ul style="list-style-type: none"> • Effective January 1, 2012, course materials are being sent to seminar registrants electronically unless a specific request is received for print materials. An average of 33% of attendees for February and March seminars requested electronic materials. • At the end of February, ten video replay sites were notified that advances in technology for delivering CLE seminars has resulted in a sharp decline in video replay registration, and OSB CLE will no longer require their firm or organization as a replay site after December 31, 2012.
<p>Diversity & Inclusion (Mariann Hyland)</p>	<ul style="list-style-type: none"> • The OSB held a “Diversity Branding” session on February 23, 2012. Twenty five Bar leaders, including members of the Board of Governors, the Executive Director, staff and OSB section and committee leaders met to develop the OSB’s diversity brand, including a draft diversity definition and business case statement explaining why diversity is important. Final recommendations will be presented to the Board of Governors for adoption at the June 2012 meeting. • The OLIO Spring Social occurred on April 6. OSB President Mitzi Naucner and Board member Hunter Emerick participated in the program and shared “words of wisdom” with graduating students and other guests. D&I launched OLIO’s new logo and clarified goals and objectives at the Spring Social. Over 90 people attended the event, which was hosted by Willamette University College of Law. • D&I launched its annual fundraising drive for OLIO 2012. Our goal is to raise \$75,000 to cover the expenses associated with the OLIO orientation, which is scheduled for August 9-12 in Hood River, Oregon. We are reaching out to an expanded donor base and have increased the sponsorship levels to attract additional donors. See attached for additional information regarding OLIO and sponsorship levels. • D&I launched its new Facebook page (www.facebook.com/OSBDiversity) and Twitter account (https://twitter.com./#!/OSBDiversity).
<p>General Counsel (including CAO) (Helen Hirschbiel)</p>	<ul style="list-style-type: none"> • The second session of Ethics Best Practices (“ethics school”) will be held at the OSB Center on May 4. The program open to anyone who is interested in attending, and a majority of registrants are not disciplined lawyers. • The anticipated launch date for the Fee Mediation Pilot Project is the end of April. • Information about UPL on the OSB website is being expanded and updated. • General Counsel, Deputy General Counsel and one of the CAO Staff Attorneys will be attending the ABA Center for Professional Responsibility

Department	Developments
	Annual Ethics Conference May 31—June 2. <ul style="list-style-type: none"> • CAO Managing Attorney Chris Mullmann recently did well-received CLE presentations to public defenders in Eugene, Medford and Grants Pass.
Human Resources (Christine Kennedy)	<ul style="list-style-type: none"> • Recruited and hired two Referral and Information Services Assistants. • Currently recruiting for Administrative Assistants for Diversity and Inclusion and Legal Publications Departments. • Completed staff performance evaluations and open enrollment for health insurance. • American Red Cross Disaster Preparedness training was presented to OSB and PLF staff.
Information & Design Technology (Anna Zanolli)	<ul style="list-style-type: none"> • Programming: completion and launch of the new Fee Arbitration and Mediation application; work on track for May launch of the New Lawyer Mentor Program application that replaces the prototype introduced in 2011. Both new applications ride on a SQL database that is being developed to serve as the foundation for future programming projects. • Improvements in the bar’s technical infrastructure to support ongoing operations and software modernization efforts. • Purchase and deployment of new desktops and peripherals around the bar as part of our annual upgrade cycle. • Design of a new OLIO logo and branding materials to support the bar’s Diversity & Inclusion efforts.
Legal Publications <ul style="list-style-type: none"> • (Linda Kruschke) 	<ul style="list-style-type: none"> • Monthly BarBooks™ webinar training continues; a live presentation was made to the Multnomah County Courthouse staff in February. • The following have been posted to BarBooks™ since February: <ul style="list-style-type: none"> ○ All 46 chapters of <i>Oregon Civil Pleading and Practice, 2012</i> revision. ○ The PLF publication <i>Oregon Statutory Time Limitations</i>. • <i>Labor and Employment Law: Private Sector, 2012</i> revision, and <i>Oregon Formal Ethics Opinions, 2011</i> supplement, were sent to the printer in early February. Sales of both titles were significantly above budget: <ul style="list-style-type: none"> ○ <i>Labor and Employment</i> Budget = \$1,100; Actual to date = \$13,875 ○ <i>Ethics Opinions</i> Budget - \$225; Actual to date = \$7,331 • The 2011 supplements for <i>Uniform Civil</i> and <i>Criminal Jury Instructions</i> have continued to sell after the pre-order period expired and in both cases actual revenue has now exceeded budget: <ul style="list-style-type: none"> ○ UCJI 2012 Budget = \$15,250; Actual to date = \$17,702 ○ UCrJI 2012 Budget = \$9,250; Actual to date = \$11,611 • We are currently taking pre-orders for <i>Oregon Civil Pleading and Practice, 2012</i> revision. Sales have been excellent: <ul style="list-style-type: none"> ○ <i>Civil Pleading</i> Budget = \$13,500; Actual to date = \$29,305 • In mid-April, we initiated the planning stages for a revision of <i>Criminal Law</i> and a new edition of <i>Appeal and Review: Advanced Topics</i>. With input from a number of individual members and bar staff, we were able to increase the ethnic diversity of that editorial board. • In early April all of our authors and editorial board members from the past

Department	Developments
	<p>five years were surveyed. To date we have received responses from 154 of the approximately 650 members who received the survey. Once we have closed the survey and compiled the responses I will prepare a summary report for the Board.</p>
<p>Legal Services/OLF (Judith Baker)</p>	<p><i>Legal Services:</i></p> <ul style="list-style-type: none"> • \$125,000 of the \$225,000 in unclaimed client funds held by the LSP will be disbursed to the 5 legal services providers when all parties have signed the Repayment Recoupment and Set-Off Agreement. • Staff has completed the analysis report for the accountability piece of the LSP Standards and Guidelines and has forwarded it to the BOG for review. • The Director of the Legal Services Program (Judith Baker) will be participating with legal aid providers in strategic planning to address how to provide legal services to low-income Oregonians given the ongoing funding crisis. • Building on last year’s successful Pro Bono Fair in Portland the Pro Bono Committee plans to have a second Pro Bono Fair/Reception in Eugene. The Pro Bono Committee will also encourage additional pro bono CLEs in October for sections/county bars, etc. • 17 LRAP applications were received as of April 17. The LRAP Advisory Committee meets on Saturday, May 12 to make decisions. They’ll select five or more participants of up to \$5,000 per year each. <p><i>Oregon Law Foundation</i></p> <ul style="list-style-type: none"> • The OLF continues to work with banks to maintain the highest possible interest rates on IOLTA accounts and educate lawyers to understand the importance of keeping IOLTA accounts at Leadership Banks. We were successful recently in getting West Coast Bank to increase its rates from 0.01% to the “Leadership Bank” rate of 0.7%. Based on the size of WCB IOLTA deposits, the OLF expects to receive approximately \$3500/mo. in new revenues.
<p>Member Services (Dani Edwards)</p>	<ul style="list-style-type: none"> • Conducted the BOG Special Election for the Region 5 vacancy. Voter participation was 17% (compared to 13% for last regular BOG election). • Published the 2011 Committee and Section Annual Reports on the bar’s website. • Initiated the process of revising the Standard Section Bylaws by seeking feedback on the proposed changes from section executive committee members and the BOG Member Services Committee. • Began the annual recruitment process for member and non-member volunteers interested in serving on bar boards, committees, and councils.
<p>Minimum Continuing Legal Education (Denise Cline)</p>	<ul style="list-style-type: none"> • The MCLE Committee met on Friday, March 2, and approved a proposed amendment to Rule 3.7(c) regarding reporting periods for Active Pro Bono members who are reinstating to Active membership. • 483 received Notices of Noncompliance for the 2011 reporting period. The deadline to cure and avoid suspension was April 13, 2012. • 1,842 program accreditation applications and 417 applications for other types of CLE credit (teaching, legal research, etc.) have been processed since the

Department	Developments
	<p>first of the year.</p> <ul style="list-style-type: none"> Jenni Abalan, MCLE Program Assistant, began her 20 hour per week schedule on April 1. This schedule will remain in effect until October 1, 2012.
<p>New Lawyer Mentoring (Kateri Walsh)</p>	<p>The program is going strong. We are focused on recruiting (always), and getting ready for the May swearing-in ceremony. We have developed a one-hour CLE focused on ethics in mentoring, which has been presented twice and is being shopped around to sections and other groups. We are coordinating with some specialty bars in creating events/socials/programs to bring NLMP participants together. We are working with IDT on a new database which is slated to be ready for May. At the April BOG meeting there will be a report on the development of mentor criteria and the NLMP Committee’s thoughts about how to deal with concerns that may be raised about a particular volunteer mentor.</p>
<p>Public Affairs (Susan Grabe)</p>	<ul style="list-style-type: none"> Survived first Annual Legislative Session Court’s budget reduction was approximately \$4 million instead of the predicted \$11.5 million reduction East County Courthouse funding was approved Oregon eCourt funding was approved, and eCourt implementation at trial court level begins in June in Yamhill County Established Stable Court Funding Initiative, a coalition of legal groups, business, and business associations working together to support funding for the courts in the legislature. Prepared overview of all legislative changes from the 2012 Annual Legislative Session that will be available online and in print format by the end of April. Have received 23 law improvement proposals from bar groups for BOG approval and submission to the 2013 legislature. Thirteen bar groups have submitted proposals, plus 3 from the BOG (including 2 Lawyer for Vets proposals) and 2 from Danny Lang. PAC will host a Legislative Forum on April 23 to consider input from other bar groups and interested parties before the board signs off on the package and bills are submitted to the legislature. Working on Bulletin article about the efforts and success of lawyer-legislators in the 2012 session.
<p>Referral & Information Services (George Wolff)</p>	<ul style="list-style-type: none"> Staff is working with the OSB Project Manager and Business Systems Analyst to replace RIS’s 24-year old database, based on planned upgrades in accordance with IDT/ F&O schedules and allocations. We are also working toward implementing changes to the Lawyer Referral Service that will take effect July 1, 2012, including: revisions to forms and documentation, developing staff and panelist training sessions, and informing panelist directly and via the OSB website regarding the upcoming changes.
<p>Regulatory Services (Jeff Sapiro)</p>	<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 next met last on April 13, 2012, at which time it considered roughly

Department	Developments
	<p>20 separate matters.</p> <ul style="list-style-type: none"> • Disciplinary Counsel staff and Legal Publications staff recently completed work on the 25th volume of the Disciplinary Board Reporter. This publication gathers all discipline opinions from each calendar year. Volumes of the DB Reporter are posted on the OSB website. A limited number of hard copies are also printed. • The DCO Annual Report for 2011 has been issued. Staff uses this publication to educate the public about the disciplinary process and to compile statistical data for each calendar year. • The second session of “Ethics Best Practices” (ethics school) will be held at the Bar Center on May 4, 2012. DCO and CAO staff again will develop the curriculum and program materials. They, along with some PLF staff, will serve as presenters. This time, the program has open enrollment; it is not limited only to those who must attend because of recent disciplinary action. To date, we have several “voluntary” registrants.

Executive Director’s Activities February 10, 2012 and April 7, 2012

Date	Event
2/11	Legal Ethics Committee
2/15	Lunch at Gevurtz Menashe
2/15	DJC “Battle of the Lawyers” CLE
2/22	Lunch at Farleigh Wada
2/23	OSB Diversity Branding Session
2/24	Oregon Hispanic Bar Association Annual Dinner
2/25	MBA Winter Smash CourtCare Fundraiser
2/29	Lunch at Sussman Shank
3/1	Supreme Court Meeting
3/7	Lunch at Bullivant Houser
3/8	Bank of the Cascades Reception for New President
3/9	OWLs Annual Auction and Dinner
3/10	Client Security Fund Committee
3/13-3/17	ABA Bar Leadership Institute
3/20	CEJ Board Meeting
3/21-3/24	Western States Bar Conference
3/27	Lunch at Garvey Schubert
3/28	Farewell Party for Tom Matsuda
3/30	OSB Committees/50-Year Member Luncheon/BOG-ONLD Dinner
4/7	Legal Ethics Committee
4/16	MBA Past Presidents’ Reception
4/18	Law Girls Breakfast
4/24	Classroom Law Project Legal Citizen Dinner
4/26	BOG/PLF Dinner

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OREGON STATE BAR

Board of Governors Agenda

Meeting Date: April 27, 2012
Memo Date: April 5, 2012
From: Jason Hirshon, Oregon New Lawyers Division Chair
Re: ONLD Report

The ONLD Executive Committee met twice since the last BOG meeting. In February, the board voted to hold a joint social with the Washington Young Lawyers Division in Vancouver this August. The board also voted to support the bar's efforts in the USDA discrimination project lead by Mariann Hyland, sponsor a public information booth at the Lane County Fair, and conduct in a public service project this September in Lincoln City.

In March, the Executive Committee approved the ONLD's participation in the MBA's May golf event for law students. This event provides the ONLD an additional opportunity to work with law students while continuing to build its relationship with the MBA. A Communications and Technology Committee was formed during the March meeting as well. The focus for this group will be to expand the ONLD's social networking and provide guidance on the use of technology.

After conducting a successful two-day law training program in early February on Social Security Disability Law, the ONLD is teaming up with the OJD, Federal Bar Association, and the OSB Seminars Department to offer another training program. This session will also be two days but will focus on foreclosure prevention. The ONLD is excited to offer this program which is intended to get under and unemployed new lawyers experience and benefit the many Oregonians facing foreclosure.

The after-work monthly socials have continued this year and have proven to be beneficial for ONLD members. The socials provide new lawyers a unique opportunity to network with each other, and the ONLD is also able to promote its activities and encourage member participation on our various subcommittees. The Member Services Subcommittee is excited to announce the return of the ONLD raft trip which will take place this July. This event is one of the ONLD's most favored member events and the subcommittee was excited to receive support from Mitzi in bring this event back this year.

In national news, the ONLD sent four members to the ABA Young Lawyers Division midyear meeting in February and David Eder, Chair-Elect, attended the Western States Bar Conference this year. The ONLD's reign for ABA District Representative begins this September and I am proud to represent Oregon and Washington in this role for the next two years.

April 17, 2012

To: Oregon State Bar Board of Governors

From: Ira Zarov, Chief Executive Officer

Re: General Report – Joint BOG/BOD Meeting – April 27, 2012

As Tom has indicated, the market performance for the first quarter of 2012 has helped the PLF fiscal picture. Concerns still exist because of high frequency (we are currently running at the rate of 958 claims a year) and we are aware that expenses have been at historically high rates for the first two months of the year.

The plan to hire an additional claims attorney is going forward. We expect to have a hire in the second half of 2012. We believe there will be more retirements within the next 18 months. In view of the new hire, the decision on whether to replace a retiring attorney will depend on the frequency and work load of the claims department at that time

We are beginning our search for Board members to serve on the Board for the 2013-2017 term. There will be one attorney position and one public member position. If any Board members have suggestions, please forward them to me.

The claims paperless project is moving along as well. There is a committee of claims attorneys working with Jeff Crawford, Ted Cave, and Emilee Preble on the project. The conversion is not likely to be completed for several years. We are discussing the various ways becoming paperless will impact claims handling. There are a number of results that are not obvious – for example, if the office is paperless, how will claims attorneys bring necessary materials to mediations or other settlement meetings?

The meetings with the Excess carriers will be held in London and Hanover, Germany in the last week of June through the first week of July. Our experience between now and then will influence the tenor of the meetings.

Finally as the BOG has been informed, the PLF had registered with the Center for Medicare Services as a “mandatory reporter.” Being a mandatory reporter meant that all settlements in which there was any possibility that Medicare

Memo To: OSB Board of Governors

April 17, 2012

Page 2

payments had been made on behalf of the claimant had to be checked to see if Medicare had been expended on behalf of the claimant and if that was found to be the case, the settlement had to be approved by the PLF and had to provide for payment to CMS of the amount of the lien. It was necessary to hire an outside firm to do the searches for the PLF.

The mandatory reporting requirement made the settlement process *very* cumbersome, slowing up settlements by months and potentially longer. In addition, there were draconian penalties possible even if a good faith effort failed to discover a Medicare lien – up to \$1000 a day per violation. We felt that there was a reasonable argument that the statute did not extend to a legal malpractice insurer and, accordingly, filed an action against the Federal Department of Health and Human Services asking for a declaratory judgment stating we were not a mandatory reporter under the Act.

On March 29, 2012 we received an opinion from Judge Hernandez that held the PLF is not a covered entity and, therefore, does not have to comply with the burdensome requirements of the Act. The case potentially has national significance and no doubt will be appealed. We expect the appeal to take several years. The work of Janet Schroer and Matt Kalmanson of Hart Wagner was superb as the issue was one of first impression and with colorable arguments on each side.

[Committee Home](#)[Archives](#)[Member Login](#)

April 2012

Page: [1]-[2]-[3]-[4]-[5]

In The News

Oregon State Bar Professional Liability Fund v. United States Department of Health and Human Services**3:10-cv-01392 (Dist. Ore. March 29, 2012)****By William B. Oberts and Jeremy N. Boeder, Tribler Orpett & Meyer, P.C., Chicago, IL
wboberts@tribler.com; jnboeder@tribler.com**

There is a new development regarding the reporting requirements occasioned by the Medicare, Medicaid and SCHIP Extension Act (the "Act"). An Oregon district court recently ruled, in *Oregon State Bar Professional Liability Fund v. United States Department of Health and Human Services*, 3:10-cv-01392 (Dist. Ore. March 29, 2012), that legal professional liability insurers are not the type of liability insurers that must report settlements for Medicare beneficiaries.

The ruling stemmed from a suit filed by the Oregon State Bar Professional Liability Fund ("Oregon PLF"), a legal malpractice insurer, in the United States District Court for the District of Oregon, seeking a declaratory judgment that it had no reporting duty under the Act because it was not an applicable plan. The United States Department of Health and Human Services ("HHS") previously advised the Oregon PLF that it was a "responsible reporting entity" and was required to report pursuant to the Act.

The Oregon State PLF argued that it is not a primary plan under the Act that would ever be subject to a repayment obligation for conditional payments made by Medicare, and thus had no duty to report. The court agreed, ruling that the Oregon PLF is not a plan that has primary responsibility for items or services claimed by a Medicare beneficiary and as a result, is not subject to repayment obligations. It focused upon the fact that the policies issued by the Oregon State PLF do not cover "claims of tortious conduct that results in bodily or emotional injuries," rather, it covers "claims against attorneys who cause economic damage related to the provision of legal services." *Id.* at *8. Therefore, a malpractice insurer, unlike an insurer of parties involved in an underlying accident causing personal injuries, does not have primary responsibility to pay for the claimant's personal injuries. The court entered summary judgment in favor of the Oregon State PLF, finding that the Oregon "PLF is not an applicable plan subject to reporting requirements mandated by the Extension Act." *Id.* at *9.

Practice Note: This ruling has potentially far-reaching implications. Although the Oregon district court ruled only with respect to the reporting requirements applicable to legal professional liability carriers, the court's ruling is based upon the finding that a legal professional liability carrier, such as the Oregon PLF, is not a primary payer under the Act. Taken to its logical conclusion, the court's ruling suggests that not only do legal professional liability carriers have no reporting responsibility under the Act but, because they are not primary payers of medical expenses, there is no need to use set-aside arrangements or include Medicare-related indemnification provisions in releases to attempt to shift the burden of repaying Medicare for future medical payments related to the personal injury upon which the malpractice claim is based. Taken another step further, the HHS may have no right to collect repayment of *past* Medicare payments from a settling malpractice defendant or its professional liability insurer. In other words, what is often referred to as a "Medicare Super Lien" may not attach to a malpractice claim.

Despite possible future implications, the ruling in *Oregon State Bar Professional Liability Fund v. United States Department of Health and Human Services* has no direct effect upon HHS's ability to obtain repayment from legal professional liability carriers other than the Oregon PLF. Nevertheless, it is expected that the United States Department of Health and Human Services will appeal the district court's ruling and an appellate ruling could have a much broader effect.

Page: [1]-[2]-[3]-[4]-[5]

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Ira R. Zarov
Chief Executive Officer

April 17, 2012

To: Professional Liability Fund Board of Directors
From: R. Thomas Cave, Chief Financial Officer *R.T.C.*
Re: February 29, 2012 Financial Statements

I have enclosed the February 29, 2012 Financial Statements.

These statements show Primary Program net income of nearly \$1.6 million for the first two months of 2012. The reason for the income is excellent investment returns. Investment return is over \$2 million and more the \$1.6 million over budget for the Primary Program. The number of new claims was very high during January. However, the frequency rate has declined and is now very close to budget expectations.

If you have any questions, please contact me.

**Oregon State Bar
Professional Liability Fund
Financial Statements
2/29/2012**

TABLE OF CONTENTS

<u>Page</u>	<u>Description</u>
2	Combined Balance Sheet
3	Primary Program Income Statement
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
2/29/2012**

ASSETS

	<u>THIS YEAR</u>	<u>LAST YEAR</u>
Cash	\$1,230,049.29	\$1,129,911.97
Investments at Fair Value	48,917,199.66	49,039,892.31
Assessment Installment Receivable	9,628,817.99	9,432,757.08
Due from Reinsurers	225,877.57	82,042.87
Other Current Assets	69,710.66	77,714.48
Net Fixed Assets	1,006,081.96	1,108,051.24
Claim Receivables	69,588.65	67,774.25
Other Long Term Assets	<u>9,900.00</u>	<u>10,000.00</u>
TOTAL ASSETS	<u>\$61,157,225.78</u>	<u>\$60,948,144.20</u>

LIABILITIES AND FUND EQUITY

	<u>THIS YEAR</u>	<u>LAST YEAR</u>
Liabilities:		
Accounts Payable and Other Current Liabilities	\$67,613.92	\$95,286.94
Due to Reinsurers	\$3,808,695.40	\$3,786,394.05
Liability for Compensated Absences	430,305.28	368,657.76
Liability for Indemnity	15,234,946.70	13,527,758.40
Liability for Claim Expense	12,787,564.04	12,227,091.82
Liability for Future ERC Claims	2,700,000.00	2,400,000.00
Liability for Suspense Files	1,400,000.00	1,400,000.00
Liability for Future Claims Administration (AOE)	2,300,000.00	2,300,000.00
Excess Ceding Commision Allocated for Rest of Year	598,369.35	588,838.92
Assessment and Installment Service Charge Allocated for Rest of Year	<u>20,820,591.39</u>	<u>20,629,576.67</u>
Total Liabilities	<u>\$60,148,086.08</u>	<u>\$57,323,604.56</u>
Fund Equity:		
Retained Earnings (Deficit) Beginning of the Year	(\$781,169.42)	\$2,349,430.48
Year to Date Net Income (Loss)	<u>1,790,309.12</u>	<u>1,275,109.16</u>
Total Fund Equity	<u>\$1,009,139.70</u>	<u>\$3,624,539.64</u>
TOTAL LIABILITIES AND FUND EQUITY	<u>\$61,157,225.78</u>	<u>\$60,948,144.20</u>

**Oregon State Bar
Professional Liability Fund
Primary Program
Income Statement
2 Months Ended 2/29/2012**

	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	\$4,099,152.95	\$4,151,250.00	\$52,097.05	\$4,062,223.50	\$24,907,500.00
Installment Service Charge	64,965.33	66,833.34	1,868.01	63,691.83	401,000.00
Other Income	29,912.60	0.00	(29,912.60)	18,668.00	0.00
Investment Return	<u>2,045,556.14</u>	<u>438,055.16</u>	<u>(1,607,500.98)</u>	<u>766,673.55</u>	<u>2,628,331.00</u>
TOTAL REVENUE	<u>\$6,239,587.02</u>	<u>\$4,656,138.50</u>	<u>(\$1,583,448.52)</u>	<u>\$4,911,256.88</u>	<u>\$27,936,831.00</u>
<u>EXPENSE</u>					
Provision For Claims:					
New Claims at Average Cost	\$3,600,000.00			\$2,769,000.00	
Coverage Opinions	31,122.09			5,475.98	
General Expense	3,012.19			616.58	
Less Recoveries & Contributions	1,775.00			(9,975.82)	
Budget for Claims Expense		<u>\$3,531,500.00</u>			<u>\$21,189,000.00</u>
Total Provision For Claims	<u>\$3,635,909.28</u>	<u>\$3,531,500.00</u>	<u>(\$104,409.28)</u>	<u>\$2,765,116.74</u>	<u>\$21,189,000.00</u>
Expense from Operations:					
Administrative Department	\$347,230.16	\$366,962.42	\$19,732.26	\$368,507.53	\$2,201,774.00
Accounting Department	120,165.39	131,659.98	11,494.59	88,720.66	789,960.00
Loss Prevention Department	273,792.98	303,071.78	29,278.80	270,532.91	1,818,430.00
Claims Department	404,134.49	411,145.48	7,010.99	353,892.80	2,466,873.00
Allocated to Excess Program	<u>(183,304.32)</u>	<u>(183,304.32)</u>	<u>0.00</u>	<u>(225,017.30)</u>	<u>(1,099,826.00)</u>
Total Expense from Operations	<u>\$962,018.70</u>	<u>\$1,029,535.34</u>	<u>\$67,516.64</u>	<u>\$856,636.60</u>	<u>\$6,177,211.00</u>
Contingency (2% of Operating Exp)	\$30,920.16	\$24,256.84	(\$6,663.32)	\$0.00	\$145,541.00
Depreciation and Amortization	\$29,770.24	\$39,600.00	\$9,829.76	\$37,074.11	\$237,600.00
Allocated Depreciation	<u>(5,999.34)</u>	<u>(5,999.34)</u>	<u>0.00</u>	<u>(7,272.66)</u>	<u>(35,996.00)</u>
TOTAL EXPENSE	<u>\$4,652,619.04</u>	<u>\$4,618,892.84</u>	<u>(\$33,726.20)</u>	<u>\$3,651,554.79</u>	<u>\$27,713,356.00</u>
NET INCOME (LOSS)	<u>\$1,586,967.98</u>	<u>\$37,245.66</u>	<u>(\$1,549,722.32)</u>	<u>\$1,259,702.09</u>	<u>\$223,475.00</u>

**Oregon State Bar
Professional Liability Fund
Primary Program
Statement of Operating Expense
2 Months Ended 2/29/2012**

<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	\$326,510.38	\$666,045.42	\$669,404.32	\$3,358.90	\$624,459.10	\$4,016,426.00
Benefits and Payroll Taxes	116,112.50	235,370.34	240,207.24	4,836.90	171,290.41	1,441,243.00
Investment Services	0.00	0.00	4,500.00	4,500.00	0.00	27,000.00
Legal Services	1,792.50	1,792.50	2,500.00	707.50	0.00	15,000.00
Financial Audit Services	0.00	0.00	4,166.66	4,166.66	0.00	25,000.00
Actuarial Services	6,337.50	6,337.50	3,166.66	(3,170.84)	6,457.50	19,000.00
Claims MMSEA Services	850.00	1,700.00	2,000.00	300.00	1,950.00	12,000.00
Information Services	6,245.93	17,920.23	12,333.32	(5,586.91)	14,618.00	74,000.00
Document Scanning Services	0.00	4,488.70	12,500.00	8,011.30	1,161.80	75,000.00
Other Professional Services	3,235.78	7,059.80	10,333.36	3,273.56	17,014.74	62,000.00
Staff Travel	518.27	521.60	2,158.34	1,636.74	510.41	12,950.00
Board Travel	1,582.47	1,582.47	6,883.34	5,300.87	1,516.12	41,300.00
NABRICO	0.00	0.00	1,750.00	1,750.00	0.00	10,500.00
Training	1,630.25	1,650.25	1,999.98	349.73	15.00	12,000.00
Rent	41,215.42	82,124.00	83,044.50	920.50	80,910.29	498,267.00
Printing and Supplies	5,607.76	9,286.79	14,166.66	4,879.87	12,895.01	85,000.00
Postage and Delivery	2,708.67	7,797.17	6,291.68	(1,505.49)	5,643.64	37,750.00
Equipment Rent & Maintenance	149.62	3,225.74	9,166.66	5,940.92	7,855.36	55,000.00
Telephone	2,418.99	5,132.73	5,833.34	700.61	5,490.58	35,000.00
L P Programs (less Salary & Benefits)	20,412.83	37,229.08	66,272.76	29,043.68	54,540.43	397,636.00
Defense Panel Training	0.00	0.00	33.32	33.32	24.30	200.00
Bar Books Grant	16,666.67	33,333.34	33,333.34	0.00	50,000.00	200,000.00
Insurance	2,817.00	2,817.00	10,210.84	7,393.84	8,448.00	61,265.00
Library	1,847.10	1,932.10	5,166.66	3,234.56	2,081.62	31,000.00
Subscriptions, Memberships & Other	1,816.80	17,976.26	5,416.68	(12,559.58)	14,771.59	32,500.00
Allocated to Excess Program	(91,652.16)	(183,304.32)	(183,304.32)	0.00	(225,017.30)	(1,099,826.00)
TOTAL EXPENSE	<u>\$468,824.28</u>	<u>\$962,018.70</u>	<u>\$1,029,535.34</u>	<u>\$67,516.64</u>	<u>\$856,636.60</u>	<u>\$6,177,211.00</u>

**Oregon State Bar
Professional Liability Fund
Excess Program
Income Statement
2 Months Ended 2/29/2012**

	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	\$119,673.87	\$117,600.00	(\$2,073.87)	\$117,767.78	\$705,600.00
Prior Year Adj. (Net of Reins.)	1,369.88	250.00	(1,119.88)	1,238.25	1,500.00
Installment Service Charge	37,180.00	6,333.34	(30,846.66)	35,494.00	38,000.00
Investment Return	<u>249,922.97</u>	<u>38,091.84</u>	<u>(211,831.13)</u>	<u>108,584.07</u>	<u>228,551.00</u>
TOTAL REVENUE	<u>\$408,146.72</u>	<u>\$162,275.18</u>	<u>(\$245,871.54)</u>	<u>\$263,084.10</u>	<u>\$973,651.00</u>
<u>EXPENSE</u>					
Operating Expenses (See Page 6)	\$198,806.24	\$202,440.30	\$3,634.06	\$240,404.37	\$1,214,642.00
Allocated Depreciation	<u>\$5,999.34</u>	<u>\$5,999.34</u>	<u>\$0.00</u>	<u>\$7,272.66</u>	<u>\$35,996.00</u>
NET INCOME (LOSS)	<u>\$203,341.14</u>	<u>(\$46,164.46)</u>	<u>(\$249,505.60)</u>	<u>\$15,407.07</u>	<u>(\$276,987.00)</u>

**Oregon State Bar
Professional Liability Fund
Excess Program
Statement of Operating Expense
2 Months Ended 2/29/2012**

	<u>CURRENT</u> <u>MONTH</u>	YEAR <u>TO DATE</u> <u>ACTUAL</u>	YEAR <u>TO DATE</u> <u>BUDGET</u>	<u>VARIANCE</u>	YEAR <u>TO DATE</u> <u>LAST YEAR</u>	<u>ANNUAL</u> <u>BUDGET</u>
<u>EXPENSE:</u>						
Salaries	\$56,281.76	\$112,563.52	\$112,455.82	(\$107.70)	\$133,560.13	\$674,735.00
Benefits and Payroll Taxes	19,901.78	39,803.56	39,928.66	125.10	40,199.81	239,572.00
Investment Services	0.00	0.00	533.34	533.34	0.00	3,200.00
Office Expense	0.00	0.00	0.00	0.00	0.00	0.00
Allocation of Primary Overhead	22,969.58	45,939.16	45,939.16	0.00	64,822.98	275,635.00
Reinsurance Placement & Travel	0.00	0.00	2,000.00	2,000.00	675.79	12,000.00
Training	0.00	0.00	166.66	166.66	0.00	1,000.00
Printing and Mailing	0.00	0.00	833.34	833.34	1,145.66	5,000.00
Program Promotion	500.00	500.00	166.66	(333.34)	0.00	1,000.00
Other Professional Services	0.00	0.00	416.66	416.66	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>\$99,653.12</u>	<u>\$198,806.24</u>	<u>\$202,440.30</u>	<u>\$3,634.06</u>	<u>\$240,404.37</u>	<u>\$1,214,642.00</u>

**Oregon State Bar
Professional Liability Fund
Combined Investment Schedule
2 Months Ended 2/29/2012**

	<u>CURRENT MONTH THIS YEAR</u>	<u>YEAR TO DATE THIS YEAR</u>	<u>CURRENT MONTH LAST YEAR</u>	<u>YEAR TO DATE LAST YEAR</u>
Dividends and Interest:				
Short Term Bond Fund	\$30,056.46	\$60,189.67	\$31,635.93	\$59,893.70
Intermediate Term Bond Funds	19,350.46	40,017.45	21,201.30	41,608.13
Domestic Common Stock Funds	0.00	0.00	0.00	0.00
International Equity Fund	0.00	0.00	0.00	0.00
Real Estate	0.00	0.00	0.00	0.00
Hedge Fund of Funds	0.00	0.00	0.00	0.00
Real Return Strategy	<u>0.00</u>	<u>0.00</u>	<u>0.00</u>	<u>0.00</u>
Total Dividends and Interest	<u>\$49,406.92</u>	<u>\$100,207.12</u>	<u>\$52,837.23</u>	<u>\$101,501.83</u>
Gain (Loss) in Fair Value:				
Short Term Bond Fund	(\$1,996.01)	\$165,515.40	\$11,377.99	\$37,645.48
Intermediate Term Bond Funds	(0.01)	172,073.10	21,326.15	21,326.16
Domestic Common Stock Funds	350,758.11	738,522.28	215,668.91	388,993.95
International Equity Fund	289,798.36	657,135.39	153,052.07	157,285.50
Real Estate	0.00	0.00	0.00	0.00
Hedge Fund of Funds	89,710.22	182,004.49	42,674.83	58,189.05
Real Return Strategy	<u>80,153.80</u>	<u>280,021.33</u>	<u>75,422.07</u>	<u>110,315.65</u>
Total Gain (Loss) in Fair Value	<u>\$808,424.47</u>	<u>\$2,195,271.99</u>	<u>\$519,522.02</u>	<u>\$773,755.79</u>
TOTAL RETURN	<u>\$857,831.39</u>	<u>\$2,295,479.11</u>	<u>\$572,359.25</u>	<u>\$875,257.62</u>
Portions Allocated to Excess Program:				
Dividends and Interest	\$5,948.59	\$11,130.21	\$6,948.10	\$12,301.21
Gain (Loss) in Fair Value	<u>97,334.31</u>	<u>238,792.76</u>	<u>68,317.15</u>	<u>96,282.86</u>
TOTAL ALLOCATED TO EXCESS PROGRAM	<u>\$103,282.90</u>	<u>\$249,922.97</u>	<u>\$75,265.25</u>	<u>\$108,584.07</u>

2011 ANNUAL REPORT

Oregon
State
Bar

PROFESSIONAL LIABILITY FUND
www.osbplf.org



By Ira R. Zarov
*PLF Chief Executive
Officer*

As Oregon lawyers are aware, there was no increase in the 2012 assessment for the PLF's Primary Claims Made Plan. The 2011 increase successfully stabilized the assessment in the face of the significant challenges identified in the PLF 2010 Annual Report. The identified challenges included increases in the number of claims filed (frequency), increases in the cost of claims (severity) – especially defense costs – a difficult investment environment, and concerns that pending claims might cost more than the current estimates.

In 2011, the PLF had 914 claims. This was the fourth consecutive year with a claim count above 900, a number that had previously been reached only one time in PLF history. Based on the successive years of high claims, it appears that elevated claim counts are, at a minimum, a feature of the current economy and, more likely, a permanent part of the landscape. Although it is early in the year, the projected claim count for 2012 is in the range of 930 to 940 claims.

Fiscally, the PLF suffered a loss of \$3.1 million in 2011, attributable to poor investment performance. Each year, the PLF routinely projects and budgets conservative estimates of investment gains. The PLF continually monitors its investment portfolio, and a historical look at investment results indicates that investments have regularly produced substantial income. In some years, strong investment returns have

been sufficient to cover all PLF administrative costs. Last year, however, investments did not meet projections.

The positive aspect of the 2011 fiscal picture is that claim costs and operating expenses were within the budgeted amounts. Nonetheless, the last several years have seen a continuing upward trend in defense costs. As with increased claim frequency, this trend appears to be sustained and not the result of anomalous factors. The average cost per claim reflects this trend, rising from \$19,000 in 2009 to \$19,500 in 2010 and to \$20,000 in 2011. The increase can be attributed almost entirely to defense costs.

continued on page 6

PLF Statistics

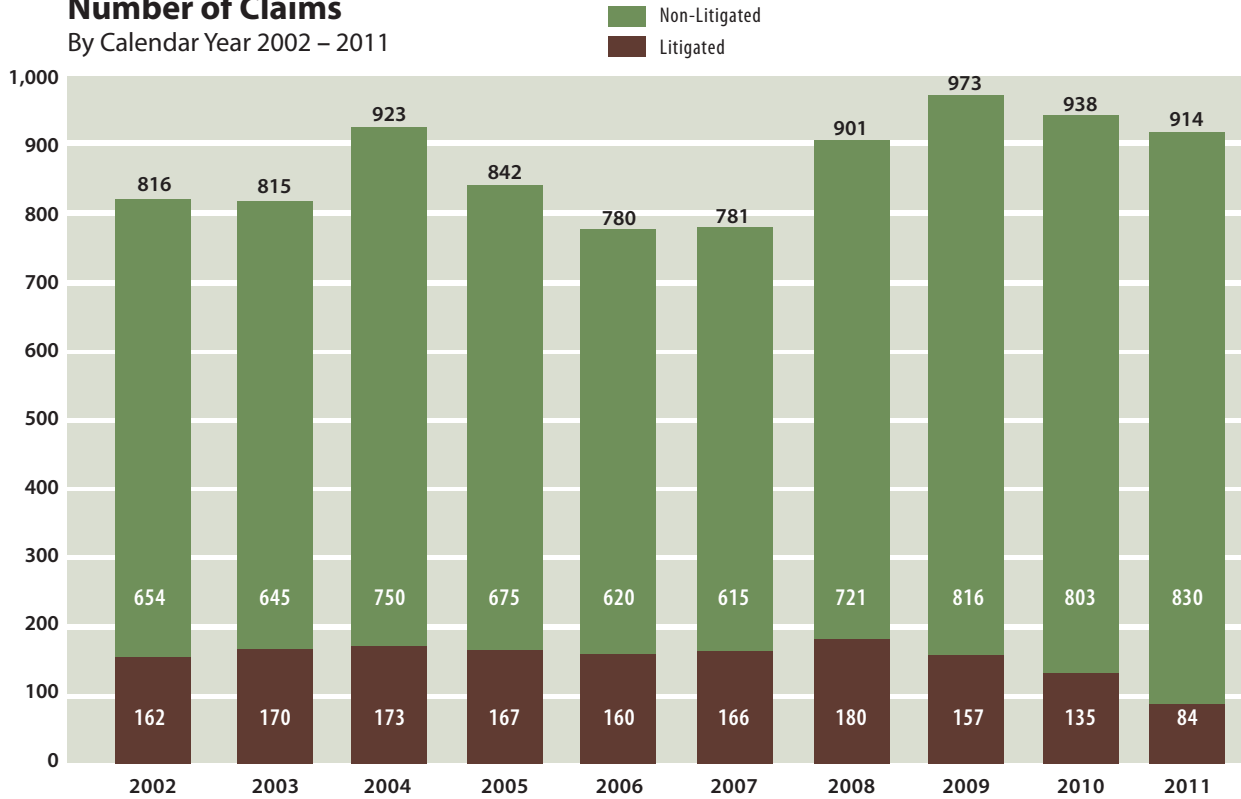
1997 – 2012

	Assessments	Claims
1997	\$2200	769
1998	\$2100	761
1999	\$1900	830
2000	\$1800	798
2001	\$1800	775
2002	\$2200	816
2003	\$2600	815
2004	\$2600	923
2005	\$3000	842
2006	\$3000	780
2007	\$3200	781
2008	\$3200	901
2009	\$3200	973
2010	\$3200	938
2011	\$3500	914
2012	\$3500	932*

* Extrapolated

Number of Claims

By Calendar Year 2002 – 2011



Average Cost per Claim

By Year of Reporting



SUMMARY FINANCIAL STATEMENTS (Unaudited)

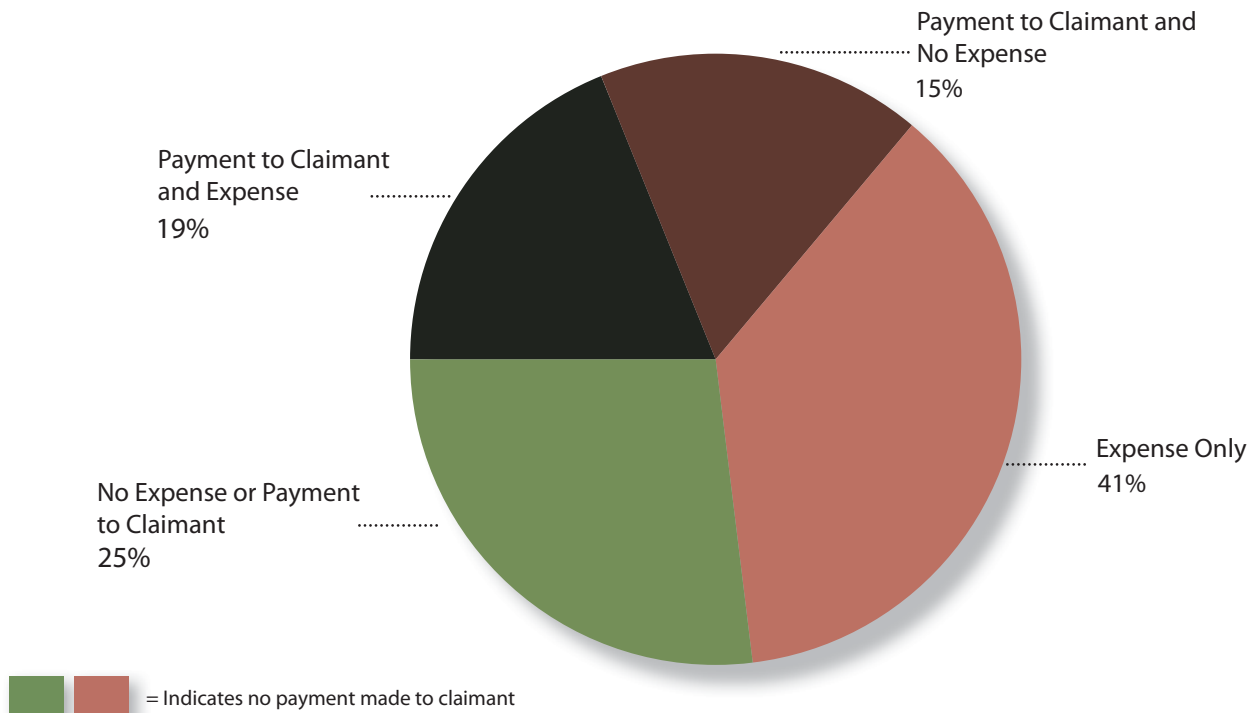
(Primary and Excess Programs Combined)

	<u>12/31/2011</u>	<u>12/31/2010</u>
ASSETS		
Cash and Investments at Market	\$32,717,259	\$33,415,582
Other Assets	<u>1,284,207</u>	<u>1,293,798</u>
TOTAL ASSETS	<u>\$34,001,466</u>	<u>\$34,709,380</u>
LIABILITIES AND FUND EQUITY		
Estimated Liabilities for Claim		
Settlements and Defense Costs	\$34,100,000	\$31,900,000
Other Liabilities	682,634	459,949
Fund Equity	<u>(781,168)</u>	<u>2,349,431</u>
TOTAL LIABILITIES AND FUND EQUITY	<u>\$34,001,466</u>	<u>\$34,709,380</u>
For the Year Ending December 31		
	<u>2011</u>	<u>2010</u>
REVENUE		
Assessments	\$24,465,415	\$22,244,406
Investment and Other Income	<u>643,006</u>	<u>5,119,157</u>
TOTAL REVENUE	<u>\$25,108,421</u>	<u>\$27,363,563</u>
EXPENSE		
Administrative	\$7,302,307	\$6,791,936
Provision for Settlements	9,649,812	9,346,993
Provision for Defense Costs	<u>11,286,901</u>	<u>10,595,590</u>
TOTAL EXPENSE	<u>\$28,239,020</u>	<u>\$26,734,519</u>
NET INCOME	<u>(\$3,130,599)</u>	<u>\$629,044</u>

These statements have been adjusted to remove prepaid assessments (e.g., payments of the 2012 assessment received in December of 2011). A complete copy of the December 31, 2010, audit report is available upon request.

Closed Claims

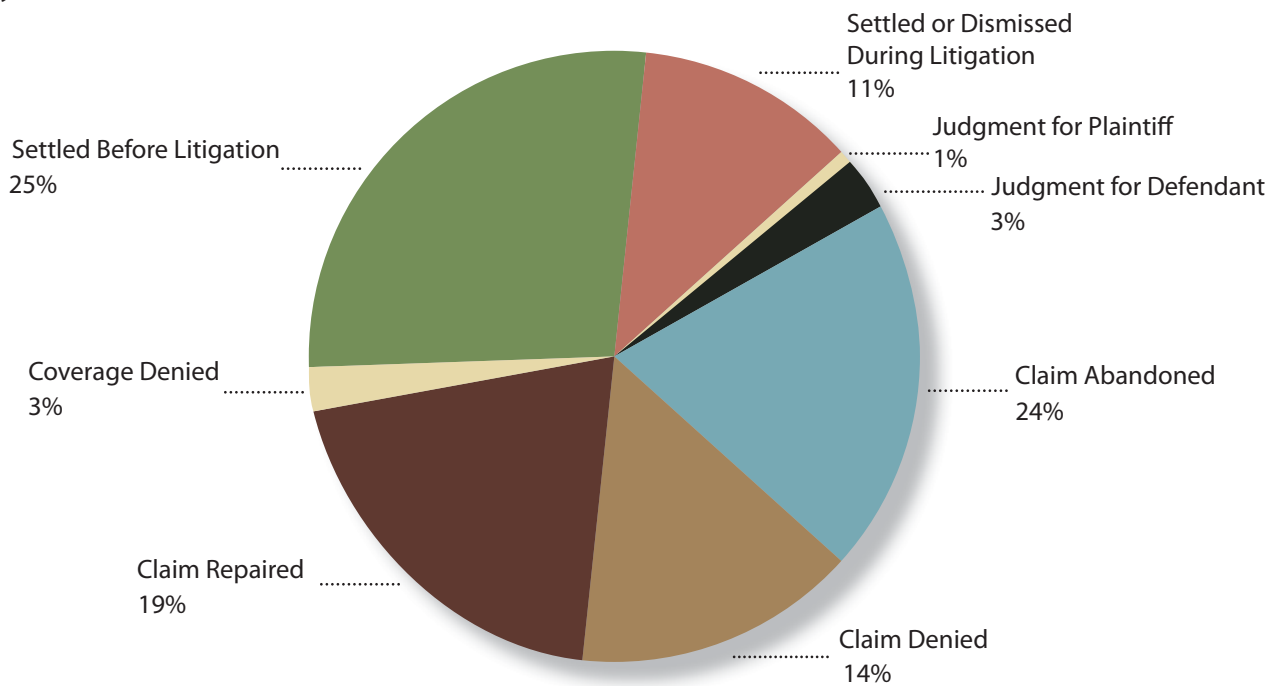
January 1, 2002 – December 31, 2011



Expense = Cost of outside counsel, court costs, experts, and other payments made other than to claimants

Disposition of Closed Claims

January 1, 2002 – December 31, 2011



Cost of Claims by Area of Law

January 1, 2002, to December 31, 2011

AREA OF LAW	PERCENT INDEMNITY PAID	INDEMNITY PAID	PERCENT EXPENSES PAID	EXPENSES PAID	TOTAL PAID
Personal Injury	19%	\$13,120,368	12%	\$6,920,921	\$20,041,289
Real Estate	16%	\$11,290,833	13%	\$7,335,737	\$18,626,570
Business Transactions / Commercial Law	13%	\$9,254,368	16%	\$8,938,559	\$18,192,927
Estate Planning & Estate Tax	12%	\$8,150,315	10%	\$5,713,448	\$13,863,763
Domestic Relations / Family Law	9%	\$6,219,726	9%	\$4,966,377	\$11,186,103
Bankruptcy & Debtor-Creditor	9%	\$5,974,215	9%	\$4,761,662	\$10,735,877
Securities	2%	\$1,415,980	4%	\$2,476,992	\$3,892,972
Workers' Compensation / Admiralty	4%	\$2,639,752	2%	\$874,117	\$3,513,869
Criminal	2%	\$1,544,697	3%	\$1,670,449	\$3,215,146
Tax	1%	\$665,169	3%	\$1,641,798	\$2,306,967
Other	13%	\$8,859,723	19%	\$10,540,135	\$19,399,858
	100%	\$69,135,146	100%	\$55,840,195	\$124,975,341

Frequency of Claims by Area of Law

January 1, 2002, to December 31, 2011

AREA OF LAW	PERCENT OF CLAIMS	NUMBER OF CLAIMS
Personal Injury	16%	1,306
Domestic Relations / Family Law	16%	1,270
Bankruptcy & Debtor-Creditor	12%	986
Real Estate	11%	890
Estate Planning & Estate Tax	11%	834
Business Transactions / Commercial Law	9%	681
Criminal	7%	546
Workers' Compensation / Admiralty	2%	193
Tax	1%	60
Securities	1%	53
Other	14%	1,107
	100%	7,926

The increase in defense costs is a national trend. Industry wisdom attributes the increase to higher defense counsel rates, the demands of electronic discovery, and the increasing complexity of claims. In PLF experience, the latter of these appears to be the most significant factor. A fourth factor also appears to be at work. In recent years, more out-of-state claims have been brought against Oregon covered parties. Out-of-state litigation is simply more costly.

We feel that an experienced, highly qualified claims department reduces the cost of outside counsel. Several claims attorneys have retired in recent years, necessitating additional hiring. Richard Wyman retired in 2010 and Bill Kwitman retired in 2011, both after 20-plus years with the PLF. We expect additional retirements over the next two years. Two new claims attorneys have been hired, Pamela Stendahl, formerly with Bodyfelt Mount LLP, and Holli Houston, formerly with Kilmer, Voorhees & Laurick, PC. Both were members of the PLF defense panel. Given the sustained increase in frequency and the increasing complexity of claims, the PLF will be hiring another claims attorney in the middle of 2012.

In conclusion, the cost of 2011 claims was consistent with actuarial projections; defense costs increased; frequency remained high; and a shortfall in investment returns resulted in a moderate loss.

THE 2013 PRIMARY PROGRAM ASSESSMENT

When the 2012 assessment was being determined in 2011, the PLF Board of Directors (Board) expressed concern that the slow economic recovery could negatively impact investment performance. The Board was also concerned that the empirical nexus between difficult financial times and increased claim frequency and severity would increase PLF liabilities. To a large degree, both of these concerns were realized in 2011. Although these results were not severe enough to require an increase in the 2012 assessment, the same dynamic potentially exists as we face 2013. However, we are pleased that the performance of the financial markets has been positive in the first quarter of 2012, and frequency seems to have stabilized. Claim costs, however, continue to be high. We hope the positive trends will continue, but it is difficult to make any prediction at this time.

As the process of determining the 2013 assessment unfolds, the Board will consider the results of the mid-2012 actuary report, the claim frequency rate, investment returns, and any identifiable trends. Of these factors, the cost of claims as projected in the actuary report will be the most important. Although the PLF may face significant external headwinds, the Board is committed to making every effort to maintain the assessment at its current rate in 2013.

HOW IS THE PLF DOING WITH CLAIMS HANDLING?

Historically, covered parties who returned the PLF claims-handling evaluation form have been overwhelmingly satisfied with the performance of the PLF claims department. Although past evaluations set a high bar, the results reported in the 2011 evaluations maintained their extraordinarily positive character.

The claims-handling evaluation form asks whether covered parties were satisfied, very satisfied, or not satisfied with their total experience, the performance of the claims attorney, and the performance of the defense counsel, if one was assigned. In 2011, the PLF closed 1,033 claims and received 456 responses (a 44% response rate).

The performance of claims attorneys was particularly noteworthy, with 92.51% of respondents stating that they were “very satisfied” with how their claim was handled, 7.27% stating that they were “satisfied,” and only 0.22% (1 response) “not satisfied” – remarkable numbers. In total, 99.78% of the respondents were “very satisfied” or “satisfied” with the PLF claims attorneys’ handling of the claim.

Covered parties’ satisfaction with defense counsel was also very high. Among the 267 covered parties who responded to the questionnaire about defense counsel, 89.14% were “very satisfied,” 9.36% were “satisfied,” and just 1.5% were “unsatisfied.” (The fewer responses regarding defense counsel reflect the fact that many cases are handled by the PLF claims attorneys without being assigned to defense counsel.)

The combined average responses for claims attorneys and defense counsel totaled 88.16% “very satisfied” and 11.18% “satisfied” – 99.34% either “very satisfied” or “satisfied.”

continued on page 7

WHAT IS THE PLF DOING IN THE AREAS OF PERSONAL AND PRACTICE MANAGEMENT ASSISTANCE?

The PLF continues to provide free and confidential personal and practice management assistance to Oregon lawyers. These services include legal education, on-site practice management assistance (through the PLF's Practice Management Advisor Program), and personal assistance (through the Oregon Attorney Assistance Program).

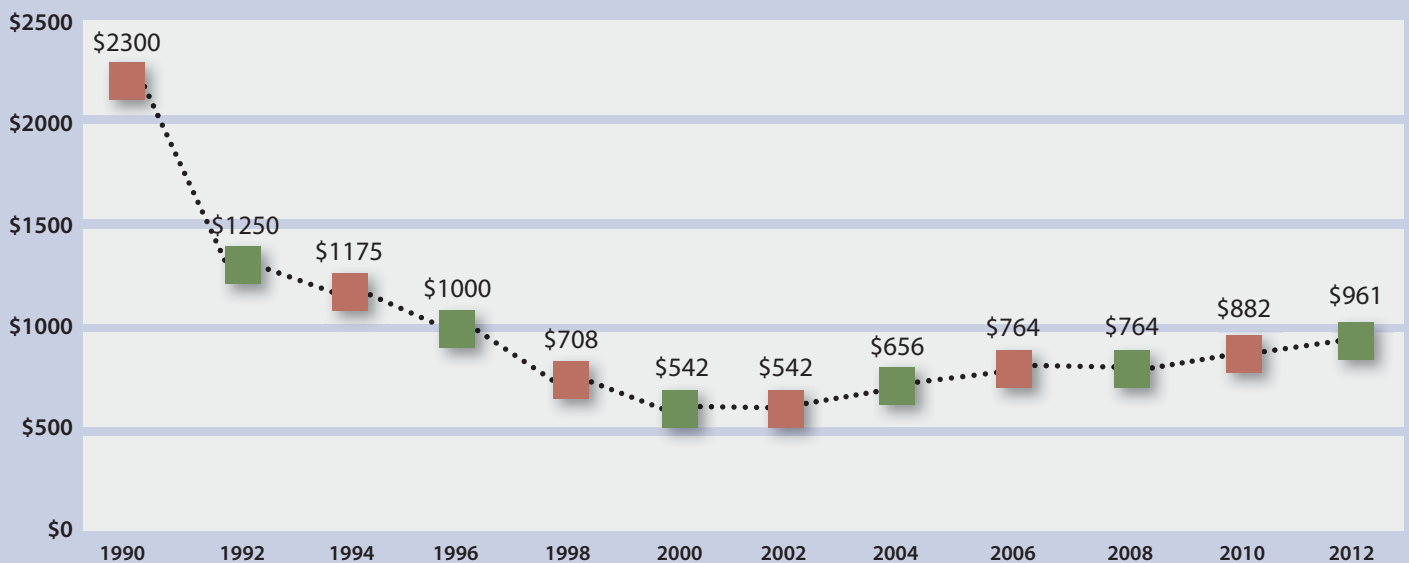
Personal and practice management assistance seminars in 2011 included programs on software updates, employment law, trust accounting, organizing e-mail and practicing in eCourt, technology tips, practice management, health insurance, retirement, stress hardiness, and compassion fatigue. In addition, the

PLF continues to offer free audio and video programs (currently 70 programs available), publications (*In Brief* and *In Sight*), over 351 practice aids, and the following handbooks: *Planning Ahead: A Guide to Protecting Your Clients' Interests in the Event of Your Disability or Death* (2009), *A Guide to Setting Up and Running Your Law Office* (2009), *A Guide to Setting Up and Using Your Lawyer Trust Account* (2011), and *Oregon Statutory Time Limitations* (2010). Our practice aids and handbooks are all available free of charge. You can download them at www.osbplf.org, or call the Professional Liability Fund at 503-639-6911 or 800-452-1639.

During 2011, the PLF presented video replays of the following programs: Health Insurance Today, at 65 and in Retirement; 2010 Practice Management Update: An *continued on page 8*

Cost of Excess Coverage – Standard Rates

By Calendar Year 1990 – 2012



Figures are the cost per attorney of \$700,000 PLF excess coverage above the primary limits. Figures for 1995 to 2012 do not include the continuity credit granted to firms for each year of continuous excess coverage with the PLF.

Figures are not adjusted for inflation.

Introduction to Internet-Based Practice Management Software; Trust Accounting: Your Financial and Ethical Responsibilities; Stress Hardiness for Lawyers and Judges; Lawyers Using iPads; Survival Tips for Organizing Your E-mail and Practicing in eCourt; Legal Productivity: Seven Ways to Make Your Law Firm More Efficient; Practicing in the Cloud from Intake to Invoicing; and Less Paper (The Paperless Office). These video replays were presented in Astoria, Bend, Coos Bay, Eugene, Grants Pass, Klamath Falls, La Grande, Medford, Newport, Pendleton, Redmond, Roseburg, Salem, and Vale, Oregon.

Practice Management Advisor Program. Our practice management advisors (PMAs), Dee Crocker, Beverly Michaelis, and Sheila Blackford, answer practice management questions and provide information about effective systems for conflicts of interest, mail handling, billing, trust accounting, general accounting, time management, client relations, file management, and software. In a recent survey about our PMAs, 100% of those who responded said they would recommend the PLF's PMA services to others. In addition, 100% said they were either satisfied or very satisfied with reaching a PMA by telephone; amount of time between the request for an appointment and when the appointment took place; the PMA's ability to explain information clearly; how the lawyer was treated by the PMA (patience, courtesy, etc.); helpfulness of the information; follow up; and overall level of satisfaction with service. In 2011, the PMAs presented seminars all over the state on practice management. In addition to these presentations, the PMAs also provide in-house CLEs for law firms.

Oregon Attorney Assistance Program. The Oregon Attorney Assistance Program (OAAP) attorney counselors, Meloney C. Crawford, Shari R. Gregory, Mike Long, and Douglas Querin, continue to provide assistance with alcohol and chemical dependency; burnout; career change and satisfaction; depression, anxiety, and other mental health issues; stress management; and time management. In 2011, the OAAP sponsored addiction support groups, lawyers-in-transition meetings, career workshops, a depression support group, a support group for lawyers going through divorce, an Inner Peace workshop, a women's support group, a support group for adult children of dysfunctional families, and a group for overcoming procrastination. In

addition, the OAAP attorney counselors assisted over 658 lawyers with personal issues in 2011, including alcoholism, drug addiction, career satisfaction, retirement, and mental health issues.

CHANGES TO THE COVERAGE PLAN

In 2011, the PLF Board and the Oregon State Bar (OSB) Board of Governors approved three changes to the PLF Primary Coverage Plan for 2012. The first change provides clarity between the meaning of the plan language and Comments to Section IV.1.b(2).

Section IV.1.b(2) was revised as follows (additions in italics and bold; deletions noted by strikethrough):

(2) Two or more CLAIMS that are SAME OR RELATED CLAIMS, whenever made, will all be deemed to have been first made at the time the earliest such CLAIM was first made. ~~However, this provision will not apply to YOU if YOU have no other coverage from any source applicable to the CLAIM (or that would have been applicable but for exhaustion of limits under that coverage).~~ ***This provision will apply to YOU only if YOU have coverage from any source applicable to the earliest such SAME OR RELATED CLAIM (whether or not the available limits of liability of such prior policy or plan are sufficient to pay any liability or CLAIM).***

A second change was needed to further clarify how PLF coverage will respond to claims involving the administrative aspects of running a law firm. To accomplish this, changes were made to the Comments of Section III.3 and to the plan language and Comments of Section V, Exclusion 16. These changes clarify the definitions of "professional services," "covered activity," and "damages."

The Comments to Section III.3 were revised as follows (additions in italics and bold; deletions noted by strikethrough):

Professional Services. To qualify for coverage under Section III.1 and III.2b, the act, error or omission causing YOUR liability must be committed "in rendering professional services in YOUR capacity as an attorney, or in failing to render professional services that should have been ren-

continued on page 9

dered in YOUR capacity as an attorney.” This language limits coverage to those activities commonly regarded as the rendering of professional services as a lawyer. This language, in addition to limiting coverage to YOUR conduct as a lawyer, is expressly intended to limit the definition of COVERED ACTIVITY so that it does not include YOUR conduct in carrying out the commercial or administrative aspects of law practice. **Examples of commercial or administrative activities could include:** ~~such as collecting fees or costs;; guaranteeing that the client will pay third parties (e.g., court reporters, experts or other vendors) for services provided;;~~ ~~or~~ depositing, endorsing or otherwise transferring negotiable instruments;; **depositing or withdrawing monies or instruments into or from trust accounts; or activities as a trustee that require no specialized legal skill or training, such as paying bills on time or not incurring unnecessary expenses.** The foregoing list of commercial or administrative activities is not exclusive, but rather is illustrative of the kinds of activities that are regarded as part of the commercial aspect of law (not covered), as opposed to the rendering of professional services (covered).

Example. A client purports to hire the Covered Party and provides the Covered Party with a cashier’s check, which the Covered Party deposits into her firm’s client trust account. The Covered Party, on the client’s instructions, wire-transfers some of the proceeds of the cashier’s check to a third party. The cashier’s check later turns out to be forged and the funds transferred out of the trust account belonged to other clients. The Covered Party is later sued by a third party such as a bank or other client arising out of the improper transfer of funds. The Covered Party’s conduct is not covered under her PLF Plan. **Placing, holding or disbursing funds in lawyer trust accounts are not considered professional services for purposes of the PLF Plan.**

Section V, Exclusion 16 was revised as follows (additions in italics and bold; deletions noted by strikethrough):

[GENERAL TORTIOUS CONDUCT EXCLUSIONS]

16. This Plan does not apply to any CLAIM against any COVERED PARTY for:

a. Bodily injury, sickness, disease, or death of any person;

b. Injury to, loss of, ***loss of use of***, or destruction of any real, personal, or intangible property ~~or loss of use thereof~~; or

c. Mental anguish or emotional distress in connection with any CLAIM described under Subsections a or b.

This exclusion does not apply to any CLAIM made under ORS 419B.010 if the CLAIM arose from an otherwise Covered Activity.

The comments to the exclusion have also been changed to stay consistent with the above change. Specifically, the comments now read:

*Subsection b of this exclusion is intended to encompass a broad definition of property. For these purposes, property includes real, personal and intangible property (e.g. electronic data, financial instruments, **money**, etc.) held by an attorney. However, Subsection b is not intended to apply to the extent the loss or damage of property materially and adversely affects an attorney’s performance of professional services, in which event the consequential damages resulting from the loss or damage to property would be covered. For the purposes of this Comment, “consequential damages” means the extent to which the attorney’s professional services are adversely affected by the property damage or loss.*

The third change to the Plan includes a new exclusion created to address the loss, compromise, or breach of confidential or private information held by a covered party. The new Exclusion 22 and Comments have been added to Section V. They read as follows:

continued on page 10

[CONFIDENTIAL OR PRIVATE DATA EXCLUSION]

22. This Plan does not apply to any CLAIM arising out of or related to the loss, compromise or breach of or access to confidential or private information or data. If the PLF agrees to defend a SUIT that includes a CLAIM that falls within this exclusion, the PLF will not pay any CLAIMS EXPENSE relating to such CLAIM.

COMMENTS

There is a growing body of law directed at protecting confidential or private information from disclosure. The protected information or data may involve personal information such as credit card information, social security numbers, drivers licenses, or financial or medical information. They may also involve business-related information such as trade secrets or intellectual property. Examples of loss, compromise, breach or access include but are not limited to electronically stored information or data being inadvertently disclosed or released by a Covered Party; being compromised by the theft, loss or misplacement of a computer containing the data; being stolen or intentionally damaged; or being improperly accessed by a Covered Party or someone acting on his or her behalf. However, such information or data need not be in electronic format, and a data breach caused through, for example, the improper safeguarding or disposal of paper records would also fall within this exclusion.

There may be many different costs incurred to respond to a data breach, including but not limited to notification costs, credit monitoring costs, forensic investigations, computer reprogramming, call center support and/or public relations. The PLF will not pay for any such costs, even if the PLF is otherwise providing a defense.

EXCESS PROGRAM

The PLF Excess Program participation remained stable. For the 2011 plan year, 705 firms with a total of 2,317 lawyers purchased PLF excess coverage. Only two changes were made to the 2011 PLF Excess Claims Made Plan for 2012. The changes follow those made to Section IV of the PLF 2011 Primary Claims Made Plan for 2012 regarding same or related claims and the addition of the exclusion related to the loss of confidential data.

As in the past, the PLF Excess Program is entirely reinsured and financially independent from the PLF's mandatory Primary Coverage Program. Because of the success of the PLF Excess Program, we are able to negotiate very favorable reinsurance rates. That savings is passed on to Oregon lawyers in lower excess coverage rates. We continue to offer continuity credits of 2% for each year of participation (up to 20%).

CHANGES IN PLF BYLAWS AND POLICIES

No changes were made in 2011 for the 2012 PLF Bylaws and Policies.

FORECAST FOR THE FUTURE

Many factors underlie the process of setting the annual PLF assessment – projections of income, operational costs, projections of the number of claims, defense expenses related to claims, and indemnity paid on claims. Of these, only operational costs, which are a small percentage of the total budget, can be predicted with certainty. Currently, claim frequency is high but within the predicted range, defense expenses have risen, and indemnity costs appear to be remaining stable. A definitive analysis will not be known until the midyear actuarial report is received. Experience has shown that legal malpractice claims are volatile, as are the economic times; accordingly, circumstances may change over the remainder of the year. The Board will carefully monitor developments as it awaits the midyear actuarial report.

If you have questions or suggestions about the PLF, please contact me.

Ira R. Zarov
Professional Liability Fund
Chief Executive Officer
503-639-6911 or 800-452-1639
iraz@osbplf.org

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: April 27, 2012
From: Sylvia E. Stevens, Executive Director
Re: WSBA License Fee Referendum

Action Recommended

None. This is merely for the BOG's information.

Background

On April 9, 2012, the Washington State Bar Association announced the results of a member-initiated bar wide vote to roll back license fees from \$450 to \$325. The reduction was approved by 52% of the members voting (43%).

According to the petition, the proponent's goal was to reduce the Washington license fee to the median of unified bar fees, "while at the same time providing adequate funding for legally required discipline and licensing functions."

The proponent compared the WSBA to the "Virginia Bar Association,"¹ which as a similar number of members but an annual license fee of only \$275. According to the proponent the VBA has many of the same programs as the WSBA, comparable staff wages, "but overhead is lower and efficiency is greater." The proponent's materials also mention the costs associated with the WSBA leadership's attendance at the Western States Bar Conference in Maui in 2011, the lack of transparency about the bar's financial records, the difficulty of transferring from inactive to active status, and the cost of CLE programs.

Members were able to comment on the referendum on the WSBA website. The comments included suggestions that the WSBA limit itself to its regulatory functions (and reduce the costs of those functions), prohibit out-of-state travel for board and staff, reduce board meetings from 8 to 6 per year, and get rid of expensive office space in downtown Seattle.

In response to the outcome of the referendum, the WSBA has embarked on an effort to figure out how the WSBA can be more relevant to its members by asking them "How can the WSBA be of greater value to you?" and "How can the WSBA better serve the day-to-day practitioner?"

Some observers have inquired whether OSB members could pursue a license fee rollback. The answer is yes, either by HOD resolution or by a member initiative. ORS 9.139(1)(b) authorizes the HOD to "direct the board of governors as to future action," which could certainly include a reduction in the annual fee. A resolution to that effect could be submitted by any individual delegate or, pursuant to ORS 9.148(3), by a petition signed by 2% of the membership.

¹ It appears he was actually referring to the Virginia State Bar, which is an agency of the Supreme Court of Virginia and a unified bar. The VBA is a voluntary association.

ORS 9.148(4) provides that by a petition signed by 5% of the membership, an issue can be submitted to a vote of the full membership. ORS 9.148 does not expressly state that the vote of the membership is binding on the BOG, but that is the clear (and only logical) implication of the statutory scheme.

Included with this memo are various materials from the WSBA referendum. Also provided is information about how the OSB member fees are spent among mandatory and discretionary activities (activities that generate revenue in excess of expense are not included).



WSBA

To: Board of Governors
From: Budget and Audit Committee
Re: Budget Recommendations
Date: April 17, 2012

ACTION: Approve the following recommendations which constitute the first steps in making the WSBA a more effective and efficient bar and closing the \$3.6 million annual budget gap. Time is of the essence. *Note: We will still be preparing a FY 2013 budget in the coming months; however it is important to make some decisions now to establish parameters for the next and more difficult phase of budget analysis.*

As a result of the member referendum to reduce license fees to \$325 for 2013 and 2014, the senior staff and Budget and Audit Committee have developed a “first round” of proposed budget cuts to help close the \$3.6 million drop in licensing revenue. The Budget & Audit Committee voted unanimously at its April 13, 2012, meeting to make the following recommendations to the Board of Governors for approval at the April BOG meeting. Approval of these items is not contingent upon the BOG discussion about mission and focus, and is required before the next phase of budget cuts can occur. The next phase of cuts will be guided by the discussion the BOG will have at its extended meeting on Saturday, April 28th, to decide whether WSBA’s mission will change as a result of the referendum decision.

Use of Reserves

1. Use \$1 million of unrestricted reserves to offset expenses in FY 2013.
2. Use \$1 million of unrestricted reserves to offset expenses in FY 2014.

Total spend-down of reserves = \$2 million

Note: This use of reserves is balanced against understanding that we must move toward an amount for license fees in 2015 that does not require a significant increase in the license fee amount.

Phase One Budget Recommendations

1. Explore moving *Bar News* online and eliminating the printed version. The goal would be to generate enough online advertising to cover staff costs (the current model is for advertising revenue to cover direct costs and license fees to cover staffing). Cost savings:

approximately \$387,000 (assuming 1/3 drop in advertising revenue, which needs more analysis to see if this is even feasible).

2. Modify policy on support of sections administration costs so that section per-member charge covers 100% of the cost. This elimination of subsidy would result in a higher per-member charge for sections, and thus an increase in most if not all section dues which currently range from \$15 to \$40 (preliminary estimate is a \$5.50-\$6.50 increase). Cost savings: approximately \$77,000.
3. Eliminate funding for positions on WSBA standing committees, boards, and task forces. This means that volunteer board/committee members will no longer be reimbursed for travel expenses including airfare, mileage, lodging, meals, etc. No meals or snacks will be provided as part of the meeting. Webcams could be provided to committee/board members to allow them to participate remotely. There would also be a scholarship fund established to assist those who would not otherwise be able to afford to participate, to ensure geographic, minority, and new lawyer diversity remains. The amount of the scholarship fund would be established through the budget process each year. Cost savings: approximately \$167,000. This new policy would apply to the following committees, boards, and task forces:
 - a. Judicial Recommendations Committee
 - b. Professionalism Committee
 - c. Committee for Diversity
 - d. Legislative Committee
 - e. Pro Bono and Legal Aid Committee
 - f. Amicus Brief Committee
 - g. Court Rules Committee
 - h. Rules of Professional Conduct Committee
 - i. Council on Public Defense
 - j. WA State Bar Foundation Board of Trustees
 - k. Access to Justice Board and ATJ Board Committees
 - l. Board of Bar Examiners
 - m. Character and Fitness Board
 - n. Limited Practice Board
 - o. Law Clerk Board
 - p. Practice of Law Board
 - q. MCLE Board
 - r. Disciplinary Board
 - s. Discipline Advisory Roundtable
 - t. BOG Committees and work groups (see #4 below)
 - u. All existing task forces and work groups including the ELC Task Force, APR Task Force, Escalating Costs of Civil Litigation Task Force, Civil Legal Needs Work Group, Local Rules Task Force, Immigration Advisory Opinion Work Group, Facilities Advisory Committee, JRC Review Committee and any other groups hereafter formed
4. Reduce Board of Governor costs by at least \$100,000. The discussion included the following ideas which shall be decided through the budget process:
 - a. Reduce BOG meeting costs by holding the majority (5) of BOG meetings in Seattle at WSBA facilities
 - b. BOG Conference policy – eliminate conferences for governors and reduce conferences for president and president-elect
 - c. No longer reimburse governors to attend BOG committees and liaison to other WSBA committees/boards
 - d. Make Annual Awards Dinner self-sustaining or eliminate

- e. Make 50-year lunch self-sustaining or eliminate
 - f. President's Dinner – eliminate
5. Transition the WYLD to a more effective and less costly model by eliminating the current “division” structure and replacing it with an unfunded WSBA standing committee. This committee would focus on connecting new lawyers around the state and be a mechanism for providing new lawyer perspectives on issues relevant to the Bar. This committee could also continue to advise on the New Lawyer Education seminars and other efforts that the YLD BOT has been coordinating with staff on. Cost savings: approximately \$153,000.
 6. Identify \$200,000 in staff-related expenses without compromising ability to retain necessary staff.
 7. Miscellaneous reductions:
 - a. Eliminate the Accommodation Fund which is budgeted each year but never used (note: the policy on paying accommodations for committee members would not change). Cost savings: \$500.
 - b. Eliminate votingforjudges.org contribution. Cost savings: \$5,000.
 - c. Eliminate funding for ABA Delegates (currently paid a \$800/year stipend to cover costs of attending ABA meetings). Cost savings: \$5,600.
 8. Move New Lawyer Education into CLE Seminars Budget. Note: this is not a structural change, but a change in how the program is funded (so it will no longer be funded by license fees).
 9. Eliminate the annual Access to Justice/Bar Leaders Conference as a WSBA event. If the ATJ Board can secure outside funding and staffing to continue the conference, it can choose to do it independently. However, no WSBA staff or resources will be used for the conference in the future. Cost savings: approximately 800 hours of staff time and \$10,000-\$20,000 currently coming out of the CLE Reserve Fund.
 10. Eliminate funding for the WSBA Leadership Institute. The WSBA could ask the Foundation Board of Trustees to advise on the sustainability of support for the WLI through outside funding in light of other programs for which the Foundation is raising money. Cost savings: approximately \$127,000.

Total estimated cost savings: \$1.3 million

Revenue-generating Ideas

1. Charge members for subscription to Casemaker so that costs could be covered and it becomes revenue-neutral. Cost savings: \$48,000.
2. Ask the Supreme Court to increase the Pro Hac Vice fees. Additional revenue: TBD.

With the use of reserve funding and the initial proposed cuts, we need to find an additional \$1.3 million in reductions (assuming we can achieve the savings figures noted above). This total could be reduced by any possible new revenue sources, which have not been factored into these figures. Other ideas are also being explored to raise revenue for WSBA. Additional ideas will be brought forward to the Budget and Audit Committee when they are ripe for action.



WSBA

WSBA Seeks Your Input — How Do You Define Value?

As I mentioned the other day in my email where I shared the referendum results, I'm interested in your feedback on how your future Bar can best meet your needs and the needs of the profession.

I shared with you that the impacts from the passage of the referendum will be felt and some of the very programs you value the most may no longer be provided.

Given that we have some tough decisions ahead, I'm seeking your input on the two questions below. I encourage you to take a few minutes and provide me your thoughts via email.

1. How can the WSBA be of greater value to you?
2. How can the WSBA better serve the day-to-day practitioner?

I will personally read all responses and share them with the Board of Governors, and I'll randomly choose 10 WSBA members who respond and invite you to lunch at the WSBA headquarters with myself and Executive Director Paula Littlewood. Our goal will be to discuss your input and other ways the Bar can be more relevant to you and other WSBA members.

I encourage you to take the time to provide your thoughts and opinions. I am committed to doing everything I can to ensure that the Bar is relevant to you, regardless of where you are in your career.

Please provide me your responses by **April 25**. All responses will be shared with the Board of Governors. For the 10 of you whose names are randomly drawn, I will be contacting you personally to extend an invitation to a discussion over lunch.

I look forward to hearing from you. Please email your responses to comments@wsba.org.

Sincerely,

Steve Crossland
WSBA President

License Fee Referendum

Overview >

Governance >

Board of
Governors

License Fee
Referendum

Diversity >

Contact Us >

Careers >

Financial Info >

History of the WSBA >

Washington State
Bar Foundation >

License Fee Referendum Passes

Members cast their votes; license fee to be reduced to \$325

A total of 12,339 WSBA members weighed in on the License Fee Reduction referendum, with 52% of those who voted casting a YES vote to reduce the current license fee by \$125. The result means that WSBA license fees will decrease to \$325.

"I want to thank all WSBA members who took the time to learn more about the role of the Bar, how decisions are made, how license fees are set and what your license fee pays for, before casting a vote," said WSBA president Steve Crossland.

Crossland expressed a renewed commitment from him and all members of the Board of Governors to listen, engage more and build stronger connections with members. "It became even clearer during the member referendum process that members expect value and relevance from the Bar, regardless of where one is at in his or her career," Crossland added. "We need to make sure we're not only meeting, but exceeding, expectations."

To kick start President Crossland's commitment, he is seeking input on the following questions:

1. How can WSBA be of greater value to you?
2. How can the WSBA better serve the day-to-day practitioner?

From all responses, which he and the Board of Governors will read, President Crossland will randomly choose 10 WSBA members and invite them to lunch at the WSBA headquarters with himself and Executive Director, Paula Littlewood. The goal will be to discuss the members' input and other ways the Bar can be more relevant to all WSBA members. All WSBA members are encouraged to respond by April 25 by emailing input to comments@wsba.org. President Crossland will personally contact the 10 individuals invited to join him and Executive Director Paula Littlewood for a lunch discussion.

Voting closed on April 6, 5 p.m. on the member referendum that proposed a reduction in license fees from \$450 to \$325.

Statement for the Referendum

The dues rollback referendum was started because mandatory annual fees imposed upon Washington lawyers exceed those charged to lawyers in most other states. In addition, the WSBA is making inefficient use of money and is not being totally open with members about where the money goes.

Per the 2010 American Bar Association Survey Dues (latest available as of deadline), Washington ranks 8th highest in mandatory fees among the states. This is up from 27th place in 1995. The ABA Survey compares "mandatory" fees which must be paid in order to practice law in a given state. It does not pertain to voluntary fees which might optionally be paid to a voluntary bar association, despite opponents' attempts to introduce confusion on this point. (Copy of survey at www.legalez.com).

A good contrast with the WSBA is the Virginia Bar Association (VBA), which, like the WSBA is a "unified" bar association, yet has fees of \$275 per year, with a pending decrease to \$250. VBA has about the same number of active members (28k), and it has an Ethics Hotline, Diversity Program, Leadership Program, Access to Legal Services Program, Lawyer-Help Program, Legislative Program, Public Education, etc. Wages are comparable, but overhead is lower and efficiency is greater. (see legalez.com).

Unlike WSBA, VBA helps members by allowing easy, automatic transfers from inactive to active status, thus allowing reduced dues for new mothers, the disabled, those who must relocate to find work, and those who need a break. But WSBA impedes transfers back to active status, and even jacked up inactive dues. That's mean.

Here are fee comparisons, per the ABA Survey:

Connecticut	\$675
Oregon	\$492
Washington	\$480
California	\$410
Montana	\$385
Idaho	\$360
Minnesota	\$317
Ohio	\$300
Massachusetts	\$300
Virginia	\$275
Florida	\$265
Kansas	\$245
Colorado	\$225
Vermont	\$210
New York	\$188
Maryland	\$130

ABA ranks Washington 8th, Minnesota 25th and Maryland 50th.

Our Board increased fees when an economic crisis was underway, despite hardships of members

who are unable to find professional work and struggling with student loans and mortgages.

WSBA President Crossland claims there have been "cuts in some programs and staff". However, data from Washington Department of Retirement Systems (see legalez.com), shows WSBA employment thus:

December 2008	138 employees
December 2009	143
December 2010	140
December 2011	145

Hiring continues, with three "help wanted" ads in December BarNews.

WSBA spends too much money on travel, lodging, and meals at various resorts and hotels around the state and elsewhere. Last March, President Crossland, Director Littlewood, and Board members used license fee money for a six-day trip to Hawaii. (details, legalez.com).

Various opponents are promoting the "Preserve the WSBA" theme. According to the opponents' own figures, the rollback will cost about \$3.6M. However, WSBA has "reserve" funds that could pay for the entire rollback with no cuts in any program. According to the WSBA's September 30, 2011 financial report, WSBA increased cash holdings from about \$4.6M in 2010 to about \$5.4M 2011, with the bulk of the increase going into a "Facilities Reserve Fund", designated for future purchase or rental of a new WSBA headquarters after 2016. But a future office could be in inexpensive suburban space, if need be, so this reserve is not essential. (details, legalez.com.)

In the February BarNews, p. 10, Director Littlewood claims Physicians license fees are \$675 "annually", and auto dealers \$760 annually. However, per WAC 246-919-990, the \$675 fee for physicians is for "two year" renewal. For auto dealers, RCW 46.70.061 sets renewal at \$250. The \$750 figure Littlewood cited applies to a one-time issuance fee, like a bar exam fee.

WSBA lacks transparency in finances. WSBA does not permit the Washington State Auditor to conduct performance audits, as do normal state agencies. WSBA's self-selected, private auditor does not look into program efficiency.

WSBA rules pertaining to public records are more restrictive than the Public Records Act. The WSBA spent over \$30,000 as Plaintiff, suing the State of Washington to prevent release of records from the Department of Retirement Systems, on the theory records of money paid to employees is "private", even with respect to WSBA members. (See letter in April 2011 BarNews by Lori Haskell, Former WSBA Governor, available at legalez.com). In contrast, the Virginia Bar Association posts its check registers on-line (see legalez.com).

WSBA extensively redacted expense records pertaining to the Board Members' 2011 Hawaii trip (see legalez.com). No WSBA financial document should be kept secret from members who fund the WSBA.

Questions may be posted on the comment board at legalez.com.

WSBA DUES ROLLBACK PETITION

Proposal: The BOG decision fixing the license fee for active members at \$450 is hereby modified. The full, active member fee shall be \$325, and fees for newly-admitted active members are reduced proportionally.

Supporting Statement

The most recent *ABA Dues Survey (Dec. 2010)* found that WSBA fees are the 8th highest in the nation, which is up from 27th in 1996. Per ABA, the median license fee is \$317, with many states charging far less, e.g. Wyoming \$305, Kansas \$245, Massachusetts \$200, Illinois \$189, New York \$188, Maryland \$130, etc. This rollback merely aligns WSBA with the median, while at the same time providing adequate funding for legally required discipline and licensing functions.

The undersigned WSBA Members petition that the above rollback proposal be submitted to a membership referendum.

_____	_____	_____
<i>name (please print)</i>	<i>city</i>	<i>signature/WSBA Number</i>
_____	_____	_____
<i>name</i>	<i>city</i>	<i>signature/WSBA Number</i>
_____	_____	_____
<i>name</i>	<i>city</i>	<i>signature/WSBA Number</i>
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<i>name</i>	<i>city</i>	<i>signature/WSBA Number</i>
_____	_____	_____
<i>name</i>	<i>city</i>	<i>signature/WSBA Number</i>

MAIL (DO NOT FAX OR E-MAIL) SIGNED PETITION TO:
Fair Bar Dues
ATTN: William J. Sorcinelli
1818 W. Francis, #206
Spokane, WA 99205

DEADLINE!

The last referendum attempt failed – enough signatures came in, but not soon enough, so we missed the deadline. Please return by November 26!

You can Help! Please copy and send to other WSBA members.

Statement against the Referendum

The Washington State Bar Association works very hard to support and assist its 30,000 members. The proposed license fee rollback would effectively dismantle our self-government, hurting lawyers and the profession. It would weaken the functions that the Bar is mandated to perform – like discipline, licensing and regulation of the practice.

Now, more than ever, we need a strong Bar. We get great value for our license fees. By slashing 26% of WSBA's budget, we would gut the very programs and services that help lawyers across the State.

WSBA Has Been A Responsible Steward Of License Fee Revenues. Nearly 3/4ths of the license fee revenues go directly to accomplishing the responsibilities imposed on WSBA under state law, RCW 2.48. Our license fees have been frozen for four years. Expenses have been held to a growth rate of less than 1%. WSBA has gradually built reserve funds to avoid the situation where expensive special assessments might need to be levied against members.

Our license fees are not excessive. They are comparable to other unified bars of similar size.

The Lawyer Disciplinary Process Is At Risk – And With It The Privilege Of Self-Regulation. 71% of the current license fee is used to pay for mandatory functions, with the most prominent being lawyer discipline. If the discipline process falters, it would result in failures to timely and effectively deal with those lawyers whose conduct and ethical lapses threaten the public's perception of all lawyers.

Our profession enjoys the privilege of self-regulation. The Office of Disciplinary Counsel annually processes approximately 2,000 written grievances. It does so fairly and efficiently. The vast number of written grievances are dismissed on the basis of the intake evaluation, the attorney's written response or following an investigation. If a lack of adequate funding results in a compromised disciplinary process, the Legislature or courts would be prepared to take this responsibility away from us.

WSBA Provides Valuable Services to Members At No Cost. WSBA is acutely aware that many practitioners have been affected by the economic downturn. It has responded with services and programs that bolster our practices and our bottom lines.

WSBA provides a critical helping hand to new attorneys and to solo and small firm practitioners with services like Law Office Management Assistance Program (LOMAP), Case Maker legal research, mentoring, practice development and low cost CLE programs for new attorneys.

The Sections and Committees, together with the mentoring and practice development programs at WSBA, help attorneys across the spectrum: whether we practice alone, in small firms, in mid to large sized firms, in private practice, the public sector, or with non-profits or for-profit corporations.

WSBA Helps Lawyers Meet Their Ethical Obligations. WSBA helps us understand and meet our obligations through ethics education and prevention programs. The Ethics Line is a prompt, effective and no-cost resource for all lawyers to obtain guidance when confronting ethical issues in their practice. The Lawyers Assistance Program helps attorneys whose health problems pose a threat to their wellbeing and the wellbeing of their clients. It enables attorneys to preserve their practice.

WSBA Is Committed to Inclusion and Diversity. WSBA has been a leader in promoting gender equity and diversity in our profession. This critical work has strengthened individual minority bar associations, enhanced employment and advancement opportunities for minority lawyers and is helping to eliminate bias in the profession. WSBA's commitment is reflected in the increased diversity in law schools, law firms and the judiciary.

WSBA Enables Attorneys to Work for Justice. The Preamble to the Rules of Professional Conduct reminds us that we are Officers of the Court and public citizens with a special responsibility for the quality of justice. WSBA helps us meet those obligations by training and organizing attorneys across the state to provide *pro bono* and low cost civil legal services to individuals and families who are in need.

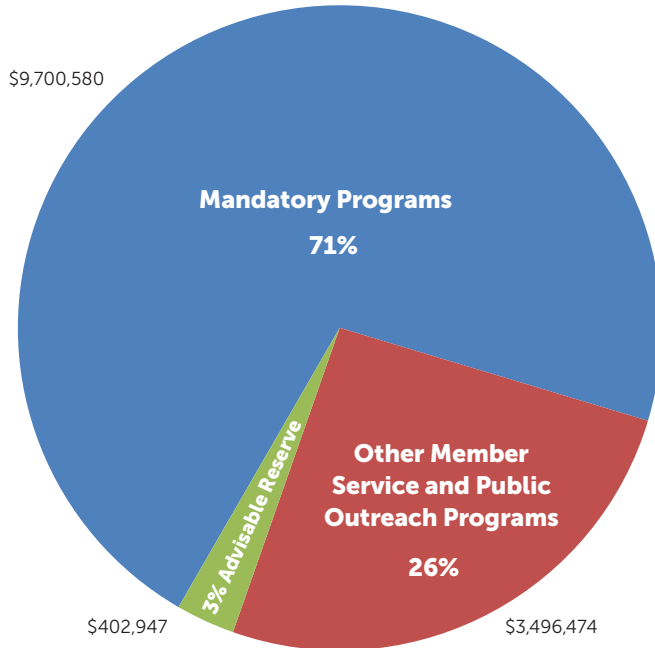
Through its Council on Public Defense, WSBA helps to ensure that the constitutional right to counsel is effectively implemented in our state. WSBA has actively supported the Task Force on Race in the Criminal Justice System and a range of other initiatives designed to identify and eliminate bias and other institutional barriers based on identity characteristics.

Opposition to the Resolution. Concern about the consequences of the rollback is widespread. The Access to Justice Board, the King County Bar Association, the Spokane County Bar Association, the Tacoma-Pierce County Bar Association, the Washington State Association for Justice, and many other lawyer groups have adopted resolutions opposing the referendum.

PLEASE VOTE "NO" ON THE REFERENDUM

What Does Your License Fee Support?

Fiscal Year 2012 General Fund Budget Summary



Mandatory Functions Include

- Admissions/bar exam
- Access to Justice Board
- Audits
- Board of Governors
- Discipline
- Licensing and membership records
- Limited practice officers
- Mandatory CLE administration
- New Lawyer Education
- Office of General Counsel
- Office of General Counsel Disciplinary Board
- Practice of Law Board
- Regulatory services (Rule 9 interns, Law Clerk Program, special admissions)
- Fixed overhead (*would not be eliminated if all member service and public outreach programs in the list on the right were eliminated*)

Other Member Service and Public Outreach Programs Include

- Ethics Line
- Casemaker
- WSBA website
- Law Office Management Assistance Program
 - Computer clinics
 - Lending library
 - Statewide conference
- Administrative support of WSBA's 27 sections
- Support for committees and boards
- *Bar News*
- Home Foreclosure Legal Aid Project
- Moderate Means Program
- WSBA Leadership Institute
- Diversity initiatives
- Washington State Bar Foundation
- Lawyers Assistance Program
 - Counseling for lawyers, judges, law students
 - Job seekers groups
 - Resource lending library
- Legislative Program
- Young Lawyers Division (WYLD)
 - Administrative support
 - Washington First Responder Will Clinics
 - *De Novo* online publication
- WSBA Service Center
- Consumer information and civics education publications

Itemized WSBA License Fees Budget

Fiscal Year 2012 General Fund Budget Summary



Mandatory Functions

Access to Justice Board	\$325,562
Administration	814,821*
Admissions/Bar Exam	81,627
Audits	371,430
Bar Leaders Support	6,500
Board of Governors and Office of the Executive Director	512,690*
Communications	161,294*
Discipline	4,364,833
Human Resources	219,328*
Licensing and Membership Records	553,585
Limited Practice Officers	(43,330)
Mandatory CLE Administration	(164,418)
New Lawyer Education	144,601*
Office of General Counsel	352,873
Office of General Counsel Disciplinary Board	260,627
Practice of Law Board	143,739
Regulatory Services	(24,466)
Technology	1,017,011*
Fixed overhead that would not be eliminated if all member service and public outreach programs in the list below were eliminated	602,273

Total General Fund — Mandatory Functions **\$9,700,580**

Other Member Service and Public Outreach Programs

Administration	\$100,000*
Bar Leaders (includes support for committees and boards)	345,468
<i>Bar News</i>	400,944
Board of Governors and Office of the Executive Director	146,000*
Communications	500,000*
Diversity Program	368,633
Human Resources	100,000*
Justice Programs (includes Home Foreclosure Legal Aid Project and Moderate Means Program)	537,480
Law Office Management Assistance Program	180,088
Lawyers Assistance Program	311,913
Legislative Program	267,793
Casemaker	(22,388)
New Lawyer Education	50,000*
Professional Responsibility Program (Ethics Line)	245,561
Sections Administration	77,729
Technology	175,000*
Washington State Bar Foundation	136,834
Young Lawyers Division (WYLD)	177,692
Fixed overhead that would not be eliminated if all member service and public outreach programs in the list above were eliminated	(602,273)

Total General Fund — Member Service and Public Outreach **\$3,496,474**

* estimated costs of program performed within these cost centers

WSBA License Fee Fact Sheet



The WSBA license fee has been set at \$450 for four consecutive years (2010–2013).

- The Board of Governors voted unanimously in 2011 to keep the fee the same through 2013, despite continued growth of the membership and budget pressure.
- Last year the Board also cut programs and staff and held expenses to a growth of only 0.25%.
- During this same time, membership grew by 5 percent and additional valuable programs and services were added to assist our members and the community, including the statewide Moderate Means Program, the Home Foreclosure Legal Aid Project, as well as free and low-cost CLE programs for new attorneys and those volunteering for our public-service programs.

Reducing the license fee to \$325 is equivalent to what was collected a decade ago when the WSBA membership was 28 percent smaller (22,393) with fewer programs and services offered.

- A cut in license fees of this magnitude equates to a 26 percent budget cut, or \$3.6 million, putting numerous programs and services at risk for cuts or elimination.
- If the WSBA eliminated all non-regulatory functions, it would still fall short of achieving the \$3.6 million reduction that would be required if the referendum passes, thus putting the Bar's core regulatory functions at risk as well.
- A decade ago WSBA did not offer many of the current programs for members, including Casemaker, the research tool available to all members at no cost; dedicated programming to assist new attorneys as they enter the profession; and the nationally acclaimed WSBA Leadership Institute that is focused on training the future leaders of our bar. These valuable programs and services would all be in jeopardy in addition to many of our older, high-use programs such as the Ethics Line; our sophisticated consumer affairs line dedicated to expeditious processing of grievances against members; and the Law Office Management Assistance Program (LOMAP).

The WSBA is both a regulatory agency and your trade association. Paying your annual license fee is the equivalent of obtaining a business license.

- The WSBA serves nearly 30,000 active members and is charged with regulating the profession as well as providing valuable services and programs to members and the public.
- Washington is one of 32 states* with a mandatory bar. The rest (18) pay a license fee to the state and additional fees for a bar membership.
- Many other professions require annual license fees to practice in our state. While a number of professions pay less, others pay more. For instance, midwives pay \$525, chiropractors pay \$607, and dentists pay \$576.

*The District of Columbia also has a mandatory bar.

When looking at other state bar associations that perform regulatory functions, Washington's license fees are on par.

- Of the 32 mandatory state bars in the country, Washington's license fees rank near the middle among those states with comparable membership size (e.g., Michigan, Wisconsin, Georgia).
- By comparison here in our region, Oregon and Alaska, also mandatory bars, have annual license fees of \$492 (Oregon) and \$660 (Alaska).
- By contrast, Massachusetts is a "voluntary" state, where attorneys pay a license fee to the Massachusetts Board of Bar Overseers as well as a voluntary membership fee to the state bar association to be a member. Those combined fees total up to \$660 annually.

Referendum Rebuttal Statement submitted by the Proponent

Statement: “...nearly 3/4th of the license fee revenues go directly to accomplishing the responsibilities imposed.... under RCW 2.48.”

Response: RCW 2.48 imposes no particular spending level or spending requirements for particular items. The “3/4” figure exists nowhere in budget documentation. When WSBA Officers travel to Hawaii, is that “imposed” by RCW 2.48, or not? RCW 2.48 has existed for decades, even in years past when the WSBA did not “impose” fees among the most expensive in the nation.

Statement: “The proposed license fee rollback would effectively dismantle our self-government...”

Response: Even with this referendum, most states will have lower fees than the WSBA. And opponents make no showing that fee levels are related to “self-government”. Arguably, the WSBA has sacrificed “self-government” in order to garner more fees for itself, see below.

Statement: “Our profession enjoys the privilege of self-regulation.”

Response: We “used” to have self-regulation, before WSBA embedded items such as CLE and the Client Security Fund into unchangeable Court Rules. The WSBA is currently pushing GR 12.4, which terminates membership control over the WSBA's own financial records.

Statement: “WSBA Provides Valuable Services to Members At No Cost.”

Response: The WSBA refuses to post “no cost” CLE programs on its website or provide “no cost” access to WSBA publications such as Deskbooks, etc. Most “free” services are ones that 99% of lawyers do not use or do not want. Typical: WSBA imposes more CLE requirements on new lawyers, and then brags about offering “low cost” CLE to new lawyers.

Referendum Rebuttal Statement submitted by the Opponents

The referendum outcome will affect every lawyer in Washington. Please understand the facts before you vote.

Our License Fees Are Reasonable

License fees for Washington attorneys are in the middle of the pack of similarly-situated state bar associations. WSBA has kept license fees flat for four years.

The Roll-Back Would Dismantle WSBA - Harming Lawyers And The Profession

Slashing WSBA's budget by 26% will have immediate and adverse consequences. Mandatory functions, including lawyer discipline, will be compromised. The stakes are high because the privilege of self-regulating our profession is at risk.

WSBA provides a high level of service to lawyers across the state and in all kinds of practices. We need these programs now more than ever given the tough economy. If the referendum passes, expect to lose assistance to solo and young lawyers, sections, committees, the Law Office Management Program (LOMAP), the Ethics Hotline, the Young Lawyers Division, and our voice in Olympia.

WSBA's Finances Are Transparent

Every WSBA member can attend any meeting where the budget is discussed or put up for vote. The budget is published in the Bar News. WSBA is independently audited every year.

WSBA's Reserves Are Appropriate And Fiscally Sound

The gradual accumulation of reserve funds has been prudent and will prevent expensive future assessments.

The Roll-Back Would Harm The Public Good

As colleagues in our shared profession, we owe responsibilities to each other and to the public. Gutting the diversity and access to justice programs will leave us all diminished.

PLEASE VOTE NO.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: April 27, 2012
Memo Date: April 17, 2012
From: Rod Wegener, CFO
Re: How the OSB Membership Fee is Spent

Action Recommended

No action. For Information only.

Background

Recently I prepared a brief summary for a member requesting through a board member how the bar's membership fee is spent. Then with the recent action by the Washington State Bar to reduce its membership fee, I refined the summary with the development of the two charts following this memo. The information estimates what the \$492.00 membership fee funds in the operations of the bar.

Here is an explanation how the fee per program was determined:

- All numbers are from the 2012 budget.
- To determine how much of the fee is allocated to each program or activity, the specific program net cost was divided by the total of the net costs of all programs/departments to determine a percentage of all net costs. The general membership fee of \$442.00 then was multiplied by this percentage to determine what dollar amount of the fee is allocated to that program/department.
- The net cost is net of any revenue generated by the program. For example, CLE Seminars generates revenue of \$1.358 million, but after deducting all costs including ICA (overhead) there is an unfunded amount of \$46,447 which will be funded by the membership fee, which per the first chart is \$3.
- Two programs, Admissions and MCLE, have budgets that generate a net revenue, so no part of the membership fee is allocated to their activities
- Regardless of cost, three programs have specific amounts of the fee allocated to the program. The Affirmative Action Program (now Diversity & Inclusion) and the Client Security Fund have specific assessments for their operations. The LRAP allotment of \$5.00 was set by action of the Board of Governors.

The chart provides a visual how the \$492.00 is spent by each program/department.

How the 2012 OSB Membership Fee is Spent

Program/Department (a)	Net Cost (d) (e)	% of Fee	\$ Amt of Fee	
Admissions (b)				
Bulletin	(\$201,401)	2.8%	\$ 13	
CLE Seminars	(\$46,447)	0.7%	\$ 3	
Client Assistance Office	(\$670,285)	9.5%	\$ 42	
Communications	(\$500,959)	7.1%	\$ 31	
Disciplinary Counsel	(\$2,147,254)	30.4%	\$ 134	
General Counsel	(\$522,940)	7.4%	\$ 33	
Governance (<i>BOG, Exec Director office</i>)	(\$559,343)	7.9%	\$ 35	
Legal Publications (c) (<i>BarBooks</i>)	(\$461,503)	6.5%	\$ 29	
MCLE (b)				
Member Services (<i>section support</i>)	(\$334,254)	4.7%	\$ 21	
New Lawyer Mentoring Program	(\$130,234)	1.8%	\$ 8	
New Lawyers Division	(\$182,879)	2.6%	\$ 11	
Production Services (<i>Directory</i>)	(\$82,362)	1.2%	\$ 5	
Public Affairs	(\$598,619)	8.5%	\$ 37	
Referral & Information Service	(\$393,367)	5.6%	\$ 25	
Special Projects (<i>Fast Case, grants</i>)	(\$214,120)	3.0%	\$ 13	
Contingency	(\$25,000)	0.4%	\$ 2	
Totals - Use of General Membership Fee	(\$7,070,967)	100.0%	\$ 442	\$ 442.00

Board Designated Use of Member Fees

Loan Repayment Asst Program	\$5.00
Totals - Use of General Membership Fee	\$447.00

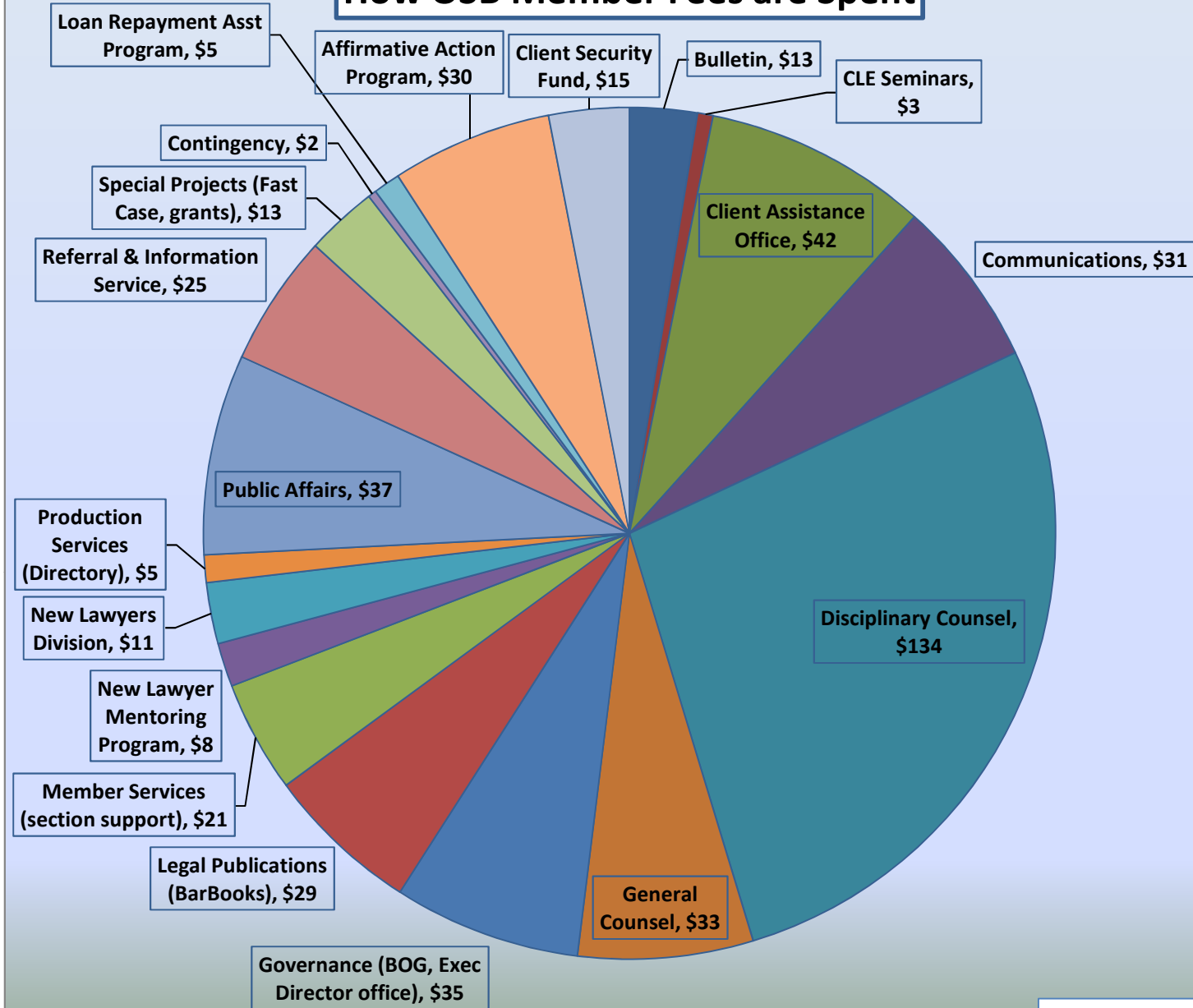
Restricted Use of Fees/Assessments

Affirmative Action Program	\$30.00
Client Security Fund	\$15.00
Total Active Membership Fee	\$492.00

Notes

- a) All amounts are from the 2012 budget
- b) Admissions and MCLE generate a net revenue, so no allocation to member fees
- c) Legal Publications Net Cost includes revenue from the PLF grant and the reserves allocation.
- d) The "Net Cost" includes any non-dues revenue the activity generates
- e) Overhead costs (ICA) are included in the "Net Cost" for each program

How OSB Member Fees are Spent



from 2012 budget

Oregon State Bar Legal Services Program Accountability Analysis

Overview

This report summarizes the review of the Legal service programs that receive funding from the OSB Legal Services Program.

The accountability review is an analysis of the information supplied by the programs in the Self Assessment Report covering the 12 month period ending December 31, 2010. This report also addresses the major events taking in place in 2011 that impacted the providers. This document is a supplement to the Oregon State Bar Legal Services Program Achievements and Results report that was issued in June, 2011.

The primary questions addressed by the review are (1) do each program's services meet the OSB Legal Service Programs Standards and Guidelines and (2) outline areas for further discussion or follow-up.

The Providers

There are five providers that receive funding from the OSB LSP:

Legal Aid Services of Oregon (LASO) – statewide provider with regional offices and the only entity that receives federal funds

Oregon Law Center (OLC) – statewide provider with regional offices

Lane County Law Aid and Advocacy Center (LCLAAC) – provides service in Lane County

Center for Nonprofit Legal Services (CNPLS) – provides service in Jackson County

Columbia County Legal Aid (CCLA) – provides service in Columbia County

The Performance Areas

This accountability analysis is divided into "Performance Areas" that track the broad themes expressed in the mission statement for the OSB Legal Services Program and as stated in the Standards and Guidelines. Each section outlines and discusses the level of alignment found and flags for further discussion. The performance areas are as follows:

- *"An integrated, statewide system of legal services... [that eliminates] barriers...caused by maintaining legal and physical separation between providers..."*
- *"Centered on the needs of the client community."*
- *"Efficient and effective full spectrum of legal services... The broadest range of legal services required to serve the needs of clients."*
- *"High quality legal services."*

1) Performance Area One: Achieving an Integrated Statewide System of Legal Services

It is the goal of the OSB LSP that all providers are part of an integrated statewide delivery system designed to provide relatively equal levels of high quality client representation

throughout the state of Oregon. This means that the providers need to work together strategically to target limited resources to ensure equality of access statewide.

The Oregon providers are exceptional in how well they work together to achieve statewide integration and meet the requirements set out by the OSB LSP Standards and Guidelines. In 2010 and 2011 the providers took several important steps that addressed this performance area.

Examples of Statewide Integration and Follow-Up

- Hillsboro Regional Office went from LASO to OLC on January 1, 2011 achieving several goals of the integrated statewide system, including: providing a broader range of services to the surrounding five-county region; increasing efficiency; and responding to changing client demographics and client needs identified through the periodic legal needs assessment process. The OLC executive director reported that at the administrative level the move from LASO to OLC went smoothly. OLC and LASO have similar structures so there were very little system changes to undergo. In 2010 there was adequate interaction between OLC and the then LASO Hillsboro office staff to understand any staff concerns prior to the change. The Regional Manager of the Hillsboro office commented that it is a relief to be part of a non-LSC funded entity so that federal restrictions no longer apply. Working for an unrestricted office has great rewards that were evident by staff very early on.
- Columbia County Legal Aid had existed as a stand-alone pro bono program since the 1980s. Although the Standards and Guidelines mandate that providers have at least one active member of the OSB on staff CCLA was granted two consecutive four year exceptions from that requirement. When the exception expired in 2005 CCLA contracted with LASO from 2005 through 2009 to provide a part-time attorney to CCLA. In 2010, in order to fulfill the requirement of having an OSB member on staff and to become more integrated in a statewide system, CCLA assigned the authority and responsibility to operate and maintain an office in St. Helens Oregon to serve low-income residents of Columbia County to the Oregon Law Center. The assignment took effect on January 1, 2011 and is managed by the OLC Regional Hillsboro Office. The Regional Manager reported that the CCLA staff have seemed to integrate well into the OLC culture and are doing a good job serving clients. CCLA staff live in the community, know it well and therefore are a trusted resource for Columbia County low-income residents. There was a fear that local attorneys would stop doing pro bono work and that has not been the case. An issue that has arisen is that the cost for OLC to manage client services in Columbia County in 2011 exceeded the agreed budget, which was approximately the cost for CCLA to provide its own independent program in 2010. However, CCLA remains committed to the OLC program at this time, has subsidized the 2011 deficit from its reserve funds, and has agreed to subsidize the 2012 program as well. CCLA's subsidy helps cushion the effect of statewide cuts on the St. Helens program. CCLA's Board has expressed its commitment to ensuring that CCLA's reserve funds will be used to maintain a long-term local program for the provision of low income legal services."
- Legal aid providers calculated an aggregate loss in funding of 16% or 4 million in mid 2011 to 2013. This was due to a loss in legal aid's three largest funding sources:

- General fund money was not renewed (\$923,574) and filing fee funding was essentially flat funded
- Federal funding was decreased by 4% for FY 2011 amounting to about \$174,000 less for Oregon.
- IOLTA funds have declined annually by approximately \$1 million.

In response legal aid programs cut staffing by 16% by eliminating 32 positions through freezing positions and layoffs. The layoffs were effective October 15 and October 31, 2011. Through careful planning the positions were strategically removed from larger offices to avoid closing offices and to maintain the bare skeletal structure necessary to provide relatively equal access statewide, as required by the OSB LSP Standards and Guidelines. In November 2011 LASO received notice of additional federal funding cuts of \$620,000 for 2012 which will likely cause the closure of one regional office. There will be an additional federal cut of and \$330,000 for 2013 which may cause the closure of additional offices.

Area for Further Discussion and Follow-up

Strategic Planning and Resource Allocation: Given legal aid's funding crisis the challenge facing providers is how to allocate resources between the programs and across various service delivery strategies so as to maximize impact on the most compelling needs of the client population statewide. Even though the recent deep federal funding cut impacts funding that goes only to LASO it is essential pursuant to the Standards and Guidelines that all providers work together to absorb the impact of the loss and any other funding cuts that may take place. This could include shifting resources between organizations as well as changing the regional structure of legal aid to achieve the goal of relative equal access to all low income Oregonians statewide.

2). Performance Area Two: Centered on the Needs of the Client Community

Performance Area Two gauges the success of providers at targeting their services on the most compelling needs of the client community. They do this by periodically conducting needs assessments in the communities they serve and setting program priorities to address the needs identified.

Providers do a good job of regularly assessing the needs of the community integration and meet the requirements set out by the OSB LSP Standards and Guidelines. All providers report that assessing the community takes place approximately every one to three years. The primary mechanism for input is a survey questionnaire distributed by a variety of methods including on-line, mail and e-mail, telephone calls, and on-site availability of surveys for current clients. After survey information is collected and analyzed, each office goes through a priority setting process. The providers are also very good at ensuring that offices remain knowledgeable and responsive to the needs of the local client community, mainly through staff who are active members of their local communities.

Areas for Further Discussion and Follow-up

Joint Coordination and Strategic Planning: The five programs providing services in Oregon share the responsibility of targeting services to the most in need of the client community. The goal of closely integrating the efforts to assure relative equal access for all Oregonians makes it

advisable for providers that serve the same region to undertake continued planning together. This is especially true given the fact that offices sharing a region differ in the range of services they can provide because of restrictions placed on offices receiving federal funds.

LASO and OLC either provide services to a region in offices adjacent to each other or coordinate regional services in offices separated by a large geographical area. It was unclear from the self-assessment reports how much coordination was taking place at a regional level between the two statewide organizations. Where it is possible and makes sense the regional LASO and OLC offices need to assess and strategically plan to assure that clients in shared regions have a full range of unrestricted legal services available to them. This will be especially critical if there are office closures due to the fiscal crisis.

This is true also for LASO and LCLAAC who share responsibility for client service in Lane County. LASO spearheads the formal Lane County client assessment process by gathering the necessary information to analyze community priorities through written questionnaires and surveys. This information is shared with LCLAAC who in turn sets priorities using this information as well as the information gleaned from providing client service and being involved in the broader community. Aside from sharing information it is unclear how much actual strategic planning takes place between the two offices. In addition LASO carries the burden of initiating the formal assessment process by gathering the community information. It is important that LCLAAC also take a role in initiating the periodic formal assessment process. The formal assessment process may be just a part of an ongoing process to assess community need and set client priorities but it is an important part of that process. Because LCLAAC is an unrestricted provider able to serve a broader community they have knowledge of and ability to gather information from a broader community.

3). Performance Area 3: Efficient and Effective in Providing a Full Spectrum of Legal Services

Performance Area Three reflects the principle expressed in the OSB LSP Standards and Guidelines that providing a wide range of legal services for the poor promotes fairness as well as efficiency and effectiveness. Enforcing broader rights of low-income communities is a function of legal services advocates, as well as providing individuals with representation in day-to-day matters. Providing community legal education and helping people represent themselves are also important functions.

The programs provide a full range of effective legal services and meet the requirements set out by the OSB LSP Standards and Guidelines. Legal services include phone/walk-in intake and advice, direct legal representation for individuals by staff and pro bono lawyers, complex litigation, community legal education, assistance to self-represented litigants and legislative advocacy. Also the providers make extensive use of other resources in the service area including community-based organizations that serve the same population.

Areas for Further Discussion and Follow up

Percent of Cases Closed as Brief Service and Advice: The case statistics forwarded by the providers showed that most cases are closed as brief service and advice (approximately 80%). Brief service and advice is an important form of representation and as one assessment revealed is the preferred method of representation indicated on a community survey. That said it is important for attorneys to also utilize their time to develop cases in a way that can cause

systemic statewide change and help the vast majority of the population that does not receive direct client service. This is especially true in times of shrinking resources and staff.

The case statistics showed that LCLAAC opened and closed a higher number of cases per attorney than other providers on average. For LCLAAC this is because part of the service model focuses on client intake and providing brief service to a large volume of clients. That said LCLAAC also has attorneys on staff that work on matters that have a broader more systemic focus.

Regional offices such as OLC Grants Pass office and LASO Roseburg office also open and closed a larger number of cases compared with other regional offices. It is important that these offices evaluate the overall effectiveness of a service model that has a significant focus on brief service and advice and keep working toward a model that balances brief service with a more significant set of services.

Inconsistent Case Statistics:

1. LCLAAC –The case statistics forwarded by LCLAAC for this review did not accurately summarize the outcome of the cases being closed. There were 2500 cases closed as “negotiated settlement without litigation” when in reality they were closed as “counsel and advice”. This error impacts the statewide legal aid case statistics reported to the Oregon Law Foundation, Campaign for Equal Justice and OSB LSP. LCLAAC staff was very helpful in revising the case statistics so they were reported accurately. One explanation for the inaccuracy was that LCLAAC uses a case management system that is in need of upgrading.

2. CNPLS – The Center for Nonprofit Legal Services reported 831 staff cases closed. Of the 831 cases closed 242 were closed as “other”. CNPLAS uses this closing category at a much larger percentage than other providers. OSB LSP staff will follow up with CNPLAS to find out why.

It is important that case statistics gathered and reported in the aggregate by the providers are consistent especially when used for statewide reporting. An upgrade in case management systems for CNPLS and LCLAAC would be helpful in gathering statistics that are consistent with those gathered by LASO and OLC. An upgraded case management system can also provide technology for upgrading the organizations conflicts checking process.

4) High Quality Legal Services

Delivering high quality legal services is a fundamental requirement of the OSB LSP and the providers meet the requirements set out by the OSB LSP Standards and Guidelines. This area includes approaches for reviewing/supervising legal work, methods for assigning cases to legal staff, supervising support and fiscal staff, technical support, evaluating staff, training staff, conflicts of interest, recruiting and retaining diverse qualified staff and ensuring zealous advocacy of clients.

In reviewing the self-assessment reports submitted by the providers it was clear that Oregon’s legal aid providers are committed to providing high quality legal services to clients statewide as mandated by the OSB Legal Service Programs Standards and Guidelines.

Areas for Discussion and Follow-up

Succession Planning: Providers that have experienced senior staff including retiring attorneys and administrative staff should put together a transition/succession plan to provide a road map for when they retire. The plan should involve other legal service providers and take into consideration the organizational impact both locally and statewide of retiring attorneys who are policy experts on statewide issues such as housing and public benefits.

Staff Evaluations: All the providers reported a policy for performing staff evaluations. With the exception of OLC it was not clear from the self-assessment answers whether the evaluations were more formal and in writing or conducted verbally. LCLAAC reported that “the professional staff of our organization are very experienced and performance is evaluated as needed”. Formal staff evaluations are an important tool for providing goals for improvement and training and should be conducted formally at least every other year.

Upgrading Case Management Systems: Both CNPLS and LCLAAC indicated the need for upgrading their case management systems both for improving capacity for information management and conflict checking. As stated above on page 4 this may also be helpful in gathering statistics that are consistent between providers.



FINANCIAL STATEMENTS SUMMARY

March 31, 2012

Narrative Summary

The 2012 first quarter Net Operating Revenue is about half it was a year ago, even though it is ahead of the seasonal budget. The most significant variance from the budget continued to be *Program Fee* revenue. Last month's statements already reported the notable variance and generally any program with budgeted revenue in excess of \$100,000 remains behind last year's levels.

On a more positive note, with an *Unrealized Gain* on the Investment portfolio of \$210,134, the Net Revenue for all general fund activities slightly exceeds a year ago.

Executive Summary

Revenue	Actual 3/31/2012	Seasonal Budget 3/31/2012	Budget Variance	% of Budget	Actual 3/31/2011
Member Fees	\$ 1,781,937	\$1,702,978	\$78,959	4.6%	\$ 1,730,308
Program Fees	987,449	1,152,666	(165,217)	-14.3%	1,138,036
Other Income	126,673	113,398	13,275	11.7%	203,177
Total Revenue	2,896,059	2,969,041	(72,982)	-2.5%	3,071,521
Expenses					
Salaries & Benefits	1,993,606	2,033,545	(39,939)	-2.0%	1,852,710
Direct Program, G & A	647,329	748,195	(100,866)	-13.5%	698,250
Contingency	5,859	6,250	(391)	-6.3%	0
Total Expense	2,646,794	2,787,989	(141,195)	-5.1%	2,550,960
Net Operating Rev (Exp)	249,265	\$ 181,052	68,213		520,561
Fanno Creek Place	(190,709)	(178,741)			(196,027)
Net Rev Bef Mkt Adj	58,556	2,311			324,534
Unrealized Investment Gains /(Losses)	210,134				99,086
Realized Investment Gains/(Losses)	36,502				31,618
Publ Inventory Increase/Decrease (COGS)	(8,250)				(118,914)
Reserve Reallocation	(50,001)	(50,000)			(99,999)
Net Revenue	\$ 246,941	\$ (47,689)			\$ 236,325

Use of the Contingency Fund

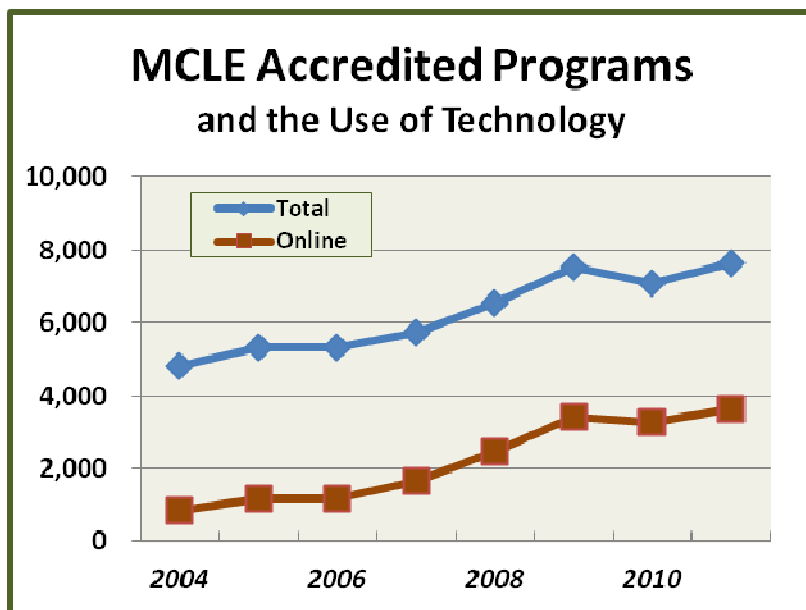
The bar has paid expenses totaling \$5,859 related to potential Client Security Fund claims due to a bar member’s conduct. The expenses have been to maintain the office, including administrative help, to aid the Discipline Department in processing the complaints.

A Closer Look at MCLE Finances

In anticipation of the Board of Governors’ look at the financial condition of CLE Seminars and its declining revenue, the revenue for the Minimum Continuing Legal Education (MCLE) is heading in the opposite direction. Possible implications for declining CLE Seminars revenue can be seen in the next two charts.

Sponsor fees to achieve MCLE accreditation of 4 credit hours or less is \$40; more than 4 hours the fee is \$75. **Per the chart below:**

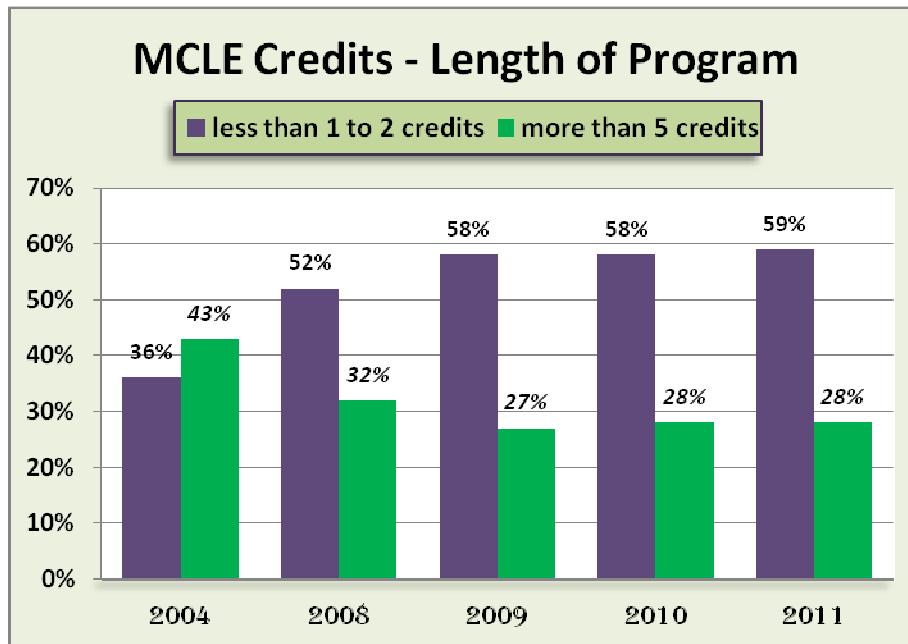
- The **blue** line indicates the total number of programs which received accreditation.
- The number of MCLE accredited programs has grown from 4,808 in 2004 to 7,650 in 2011 – a 59% increase in seven years.
- The **brown** line indicates the number of programs accredited that were offered via teleconference, webcast, or on demand.
- From the gap between the two lines, it is evident that the increase in number of accredited programs is of the online version.



The number of “online” accredited programs has grown from 828 in 2004 to 3,644 in 2011 – a whopping 340% increase.

The chart on the next page shows a related trend in MCLE credits. Of the 4,808 accredited programs in 2004, 36% of them were less than 2 credits, i.e. the program was less than two hours in length. In the same year, 43% of the programs were 5 or more credits, generally a more than half-day program.

Notice the trend in the greater number of the shorter programs over the same seven-year period.



To summarize, clearly members are signing up for shorter programs which they can attend via telephone or their computer, and attendance at longer programs, which usually are attended in person, has declined.

While these trends have had a positive impact on MCLE revenue (MCLE revenue has grown from \$200,500 in 2004 to a record \$314,990 in 2011), these trends have had just the opposite effect on the revenue of CLE Seminars. For years, the larger sources of revenue for CLE Seminars were “live” registration in longer programs and Season Tickets. Now its revenue trend is moving to less “live” attendance and access to education via the web and telephone.

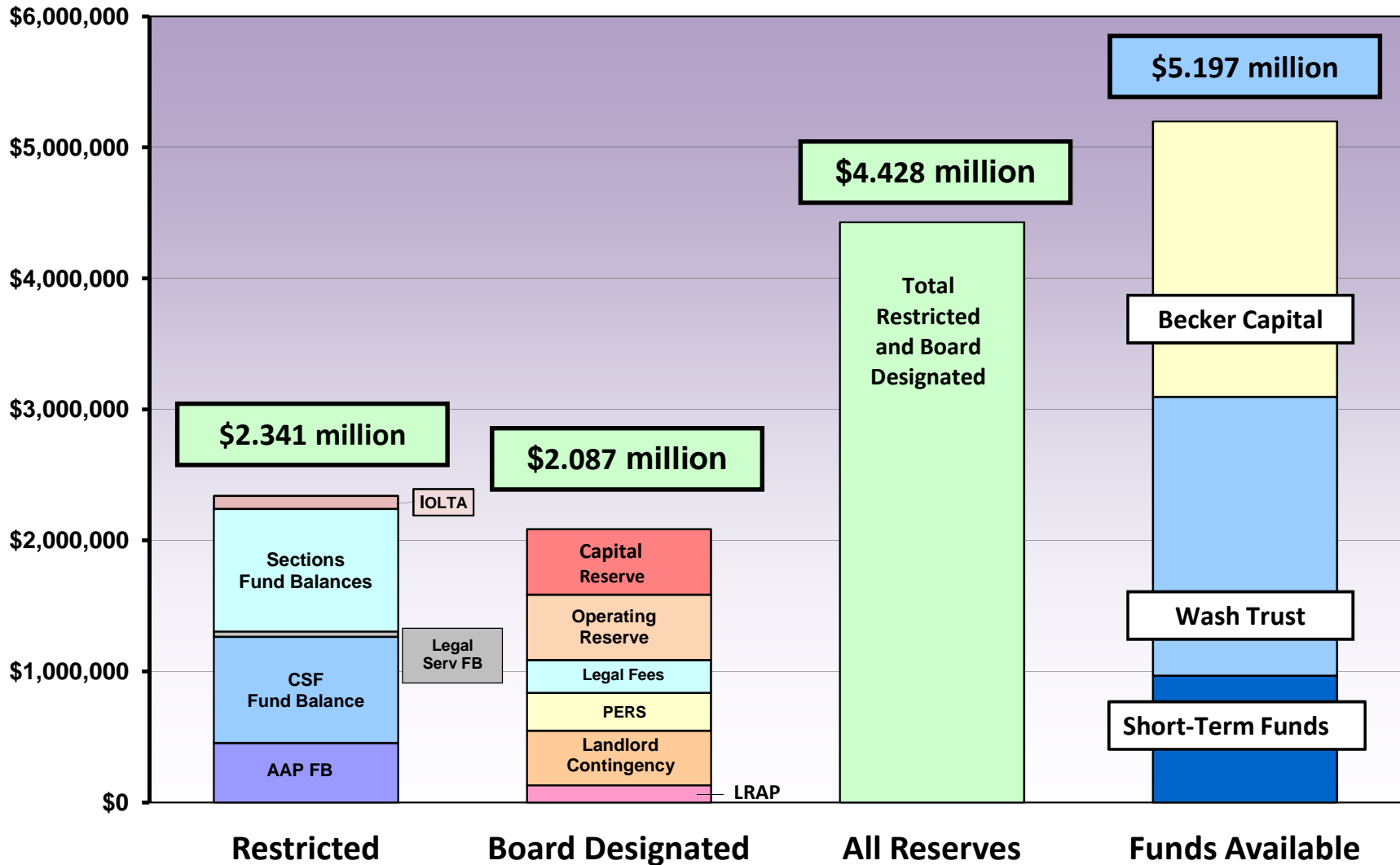
First Quarter Reserve Requirements vs Funds Available

The bar’s Reserves are well funded at the end of the first quarter. **See the chart on the next page.** The funds available managed by the investment managers and short-term funds exceed the needed amount in all the reserves and contingencies by \$769,000. This is higher than first quarter a year ago as the portfolio managed by the investment firms is \$175,000 higher and the *Board Designated* contingencies (PERS and the Landlord Contingency) have declined from a year ago.

The first quarter report usually is better than later-in-the-year reports since all the Restricted Funds (Sections, Legal Services, Client Security Fund, and Affirmative Action Program) and LRAP have almost all its entire year’s revenue included in the fund balances. Included in the *Funds Available* column is \$967,000 in short-term funds (not held by the investment managers), which are the total of the expected reductions by year end of those Restricted Funds.

OSB Reserves and Funds Available

March 31, 2012



OREGON STATE BAR

Policy and Governance Committee Agenda

Meeting Date: March 30, 2012
Memo Date: March 15, 2012
From: Danielle Edwards, Ext. 426
Re: NLMP and UPL Committee Assignments

Action Recommended

The Policy and Governance Committee should recommend to the Board that it approve the proposed New Lawyer Mentoring Committee assignment and changes to the Unlawful Practice of Law Committee assignment.

Background

The New Lawyer Mentoring Committee was created by the Board of Governors during their March 18, 2011 meeting with the purpose of reviewing mentor candidates and overseeing implementation of the curriculum and program. Since a committee assignment was not originally created, the language on the following page is offered to serve as their formal committee assignment.

In November 2011 the Board of Governors approved changes to OSB Bylaw Article 20 based on a recommendation from the Policy and Governance Committee and the Unlawful Practice of Law Task Force. The following proposed changes to the UPL Committee assignment reflect the bylaw changes adopted by the BOG last November and relate to the committee's role in drafting informal advisory opinions.

Note, additions and deletions to the original UPL committee assignment are indicated on the following pages by underlining (new) or strikethrough (deleted).

NEW LAWYER MENTORING COMMITTEE CHARGE

General:

The New Lawyer Mentoring Committee works with Oregon State Bar Staff to develop, implement, oversee and refine the New Lawyer Mentoring Program. The Committee and its members shall:

Specific:

1. Act as ambassadors for the Program to the legal community and public, including acting as a resource for speaking engagements and CLE programs related to the Program;
2. Assist with the recruitment and retention of mentors;
3. Develop Program policy and oversee the regulatory components of the program, including enforcement of Program requirements and approval of new mentors;
4. Solicit feedback from Program participants and strategies for evaluating the performance of the Program;
5. Review and revise Program curriculum and structure as needed; and
6. Solicit nominations for the OSB Award of Merit, the President's Public Service Award, Membership Service Award, Affirmative Action Awards, the Joint Bench Bar Professionalism Award, and any other state, local, and national awards for lawyers who make a contribution to serving the legal needs of Oregonians.

UNLAWFUL PRACTICE OF LAW COMMITTEE CHARGE

General:

1. Provide input, analysis and evaluation of the program to the program manager and/or BOG.
2. Make recommendations to the program manager regarding how the program can be improved.
3. Serve as volunteers for program elements.
4. Understand that when changes are made in program outcomes, input will be considered from the committee, as well as from other groups or means such as surveys, focus groups, ideas from other bars, etc.
5. Recognize that the program committee is not a governing body for the program and that the committee does not direct the activities of the program manager.

Specific Program Outcomes:

1. Conduct thorough investigations of UPL complaints and present comprehensive investigative reports for full committee consideration within 60 days of an assignment, or within an extended period as provided by committee rule.
2. Assist in drafting informal advisory opinions on what constitutes the unlawful practice of law.
3. Continue to recommend to the BOG that injunctive suits be initiated or that cease and desist agreements be entered into when the facts of a particular investigation support such action.
4. Issue letters of notice or admonition to the subjects of committee investigations, as warranted by the facts and committee rules.
5. Maintain policies and procedures to ensure compliance with statutory requirements, to meet standards of due process and fairness, and to ensure an appropriate measure of public protection from unlicensed practitioners.
6. Solicit nominations for the OSB Award of Merit, the President's Public Service Award, Membership Service Award, Affirmative Action Awards, the Joint Bench Bar Professionalism Award and any other local and national awards for lawyers who make a contribution to serving the legal needs of Oregonians.

OREGON STATE BAR

Policy and Governance Committee Agenda

Meeting Date: March 30, 2012
Memo Date: March 6, 2012
From: MCLE Committee
Re: Proposed Amendment to MCLE Rule 3.7(c)

Action Recommended

Review and approve the proposed amendment to MCLE Rule 3.7(c) to clarify reporting periods for Active Pro Bono members who are reinstated as active members.

Background

Please see MCLE Rule 3.6 regarding Active Pro Bono members.

3.6 Active Pro Bono. Members who are in Active Pro Bono status pursuant to OSB Bylaw 6.101 are exempt from compliance with these Rules.

In order to clarify whether an Active Pro Bono member who becomes reinstated as an active member will be assigned a new reporting period or retain a current reporting period, I propose amending Rule 3.7(c) as follows:

3.7 Reporting Period.

(c) Reinstatements.

(1) A member who transfers to inactive or Active Pro Bono status, is suspended, or has resigned and who is reinstated before the end of the reporting period in effect at the time of the status change shall retain the member's original reporting period and these Rules shall be applied as though the transfer, suspension, or resignation had not occurred.

(2) Except as provided in Rule 3.7(c)(1), the first reporting period for a member who is reinstated as an active member following a transfer to inactive or Active Pro Bono status or a suspension, disbarment or resignation shall start on the date of reinstatement and shall end on December 31 of the next calendar year. All subsequent reporting periods shall be three years.

(3) Notwithstanding Rules 3.7(c)(1) and (2), reinstated members who did not submit a completed compliance report for the reporting period immediately prior to their transfer to inactive or Active Pro Bono status, suspension or resignation will be assigned a new reporting period upon reinstatement. This reporting period shall begin on the date of reinstatement and shall end on December 31 of the next calendar year. All subsequent reporting periods shall be three years.

OREGON STATE BAR

BOG Policy and Governance Committee Agenda

Meeting Date: March 30, 2012
Memo Date: March 8, 2012
From: Jeffrey D. Sapiro, Disciplinary Counsel, Ext. 319
Re: Proposed Amendments to Reinstatement Rules

Action Recommended

Review amendments to Title 8 of the Bar Rules of Procedure (“BRs”) and, if acceptable, submit them to the Board of Governors for adoption and subsequent filing with the Oregon Supreme Court. The amendments would establish a reinstatement procedure for lawyers who have been suspended for not filing the annual IOLTA certificate, for failing to complete Ethics School and for failing to comply with the New Lawyer Mentoring Program.

Background

Title 8 of the BRs contains the rules of procedure that govern reinstatements. Presently, the rules recognize that lawyers may be applying for reinstatement for the following reasons: they are on inactive status, or previously resigned, or have been suspended for disciplinary reasons, or were suspended for nonpayment of bar dues or the PLF assessment.

Recent developments have created a need to amend the reinstatement rules to recognize other situations in which lawyers may be suspended and subsequently seek reinstatement:

1. NLMP. The New Lawyer Mentoring Program (“NLMP”) Rule, adopted by the Oregon Supreme Court in December 2010, provides that a lawyer who fails to complete the program may be suspended by the court.
2. IOLTA Certificate. At the bar’s request, ORS 9.675 was passed in 2011. That statute requires active members to file an annual IOLTA certificate with the bar, disclosing the location and account number of lawyer trust accounts. A failure to do so results in an administrative suspension, much like a failure to pay bar dues or the PLF assessment.
3. Ethics School. In 2011, BR 6.4 became effective. That rule requires disciplined lawyers to attend a one-day ethics program presented by the bar. A failure to do so may result in suspension.

Discussion

Attached, in a red-line format, are proposed amendments to the reinstatement rules. They incorporate into the existing rule structure of Title 8 the new types of suspension

mentioned above and establish the procedure for those suspended lawyers to seek reinstatement.

The amendments recognize that, like MCLE suspensions, NLMP and Ethics School suspensions are imposed by the Supreme Court and, therefore, it is the court that must make the ultimate decision to reinstate.¹ However, suspensions for failing to file an annual IOLTA certificate occur by operation of a statutory procedure like bar dues and PLF suspensions. Therefore, these three types of reinstatements (IOLTA, bar dues and PLF assessment) are dealt with similarly.

ORS 9.542 provides that the Board of Governors may adopt rules of procedure, subject to the approval of the Supreme Court. Staff is recommending that the Policy & Governance Committee submit the attached amendments to the Board of Governors for adoption and subsequent filing with the Supreme Court.

JDS

¹ Note that the NLMP rule adopted by the Supreme Court in December 2010, already has a reinstatement provision in it and, therefore, the inclusion of an NLMP provision in Title 8 of the rules of procedure is a bit redundant. However, lawyers who are interested in reinstatement for any reason are likely to look to Title 8 for guidance and staff sees no harm in having an NLMP provision there, as well. The two provisions are consistent with one another.

Title 8 — Reinstatement

Rule 8.1 Reinstatement — Formal Application Required.

(a) Applicants. Any person who has been a member of the Bar, but who has

- (i) resigned under Form A of these rules more than five years prior to the date of application for reinstatement and who has not been a member of the Bar during such period; or
- (ii) resigned under Form B of these rules prior to January 1, 1996; or
- (iii) been disbarred as a result of a disciplinary proceeding commenced by formal complaint before January 1, 1996; or
- (iv) been suspended for misconduct for a period of more than six months; or
- (v) been suspended for misconduct for a period of six months or less but has remained in a suspended status for a period of more than six months prior to the date of application for reinstatement; or
- (vi) been enrolled voluntarily as an inactive member for more than five years; or
- (vii) been involuntarily enrolled as an inactive member; or
- (viii) been suspended for any reason and has remained in that status more than five years,

and who desires to be reinstated as an active member or to resume the practice of law in this state shall be reinstated as an active member of the Bar only upon formal application and compliance with the Rules of Procedure in effect at the time of such application. Applicants for reinstatement under this rule must file a completed application with the Bar on a form prepared by the Bar for such purpose. The applicant shall attest that the applicant did not engage in the practice of law except where authorized to do so during the period of the applicant's inactive status, suspension, disbarment or resignation. A reinstatement to inactive status shall not be allowed under this rule. The application for reinstatement of a person who has been suspended for a period exceeding six months shall not be made earlier than three months before the earliest possible expiration of the period specified in the court's opinion or order of suspension.

(b) Required Showing. Each applicant under this rule must show that the applicant has good moral character and general fitness to practice law and that the resumption of the practice of law in this state by the applicant will not be detrimental to the administration of justice or the public interest. No applicant shall resume the practice of law in this state or active membership status unless all the requirements of this rule are met.

(c) Learning and Ability. In addition to the showing required in BR 8.1(b), each applicant under this rule who has remained in a suspended or resigned status for more than three years or has been enrolled voluntarily or involuntarily as an inactive member for more than five years must show that the applicant has the requisite learning and ability to practice law in this state. The Board may recommend and the Supreme Court may require as a condition precedent to

reinstatement that the applicant take and pass the bar examination administered by the Board of Bar Examiners, or successfully complete a prescribed course of continuing legal education. Factors to be considered in determining an applicant's learning and ability include, but are not limited to: the length of time since the applicant was an active member of the Bar; whether and when the applicant has practiced law in Oregon; whether the applicant practiced law in any jurisdiction during the period of the applicant's suspension, resignation or inactive status in this state; and whether the applicant has participated in continuing legal education activities during the period of suspension or inactive status in this state.

(d) Fees. In addition to the payments required in BR 8.6, an applicant under this rule shall pay at the time the application for reinstatement is filed, an application fee of \$500.

Rule 8.2 Reinstatement — Informal Application Required.

(a) Applicants. Any person who has been a member of the Bar, but who has

(i) resigned under Form A of these rules for five years or less prior to the date of application for reinstatement, and who has not been a member of the Bar during such period; or

(ii) been enrolled voluntarily as an inactive member for five years or less prior to the date of application for reinstatement; or

(iii) been suspended for failure to pay the Professional Liability Fund assessment, Client Security Fund assessment, or membership fees or penalties and has remained in that status more than six months but not in excess of five years prior to the date of application for reinstatement,

(iv) been suspended for failure to file with the Bar a certificate disclosing lawyer trust accounts and has remained in that status more than six months but not in excess of five years prior to the date of application for reinstatement,

may be reinstated by the Executive Director by filing an informal application for reinstatement with the Bar and compliance with the Rules of Procedure in effect at the time of such application. The informal application for reinstatement shall be on a form prepared by the Bar for such purpose. The applicant shall attest that the applicant did not engage in the practice of law except where authorized to do so during the period of the applicant's inactive status, suspension or resignation. Reinstatements to inactive status shall not be allowed under this rule except for those applicants who were inactive and are seeking reinstatement to inactive status after a financial suspension. No applicant shall resume the practice of law in this state or active or inactive membership status unless all the requirements of this rule are met.

(b) Required Showing. Each applicant under this rule must show that the applicant has good moral character and general fitness to practice law and that the resumption of the practice of law in this state by the applicant will not be detrimental to the administration of justice or the public interest. No applicant shall resume the practice of law in this state or active membership status unless all the requirements of this rule are met.

(c) Fees. In addition to the payments required in BR 8.6, an applicant under this rule shall pay at the time the application for reinstatement is filed, an application fee of \$250.

(d) Exceptions. Any applicant otherwise qualified to file for reinstatement under this rule but who

(i) during the period of the member's resignation, has been convicted in any jurisdiction of an offense which is a misdemeanor involving moral turpitude or a felony under the laws of this state, or is punishable by death or imprisonment under the laws of the United States; or

(ii) during the period of the member's suspension, resignation or inactive status, has been suspended for professional misconduct for more than six months or has been disbarred by any court other than the Supreme Court; or

(iii) has engaged in conduct which raises issues of possible violation of the Bar Act, Code of Professional Responsibility or Rules of Professional Conduct;

shall be required to seek reinstatement under BR 8.1. Any applicant required to apply for reinstatement under BR 8.1 because of this rule shall pay all fees, assessments and penalties due and delinquent at the time of the applicant's resignation, suspension or transfer to inactive status, and an application fee of \$500 to the Bar at the time the application for reinstatement is filed, together with any payments due under BR 8.6.

(e) Referral of Application to Board. If the Executive Director is unable to determine from a review of an informal application and any information gathered in the investigation of the application that the applicant for reinstatement has made the showing required by BR 8.2(b), the Executive Director shall refer the application to the Board for consideration, with notice to the applicant.

(f) Board Consideration of Application. If, after a referral from the Executive Director, the Board determines from its review of the informal application and any information gathered in the investigation of the application that the applicant for reinstatement has made the showing required by BR 8.2(b), the Board shall reinstate the applicant. If the Board determines that the applicant has not made the showing required by BR 8.2(b), the Board shall deny the application for reinstatement. The Board also may determine that an application filed under BR 8.2 be granted conditionally. The Board shall file an adverse recommendation or a recommendation of conditional reinstatement with the Supreme Court under BR 8.7.

(g) Suspension of Application. If the Executive Director or the Board, as the case may be, determines that additional information is required from an applicant regarding conduct during the period of suspension, resignation or inactive status, the Executive Director or the Board, as the case may be, may direct Disciplinary Counsel to secure additional information concerning the applicant's conduct and defer consideration of the application for reinstatement.

Rule 8.3 Reinstatement — Compliance Affidavit.

(a) Applicants. Subject to the provisions of BR 8.1(a)(v), any person who has been a member of the Bar but who has been suspended for misconduct for a period of six months or less shall be reinstated upon the filing of a Compliance Affidavit with Disciplinary Counsel as set forth in BR 12.9, unless the court or Disciplinary Board in any suspension order or decision shall have directed otherwise.

(b) Fees. In addition to the payments required in BR 8.6, an applicant under this rule shall pay an application fee of \$250.

Rule 8.4 Reinstatement — Financial or Trust Account Certification Matters.

(a) Applicants. Any person who has been a member of the Bar but suspended solely for failure to pay the Professional Liability Fund assessment, Client Security Fund assessment or annual membership fees or penalties, or suspended solely for failure to file a certificate disclosing lawyer trust accounts, may be reinstated by the Executive Director to the membership status from which the person was suspended within six months from the date of the applicant's suspension, upon ~~payment of the following sums to the Bar:~~

(i) payment to the Bar of all applicable assessments, fees and penalties owed by the member to the Bar, and

(ii) in the case of a suspension for failure to pay membership fees or penalties or the Client Security Fund assessment, payment of a reinstatement fee of \$100; or

(iii) in the case of a suspension for failure to pay the Professional Liability Fund assessment, payment of a reinstatement fee of \$100; or

(iv) in the case of suspensions for failure to pay both membership fees or penalties or the Client Security Fund assessment, and the Professional Liability Fund assessment, payment of a reinstatement fee of \$200; or

(v) in the case of suspension for failure to file a lawyer trust account certificate, filing such a certificate with the Bar and payment of a reinstatement fee of \$100.

An applicant under this rule must, in conjunction with the payment of all required sums, submit a written statement to the Executive Director indicating compliance with this rule before reinstatement is authorized. The written statement shall be on a form prepared by the Bar for such purpose. The applicant shall attest that the applicant did not engage in the practice of law except where authorized to do so during the period of the applicant's suspension.

(b) Exceptions. Any applicant otherwise qualified to file for reinstatement under this rule but who, during the period of the member's suspension, has been suspended for misconduct for more than six months or been disbarred by any court other than the Supreme Court, shall be required to seek reinstatement under BR 8.1. Any applicant required to apply for reinstatement under BR 8.1 because of BR 8.4(b) shall pay all fees, assessments and penalties due and delinquent at the time of the applicant's suspension and an application fee of \$500 to the Bar at the time the application for reinstatement is filed, together with any payments due under BR 8.6.

Rule 8.5 Reinstatement — Noncompliance With Minimum Continuing Legal Education, New Lawyer Mentoring Program or Ethics School Requirements.

(a) Applicants. Subject to the provisions of BR 8.1(a)(viii), any person who has been a member of the Bar but suspended solely for failure to comply with the requirements of the Minimum Continuing Legal Education Rules, the New Lawyer Mentoring Program or the Ethics School established by BR 6.4 may seek reinstatement at any time subsequent to the date of the applicant's suspension by meeting the following conditions:

(i) Completing the requirements that led to the suspension;

(ii) Filing a written statement with the Executive Director, on a form prepared by the Bar for that purpose, which indicates compliance with this rule and the applicable MCLE, -NLMP or Ethics School Rule 8-2. The applicant shall attest that the applicant did not engage in the practice of law except where authorized to do so during the period of the applicant's suspension; and

(~~iii~~) Submitting in conjunction with the required written statement, a reinstatement fee of \$100.

(b) Referral to Supreme Court. Upon compliance with the requirements of this rule, the Executive Director shall submit a recommendation to the Supreme Court with a copy to the applicant. No reinstatement is effective until approved by the Court.

(c) Exception. Reinstatement under this rule shall have no effect upon any member's status under any other proceeding under these Rules of Procedure.

Rule 8.6 Other Obligations Upon Application.

(a) Financial Obligations. Each applicant under BR 8.1 through 8.5 shall pay to the Bar, at the time the application for reinstatement is filed, all past due assessments, fees and penalties owed to the Bar for prior years, and the membership fee and Client Security Fund assessment for the year in which the application for reinstatement is filed, less any active or inactive membership fees or Client Security Fund assessment paid by the applicant previously for the year of application. Each applicant under BR 8.1(a)(i), BR 8.1(a)(viii), BR 8.2(a)(i), ~~or~~ BR 8.2(a)(iii) or BR 8.2(a)(iv) shall also pay to the Bar, at the time of application, an amount equal to the inactive membership fee for each year the applicant remained suspended or resigned and for which no membership fee has been paid. Each applicant shall also pay, upon reinstatement, any applicable assessment to the Professional Liability Fund.

(b) Judgment for Costs; Client Security Fund Claim. Each applicant shall also pay to the Bar, at the time of application:

(i) any unpaid judgment for costs and disbursements assessed in a disciplinary or contested reinstatement proceeding; and

(ii) an amount equal to any claim paid by the Client Security Fund due to the applicant's conduct, plus accrued interest thereon.

(c) Refunds. In the event an application for reinstatement is denied, the Bar shall refund to the applicant the membership fees and assessments paid for the year the application was filed, less the membership fees and assessments that applied during any temporary reinstatement under BR 8.7.

(d) Adjustments. In the event an application for reinstatement is filed in one year and not acted upon until the following year, the applicant shall pay to the Bar, prior to reinstatement, any increase in membership fees or assessments since the date of application. If a decrease in membership fees and assessments has occurred, the Bar shall refund the decrease to the applicant.

Rule 8.7 Board Investigation And Recommendation.

(a) Investigation and Recommendation. On the filing of an application for reinstatement under BR 8.1 and BR 8.2, Disciplinary Counsel shall make such investigation as it deems proper and report to the Executive Director or the Board, as the case may be. For applications filed under BR 8.1, the Board shall recommend to the court that the application be granted, conditionally or unconditionally, or denied, and shall mail a copy of its recommendation to the applicant. For applications denied by the Board or recommended for conditional reinstatement under BR 8.2(f), the Board shall file its recommendation with the court and mail a copy of the recommendation to the applicant.

(b) Temporary Reinstatements. Except as provided herein, the Board may temporarily reinstate an applicant pending receipt of all investigatory materials if a determination is made that the applicant is of good moral character and generally fit to practice law. A temporary reinstatement shall not exceed a period of four months unless authorized by the court. In no event shall the Board temporarily reinstate an applicant who seeks reinstatement following a suspension or disbarment for professional misconduct, or an involuntary transfer to inactive status.

Rule 8.8 Petition To Review Adverse Recommendation.

Not later than 28 days after the Bar files an adverse recommendation regarding the applicant with the court, an applicant who desires to contest the Board's recommendation shall file with Disciplinary Counsel and the State Court Administrator a petition stating in substance that the applicant desires to have the case reviewed by the court. If the court considers it appropriate, it may refer the petition to the Disciplinary Board to inquire into the applicant's moral character and general fitness to practice law. Written notice shall be given by the State Court Administrator to the Disciplinary Board Clerk, Disciplinary Counsel and the applicant of such referral. The applicant's resignation, disbarment, suspension or inactive membership status shall remain in effect until final disposition of the petition by the court.

Rule 8.9 Procedure On Referral By Court.

On receipt of notice of a referral to the Disciplinary Board under BR 8.8, Disciplinary Counsel may appoint Bar Counsel to represent the Bar. Disciplinary Counsel or Bar Counsel shall prepare and file with the Disciplinary Board Clerk, with proof of service on the applicant, a statement of objections. The statement of objections shall be substantially in the form set forth in BR 12.5.

Rule 8.10 Answer To Statement Of Objections.

The applicant shall answer the statement of objections within 14 days after service of the statement and notice to answer upon the applicant. The answer shall be responsive to the objections filed. General denials are not allowed. The answer shall be substantially in the form set forth in BR 12.3. The original shall be filed with the Disciplinary Board Clerk with proof of service on Disciplinary Counsel and Bar Counsel. After the answer is filed or upon the expiration of the time allowed in the event the applicant fails to answer, the matter shall proceed to hearing.

Rule 8.11 Hearing Procedure.

Titles 4, 5 and 10 shall apply as far as practicable to reinstatement proceedings referred by the court to the Disciplinary Board for hearing.

Rule 8.12 Burden Of Proof.

An applicant for reinstatement to the practice of law in Oregon shall have the burden of establishing by clear and convincing evidence that the applicant has the requisite good moral character and general fitness to practice law and that the applicant's resumption of the practice of law in this state will not be detrimental to the administration of justice or the public interest.

Rule 8.13 Burden Of Producing Evidence.

While an applicant for reinstatement has the ultimate burden of proof to establish good moral character and general fitness to practice law, the Bar shall initially have the burden of producing evidence in support of its position that the applicant should not be readmitted to the practice of law.

Rule 8.14 Reinstatement and Transfer--Active Pro Bono.

(a) Reinstatement from Inactive Status. An applicant who has been enrolled voluntarily as an inactive member and who has not engaged in any of the conduct described in BR 8.2(d) may be reinstated by the Executive Director to Active Pro Bono status. The Executive Director may deny the application for reinstatement for the reasons set forth in BR 8.2(d), in which event the applicant may be reinstated only upon successful compliance with all of the provisions of BR 8.2. The application for reinstatement to Active Pro Bono status shall be on a form prepared by the Bar for such purpose. No fee is required.

(b) Transfer to Regular Active Status. An applicant who has been on Active Pro Bono status for a period of five years or less and who desires to be eligible to practice law without restriction may be transferred to regular active status by the Executive Director in the manner provided in and subject to the requirements of BR 8.2. An applicant who has been on Active Pro Bono status for a period of more than five years may be transferred to regular active status only upon formal application pursuant to BR 8.1.

OREGON STATE BAR

Policy and Governance Committee Agenda

Meeting Date: April 27, 2012
From: Sylvia E. Stevens, Executive Director
Re: Section Charitable Donations

Action Recommended

Consider revising the OSB Bylaw 15.401 as it relates to charitable donations by sections.

Background

OSB Sections are authorized to make charitable donations only with the prior approval of the Executive Director. The ED, in turn, may approve donations only where the contribution “is related to the purposes for which the section exists.”¹ Pursuant to OSB Bylaw 15.1, “Sections are intended to provide bar members who share particular interests an opportunity to develop and improve skills and to provide a forum for communication and action in matters of common interest.”

For sections that are not entirely self-supporting, charitable donations must also be to organizations or causes where the donee can show that the donation is consistent with the “limitations” in Bylaw 12.1,² the “guidelines” for the bar’s legislative and policy activities. The guidelines are an expression of permitted uses for mandatory license fees under the doctrine of *Keller v. State Bar of California*, 499 US 1,111 SCt 2228 (1990), which requires that the fees only be used for activities that are germane to the purposes for which the bar exists. According to ORS 9.080, those purposes are “advancing the science of jurisprudence” and “improving the administration of justice.”

¹ OSB Bylaws Subsection 15.401 Donations:

Sections may make donations to charitable causes only with prior approval of the Executive Director. The Executive Director will allow such donations only on a showing by the prospective donee that the donation of section funds to the charitable entity is related to the purposes for which the section exists. For sections that are not entirely self-supporting, as described in Article IX, Section 5(B) of the Standard Section Bylaws, the prospective donee must also show that the donation fits within the limitations set forth in Section 12.1 of the Bar’s Bylaws.

² OSB Bylaws Section 12.1:

Bar legislative or policy activities must be reasonably related to any of the following subjects: Regulating and disciplining lawyers; improving the functioning of the courts including issues of judicial independence, fairness, efficacy and efficiency; making legal services available to society; regulating lawyer trust accounts; the education, ethics, competence, integrity and regulation of the legal profession; providing law improvement assistance to elected and appointed government officials; issues involving the structure and organization of federal, state and local courts in or affecting Oregon; issues involving the rules of practice, procedure and evidence in federal, state or local courts in or affecting Oregon; or issues involving the duties and functions of judges and lawyers in federal, state and local courts in or affecting Oregon.

Section donations to the Campaign for Equal Justice and the Classroom Law Project have long been permitted (and, in fact, encouraged). Other approved recipients have been added to the list (see attached) as requests were made by sections. While most of the recipients have some connection to the science of law and the administration of justice, it is difficult to always see a connection to the purposes for which a section exists. The lack of clear standards on that last point suggest (and recent practice bears this out) that nearly every section request is granted without much analysis. The process would have more integrity if the bylaw relating to section donations offered better guidance.

No section is entirely self-supporting, so all are required to abide by the *Keller*-based limitations in Bylaw 12.1. Further limiting donations to those that are connected to the section's mission may not be necessary. A look at the list of approved recipients suggests that the requirement has been interpreted loosely over the years. Assuming, for instance, that the donation to the Lewis & Clark Small Business Clinic came from the Business Law Section, it is not clear how that donation advances the section's purpose of "improving skills" or "action in matters of common interest" to section members. On the other hand, the donation provides greater avenues to legal services for small business owners, which serves a bar-wide commitment to access to justice. It is more properly the province of a section to decide what causes to support, so long as they don't violate Bylaw 12.1.

I suggest amending Bylaw 15.4011 as follows:

Sections may make donations to charitable causes or organizations only with prior approval of the Executive Director. The Executive Director will allow such donations ~~only~~ on a showing by the section prospective donee ~~that the donation of section funds to the charitable entity is related to the purposes for which the section exists. For sections that are not entirely self-supporting, as described in Article IX, Section 5(B) of the Standard Section Bylaws, the prospective donee must also show~~ that the donation ~~fits within the limitations~~ is germane to the Bar's purposes as set forth in Section 12.1 of the se Bar's Bylaws. The Executive Director will maintain a list of approved recipients.

List of Approved
Charitable Contributions

Any section making a donation to a charitable group can only do so with the approval of the Executive Director. The Director will only allow donations on the showing by the prospective donee that the donation of section funds to the charitable entity is related to the purpose for which the section exists. The following groups have been approved:

Allen Hein Scholarship Fund at NW School of Law of Lewis & Clark College

Campaign for Equal Justice

Carlton Snow scholarship fund

Chemawa Student Association

Classroom Law Project

Federal Circuit Bar Associations Charitable and Educational Fund - FCBA

Harry Chandler scholarship fund

Legal Aid Services of Oregon

Lewis & Clark Small Business Clinic

Multnomah County Probate Advisory Committee

National Bar Assoc. – Oregon Chapter

National Council on Juvenile and Family Court Judges

NAYA – Native American Youth Association

OMLA (Oregon Minority Lawyers Association)

OLIO (Opportunity for Lawyers in Oregon)

Oregon Lawyer Assistance Foundation (OLAF)

Oregon Lawyers Against Hunger

Peacemakers

St. Andrews Legal Clinic

Section scholarships to 3 law school for students earning the highest grade on the final exam i.e., Securities Section award to securities students.

Updated 3/12

OREGON STATE BAR

Policy and Governance Committee Agenda

Meeting Date: April 27, 2012
From: Sylvia E. Stevens, Executive Director
Re: Refunding Fees upon Death of a Member

Action Recommended

Consider whether to amend Bylaw 6.4 regarding refunds upon death to conform to customary practice.

Background

OSB Bylaw 6.4 provides, in pertinent part:

No part of the membership fees will be rebated, refunded or forgiven by reason of death, resignation, suspension, disbarment or change from active to inactive membership after January 31.

Notwithstanding the unequivocal language in the bylaw, it has come to my attention that accounting department staff has for many years given a prorated refund of annual fees upon learning that a member had died. None of the accounting staff knows the history of the practice, except that the staffer who has been here the longest (23+ years) says "we've always done it this way". Recently, the accounting manager scaled back the practice to only make a refund on request and only when it is clear that the person making the request is entitled to the funds.

The accounting department isn't opposed to making refunds in proper circumstances, but is uncomfortable doing it in violation of a long-established (albeit ignored) bylaw prohibition. If the Committee supports a change, I suggest the following to replace the relevant language:

No part of the membership fees will be rebated, refunded or forgiven by reason of [death,] resignation, suspension, disbarment or change from active to inactive membership after January 31. A prorated refund will be allowed by reason of a member's death upon a written request from a duly appointed personal representative or other person entitled to receive the funds.

OREGON STATE BAR
Policy and Governance Committee

Meeting Date: March 19, 2012
Memo Date: March 30, 2012
From: Oregon Law Foundation Board
Re: Centralized Legal Notice System

Action Recommended

This memo is informational only.

Background

OBJECTIVE: Create a website owned by the Oregon State Bar, at which all legal notices required under state law would be made available free of charge and in a searchable format to the public, the net revenue of which website would be allocated to the Oregon Law Foundation (OLF) for distribution according to its charitable formulae.

WHY MOVE TO A SYSTEM OF ONLINE LEGAL NOTICES: The current system in which legal notices are published in newspapers is both costly and ineffective. Persons and businesses who must publish legal notices in newspapers incur significant costs, often running into the thousands of dollars for each individual legal notice. Some local governments, which must publish a variety of legal notices regarding governmental meetings and actions (see, e.g., ORS § 305.583(9)), spend considerable sums publishing these required legal notices. In the case of legal notices published by private businesses, such as banks or construction firms, the costs of publishing these notices are passed along to customers; in the case of legal notices published by county and local governments, those costs are passed on to taxpayers in the form of higher taxes.

Equally disturbing, legal notices published in newspapers are often never viewed by the persons who might be interested or affected by the actions that are the subject of the notices. Indeed, many of these legal notices are published in newspapers with small circulations in which it is highly unlikely that interested parties will ever see or learn of the notice.

Moreover, the Legislature did not create the newspapers' monopoly because it wished to subsidize the newspaper industry but because, for most of Oregon's history, newspapers were the best way to alert the public of important issues and developments.

That assumption, which is the entire rationale for requiring publication of legal notices in newspapers – no longer holds true in the 21st Century. More and more individuals seek information through online sources. Correspondingly, newspaper circulation has dwindled substantially in the past decade. As a result of these two, mutually reinforcing phenomena, newspaper publication is increasingly unlikely to alert members of the public of the activities or developments that are the subject matter of the required legal notices. In short, relying on newspapers to provide a forum for the dissemination of important legal notices no longer makes sense.

By centralizing legal notices on a single, online website, costs to advertisers would be reduced (saving affected businesses and taxpayers millions of dollars per year in advertising costs). In addition, a centralized online system would make it easier for individuals and businesses to find or be made aware of notices that affect or interest them. In short, an online notice system would be both more efficient and more effective.

WHY DOES THE SYSTEM NEED TO BE CENTRALIZED? In order to ensure that the public would be able to easily find legal notices in which they are interested, all legal notices would have to be published in one, central location. If there were multiple websites (or newspapers as there are now), members of the public would not know which website to access. Indeed, for those notices whose publication is required by due process, the failure to centralize the online publication of such notices would arguably raise concerns under the Due Process Clause of the Fourteenth Amendment.

WHY OSB SHOULD BE THE ENTITY TO SET UP AND RUN AN ONLINE LEGAL NOTICE WEBSITE: For three reasons. First, the bar is the most natural entity to own and operate a centralized legal notices website. Legal notices are, by definition, uniquely associated with the legal profession. They are typically created by lawyers and have critical due process impact on the public. Who better to understand and enforce the public's due process rights than lawyers. Moreover, part of the problem with the current, newspaper-based system is that so many legal notices are never seen or read by the parties to which they are ostensibly addressed. An OSB-owned website would be the most natural place for lawyers both to post and to search legal notices. As such, it would be much more likely that

notices posted on such a website would reach their intended audience, thereby assisting in the administration of justice in Oregon.

Second, as discussed in more detail below, a centralized, online legal notice website would generate a significant amount of net revenue. It is precisely because of the amount of revenue that is at stake that newspapers or other for-profit enterprises have an incentive to maximize profits which come at the cost of tax payers and consumers. Hence, the online legal notices website should be owned by a not for profit entity, such as the bar. Indeed, it is hard to imagine another not for profit entity that would be better suited to own and operate an online, legal notices website other than the bar. In addition an important element of a legal notice system is that notices be published in a forum independent of the government such as a neutral third party to ensure that the notice delivery requirements are followed. The bar is a public corporation funded by membership and program fees. It is not a state agency and does not receive any financial support from the state's general fund. To that end it is an objective third party with no economic stake in the system making it the ideal neutral party.

Third, by operating the legal notices website, the bar would be positioned, via the Oregon Law Foundation, to provide funds for legal services for the benefit of needy Oregonians. Affiliated with the bar, OLF helps fulfill the bar's mission of increasing access to justice in Oregon. As in the 1980s, when the bar realized that the interest on lawyer trust accounts provided a potential revenue source for legal aid programs and assigned the OLF to serve as the organization to collect and distribute IOLTA income, the requirement to publish legal notices likewise creates a large potential source of revenue that could be used to fund legal aid services. Although the state's IOLTA program provides significant assistance to legal aid services in Oregon, the drop in interest rates witnessed in the past four years has forced the Oregon Law Foundation to slash the amount of money that it awards to grantees by over 66% during that time. The income generated from a bar-owned legal notices website would allow OLF both to diversify its income sources (thereby making it less sensitive to interest rate changes) and, more importantly, to increase the amount of money that it is able to distribute each year to eligible programs.

HOW SUCH AN ONLINE SYSTEM WOULD WORK: Persons or entities who are required by law to give the public notice of proposed actions (such as public meetings, foreclosures, probating of wills, etc.) would send the proposed notice to the online website (either electronically or via mail), which would then post the notice on the website in an easily searchable format for the required time period for that type of notice. The website would be free to the public, who could search the posted notices free of charge. The persons or businesses who post the notices, however, would be charged a reasonable fee for publishing the notice, just as newspapers do currently.

Such a centralized online system would likely generate significant income for the bar. An informal study conducted last fall by an Oregon attorney, John Gear, estimated that Oregon newspapers receive approximately \$30 million per year to publish legal notices required under state law. Assuming that the \$30 million figure is in the general ballpark, an online website could easily charge less than the newspaper do now (because, unlike a newspaper, the website would not have to purchase newsprint or hire many employees to operate the endeavor). Preliminary investigations as to what it would cost to create and maintain the website suggest that it would cost approximately \$100,000 to set up the website and perhaps that same amount per year to maintain it. If the website were to charge one-third of what newspapers currently charge, it would stand to generate potentially as much as \$10 million in gross revenue per year, which would produce a net income of approximately \$9.9 million per year.

In addition to this publication revenue, additional revenue could also be generated by setting up the website to allow for individuals who wish to be notified when a notice naming a particular person, property, or business to purchase an “alert me” service. For a fixed fee covering a limited period of time, the website would email the subscriber to alert them whenever a legal notice with a particular person, property, or business is named in the notice. Because such a service is not currently offered by Oregon newspapers, the likely revenue stream from such subscriptions is difficult to estimate.

WHAT NEEDS TO BE DONE:

PHASE ONE (Legislative Changes): Currently, a number of sections in the Oregon Revised Statutes require regulated entities to publish notices in a newspaper of general circulation. As a consequence, newspapers possess a legislatively-conferred monopoly on the publication of these notices. In order to set up a bar-owned and operated online legal notice system, it would be necessary to persuade the Legislature during the 2013 Regular Session to amend these statutory provisions.

Legislation to establish an online legal notices system would need to comprise two elements. First, a new subchapter would need to be added to Chapter 193 of the ORS, which governs publication of legal notices, to expressly provide for online publication through the OSB. This subchapter would authorize OSB to create a centralized, online website for the publication of legal notices, permit OSB to charge persons who submit such notices for publication a reasonable charge for such publication, and outline the basic guidelines for the publication of such notices (how long must OSB keep them online, etc.). In addition, the statute would provide that the net revenue from such website be provided to OLF to, in turn, fund access to justice.

Second, all of the pertinent statutes throughout ORS that require newspaper publication of a legal notice would have to be amended to provide that all such legal notices be “published” in the OSB Legal Notices Website. For example, consider the statutory requirement for banks and other lenders that wish to foreclose on real property to provide notice of the foreclosure sale to the public. As currently written, ORS § 86.750(2)(A) requires trustees under a deed of trust to publish notice of the foreclosure sale: “a copy of the notice of sale must be published in a newspaper of general circulation in each of the counties in which the property is situated once a week for four successive weeks. The last publication must be made more than 20 days prior to the date the trustee conducts the sale.” In recent years, this particular statutorily-conferred monopoly has become especially lucrative for newspapers, so much so that real estate trust companies have recently begun purchasing small-

town newspapers to reduce their publication costs – see the Oregonian article from Jan. 15, 2012

([http://www.oregonlive.com/business/index.ssf/2012/01/northwest trustee squeezes mor.html](http://www.oregonlive.com/business/index.ssf/2012/01/northwest_trustee_squeezes_mor.html)). Under this proposal, ORS § 86.750(2)(A) would be amended to read something like the following: “... a copy of the notice of sale must be transmitted to the Oregon State Bar, which shall include such notice on its legal notice website as provided in ORS § 193.____ for a period of no less than 28 days, the last day of which period must be at least 20 days prior to the date the trustee conducts the sale.”

PHASE TWO (Business Startup): Create the OSB Legal Notices website in time for it to be up and running as of the effective date of the statutory changes.

A. Place an RFP with website developers to create a website that would permit individuals to search all legal notices by name, subject, or location. The website could also sell subscription services to individuals and lawyers, in which, for a fixed fee, the website would automatically alert the individual or lawyer by email if a legal notice were posted that met a specified search parameter.

B. Once the website is up and running, OSB would designate a person to manage the website to ensure its continual operation and to answer questions by outside parties.

C. Advertise the website. It will be important to undertake an advertising campaign to assure that both the entities using the website to place notices and the public searching for notices have knowledge of the website’s existence.

LIKELY OBJECTIONS AND THE RESPONSES THERETO:

(1) This is stealing business from newspapers and will therefore be the end of many newspapers. Newspapers are likely to object to this proposal on the ground that it will eliminate a substantial category of their advertising revenue, thereby imperiling many marginal newspapers. While that is undoubtedly true, it is also beside the point.

Newspapers have been able to generate that income solely by virtue of the legislatively-conferred monopoly that the Oregon Legislature has given them. There is nothing sacrosanct about that monopoly. In fact, newspapers have abused that monopoly by charging high prices for the publication of those notices. Those high costs, in turn, are passed along to consumers and taxpayers, both of whom must ultimately foot the bill for the cost of these notices.

(2) Due process requires that legal notices be published in newspapers. The U.S. Supreme Court has never held that legal notices must be published in newspapers; rather, due process requires only that any notice, other than personal notice, be undertaken in a manner “reasonably calculated” to reach affected persons or entities. True, publication in newspapers has long been held to provide a way of complying with due process when personal notice is impossible or unavailable. At a time when newspapers were the only widely circulated medium of communication, newspapers were perhaps the best mechanism for reaching individuals who could not be identified personally or for giving notice to the public generally. These days, however, with declining newspaper circulation, it is possible that newspaper publication no longer satisfies this due process requirement. More importantly, though, online publication on a centralized website available free of charge to the public would certainly provide a superior means of providing notice both to individuals potentially affected by the action that is the subject matter of the notice and to the public generally. Unlike newspaper publication, the online system would be free to consumers and more readily accessible to the public at large.

Newspapers will argue that a web based legal notice system is not readily accessible to those members of the public not online so the due process requirement is not met. However the same holds true for those members of the public who do not subscribe to a newspaper. Both those without online access and those without a newspaper subscription can go to their local library to gain either online or newspaper access for free.

SUMMARY: The current statutory system provides newspapers with a legislatively-conferred and -created monopoly for the publication of legal notices. This monopoly is both costly and incomplete. It is costly because, in many towns and cities where there is only one

newspaper, that newspaper is able to charge above-market advertising rates for individuals, businesses, or local governments that must publish legal notices. It is incomplete because individuals or businesses that wish to learn of some action that is the subject of the legal notice may not subscribe to the relevant newspaper or read the pertinent section of the newspaper on the day that the legal notice is published.

By moving to a centralized, online system for the publication of legal notices, costs to businesses and taxpayers could be reduced, and due process concerns could be more easily met. Moreover, as the principal, not for profit organization dedicated to serving and bolstering the system of justice in Oregon, OSB is best positioned to assume this role, and the income generated by the website could then be used by OLF to help fund legal services for low-income Oregonians.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: March 30, 2012
Memo Date: March 5, 2012
From: Ann Fisher, Policy & Governance Committee Chair
Re: Amendments to OSB Bylaws 2.101, 2.3, 5.1, 9.1, 18.100, 18.101, 24.400 & 25

Action Recommended

The Policy & Governance Committee recommends that the Board adopt the attached housekeeping amendments to the Oregon State Bar Bylaws.

Background

The attached proposed bylaw amendments address recent legislative changes to the State Bar Act, correct typographical errors in the bylaws, and implement Board changes to the Law Student Associate Membership Program.

ORS 9.025 was amended in 2009 to increase the composition of the Board from twelve to fourteen resident active members of the bar. OSB Bylaws 2.3, 18.100 and 18.101 should be amended to complete implementation of this statutory change and changes in Board regions.

ORS 9.040 was amended in 2011 to eliminate the nominating petition requirement when filing as a candidate for any bar election. In order to complete implementation of this statutory change, OSB Bylaws 2.101, 5.1 and 9.1 should be amended to replace all references to the nominating petition with the new candidate statement requirement.

Bylaw 24.400(b) erroneously refers to RPC 8.1(c) when referring to the mandatory reporting obligation. The reporting obligation is found at RPC 8.3(a).

In August 2011, the BOG approved waiving the per member assessment fee charged to sections when they allow law students to join their section at no charge. Member Services is working to update forms and make changes to the Law Student Associate Membership Program materials. Bylaw changes are also necessary to give the bar more flexibility in determining what services to provide Law Student Associate Members.

Conclusion

The attached proposed amendments should be presented to the Board with a recommendation that they be adopted.

Article 2 Board of Governors

Section 2.1 Duties and Responsibilities

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Subsection 2.101 Election

(a) The election of lawyer-members of the Board will be conducted according to Article 9 of the Bar's Bylaws.

(b) ~~Nominations-Candidate statements~~ for the office of Governor from a region must be in writing. The Executive Director will prepare the forms for ~~these nominations~~the candidate statements and supply the forms to the applicants. Applicants must complete and file the form with the Executive Director by the date set by the Board. The Executive Director must conduct elections in accordance with the Bar Bylaws and the Bar Act.

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Section 2.3 Public Members

In addition to the ~~12~~ resident active members of the Bar required by ORS 9.025, four public positions exist on the Board of the Bar.

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Article 5 Oregon State Bar Delegates to the American Bar Association House of Delegates

Section 5.1 Selection

~~Nominations-Candidate statements~~ for the House of Delegates of the American Bar Association ("ABA") must be in writing. The Executive Director will prepare forms for ~~these nominations~~the candidate statements and supply the forms to applicants. The applicants must file the forms with the Executive Director not more than 90 nor less than 30 days before the election held in conjunction with the Oregon State Bar House of Delegates election. Election of ABA delegates must be conducted according to Article 9 of the Bar's Bylaws. The ABA delegates will be elected from the state at large and the term of office is two years. ABA delegates must be in-state active members of the Bar. The Board must fill a vacancy in the office of ABA delegate due to a delegate's resignation, death or any other reason in the same manner as provided in ORS 9.040(2) for board members.

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Article 9 Election Procedures

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 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~~candidate statements 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.

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 candidate statement to the executive director of the Bar at least 30 days before the election.

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 candidate statement to the executive director of the Bar at least 30 days before the election.

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Article 18 Discipline

Section 18.1 State Professional Responsibility Board

Subsection 18.100 Duties

The State Professional Responsibility Board ("SPRB") is authorized to exercise its powers and authority pursuant to statute, the rules of procedure and the Bar's bylaws. The SPRB will meet regularly pursuant to the call of the chairperson to consider complaints and other matters within its jurisdiction. The SPRB will receive the counsel and advice of the Office of Disciplinary Counsel of the Bar. Disciplinary Counsel will regularly report to the Board of Governors regarding actions taken by the SPRB. The SPRB may proceed with business if a quorum of ~~five-six~~ members is present at any meeting and act by a vote of a majority of those present.

Subsection 18.101 Composition

The SPRB will consist of ~~seven-eight~~ resident active members of the Bar and two at large public members appointed by the Board of Governors. The Board of Governors annually will appoint one member of the SPRB to act as its chairperson. All lawyer members of the SPRB are appointed for terms of not more than four years from the following regions: two members from region five and one member from each of the other Board of Governors regions. The two public members are appointed for terms of not more than four years. No member may serve more than four years. The Board of Governors may replace members of the SPRB as the need arises.

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Article 24 Attorney Assistance

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Section 24.4 State Lawyers Assistance Committee Review and Intake

Subsection 24.400 Complaints and Referrals

(a) Any person may submit directly to SLAC, either orally or in writing, the name of any lawyer whose performance or conduct appears to be impairing the lawyer's professional competence or ability to practice law. A referral of a lawyer to SLAC should include a description of the circumstances and copies of any relevant documents. SLAC members who are contacted regarding a complaint or referral will obtain preliminary information and refer the matter to the chairperson. The chairperson will confirm receipt of a referral in a letter to the person making the referral. The letter must contain a disclosure substantially as follows:

"We appreciate your interest in bringing this matter to our attention. Our Committee will respond by contacting the lawyer to discuss the problem. It is important for you to understand, however, that the purpose of this Committee is to provide confidential assistance to lawyers who are impaired in the practice of law for reasons such as drug or alcohol problems, emotional problems or lack of competence. For that reason, we focus our work on determining the specific assistance that the lawyer needs and making sure that the lawyer follows a treatment or assistance program. This Committee does not deal with lawyer discipline issues. All information we receive from you will be kept confidential and will not be reported to the bar disciplinary authorities. If you believe that this lawyer has acted improperly and you wish to make a complaint to the bar, you should write to Client Assistance Office, Oregon State Bar, P.O. Box 231935, Tigard, OR 97281."

(b) If a referral is received from a member of the Bar, the letter required in paragraph (A) must also contain the following statement:

"If you are a member of the Bar, please review Oregon RPC ~~8-1(e)~~8.3(a) to determine whether you may have an independent obligation to contact the Bar."

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Article 25 Law Student Associates

Any student currently enrolled in an Oregon law school may become a Law Student Associate of the Bar. Law Student Associates are not members of the Bar and, except as provided in this article, do not have any of the rights and responsibilities of members. Law Student Associates must pay an annual fee established by the Executive Director in an amount sufficient to cover the cost of providing information and services to Law Student Associates. ~~Law Student Associates will receive a subscription to the Bulletin, will be informed of the Bar sections that permit Law Student Associates and will be informed of CLE seminars that the CLE Seminars Manager determines are relevant to law students. Other s~~Services and information ~~may be~~ provided ~~to Law Student Associates will be as~~ determined by the Executive Director.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: April 27, 2012
From: Steve Larson, Public Affairs Committee Chair
Re: Law Improvement Proposals

Consider Public Affairs Committee request to approve 2013 OSB package of Law Improvement proposals for introduction.

Background

Attached is a list of legislative proposals from bar groups reviewed by the Public Affairs Committee to ensure they meet the OSB guidelines with respect to legislation, OSB Bylaw 12. Once approved by the board, these bills will be submitted to Legislative Counsel's office for bill drafting purposes and then pre-session filed for the 2013 legislative session.

Direct link to the proposals: <http://osblip2013.homestead.com/index.html>

Oregon State Bar

2013 Law Improvement Proposal Overview

Board of Governors:

1. Custodianship of Law Practice
 - Custodianship of Law Practice – This bill would permit an individual who is appointed as a custodian of a nonperforming law practice to receive first priority in payment for reasonable compensation and expenses in a case where assets are insufficient to meet all obligations.
2. Unlawful Practice of Law
 - Unlawful Practice of Law – Amends the Unlawful Trade Practices Act to explicitly make the unlawful practice of law an unlawful trade practice. Amends ORS 646.608
3. Lawyers for Veterans
 - Notice of SCRA in Administrative Hearings – Amend ORS 183.413 to require notice of administrative hearings to include a statement that the Servicemembers Civil Relief Act applies to such proceedings and affords active duty servicemembers the right to defer such hearings.
 - Increase Judicial Discretion in Sentencing Certain Veterans – Allow judges increased discretion to sentence certain veterans to probation and treatment rather than to incarceration. To be eligible for such sentencing, the veteran must suffer from Post Traumatic Stress Disorder or from Traumatic Brain Injury.
4. OLF
 - Interest from Escrow Accounts – Requires that escrow trust accounts held by title companies be set up according to a system similar to lawyer’s IOLTA accounts, with interest going partially to funding legal services.
 - Centralized Legal Notice System – Requires that the Oregon State Bar create and maintain a centralized online system that lawyers, government entities, and other persons may use to post statutorily required legal notices. Posting to this system eliminate the need for the person to run a notice in the newspaper. Any net revenue from this system would go to fund legal services.

OSB Sections:

5. Administrative Law
 - Fastcase Pilot Project – Requires state agencies to maintain final orders (as defined in ORS Chapter 183) in a digital format. This requirement is being proposed in order to facilitate the inclusion of agency final orders in online electronic databases such as Fastcase.

6. Animal Law

- Warrantless Entry for Animal Welfare – Amends existing law to clarify that peace officers may enter a premises, search and seize an animal without a warrant if they reasonably believe that it is necessary to prevent serious harm or to render aid to the animal. Peace officers are currently permitted to do this to safeguard “property”, which includes animals. However some jurisdictions are reluctant to exercise this authority without clearer statutory guidance. Amends ORS 133.033.

7. Business Law

- Remote-only Shareholder Meetings – Clarify existing law to make clear that it is permissible to hold shareholder meetings over a webcast or other electronic communications medium without the need for the meeting to be based in a physical location. Current law clearly allows shareholders to participate at a meeting via this type of technology, but references in statute to the “place” of the meeting make it unclear if a meeting can be conducted exclusively through such remote communication systems. Amends ORS Chapter 60.
- Equity Awards to Employees – The bill provides express authority for boards of directors to delegate to corporate officers the authority to grant equity awards to corporate employees. Current law is clear that boards may do this directly, but it is unclear as to whether they may delegate the authority to officers. Amends ORS 60.157.

8. Consumer Law

- Disclosure of Termination Fees – This bill amends the Unlawful Trade Practice Act and would require that at the time a contract is executed the contracting entity must conspicuously disclose the early cancellation fee and the total amount of the payments required to fulfill the entire contract. Amends ORS Chapter 646.

9. Debtor-Creditor

- Amended Notices of Sale – This bill would clearly define the duties of a trustee in a trust deed foreclosure when an initial sale has been lawfully stayed and the stay is then lifted. Amends ORS 86.755.
- Qualifications to Serve as Trustee – This bill would allow another attorney in the trustee attorney’s firm to act on behalf of the trustee when the trustee is unavailable to act as trustee. Under current law, matters that must be undertaken by the trustee must wait until the trustee is again available, or a new trustee is appointed. Amends ORS 86.790.

10. Elder Law

- Protective Proceedings – Makes clarifications to the rules regarding attorney’s fees and costs in protective proceedings cases. Amends ORS 125.095.

11. Estate Planning and Administration

- Uniform Trust Code Revisions – Makes numerous technical changes to the Oregon Uniform Trust Code. Amends ORS Chapter 130.
- Digital Assets – Establishes definitions and rules for the administration, maintenance and disposition of digital assets upon a decedents’ death. Amends ORS Chapters 114, 125 and 130.

12. Family Law

- Housekeeping (ORS Ch 107 and 109) – This bill makes several changes to ORS Chapters 107 and 109 in order to clarify several ambiguities and errors. The issues covered include taxability of spousal support, applicability of statutory restraining orders, the proper location to file filiation proceedings, and the elimination of the term “suit” in certain contexts.
- Life Insurance – This bill provides for the award of attorneys fees in certain cases involving court ordered life insurance policies.
- Survivor Benefit – This bill provides for protections of survivor benefits for former spouses of members in a public retirement plan in cases where the spouses divorce prior to the death of the insured party.

13. Juvenile Law

- Correction to Erroneous Statutory Reference – ORS 419B.100(1) (Jurisdiction in juvenile dependency proceedings) refers to “subsection 6” in the body of the text. However, this subsection was eliminated by a bill in 2011. In 2011, the legislature removed the former subsection3, dealing with parental treatment by prayer, leaving only 5 subsections. This bill would correct this erroneous reference.

OSB Committees:

14. Uniform Criminal Jury Instructions

- Technical Correction to Uniform Criminal Jury Instructions – Corrects a longstanding conflict between the current Uniform Criminal Jury Instructions and the Oregon Supreme Court’s decision in *Ireland v. Mitchell*, 226 Or 286, 290, 359 P2d 894 (1961). The statute requires that a judge inform jurors that they must distrust a witness that is false in one part of their testimony, whereas the court has ruled that jurors may distrust such a witness, but are not obligated to do so. Common practice is to abide by the Supreme Court’s ruling. Amends ORS 10.095.

OREGON STATE BAR
Legislative Proposal
Part I – Legislative Summary

RE: ASSUMING PRACTICE OF NONPERFORMING ATTORNEY; ORS 9.705 – 9.755

Submitted by: Oregon State Bar General Counsel

Legislative Contact(s): Helen Hirschbiel
Phone: (503) 431-6361
E-mail: hhirschbiel@osbar.org

1. Does this amend current law or program?

- a. Yes Amends ORS 9.735
b. No

2. PROBLEM PRESENTED (including level of severity):

When a lawyer either abandons his practice or is incapable to devoting the time and attention necessary to his practice, the OSB may petition the court to take jurisdiction over the lawyer’s law practice. When the court takes jurisdiction, it appoints a custodian to take possession and control of the law practice and take steps to protect the interests of the lawyer’s clients and the public. The custodian is entitled to a judgment for its reasonable compensation and expenses in acting as custodian, and that judgment is a lien against all nontrust funds (that is, non-client funds) and other property of the law practice. See ORS 9.705—9.725.

The problem is that the custodian’s lien for its expenses “is subordinate to nonpossessory liens and security interest created prior to its taking effect.” ORS 9.735. This means that the custodian gets paid for his efforts to clean up the lawyer’s abandoned practice only after other creditors with mere security interests and nonpossessory liens. As a practical matter, this means that the custodian is highly unlikely to be reimbursed for expenses, let alone compensated for his time and effort.

3. SOLUTION:

Give the custodian first priority in payment for its reasonable compensation and expenses.

4. PUBLIC POLICY IMPLICATION of this proposed legislative change:

5. Could the problem be addressed through a NON-LEGISLATIVE SOLUTION, such as administrative rule or education?

No.

6. COULD ANOTHER SECTION OR GROUP MORE APPROPRIATELY INTRODUCE THE BILL? If so, have you suggested it to the section or group?

No.

7. IDENTIFY THE GROUP OR CONSTITUENCIES THAT WOULD BE MOST IMPACTED or interested in this change. Who would support it and who would oppose it?

8. Has this been introduced in a prior session?

No.

OREGON STATE BAR
Legislative Proposal
Part II – Legislative Language

Please provide your legislative language below:

9.735 Compensation of custodian. The court shall enter a judgment awarding reasonable compensation and expenses to any attorney who acts as custodian under ORS 9.705 to 9.755. The judgment shall be against the affected attorney or the estate of the affected attorney. The judgment is a lien upon all nontrust funds, office furnishings, supplies, equipment, library and other personal property used in the law practice of the affected attorney retroactive to the date of filing of the petition for jurisdiction under ORS 9.705 to 9.755. The judgment lien takes priority over all general unsecured creditors, nonpossessory liens and unperfected security interests.

OREGON STATE BAR
Legislative Proposal
Part I – Legislative Summary

RE: AMEND THE UNLAWFUL TRADE PRACTICES ACT (“UTPA”), ORS 646.608 et seq. TO EXPLICITLY INCLUDE UNLAWFUL PRACTICE OF LAW AS AN UNLAWFUL TRADE PRACTICE

Bar Group: Unauthorized Practice of Law Task Force

Task force members include 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. The Task Force was staffed by Helen Hierschbiel.

Submitted by: Amber Hollister

Date: March 28, 2012

Executive Committee Approval? **Yes** **Date: August 18, 2011** **No**

See Task Force Report.

This is a BOG Approved recommendation.

Legislative Contact(s): Amber Hollister
Phone: (503) 431-6312
E-mail: ahollister@osbar.org

Contact: Helen Hierschbiel
Phone: (503) 431.6361
E-mail: hhierschbiel@osbar.org

- 1. Does this amend current law or program?**
- a. Yes **Amends Unlawful Trade Practices Act, ORS 646.608 et seq., to provide that a violation of ORS 9.160 is an unlawful trade practice.**
 - b. No

2. PROBLEM PRESENTED (including level of severity):

The OSB is charged with prosecuting the unlawful practice of law, but has limited resources to pursue actions against individuals who engage in the unlawful practice of law. The unlawful practice of law often causes significant harm to victims. Nonlawyers may charge thousands of dollars to provide substandard services; victims may lose cases or waive important claims because of poor work by nonlawyers. It is not unusual for a victim of the unlawful practice of law to have to hire an attorney to clean up the mess created by a nonlawyer.

The OSB does not allocate any funds specifically for enforcement of the UPL statute, ORS 9.160. 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.

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.

For all of these reasons, the unlawful practice of law is infrequently prosecuted, and prosecution is limited to the most egregious cases. The bar, at most, brings a few cases a year for the unlawful practice of law.

3. SOLUTION:

Amend the UTPA, ORS 646.608 et seq., to explicitly include the unlawful practice of law as an unlawful trade practice.

Amending the UTPA would provide 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.

4. PUBLIC POLICY IMPLICATION of this proposed legislative change:

Amending the UTPA to explicitly include the unlawful practice of law as an unlawful trade practice would be of benefit to victims of UPL. In particular, 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. By creating a private right of action, immigrants and other vulnerable persons would be able to seek compensation caused by notarios and others engaging in the unlawful practice of law.

5. Could the problem be addressed through a **NON-LEGISLATIVE SOLUTION**, such as administrative rule or education?

No.

The Department of Justice has had some success in obtaining decisions from circuit courts that the unlawful practice of law by notarios is an unlawful trade practice because notarios fail to deliver the legal services promised. ORS 646.607(b). But this requires proving that the notarios promised to deliver legal services and then failed to deliver those services because they were not properly licensed to practice law. Amending the UTPA to explicitly include the unlawful practice of law would remove significant evidentiary and procedural barriers to efforts by both public and private entities who wish to bring UTPA claims.

6. **COULD ANOTHER SECTION OR GROUP MORE APPROPRIATELY INTRODUCE THE BILL?** If so, have you suggested it to the section or group?

I have discussed this proposal with Assistant Attorney General Diane Schwartz Sykes, who has indicated some interest in the bill. We may wish to pursue a co-sponsorship with DOJ.

7. IDENTIFY THE GROUP OR CONSTITUENCIES THAT WOULD BE MOST IMPACTED or interested in this change. Who would support it and who would oppose it?

Likely supporters include the Department of Justice and the immigration bar (including groups such as AILA). DCBS may also support this proposal.

Likely opposition would come from debt collection agencies and other industries who like to “walk the line” and whose practices may sometimes veer into unlawful practice of law.

OREGON STATE BAR
Legislative Proposal
Part II – Legislative Language

Please provide your legislative language below:

646.608 Additional unlawful business, trade practices; proof; rules. (1) A person engages in an unlawful practice when in the course of the person’s business, vocation or occupation the person does any of the following:

- (a) Passes off real estate, goods or services as those of another.
- (b) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of real estate, goods or services.
- (c) Causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another.
- (d) Uses deceptive representations or designations of geographic origin in connection with real estate, goods or services.
- (e) Represents that real estate, goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, quantities or qualities that they do not have or that a person has a sponsorship, approval, status, qualification, affiliation, or connection that the person does not have.
- (f) Represents that real estate or goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used or secondhand.
- (g) Represents that real estate, goods or services are of a particular standard, quality, or grade, or that real estate or goods are of a particular style or model, if they are of another.
- (h) Disparages the real estate, goods, services, property or business of a customer or another by false or misleading representations of fact.
- (i) Advertises real estate, goods or services with intent not to provide them as advertised, or with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity.
- (j) Makes false or misleading representations of fact concerning the reasons for, existence of, or amounts of price reductions.
- (k) Makes false or misleading representations concerning credit availability or the nature of the transaction or obligation incurred.
- (L) Makes false or misleading representations relating to commissions or other compensation to be paid in exchange for permitting real estate, goods or services to be used for model or demonstration purposes or in exchange for submitting names of potential customers.
- (m) Performs service on or dismantles any goods or real estate when not authorized by the owner or apparent owner thereof.
- (n) Solicits potential customers by telephone or door to door as a seller unless the person provides the information required under ORS 646.611.
- (o) In a sale, rental or other disposition of real estate, goods or services, gives or offers to give a rebate or discount or otherwise pays or offers to pay value to the customer in consideration of

the customer giving to the person the names of prospective purchasers, lessees, or borrowers, or otherwise aiding the person in making a sale, lease, or loan to another person, if earning the rebate, discount or other value is contingent upon occurrence of an event subsequent to the time the customer enters into the transaction.

(p) Makes any false or misleading statement about a prize, contest or promotion used to publicize a product, business or service.

(q) Promises to deliver real estate, goods or services within a certain period of time with intent not to deliver them as promised.

(r) Organizes or induces or attempts to induce membership in a pyramid club.

(s) Makes false or misleading representations of fact concerning the offering price of, or the person's cost for real estate, goods or services.

(t) Concurrent with tender or delivery of any real estate, goods or services fails to disclose any known material defect or material nonconformity.

(u) Engages in any other unfair or deceptive conduct in trade or commerce.

(v) Violates any of the provisions relating to auction sales, auctioneers or auction marts under ORS 698.640, whether in a commercial or noncommercial situation.

(w) Manufactures mercury fever thermometers.

(x) Sells or supplies mercury fever thermometers unless the thermometer is required by federal law, or is:

(A) Prescribed by a person licensed under ORS chapter 677; and

(B) Supplied with instructions on the careful handling of the thermometer to avoid breakage and on the proper cleanup of mercury should breakage occur.

(y) Sells a thermostat that contains mercury unless the thermostat is labeled in a manner to inform the purchaser that mercury is present in the thermostat and that the thermostat may not be disposed of until the mercury is removed, reused, recycled or otherwise managed to ensure that the mercury does not become part of the solid waste stream or wastewater. For purposes of this paragraph, "thermostat" means a device commonly used to sense and, through electrical communication with heating, cooling or ventilation equipment, control room temperature.

(z) Sells or offers for sale a motor vehicle manufactured after January 1, 2006, that contains mercury light switches.

(aa) Violates the provisions of ORS 803.375, 803.385 or 815.410 to 815.430.

(bb) Violates ORS 646A.070 (1).

(cc) Violates any requirement of ORS 646A.030 to 646A.040.

(dd) Violates the provisions of ORS 128.801 to 128.898.

(ee) Violates ORS 646.883 or 646.885.

(ff) Violates ORS 646.569.

(gg) Violates the provisions of ORS 646A.142.

(hh) Violates ORS 646A.360.

(ii) Violates ORS 646.553 or 646.557 or any rule adopted pursuant thereto.

(jj) Violates ORS 646.563.

- (kk) Violates ORS 759.690 or any rule adopted pursuant thereto.
- (ll) Violates the provisions of ORS 759.705, 759.710 and 759.720 or any rule adopted pursuant thereto.
- (mm) Violates ORS 646A.210 or 646A.214.
- (nn) Violates any provision of ORS 646A.124 to 646A.134.
- (oo) Violates ORS 646A.095.
- (pp) Violates ORS 822.046.
- (qq) Violates ORS 128.001.
- (rr) Violates ORS 646.649 (2) to (4).
- (ss) Violates ORS 646A.090 (2) to (4).
- (tt) Violates ORS 87.686.
- (uu) Violates ORS 646.651.
- (vv) Violates ORS 646A.362.
- (ww) Violates ORS 646A.052 or any rule adopted under ORS 646A.052 or 646A.054.
- (xx) Violates ORS 180.440 (1) or 180.486 (1).
- (yy) Commits the offense of acting as a vehicle dealer without a certificate under ORS 822.005.
- (zz) Violates ORS 87.007 (2) or (3).
- (aaa) Violates ORS 92.405 (1), (2) or (3).
- (bbb) Engages in an unlawful practice under ORS 646.648.
- (ccc) Violates ORS 646A.365.
- (ddd) Violates ORS 98.854 or 98.858 or a rule adopted under ORS 98.864.
- (eee) Sells a gift card in violation of ORS 646A.276.
- (fff) Violates ORS 646A.102, 646A.106 or 646A.108.
- (ggg) Violates ORS 646A.430 to 646A.450.
- (hhh) Violates a provision of ORS 744.318 to 744.384, 744.991 and 744.992.
- (iii) Violates a provision of ORS 646A.702 to 646A.720.
- (jjj) Violates ORS 646A.530 30 or more days after a recall notice, warning or declaration described in ORS 646A.530 is issued for the children's product, as defined in ORS 646A.525, that is the subject of the violation.
- (kkk) Violates a provision of ORS 697.612, 697.642, 697.652, 697.662, 697.682, 697.692 or 697.707.
- (LLL) Violates the consumer protection provisions of the Servicemembers Civil Relief Act, 50 U.S.C. App. 501 et seq., as in effect on January 1, 2010.
- (mmm) Violates a provision of ORS 646A.480 to 646A.495.

- (nnn) Violates ORS 646A.082.
- (ooo) Violates ORS 646.647.
- (ppp) Violates ORS 646A.115.
- (qqq) Violates a provision of ORS 646A.405.
- (rrr) Violates ORS 646A.092.
- (sss) Violates a provision of ORS 646.644.
- (ttt) Violates a provision of ORS 646A.295.
- (uuu) Violates a povision of ORS 9.160.

OREGON STATE BAR
Legislative Proposal
Part I – Legislative Summary

RE: NOTICE OF SERVICEMEMBERS CIVIL RELIEF ACT (SCRA) RIGHTS IN ADMINISTRATIVE PROCEEDINGS

Submitted by: Lawyers for Veterans Steering Committee

Legislative Contact(s): Christopher Kent
Phone: (503) 220-0717
E-mail: ckent@kentlaw.com

1. Does this amend current law or program?

- a. Yes ORS 183.413**
b. No

2. PROBLEM PRESENTED (including level of severity):

Active duty servicemembers are protected from default in legal proceedings by the Servicemembers Civil Relief Act (SCRA). The act applies to administrative proceedings. Notices of administrative hearings do not contain notice to the parties of their rights under the SCRA to a stay of proceedings. A servicemember who does not appear at a hearing and loses by default may attempt to set the default order aside based on the SCRA after the fact, but that remedy is less than adequate.

3. SOLUTION:

Amend ORS 183.413 to require notices of administrative hearings to include a statement apprising the parties of the rights of active duty servicemembers under the SCRA.

4. PUBLIC POLICY IMPLICATION of this proposed legislative change:

Active duty servicemembers would receive more complete and accurate information about their rights.

5. Could the problem be addressed through a NON-LEGISLATIVE SOLUTION, such as administrative rule or education?

The Department of Justice might adopt such a provision in its Model Rules of Procedure for Contested Cases, OAR 137-003-0000 to 137-003-0700.

6. COULD ANOTHER SECTION OR GROUP MORE APPROPRIATELY INTRODUCE THE BILL? If so, have you suggested it to the section or group?

The Administrative Law Section may be interested in this proposal, but the concept has not been suggested to them. Consideration by the Department of Justice Model Rules Committee is unknown.

7. IDENTIFY THE GROUP OR CONSTITUENCIES THAT WOULD BE MOST IMPACTED or interested in this change. Who would support it and who would oppose it?

Active duty servicemembers would benefit by adoption of this requirement. The new notice requirement would not be burdensome, but agencies might object because hearings would have to be postponed.

8. Has this been introduced in a prior session?

No.

OREGON STATE BAR
Legislative Proposal
Part II – Legislative Language

Please provide your legislative language below:

Add a new subsection to ORS 183.413:

(2) Prior to commencement of a contested case hearing before any agency including those agencies identified in ORS 183.315, the agency shall serve personally or by mail a written notice to each party to the hearing that includes the following:

...

(p) Notice to parties that active duty servicemembers have the right to stay proceedings under the Servicemembers Civil Relief Act.

OREGON STATE BAR
Legislative Proposal
Part I – Legislative Summary

RE: JUDICIAL SENTENCING OPTIONS FOR VETERANS

Submitted by: Lawyers for Veterans Steering Committee

Legislative Contact(s): Christopher Kent
Phone: (503) 220-0717
E-mail: ckent@kentlaw.com

1. Does this amend current law or program?

- a. Yes**
b. No

2. PROBLEM PRESENTED (including level of severity):

Many veterans return from deployment suffering from Post Traumatic Stress Disorder (PTSD) or Traumatic Brain Injury (TBI), both of which can affect the veteran's behavior in unpredictable ways. The 2010 legislature enacted SB 999, which allows the diversion for servicemembers in criminal cases under certain circumstances. This diversion program seems to be underutilized. Veterans may find themselves in the criminal justice system, convicted of a crime and facing incarceration, when a more appropriate sentence would be probation with a treatment regimen.

3. SOLUTION:

Provide judges with authority to impose a sentence of probation on veterans who suffer from PTSD or TBI upon conviction of certain crimes. Instead of incarceration, such veterans would enter treatment

4. PUBLIC POLICY IMPLICATION of this proposed legislative change:

This measure could encourage district attorneys to use the veterans' diversion program more extensively.

5. Could the problem be addressed through a NON-LEGISLATIVE SOLUTION, such as administrative rule or education?

No.

6. COULD ANOTHER SECTION OR GROUP MORE APPROPRIATELY INTRODUCE THE BILL? If so, have you suggested it to the section or group?

The Criminal Law Section will be interested in this measure, but given the make-up of the group is unlikely to take a position on it.

7. IDENTIFY THE GROUP OR CONSTITUENCIES THAT WOULD BE MOST IMPACTED or interested in this change. Who would support it and who would oppose it?

The measure would probably be supported by veterans' service organizations and the criminal defense bar. District attorneys have opposed similar measures in the past.

8. Has this been introduced in a prior session?

- a. **Year: 2009 and 2010**
- b. **Bill # HB 3396 (2009).** In 2010 provisions similar to those in this concept were considered for inclusion in SB 999, but were not included in the bill as introduced.

OREGON STATE BAR
Legislative Proposal
Part II – Legislative Language

Please provide your legislative language below:

SECTION 1. (1) As used in this section:

(a) “Eligible defendant” means a defendant who has been convicted of a crime for which Chapter 2, Oregon Laws 1995 does not prohibit the court from imposing a sentence of probation.

(b) “Servicemember” has the meaning given that term in ORS 135.881.

(2) Upon the motion of an eligible defendant, the court shall hold a hearing that is consistent with the requirements of ORS 137.080, 137.085, 137.090 and 137.100 to determine whether the defendant:

(a) Is a servicemember; and

(b) Suffers from a mental disorder or traumatic brain injury as a result of military service.

(3) The court may impose probation and order an eligible defendant into a treatment program for a period that does not exceed the term of incarceration that the court otherwise would have imposed, if the court finds that:

(a) The defendant is a servicemember who suffers from a mental disorder or traumatic brain injury;

(b) The defendant agrees to enter a treatment program; and

(c) An appropriate treatment program is available.

(4) An eligible defendant sentenced to probation under this section and ordered into a treatment program shall earn sentence credits for the actual time the defendant serves in a treatment program.

(5) If the court imposes probation and orders an eligible defendant into a treatment program under subsection (3) of this section, the court shall give preference to treatment programs that have a history of successful treatment of servicemembers who suffer from mental disorders or traumatic brain injuries resulting from military service.

SECTION 2. The Oregon Criminal Justice Commission shall adopt rules consistent with section 1 of this 2013 Act that establish a defendant’s status as a servicemember as a mitigating factor that a sentencing judge may consider as a substantial and compelling reason to impose a downward departure from a presumptive sentence.

SECTION 3. Section 1 of this 2013 Act applies to offenses sentenced on or after the effective date of this 2013 Act.

OREGON STATE BAR
Legislative Proposal
Part I – Legislative Summary

RE: INTEREST FROM ESCROW ACCOUNTS

Submitted by: Oregon Law Foundation

Legislative Contact(s): Judith Baker
Phone: (503) 431-6323
E-mail: jbaker@osbar.org

1. Does this amend current law or program?

- a. Yes **Amends ORS 696.578**
b. No

2. PROBLEM PRESENTED (including level of severity):

Escrow trust accounts set up by title companies are very similar in form and function to lawyer trust accounts. However, moneys in the accounts are not treated similarly in terms of requirements for the accounts to be interest bearing with funds dedicated toward an appropriate purpose. Specifically these accounts need not be interest bearing, and if they are the interest may be kept by the escrow agent.

3. SOLUTION:

Require that escrow trust accounts be established as interest bearing accounts with interest dedicated to an approved charitable purpose such as the Oregon Law Foundation.

Title companies currently have escrow trust accounts set up to hold funds of parties to a real estate transaction until the transaction is completed. Similar to IOLTA accounts, escrow accounts must be set up as trust accounts kept separate and distinct from funds belonging to the title company. Currently under Oregon statute these escrow trust accounts can be set up as either noninterest bearing accounts or interest bearing with interest, upon agreement of all parties, going to either the escrow agent or a nonprofit selected by the escrow agent that has an affordable housing mission.

There are large sums of money being held in escrow trust accounts that have the potential to earn a substantial amount of interest to fund legal aid during a time when legal aid funding is decreasing and statewide services are eroding. It is difficult to predict with certainty the level of interest revenue that could be generated. This is because we currently don't know how much money is held in escrow accounts in Oregon and what the interest rate would be. In an attempt to estimate a ball park figure it may help to use Ohio as an example. Ohio's escrow accounts, which are only for residential property, generate two-thirds the interest revenue produced by Ohio's IOLTA accounts. When interest rates are more robust OLF annually receives \$3.6 million in IOLTA account interest. Two-thirds of \$3.6 million is almost \$2.4 million.

4. PUBLIC POLICY IMPLICATION of this proposed legislative change:

It will increase the interest revenue going to the OLF which in turn will increase the grant allocations to legal aid providers and other legal service organizations that provide access to justice to low income Oregonians.

5. Could the problem be addressed through a **NON-LEGISLATIVE SOLUTION**, such as administrative rule or education?

No.

6. **COULD ANOTHER SECTION OR GROUP MORE APPROPRIATELY INTRODUCE THE BILL?** If so, have you suggested it to the section or group?

No.

7. **IDENTIFY THE GROUP OR CONSTITUENCIES THAT WOULD BE MOST IMPACTED** or interested in this change. Who would support it and who would oppose it?

Groups that Support

This would be supported by legal service organizations that receive funding from the OLF for access to justice purposes. Support may also come from the courts who value increased funding for organizations that promote access to the court system.

Groups with Concerns

The three groups that it might concern are the banks, title companies and the Oregon Association of Realtors Home Foundation (Foundation).

- The banks may be concerned because it is believed that escrow accounts are mostly set up as noninterest bearing and therefore the banks benefit from not paying interest on accounts with potentially large balances.
- The title companies also benefit from having funds in noninterest bearing accounts because the banks allow an earnings credit on other accounts title companies hold at the bank. That said all but one title company in Oregon is a national company. In all likelihood the national title companies are already familiar with escrow accounts being IOLTA accounts in other state.
- In 2003 legislation was passed allowing escrow agents and real estate agents to voluntarily open client trust accounts with interest going to a nonprofit that provides first time home buying assistance and for development of affordable housing. In 2004 the **Oregon Association of Realtors Home Foundation** was set up with the mission to provide financial resources to create, expand and encourage home ownership opportunities for Oregonians. The Foundations website encourages both escrow agents and real estate agents to voluntarily set up their client trust accounts with interest going to the Foundation. The Foundation also encourages direct contributions and in the last couple of years has held fundraising events.

Based on the Foundation's tax returns the Foundation is not generating a large amount of revenue from escrow and real estate account interest. The following is the revenue reported from the Foundations tax returns for 2004 through 2010 (includes both interest and contribution revenue but not revenue generated by fundraising events)

- 2004 - \$21,480
- 2005 - \$14,970
- 2006 - \$14,960
- 2007 - \$46,235
- 2008 - \$41,058
- 2009 - \$82, 838
- 2010 - \$32,792

8. **Has this been introduced in a prior session?**

No.

OREGON STATE BAR
Legislative Proposal
Part II – Legislative Language

Please provide your legislative language below:

We don't have legislative language at this time.

OREGON STATE BAR
Legislative Proposal
Part I – Legislative Summary

RE: CENTRALIZED LEGAL NOTICE SYSTEM

Submitted by: Oregon Law Foundation

Legislative Contact(s): Judith Baker
Phone: (503) 431-6323
E-mail: jbaker@osbar.org

1. Does this amend current law or program?

- a. Yes **First**, a new subchapter would need to be added to Chapter 193 of the ORS, which governs publication of legal notices, to expressly provide for online publication through the OSB.
Second, all of the pertinent statutes throughout ORS that require newspaper publication of a legal notice would have to be amended to provide that all such legal notices be “published” in the OSB Legal Notices Website.
- b. No

2. PROBLEM PRESENTED (including level of severity):

This proposal seeks to simultaneously address two serious problems affecting both the legal community and state and local governments.

The current statutory requirements that force public entities and individuals to publish legal notices in newspapers are both extremely expensive for the individual or government entity, and are at the same time significantly less effective than in years past. Newspapers do not have the circulation they once did, and an ever increasing number of Oregonians instead choose to seek information online. This means that newspaper publication – while extremely expensive for the entity responsible for providing the notice – does a less effective job of providing meaningful notice to lawyers and the public than would a centralized online legal notice system. This situation may raise due process concerns for those members of the public who are entitled to public notice.

The second problem is that deep cuts to legal aid are destroying the core service delivery system at a time when the need for services is on the rise. Cuts have been made in both federal and state funding, and we have seen reductions in filing fee and IOLTA revenue as well. At the current time, additional state funding is not available, meaning that creative long term solutions for legal aid funding must be sought.

3. SOLUTION:

Permit public entities and individuals to instead publish required notices in an online notification system that is created and maintained by the Oregon State Bar, and permit the bar to dedicate any net revenue from such a service to the Oregon Law Foundation for the purpose of funding legal aid programs in Oregon.

To this end, a website would be created that is owned by the Oregon State Bar, at which legal notices required under state law could be posted and which would be made available free of charge and in a

Centralized Legal Notice System

searchable format to the public. In addition to being free for the public to use, the Oregon State Bar would be able to charge state and local government a fraction of what they currently pay to newspapers. Additionally, this system would likely result in more widespread distribution of legal notices, meaning that lawyers and the public would receive more meaningful notice than they do under the current system.

The Oregon State Bar is a good choice to administer such a service for several reasons. Legal notices are uniquely associated with the legal profession, making the bar a logical place to house the service. Additionally, because the bar is not a state agency and does not receive any tax revenue, it is an objective third party who would very rarely have a stake in the outcome of the issues for which notice is provided.

Finally, to the extent that the system would generate significant revenue, any net revenue from this system would instead be allocated to the Oregon Law Foundation (OLF) for distribution to organizations that provide legal services to persons of lesser means. This would enable legal aid to have a reliable funding source without taking money away from other worthy government programs.

Some estimates have placed the amount of money spent annually on legal notices in Oregon as high as \$30 million. Given that a centralized online system would have considerably lower operating costs than newspaper publication, the savings to state and local governments would easily be in the millions if not tens of millions of dollars. Even with cost savings of 50% or more to government and individuals, such a system could still generate millions of dollars per year to help fund legal service providers in Oregon.

4. **PUBLIC POLICY IMPLICATION** of this proposed legislative change:

The legislature has made the policy determination that many legal notices must be provided to the public. The current statutory system provides newspapers with a legislatively-conferred and created monopoly for the publication of legal notices. Opening that system up to permit entities to provide notice through this alternate online system run by the Oregon State Bar would be a significant policy shift.

5. Could the problem be addressed through a **NON-LEGISLATIVE SOLUTION**, such as administrative rule or education?

No.

6. **COULD ANOTHER SECTION OR GROUP MORE APPROPRIATELY INTRODUCE THE BILL?** If so, have you suggested it to the section or group?

No.

7. **IDENTIFY THE GROUP OR CONSTITUENCIES THAT WOULD BE MOST IMPACTED** or interested in this change. Who would support it and who would oppose it?

Support It

The government agencies, businesses and individuals that incur significant costs publishing legal notices are likely to support this proposal, because it would save them considerable money each year.

Opposed It

Newspapers are likely to object to this proposal on the ground that it will eliminate a substantial category of their advertising revenue, thereby imperiling many marginal newspapers.

8. **Has this been introduced in a prior session?**

No.

OREGON STATE BAR
Legislative Proposal
Part II – Legislative Language

Please provide your legislative language below:

The language has not yet been drafted.

OREGON STATE BAR
Legislative Proposal
Part I – Legislative Summary

RE: FASTCASE ADMINISTRATIVE LAW PILOT PROJECT

Submitted by: Administrative Law Section

Legislative Contact(s): Janice Krem
Phone: (503) 697-8042
E-mail: janicekrem@involved.com

Contact: Frank Mussell
Phone: (541) 549-0117
E-mail: frank@mussell.biz

1. Does this amend current law or program?

- a. Yes
- b. No

2. PROBLEM PRESENTED (including level of severity):

The Oregon State Bar, on the initiative of the Administrative Law Section, launched a pilot project with Fastcase for the publication of state agency final orders issued in contested cases under the Administrative Procedures Act. An online library is an important part of our efforts for ensuring access to administrative justice.

The pilot project was begun because at the present time, with very few exceptions, agency final orders are not accessible in an efficient searchable form. Consequently, there is no meaningful or consistent way for the agency decision makers, agency staff, government attorneys, private attorneys or administrative law judges to access agency precedent. This means that there is no meaningful way for agencies, administrative law judges and government attorneys to assure that agencies make principled decisions in contested cases. And, it means that there is no meaningful way for private attorneys and reviewing courts to ensure that agencies don't engage in *ad hoc* or arbitrary and capricious decision making or engage in decision making that violates either Oregon's constitutional provision regarding equal privileges and immunities or the United States Constitution regarding equal protection.

Under the pilot project Fastcase currently publishes the final orders of six state agencies (Medical Board, Pharmacy Board, Nursing Board, Physical Therapist Board, Dental Board and the Liquor Control Commission) that were issued in 2010. Fastcase is working on collecting and publishing orders issued in 2011.

In the course of the pilot project cooperation by the agencies has been mixed (one agency has completely refused to cooperate). Despite the fact that virtually all agency final orders are prepared and maintained in a digital form (either as Word or WordPerfect documents) agencies unnecessarily convert the final orders to PDF files before making them available to Fastcase. Fastcase obtains copies of final orders from agencies either by making a public records request

or by accessing the orders that are published on the agency's website. Not all agencies publish any final orders on their website and agencies that publish final orders on their website don't necessarily publish all of their final orders.

3. SOLUTION:

In order for agencies to efficiently provide final orders to Fastcase and for Fastcase to efficiently publish them, the final orders need to be maintained and provided to Fastcase (1) in a digital format that preserves the text of the document, including the attributes of the text, such as bold, underline, italics and pagination; (2) in a format suitable for indexing and searching by Fastcase; and (3) in a format that identifies the orders by the date the order was issued and allows for them to be provided to Fastcase by date of issuance. In short, the orders need to be maintained and provided in the word processing format, such as Word or WordPerfect, in which they are created by the agencies.

The technical language in Section 1a. was written by the IT experts at the bar. This legislation will reduce the work that agencies need do to get these public records in an online library, while preserving an agency's ability to redact confidential information and remove metadata. This standardization is cost-effective, requiring no outlay by agencies for software. It reduces an agency's workload for complying with individualized public records requests on a piecemeal basis. Agencies are required by current law to provide these public records. This standardizes and simplifies the process.

We are proposing this legislative initiative as a placeholder bill in the event that the section's efforts to work with agencies, the Department of Administrative Services and the Governor's office are not successful in fully implementing the project.

Our proposal represents a consensus of the members of the section's executive committee. The Fastcase pilot project is a balanced public interest response to the issues at hand. It specifically addresses the concerns expressed by agencies for protecting confidentiality while avoiding duplication of effort. It also requires no costly software to provide these public records in an efficient format for publication.

4. PUBLIC POLICY IMPLICATION of this proposed legislative change:

Implementation of the Fastcase project, that is, the publication of the precedent of state administrative agencies is a groundbreaking initiative of both state and national importance. For the first time and at minimal expense, agency decision making will become transparent, as required by the public records laws.

The fiscal impact is indeterminate. However, it will very likely be minimal in light of the ease with which digital records can be created, redacted and scrubbed free of metadata.

5. Could the problem be addressed through a **NON-LEGISLATIVE SOLUTION**, such as administrative rule or education?

In implementing the pilot project the section and Fastcase staff have worked effectively with staff members of several of the agencies. We expect to continue our efforts to work with agencies, the Department of Administrative Services and the Governor's office. As noted

above, this legislative initiative is a place holder should our non-legislative efforts prove unsuccessful.

6. COULD ANOTHER SECTION OR GROUP MORE APPROPRIATELY INTRODUCE THE BILL? If so, have you suggested it to the section or group?

No. The Health Law Section and the Real Estate and Land Use Section have expressed considerable interest in supporting and expanding the Fastcase pilot project. However, the Administrative Law Section generically spans all issues involving matters of administrative procedure and is the appropriate section to advance this legislation. The section will continue to work with other sections interested in expanding the online library of final orders.

7. IDENTIFY THE GROUP OR CONSTITUENCIES THAT WOULD BE MOST IMPACTED or interested in this change. Who would support it and who would oppose it?

Agency final orders published on Fastcase will benefit agency staff, administrative law judges, government lawyers, lawyers in private practice and trial court and appellate judges. The Department of Justice has provided feedback from its clients. These concerns have been fully-addressed in this proposal.

8. Has this been introduced in a prior session?

No.

OREGON STATE BAR
Legislative Proposal
Part II – Legislative Language

Please provide your legislative language below:

Section 1.

a). State agencies that issue final orders as defined in ORS chapter 183 shall maintain all final orders issued after January 1, 2014, in a digital format that preserves the text of the document, including the attributes of the text (bold, underline, italics and pagination) and is suitable for indexing and searching by the requestor that is identified in Section 2.

b). All final orders shall be maintained in an electronic format that identifies them by the date the order was issued and allows for orders to be provided by date of issuance pursuant to Section 3.

Section 2.

Upon request of the designee of the Oregon State Bar, state agencies subject to this Act shall provide an electronic copy of all final orders identified in the request. The electronic copies shall be provided to the requester within 30 days of the date of the request. The orders shall be provided at no charge for the first two requests made in a calendar year. Agencies may charge their actual costs for responding to any further requests in any calendar year.

Section 3.

State agencies subject to this Act which do not already maintain final orders as provided in section 1 of this Act shall comply with the provisions of this Act no later than January 1, 2014, for orders issued on or after January 1, 2014.

Section 4.

Nothing in this Act requires a state agency that currently is in compliance with the provisions of Section 1 of this Act to take any action that duplicates the requirements in Section 1 of this Act.

Section 5.

This Act supersedes the provision of any other law that may be in conflict with Sections 1 through 4 of this Act. However, this Act does not supersede any other provisions of law regarding the non-disclosure of privileged or other confidential information in public records.

OREGON STATE BAR
Legislative Proposal
Part I – Legislative Summary

RE: PEACE OFFICER; COMMUNITY CARETAKING FUNCTIONS

Submitted by: Nicholas Kahl

Legislative Contact(s): Nicholas Kahl
Phone: (503) 223-6333
E-mail: nick@damorelaw.com

1. Does this amend current law or program?

- a. Yes
- b. No

2. PROBLEM PRESENTED (including level of severity):

Currently, peace officers have authority to enter premises, search, and seize an animal without a warrant if they determine it to be reasonably necessary to prevent serious harm or render aid to that animal. However, many peace officers do not conduct such authorized functions, as they believe it to be outside their scope of authority due to ambiguous wording in the relevant statutory provisions.

3. SOLUTION:

Include the words "or animal" between the words "person" and "property" in ORS 133.033(2)(a)(A)-(B), (2)(b)(A)-(B).

Currently, ORS 133.033 grants peace officers express authority to “enter or remain upon the premises of another if it reasonably appears to be necessary to: prevent serious harm [], render aid []; or locate missing persons.” Each of these reasonably necessary circumstances permits aid or prevention of harm to persons or property. Under both Oregon common law and Oregon statutory law, animals are considered personal property. Therefore, under the current statutory language, peace officers already have authority to enter, search, remain, and seize animals they reasonably believe to be in danger or need assistance, as animals are covered under the term “property.”

Expressly adding “animal(s)” to the statutory language of this section will provide clarity and an express articulation of what some may consider an ambiguous, or even implicit, grant of authority.

4. PUBLIC POLICY IMPLICATION of this proposed legislative change:

None

5. Could the problem be addressed through a **NON-LEGISLATIVE SOLUTION**, such as administrative rule or education?

No.

6. **COULD ANOTHER SECTION OR GROUP MORE APPROPRIATELY INTRODUCE THE BILL?** If so, have you suggested it to the section or group?

No.

7. **IDENTIFY THE GROUP OR CONSTITUENCIES THAT WOULD BE MOST IMPACTED** or interested in this change. Who would support it and who would oppose it?

All members of the public will be affected by this proposal. However, it does not make any substantive changes to existing law. Therefore, any groups or members that oppose this proposal oppose the current law.

8. **Has this been introduced in a prior session?**

No.

OREGON STATE BAR
Legislative Proposal
Part II – Legislative Language

Please provide your legislative language below:

ORS 133.033 Peace Officer; community caretaking functions.

(1) Except as otherwise expressly prohibited by law, any peace officer is authorized to perform community caretaking functions.

(2) As used in this section, “community caretaking functions” means any lawful acts that are inherent in the duty of the peace officer to serve and protect the public. “Community caretaking functions” includes, but is not limited to:

(a)The right to enter or remain upon the premises of another if it reasonably appears to be necessary to:

- A. Prevent serious harm to any person, **animal**, or property;
- B. Render aid to injured or ill persons **or animal(s)**; or
- C. Locate missing persons.

(b)The right to stop or redirect traffic or aid motorists or other persons when such action reasonably appears to be necessary to:

- A. Prevent serious harm to any person, **animal**, or property;
- B. Render aid to injured or ill persons **or animal(s)**; or
- C. Locate missing persons.

(3) Nothing contained in this section shall be construed to limit the authority of a peace officer that is inherent in the office or that is granted by any other provision of law.

OREGON STATE BAR
Legislative Proposal
Part I – Legislative Summary

RE: REMOTE-ONLY SHAREHOLDER MEETINGS

Submitted by: Business Law Section

Legislative Contact(s): John Thomas
Phone: (503) 727-2144
E-mail: jrthomas@perkinscoie.com

- 1. Does this amend current law or program?**
- a. Yes **Amends ORS 60.201 – Annual meeting, ORS 60.204 – Special meeting, ORS 60.222 – Participation at meeting.**
 - b. No

2. PROBLEM PRESENTED (including level of severity):

Oregon appears to allow remote-only shareholders meetings, such as meetings by webcast without a physical location, but inconsistent provisions make that conclusion uncertain.

ORS 60.222(1) reads as follows:

Unless the articles of incorporation or bylaws provide otherwise, the bylaws or the board of directors, by resolution adopted in advance either specifically with respect to a particular meeting or generally with respect to future meetings, may permit any or all shareholders to participate in an annual or special meeting by, *or permit the conduct of a meeting through, use of any means of communication through which all shareholders participating may simultaneously hear each other. A shareholder participating in a meeting by this means is deemed to be present in person at the meeting. [Italics added.]*

Although this statute clearly allows remote participation by shareholders, whether it allows remote-only shareholder meetings is less clear. The ambiguity results in part because ORS 60.201 and ORS 60.204 each provide that shareholder meetings must be held "at the place stated in or fixed in accordance with the bylaws." These provisions seem to require a physical meeting place, and thus could be viewed as inconsistent with a provision permitting a remote-only meeting. In addition, the Oregon Business Corporation Act does not include affirmative language providing that a remote-only meeting may be held in lieu of a meeting held at a particular, physical location.

ORS 60.222(1) differs from its Model Business Corporation Act counterpart since the Oregon statute includes the clause italicized above. The Colorado Code's counterpart statute also includes the italicized clause, which practitioners have interpreted as permitting remote-only shareholder meetings because a different interpretation would render the italicized clause duplicative with the remainder of the statute.

Although the Model Business Corporation Act does not include the clause italicized above, and thus does not provide for remote-only shareholder meetings, the Delaware General Corporation

Law does provide express authorization to hold remote-only shareholder meetings. Sixteen other states follow the DGCL model, whereas approximately seven states follow the MBCA model.

3. SOLUTION:

Adopt amendments to ORS 60.201, 60.204 and 60.222 to provide express authority for holding remote-only shareholder meetings. ORS 60.201 and 60.204 would be amended to provide that directors may determine to hold an annual shareholder meeting (ORS 60.201) or a special shareholder meeting (ORS 60.204) solely by means of remote communication. ORS 60.222(1) would be amended to provide for participation in remote-only shareholder meetings, including the procedures that must be implemented for remote-only shareholder meetings beyond simply ensuring that participants can hear each other.

4. PUBLIC POLICY IMPLICATION of this proposed legislative change:

Adoption of this proposal would clarify that Oregon corporations are permitted to conduct remote-only shareholder meetings, while preserving shareholders' ability to participate in remote-only meetings to the same extent as a shareholder meeting at a physical meeting place. Directors of Oregon corporations would be certain, therefore, that they could determine to hold a remote-only shareholder meeting without also providing for a physical meeting place. Holding remote-only shareholder meetings may reduce the expense of holding a meeting at a physical place, and is analogous to now standard public company earnings release webcasts, where the company announces its operating results and permits analysts to ask questions about the company's presentation.

5. Could the problem be addressed through a NON-LEGISLATIVE SOLUTION, such as administrative rule or education?

As noted above, some practitioners have interpreted the Colorado Code statute that is analogous to ORS 60.222(1) to permit remote-only shareholder meetings, but this interpretation is not beyond doubt. Clarifying this matter legislatively, as it has been in Delaware and other states that follow the DGCL model, would put this matter to rest.

6. COULD ANOTHER SECTION OR GROUP MORE APPROPRIATELY INTRODUCE THE BILL? If so, have you suggested it to the section or group?

No.

7. IDENTIFY THE GROUP OR CONSTITUENCIES THAT WOULD BE MOST IMPACTED or interested in this change. Who would support it and who would oppose it?

Oregon corporations and their boards of directors and officers would be most affected and interested in the change. Shareholders also may have an interest, but often rarely attend physical meetings. Because the proposal requires a corporation to give shareholders an opportunity to communicate and participate in the meeting, similar to a physical meeting, we do not believe there would be any material opposition to the proposal.

OREGON STATE BAR
Legislative Proposal
Part II – Legislative Language

Please provide your legislative language below:

Proposed Amended ORS 60.201 Annual meeting

(2) Annual shareholders' meetings may be held in or out of this state at the place stated in or fixed in accordance with the bylaws or, when not inconsistent with the bylaws, as determined by the board of directors. If no place is stated in or fixed in accordance with the bylaws and the board of directors has not determined that the meeting will be held solely by means of remote communication, annual meetings will be held at the corporation's principal office.

Proposed Amended ORS 60.204 Special meeting

(4) Special shareholders' meetings may be held in or out of this state at the place stated in or fixed in accordance with the bylaws or, when not inconsistent with the bylaws, as determined by the board of directors. If no place is stated in or fixed in accordance with the bylaws and the board of directors has not determined that the meeting will be held solely by means of remote communication, special meetings will be held at the corporation's principal office.

Proposed Amended ORS 60.222 Participation at meeting

(1) *[Unless the articles of incorporation or bylaws provide otherwise, the bylaws or the board of directors, by resolution adopted in advance either specifically with respect to a particular meeting or generally with respect to future meetings, may permit any or all shareholders to participate in an annual or special meeting by, or may permit the conduct of a meeting through, use of any means of communication by which all shareholders participating may simultaneously hear each other. A shareholder participating in a meeting by this means is deemed to be present in person at the meeting.]* If authorized by the board of directors, and subject to any guidelines and procedures that the board of directors may adopt, shareholders and proxy holders not physically present at a meeting of shareholders may, by means of remote communication:

(a) Participate in a meeting of shareholders; and

(b) Be deemed present in person and vote at a meeting of shareholders.

(2) Before a board of directors may authorize shareholders or proxy holders to be deemed present in person, or vote, at a meeting of the shareholders by remote communication in accordance with ORS 60.222(1), the corporation must:

(a) Implement reasonable measures to verify that each person deemed present and permitted to vote at the meeting by means of remote communication is a shareholder or proxy holder; and

(b) Implement reasonable measures to provide shareholders or proxy holders an opportunity to participate in the meeting and to vote on matters submitted to the shareholders, including an opportunity to communicate and to read or hear the proceedings of the meeting substantially concurrently with the proceedings.

(3) The corporation shall maintain a record of the vote or other action of any shareholder or proxy holder votes or other action at the meeting of the shareholder by remote communication.

[Renumber current Section (2) of ORS 60.222 Section (4)]

OREGON STATE BAR
Legislative Proposal
Part I – Legislative Summary

RE: DELEGATING TO OFFICERS THE RIGHT TO DESIGNATE OPTIONS AND OTHER EQUITY AWARDS

Submitted by: Business Law Section

Legislative Contact(s): Chris Hall
Phone: (503) 727-2000
E-mail: chall@perkinscoie.com

- 1. Does this amend current law or program?**
a. Yes **Amends ORS 60.157 – Share rights, options and warrants**
b. No

2. PROBLEM PRESENTED (including level of severity):

The Oregon Business Corporation Act does not clearly allow officers to grant equity compensation to employees, within limitations set by the board of directors.

Oregon corporations routinely grant options and similar forms of equity compensation to their employees. Many grant the equity compensation to a number of employees, including those not considered senior executive officers. Because senior executives may have a better view of the amount of awards to grant lower level officers and employees and because of administrative ease, some Oregon corporations desire to delegate administration of board-approved equity compensation programs to officers, within specific board-approved policies and procedures. Typically, maximum amounts and ranges of terms for awards will be set by the board. However, the law on the authority of a board to permit officers to exercise some or all of the board's functions regarding the award of rights, options, warrants or other forms of equity compensation is not always clear in Oregon. If a court were to interpret the law as not allowing the delegation, some employees would not hold valid equity compensation.

The Model Business Corporation Act and the Delaware General Corporation Law both provide expressly authorize corporate boards to delegate authority to officers to administer equity compensation programs.

3. SOLUTION:

Adopt a new statutory provision – ORS 60.157(3) – that would provide express authority for board delegation to officers of the designation of recipients of compensatory awards involving the issuance of shares, either directly or upon exercise of rights to acquire shares, and the determination of the amount and other terms of the awards, subject to any applicable limitations established by the board or shareholders. A board (or a committee with authority delegated to it under ORS 60.354) could decide whether to exercise this authority and, to the extent it does so, it must specify the total amount that may be awarded and may impose any other limits it desires as part of the board's oversight of the award process. ORS 60.157(3) would not permit authorizing an officer to make awards to herself or himself or to other persons specified by the

board. ORS 60.157(3) would not address the extent to which the board or a committee may delegate authority in other circumstances.

4. PUBLIC POLICY IMPLICATION of this proposed legislative change:

There would be no significant shift in public policy. The proposal makes the law consistent with certain existing practices by Oregon corporations. It would not change a board's duty to act in the best interest of the corporation and its shareholders, including its oversight role with respect to executive compensation. A board delegating authority would include appropriate limits on that authority, as provided in the proposal. For example, the amount or range of shares to be awarded to different classes of employees, the timing and pricing of awards and the vesting terms or other variable provisions of awards may be limited. The board or committee also might provide for periodic reporting to it of awards made under the delegated authority.

5. Could the problem be addressed through a NON-LEGISLATIVE SOLUTION, such as administrative rule or education?

We do not believe so.

6. COULD ANOTHER SECTION OR GROUP MORE APPROPRIATELY INTRODUCE THE BILL? If so, have you suggested it to the section or group?

No.

7. IDENTIFY THE GROUP OR CONSTITUENCIES THAT WOULD BE MOST IMPACTED or interested in this change. Who would support it and who would oppose it?

Oregon corporations, boards of directors and officers would be most impacted and interested in the change. Shareholders might have an interest. We are not aware of any group or constituency that would have any material opposition to the proposal.

OREGON STATE BAR
Legislative Proposal
Part II – Legislative Language

Please provide your legislative language below:

Proposed New ORS 60.157(3) Share rights, options and warrants

(3) The board of directors may authorize one or more officers to (a) designate the recipients of rights, options, warrants or other equity compensation awards that involve the purchase or issuance of shares and (b) determine, within an amount and subject to any other limitations established by the board of directors, the number of rights, options, warrants or other equity compensation awards and the terms thereof to be received by the recipients. An officer may not use this authority to designate either himself or herself or other persons specified by the board of directors as a recipient of rights, options, warrants or other equity compensation awards.

**OREGON STATE BAR
Legislative Proposal
Part I – Legislative Summary**

RE: FULL DISCLOSURE OF PAYMENTS DUE UNDER CONSUMER SERVICE CONTRACTS

Submitted by: OSB Consumer Law Section

Legislative Contact(s): Anna Braun
Phone: (503) 569-7777
E-mail: anna@annabraunlaw.com

- 1. Does this amend current law or program?**
 - a. Yes ORS 646.608, the Unlawful Trade Practices Act (UTPA)**
 - b. No**

2. PROBLEM PRESENTED (including level of severity):

Consumers receive a large number of offers with low introductory rates for services such as cell phones, TV or Internet access, and home security services. Consumers often are not aware of the extent of their liability when they accept the offer. They are often surprised to learn that they are obligated for higher payments when the introductory rate expires and that they must pay a termination fee to cancel the contract before it expires by its terms.

Consumer law attorneys see this problem often, and the problem is particularly harmful to low income people.

3. SOLUTION:

At the time the contract is executed, require conspicuous disclosure of the early cancellation fee and the total amount of the payments required to fulfill the entire contract. Unless the disclosure is made, the early termination fee would be void and unenforceable, and failure to make the disclosure and any attempt to enforce it would be a violation of the UTPA.

4. PUBLIC POLICY IMPLICATION of this proposed legislative change:

This change will help consumers make better choices by requiring fuller disclosure of the agreements they sign. The bill would also encourage businesses not to rely on misleading rates to induce people to sign contracts they cannot afford.

- 5. Could the problem be addressed through a NON-LEGISLATIVE SOLUTION, such as administrative rule or education?**

No, this requires a legislative solution.

6. COULD ANOTHER SECTION OR GROUP MORE APPROPRIATELY INTRODUCE THE BILL? If so, have you suggested it to the section or group?

No, this is an appropriate bill for the Consumer Law Section.

7. IDENTIFY THE GROUP OR CONSTITUENCIES THAT WOULD BE MOST IMPACTED or interested in this change. Who would support it and who would oppose it?

The bill would likely have the support of consumer advocates, senior advocates and possibly the Department of Justice.

Opponents would include telecommunications companies and others who provide services to consumers over an extended term in exchange for monthly payments.

8. Has this been introduced in a prior session?

- a. Year : 2010 special session.
- b. Bill # SB 1001 (note: this bill prohibited early termination fees and remained in committee upon adjournment).

OREGON STATE BAR
Legislative Proposal
Part II – Legislative Language

Please provide your legislative language below:

Early Termination Fee Legislative Draft

SECTION 1. Section 2 of this 2013 Act is added to and made a part of ORS 646.605 to 646.652.

SECTION 2. (1) As used in this section:

(a) 'Early termination fee' means any expense or obligation that a consumer incurs under the contract as the result of the consumer's termination or cancellation of the contract before the contract ends by its terms.

(b) 'Clear and conspicuous' means language that is readily understandable and presented in such size, color, contrast and location, or audibility and cadence, compared to other language as to be readily noticed and understood, and that is in direct proximity to the request for consent to a contract offer.

(c) 'Consumer' means an individual who seeks to purchase, or purchases, real estate, goods or services for personal, family or household purposes.

(d)(A) 'Consumer contract' means any agreement, or renewal of an agreement, between a person and a consumer for the sale and purchase of real estate, goods or services for personal, family or household purposes.

(B) 'Consumer contract' does not include:

(i) An agreement for insurance;

(ii) A certificate of deposit;

(iii) A consumer finance loan, as that term is defined in ORS 725.010;

(iv) A rental agreement, as that term is defined in ORS 90.100;

(v) A lease-purchase agreement, as that term is defined in ORS 646A.120;

(vi) A service contract, as that term is defined in ORS 646A.154;

(e) 'Express consent' means a consumer's agreement, as indicated by the consumer's written signature, oral words of acceptance or other indicia, to become legally obligated under a consumer contract.

(2) All consumer contracts providing for an early termination fee shall include the following notice in a clear and conspicuous manner at the time of contract or at the time of extending the contract:

“OREGON FULL-COST DISCLOSURE: This contract includes a cancellation penalty of \$_____. The total payments that you will have to make under this contract to avoid owing a penalty is \$_____.”

(3) No person may collect or attempt to collect an early termination fee unless the consumer expressly consented to the contract when the consumer entered into the contract and at each time the contract was extended for an additional term.

(4) In addition to any of the remedies available under ORS 646.605 to 646.652, in any situation in which a person violates subsection (2) or (3) of this section, the early termination fee provision is void and unenforceable.

SECTION 3. Add a new subsection to ORS 646.608(1) as follows:

646.608. (1) A person engages in an unlawful practice when in the course of the person's business, vocation or occupation the person does any of the following:

...

(uuu) Violates a provision of section 2 or 3 of this 2013 Act.

SECTION 4. Section 2 of this 2013 Act and the amendments to ORS 646.608 by section 3 of this 2013 Act apply to consumer contracts entered into on or after the effective date of this 2013 Act.

OREGON STATE BAR
Legislative Proposal
Part I – Legislative Summary

RE: AMENDED NOTICES OF SALE UNDER ORS 86.755

Submitted by: OSB Debtor/Creditor Section

Legislative Contact(s): Patrick W. Wade
Phone: (541) 686-8511
E-mail: pwade@hershnerhunter.com

1. Does this amend current law or program?

- a. Yes **ORS 86.755**
b. No

2. PROBLEM PRESENTED (including level of severity):

Under current law, when a non-judicial foreclosure (also known as a foreclosure by advertisement and sale or as a trustee’s sale) is stayed by a bankruptcy proceeding or some other lawful stay, upon the termination of that stay the foreclosure proceeding may resume and be completed. The trustee must provide an amended notice of sale pursuant to ORS 86.755(12), (13), and (14).

The current statutes do not clearly define the duties of the trustee, resulting in some confusion about the content and service of the amended notice of sale. A frequent issue which arises is found in situations where a homeowner has filed a Chapter 13 bankruptcy case which provides for cure of defaults. If the Chapter 13 case later fails for some reason, but the borrower has in the meantime partially cured the defaults, it is not clear what the trustee must include in the notice of sale regarding the nature of the defaults upon which the continued foreclosure proceeding is based.

Finally, there may be confusion regarding the ability of a trustee to postpone a sale which has been scheduled by an amended notice given after the termination of a stay.

3. SOLUTION:

The proposed changes specify that the default described in the amended notice of sale must be the default which existed at the time the stay was terminated. The proposal also provides for additional postponements of a sale.

The proposed change also reorganizes the statute in a more logical format to make clear that certain provisions apply only in the circumstance where an amended notice of sale is being sent.

4. PUBLIC POLICY IMPLICATION of this proposed legislative change:

There is no significant public policy implication of this change.

5. Could the problem be addressed through a **NON-LEGISLATIVE SOLUTION**, such as administrative rule or education?

No. The requirements which are proposed to be changed are purely statutory.

6. **COULD ANOTHER SECTION OR GROUP MORE APPROPRIATELY INTRODUCE THE BILL?** If so, have you suggested it to the section or group?

No. The proposed changes affect both trustees on one hand and borrowers in default (and those who represent them) on the other. The Debtor-Creditor Section of the Oregon State Bar has significant constituencies in each group.

7. **IDENTIFY THE GROUP OR CONSTITUENCIES THAT WOULD BE MOST IMPACTED** or interested in this change. Who would support it and who would oppose it?

Again, the proposed changes affect both trustees on one hand and borrowers in default (and those who represent them) on the other. The proposed changes seek to make existing law clearer and to eliminate possible areas of disagreement on the interpretation of statutory language.

The Section does not anticipate opposition to this proposal.

8. **Has this been introduced in a prior session?**

No.

OREGON STATE BAR
Legislative Proposal
Part II – Legislative Language

Please provide your legislative language below:

Section 1. ORS 86.755 is amended to read (new material in **bold and underlined text**, deleted material in *strikeout and italic text*):

86.755. Sale of property, date and time, price

(1) (a) A trustee shall hold a trustee's sale on the date and at the time and place designated in the notice of sale given under ORS 86.740. The designated time of the trustee's sale must be after 9 a.m. and before 4 p.m., based on the standard of time set forth in ORS 187.110, and the designated place of the trustee's sale must be in the county or one of the counties in which the property is situated. Except as provided in paragraph (b) of this subsection, the trustee may sell the property in one parcel or in separate parcels and shall sell the parcel or parcels at auction to the highest bidder for cash. Any person, including the beneficiary under the trust deed, but excluding the trustee, may bid at the trustee's sale. An attorney for the trustee, or any agent designated by the trustee or the attorney, may conduct the sale and act in the sale as the auctioneer of the trustee.

(b) If the trustee sells property upon which a single residential unit that is subject to an affordable housing covenant is situated, the eligible covenant holder may purchase the property from the trustee at the trustee's sale for cash or cash equivalent in an amount that is the lesser of:

(A) The sum of the amounts payable under ORS 86.765 (1) and (2); or

(B) The highest bid received for the property other than a bid from the eligible covenant holder.

(c) (A) Except as provided in subparagraph (B) of this paragraph, if an eligible covenant holder purchases the property in accordance with paragraph (b) of this subsection, the sale forecloses and terminates all other interests in the property as provided in ORS 86.770 (1).

(B) If an interest in the property exists that is prior to the eligible covenant holder's interest, other than the interest set forth in the trust deed that was the subject of the foreclosure proceeding under ORS 86.735, notwithstanding the provisions of ORS 86.770 (1) the sale does not foreclose and terminate the prior interest and the eligible covenant holder's title to the property is subject to the prior interest.

(2) The trustee or the attorney for the trustee, or an agent that the trustee or the attorney conducting the sale designates, may postpone the sale for one or more periods that total not more than 180 days from the original sale date, giving notice of each adjournment by public proclamation made at the time and place set for sale. The trustee, the attorney, or an agent that the trustee or the attorney designates may make the proclamation.

(3) The purchaser shall pay at the time of sale the price bid, or the price determined in accordance with subsection (1)(b) of this section and, within 10 days following payment, the trustee shall execute and deliver the trustee's deed to the purchaser.

(4) The trustee's deed shall convey to the purchaser the interest in the property that the grantor had, or had the power to convey, at the time the grantor executed the trust deed, together with any interest the grantor or the grantor's successors in interest acquire after the execution of the trust deed.

(5) (a) If property purchased at the trustee's sale includes one or more dwelling units that are subject to ORS chapter 90, the purchaser must provide written notice of change in ownership to the occupants of each unit within 30 days after the date of sale and before or concurrently with service of a written termination notice authorized by subsection (6)(c)(B) of this section.

(b) The notice required by this subsection must:

(A) Explain that the dwelling unit has been sold at a foreclosure sale and that the purchaser at that sale is the new owner.

(B) Include the date on which the foreclosure sale took place.

(C) Include the name, contact address and contact telephone number of the purchaser or the purchaser's representative.

(D) Provide information about the rights of bona fide residential tenants as provided in subsections (6)(c) and (e) and (9)(a) of this section.

(E) Include contact information for the Oregon State Bar and a person or organization that provides legal help to individuals at no charge to the individual.

(c) The notice must be served by one or more of the following methods:

(A) Personal delivery to the tenant.

(B) First class mail to the tenant at the dwelling unit.

(C) First class mail to the tenant at the dwelling unit and attachment of a second notice copy. The second notice copy must be attached in a secure manner to the main entrance to the portion of the premises in the possession of the tenant.

(D) If the names of the tenants are not known to the purchaser, the notice may be addressed to "occupants."

(d) A notice that contains the information required under paragraph (b)(B) and (C) of this subsection meets the requirements of paragraph (b) of this subsection if the notice is in substantially the following form:

Amended Notices of Sale

The property in which you are living has gone through foreclosure and was sold to a new owner on _____ (date). The contact information for the new owner or the owner's representative is _____ (name, address, telephone number).

IF YOU ARE A BONA FIDE TENANT RENTING THIS PROPERTY AS A RESIDENTIAL DWELLING, YOU HAVE THE RIGHT TO CONTINUE LIVING IN THIS PROPERTY AFTER THE FORECLOSURE SALE FOR:

- THE REMAINDER OF YOUR FIXED TERM LEASE, IF YOU HAVE A FIXED TERM LEASE; OR
- AT LEAST 90 DAYS FROM THE DATE YOU ARE GIVEN A WRITTEN TERMINATION NOTICE.

If the new owner wants to move in and use this property as a primary residence, the new owner can give you written notice and require you to move out after 90 days, even though you have a fixed term lease with more than 90 days left.

You must be provided with at least 90 days' written notice after the foreclosure sale before you can be required to move.

A bona fide tenant is a residential tenant who is not the borrower (property owner), or a child, spouse or parent of the borrower, and whose rental agreement:

- Is the result of an arm's-length transaction;
- Requires the payment of rent that is not substantially less than fair market rent for the property, unless the rent is reduced or subsidized due to a federal, state or local subsidy; and
- Was entered into prior to the date of the foreclosure sale.

IMPORTANT:

YOU SHOULD CONTACT THE NEW OWNER OR THE OWNER'S REPRESENTATIVE AT THE ADDRESS LISTED ON THIS NOTICE AS SOON AS POSSIBLE TO LET THE NEW OWNER KNOW IF YOU ARE A BONA FIDE TENANT. YOU SHOULD PROVIDE WRITTEN EVIDENCE OF THE EXISTENCE OF YOUR RENTAL AGREEMENT, ESPECIALLY IF YOU HAVE A FIXED TERM RENTAL AGREEMENT OR LEASE WITH MORE THAN 90 DAYS LEFT. Written evidence of your rental agreement can be a copy of your lease or rental agreement, or other documentation of the existence of your rental agreement. Keep your original documents and a record of any information you give to the new owner.

YOUR TENANCY BETWEEN NOW AND THE MOVE-OUT DATE

The new owner may be willing to allow you to stay as a tenant instead of requiring you to move out after 90 days or at the end of your fixed term lease. You should contact the new owner if you would like to stay. If the new owner accepts rent from you, signs a new residential rental agreement with you or does not notify you in writing within 30 days after the date of the foreclosure sale that you must move out, the new owner becomes your new landlord and must maintain the property. Otherwise:

- You do not owe rent;
- The new owner is not your landlord and is not responsible for maintaining the property; and
- You must move out by the date the new owner specifies in a notice to you.

The new owner may offer to pay your moving expenses and any other costs or amounts you and the new owner agree on in exchange for your agreement to leave the premises in less than 90 days or before your fixed term lease expires. You should speak with a lawyer to fully understand your rights before making any decisions regarding your tenancy.

IT IS UNLAWFUL FOR ANY PERSON TO TRY TO FORCE YOU TO LEAVE YOUR DWELLING UNIT WITHOUT FIRST GIVING YOU WRITTEN NOTICE AND GOING TO COURT TO EVICT YOU. FOR MORE INFORMATION ABOUT YOUR RIGHTS, YOU SHOULD CONSULT A LAWYER. If you believe you need legal assistance, contact the Oregon State Bar and ask for the lawyer referral service. Contact information for the Oregon State Bar is included with this notice. If you do not have enough money to pay a lawyer and are otherwise eligible, you may be able to receive legal assistance for free. Information about whom to contact for free legal assistance is included with this notice.

-
- (6) (a) Except as provided in paragraph (b) or (c) of this subsection, the purchaser at the trustee's sale is entitled to possession of the property on the 10th day after the sale. A person that remains in possession after the 10th day under any interest, except an interest prior to the trust deed or an interest the grantor or a successor of the grantor created voluntarily is a tenant at sufferance. The purchaser may obtain possession of the property from a tenant at sufferance by following the procedures set forth in ORS 105.105 to 105.168 or other applicable judicial procedure.

(b) Except as provided in paragraph (c) of this subsection, at any time after the trustee's sale the purchaser may follow the procedures set forth in ORS 105.105 to 105.168 or other applicable judicial procedure to obtain possession of the property from a person that holds possession under an interest that the grantor or a successor of the grantor created voluntarily if, not earlier than 30 days before the date first set for the sale, the person was served with not less than 30 days' written notice of the requirement to surrender or deliver possession of the property.

(c) If the property purchased at the trustee's sale includes a dwelling unit that is subject to ORS chapter 90 and an individual occupies the unit under a bona fide tenancy, the purchaser may obtain possession by following the procedures set forth in ORS 105.105 to 105.168 and by using the complaint form provided in ORS 105.124 or 105.126:

(A) Upon expiration of the fixed term of the tenancy, if the bona fide tenancy is a fixed term tenancy as defined in ORS 90.100; or

(B) At least 90 days after service of a written termination notice if the bona fide tenancy is:

(i) A fixed term tenancy and the purchaser intends to occupy, as the purchaser's primary residence, the dwelling unit that is subject to the fixed term tenancy; or

(ii) A month-to-month tenancy or week-to-week tenancy, as those terms are defined in ORS 90.100.

(d) If a purchaser gives a 90-day written termination notice pursuant to paragraph (c) of this subsection, the purchaser may include in the notice a request that a tenant with a fixed term tenancy provide written evidence of the existence of the tenancy to the purchaser at an address described in the notice. Written evidence includes a copy of the rental agreement or another document that shows the existence of the fixed term tenancy. Failure of the tenant to provide the requested written evidence before the purchaser files an action for possession based on a 90-day notice:

(A) Does not prevent the tenant from asserting the existence of the fixed term tenancy as a defense to the action.

(B) Prevents the tenant from recovering prevailing party attorney fees or costs and disbursements pursuant to subsection (11)(b) of this section. The 90-day notice must describe the provisions of this paragraph.

(e) A purchaser may not commence a proceeding under ORS 105.105 to 105.168 that is authorized under this subsection before the later of:

(A) The 10th day after the trustee's sale;

(B) The date specified in a written notice of the requirement to surrender or deliver possession of the property if the notice is required by and is given to the person in accordance with paragraph (b) of this subsection;

(C) The date specified in a written notice of the purchaser's intent to terminate a tenancy if the notice is required by and is given to the person in accordance with paragraph (c) of this subsection; or

(D) The date on which the term of a fixed term tenancy ends, if the property is a dwelling unit and the purchaser has not terminated the tenancy in accordance with paragraph (c) of this subsection.

(f) A purchaser seeking to obtain possession pursuant to ORS 105.105 to 105.168 must attach proof of service of a written termination notice required by paragraph (c) of this subsection to the pleadings.

(g) In an action to obtain possession, violation of the procedures required by subsection (5) of this section or paragraph (c) of this subsection is a defense for a bona fide tenant seeking to retain possession.

(h) As used in this subsection, “bona fide tenancy” means tenancy of a dwelling unit that is subject to ORS chapter 90 that results from an arm’s-length transaction that occurred before the date of a foreclosure sale in which:

(A) The mortgagor or the child, spouse or parent of the mortgagor under the contract is not the tenant; and

(B) The rent required is not substantially less than fair market rent for the dwelling unit, unless the rent is reduced or subsidized due to a federal, state or local subsidy.

(7) A purchaser shall serve a notice under subsection (6) of this section by one or more of the following methods:

(a) Personal delivery to the tenant.

(b) First class mail to the tenant at the dwelling unit.

(c) First class mail to the tenant at the dwelling unit and attachment of a second notice copy. The second notice copy must be attached in a secure manner to the main entrance to the portion of the premises in the possession of the tenant.

(8) If the notice under subsection (6) of this section is served by mail pursuant to subsection (7)(b) of this section, the minimum period for compliance must be extended by three days and the notice must include the extension in the period stated in the notice.

(9) (a) Notwithstanding the provisions of subsection (6)(c) of this section and except as provided in paragraph (b) of this subsection, the purchaser is not a landlord subject to the provisions of ORS chapter 90 unless the purchaser:

(A) Accepts rent from the individual who possesses the property under a tenancy described in subsection (6)(c) of this section;

(B) Enters into a new rental agreement with the individual who possesses the property under a tenancy described in subsection (6)(c) of this section; or

(C) Fails to terminate the tenancy as provided in subsection (6)(c) of this section within 30 days after the date of the sale.

(b) The purchaser may act as a landlord for purposes of terminating a tenancy in accordance with the provisions of ORS 90.396.

(c) The purchaser is subject to the provisions of ORS 90.322, 90.375, 105.165, 659A.421 and 659A.425. The application of ORS 90.375 to a purchaser that does not become a

landlord does not impose an affirmative duty to pay for or provide services. For the purpose of damages pursuant to this paragraph, “rent” refers to the amount paid by the tenant to the landlord for the right to occupy the unit before the foreclosure.

- (10) (a) Except as provided in paragraph (b) of this subsection, the purchaser is not liable to the individual who possesses the property under a tenancy described in subsection (6)(c) of this section for:

(A) Damage to the property or diminution in rental value; or

(B) Returning a security deposit.

(b) A purchaser that is a landlord under the provisions of subsection (9)(a) of this section is liable to the individual who possesses the property under a tenancy described in subsection (6)(c) of this section for:

(A) Damage to the property or diminution in rental value that occurs after the date of the trustee's sale; or

(B) Returning a security deposit the individual pays after the date of the trustee's sale.

- (11) (a) Except as provided in paragraph (b) of this subsection and notwithstanding an agreement to the contrary, in an action or defense arising pursuant to subsection (6)(c), (d), (f) or (g), (7) or (9)(c) of this section, reasonable attorney fees at trial and on appeal may be awarded to the prevailing party together with costs and disbursements.

(b) If a tenant asserts a successful defense to an action for possession pursuant to subsection (6)(c), (d), (f) or (g) of this section, the tenant is not entitled to prevailing party fees, attorney fees or costs and disbursements if the purchaser:

(A) Did not know, and did not have reasonable cause to know, of the existence of a fixed term tenancy when commencing the action for possession; and

(B) Promptly dismissed the action upon becoming aware of the existence of a fixed term tenancy.

(c) As used in this subsection, “prevailing party” means the party in whose favor final judgment is rendered.

- (12) (a) Notwithstanding subsection (2) of this section, except when a beneficiary has participated in obtaining a stay, foreclosure proceedings that are stayed by order of the court, by proceedings in bankruptcy or for any other lawful reason shall, after release from the stay, continue as if uninterrupted, if within 30 days after release the trustee sends amended notice of sale by registered or certified mail to the last known address of the persons listed in ORS 86.740 and 86.750 (1).

(b) In addition to the notice required under paragraph (a) of this subsection, the trustee shall send amended notice of sale:

(A) By registered or certified mail to:

(i) The address provided by each person who was present at the time and place set for the sale that was stayed; and

(ii) The address provided by each member of the Oregon State Bar who by registered or certified mail requests the amended notice of sale and includes with the request the notice of default or an identification number for the trustee's sale that would assist the trustee in identifying the property subject to the trustee's sale and a self-addressed, stamped envelope measuring at least 8.5 by 11 inches in size; or

(B) By posting a true copy or a link to a true copy of the amended notice of sale on the trustee's Internet website.

~~(13)~~ **(c)** The amended notice of sale must:

~~(a)~~ **(A)** Be given at least 20 days before the amended date of sale;

~~(b)~~ **(B)** Set an amended date of sale that may be the same as the original sale date, or date to which the sale was postponed, provided the requirements of this subsection and ORS 86.740 and 86.750 are satisfied;

~~(c)~~ **(C)** Specify the time and place for sale;

~~(d)~~ **(D)** Conform to the requirements of ORS 86.745; and

~~(e)~~ **(E)** State that the original sale proceedings were stayed and the date the stay terminated.

~~(14)~~ **(d)** If the publication of the notice of sale was not completed before the date the foreclosure proceedings were stayed by order of the court, by proceedings in bankruptcy or for any other lawful reason, after release from the stay, in addition to complying with the provisions of subsections (12)**(b)** and ~~(13)~~ **(12)(c)** of this section, the trustee shall complete the publication by publishing an amended notice of sale that states that the notice has been amended following release from the stay, and which contains the amended date of sale. The amended notice must be published in a newspaper of general circulation in each of the counties in which the property is situated once a week for four successive weeks, except that the required number of publications must be reduced by the number of publications that were completed before the effective date of the stay. The last publication must be made more than 20 days before the date the trustee conducts the sale.

(e) If some portion of the default or defaults specified in the original notice of default or in the original notice of sale has been cured or satisfied during the time the foreclosure proceedings were stayed, or if additional defaults have occurred during that time, then the trustee must describe in the amended notice of sale only those defaults which existed on the date the stay was released.

(f) A trustee or the attorney for the trustee, or an agent that the trustee or the attorney conducting the sale designates may, by public proclamation made at the time and place set for the sale, postpone a sale which has been scheduled pursuant to subsection (12)(a) of this section for one or more periods that total not more than 180 days from the date set pursuant to said subsection (12)(a).

OREGON STATE BAR
Legislative Proposal
Part I – Legislative Summary

RE: QUALIFICATION TO SERVE AS TRUSTEE: ORS 86.790

Submitted by: OSB Debtor/Creditor Section

Legislative Contact(s): Patrick W. Wade
Phone: (541) 686-8511
E-mail: pwade@hershnerhunter.com

- 1. Does this amend current law or program?**
a. Yes **ORS 86.705 and ORS 86.790**
b. No

2. PROBLEM PRESENTED (including level of severity):

Current law permits certain categories of entities to serve as a trustee under a trust deed pursuant to ORS Chapter 86. It also permits individuals to serve as trustees if the individuals are either attorneys or escrow agents. Under current law, if an individual trustee is temporarily away from the individual's place of business, becomes incapacitated or otherwise cannot continue to serve for any reason, an action to be taken by the trustee must await the trustee's return or restoration of the ability to serve, or the beneficiary must appoint a successor trustee. If the latter option is taken, no action may be taken until the appointment has been recorded. This circumstance creates needless delay and confusion when, for example, an individual attorney is unavailable to act when a necessary or appropriate step must be taken under the powers granted under the Oregon Trust Deed Act.

3. SOLUTION:

The proposed change to ORS 86.790 would permit a law firm to serve as a trustee. Once a law firm entity has been appointed as trustee, then any necessary action could be taken by an authorized member of the firm. This would eliminate delay and confusion caused under the current statute. By limiting the change to add only law firms, there would be no change to the characteristics of the limited types of individuals and entities that are qualified to act as trustee.

4. PUBLIC POLICY IMPLICATION of this proposed legislative change:

There is no significant public policy implication of this change.

5. Could the problem be addressed through a NON-LEGISLATIVE SOLUTION, such as administrative rule or education?

No. The limitations on qualifications to serve as trustee are purely statutory.

6. COULD ANOTHER SECTION OR GROUP MORE APPROPRIATELY INTRODUCE THE BILL? If so, have you suggested it to the section or group?

Since the proposed change is focused solely on law firms, it is appropriate for the Oregon State Bar to sponsor this legislation.

7. IDENTIFY THE GROUP OR CONSTITUENCIES THAT WOULD BE MOST IMPACTED or interested in this change. Who would support it and who would oppose it?

The group which that would be most affected would be lawyers practicing in group practices in partnerships, professional corporations, limited liability companies or limited liability partnerships.

The Section does not anticipate opposition to this proposal.

8. Has this been introduced in a prior session?

No.

OREGON STATE BAR
Legislative Proposal
Part II – Legislative Language

Section 1. ORS 86.705 is amended to read (new material in **bold and underlined text**, deleted material in *strikeout and italic text*):

As used in ORS 86.705 to 86.795, unless the context requires otherwise:

(1) “Affordable housing covenant” has the meaning given that term in ORS 456.270.

(2) “Beneficiary” means a person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given, or the person’s successor in interest, and who is not the trustee unless the beneficiary is qualified to be a trustee under ORS 86.790 (1)(d).

(3) “Eligible covenant holder” has the meaning given that term in ORS 456.270.

(4) “Grantor” means the person that conveys an interest in real property by a trust deed as security for the performance of an obligation.

(5) “Residential trust deed” means a trust deed on property upon which are situated four or fewer residential units, one of which the grantor, the grantor’s spouse or the grantor’s minor or dependent child occupies as a principal residence at the time a trust deed foreclosure is commenced.

(6) “Residential unit” means an improvement designed for residential use.

(7) “Trust deed” means a deed executed in conformity with ORS 86.705 to 86.795 that conveys an interest in real property to a trustee in trust to secure the performance of an obligation the grantor or other person named in the deed owes to a beneficiary.

(8) “Trustee” means a person, other than the beneficiary, to whom a trust deed conveys an interest in real property, or the person’s successor in interest, or an employee of the beneficiary, if the employee is qualified to be a trustee under ORS 86.790.

(9) “Law entity” means a professional corporation, partnership, limited liability partnership, limited liability company or sole proprietorship authorized to do business in this state and the attorneys who are shareholders, partners, members, proprietors or employees thereof are engaged in the private practice of law in this state.

Section 2. ORS 86.790 is amended to read (new material in **bold and underlined text**, deleted material in *strikeout and italic text*):

(1) The trustee of a trust deed under ORS 86.705 to 86.795 shall not be required to comply with the provisions of ORS chapters 707 and 709 and shall be:

(a) Any attorney who is an active member of the Oregon State Bar

(b) A law entity;

(c) ~~(b)~~ A financial institution or trust company, as defined in ORS 706.008, that is authorized to do business under the laws of Oregon or the United States;

(d) ~~(c)~~ A title insurance company authorized to insure title to real property in this state, its subsidiaries, affiliates, insurance producers or branches;

(e) ~~(d)~~ The United States or any agency thereof; or

(f) ~~(e)~~ Escrow agents licensed under ORS 696.505 to 696.590.

(2) An attorney **or law entity** who is a trustee under subsection (1)(a) **or (b)** of this section may represent the beneficiary in addition to performing the duties of trustee.

(3) At any time after the trust deed is executed, the beneficiary may appoint in writing another qualified trustee. If the appointment of the successor trustee is recorded in the mortgage records of the county or counties in which the trust deed is recorded, the successor trustee shall be vested with all the powers of the original trustee.

(4) A trustee or successor trustee is a necessary and proper party to any proceeding to determine the validity of or enjoin any private or judicial proceeding to foreclose a trust deed, but a trustee or successor trustee is neither a necessary nor a proper party to any proceeding to determine title to the property subject to the trust deed, or to any proceeding to impose, enforce or foreclose any other lien on the subject property.

(5) Nothing in ORS 86.705 to 86.795 imposes a duty on the trustee or successor trustee to notify any person of any proceeding with respect to such person, except a proceeding initiated by the trustee or successor trustee.

(6) A trustee or the attorney for the trustee or any agent designated by the trustee or the attorney may announce and accept a bid from the beneficiary whether or not the beneficiary is present at the sale.

(7) The trustee or successor trustee shall have no fiduciary duty or fiduciary obligation to the grantor or other persons having an interest in the property subject to the trust deed. The trustee or successor trustee shall not be relieved of the duty to reconvey the property subject to the trust deed to the grantor upon request for reconveyance by the beneficiary.

(8) If the trustee is an attorney or law entity described in subsection (1)(a) or (b) of this section, any document which is permitted or required under ORS 86.705 to 86.795 to be signed by the trustee, including but not limited to a trustee's deed issued pursuant to ORS 86.755(3), may be signed by any attorney who is a shareholder, partner, member, or employee of the trustee if the full name, Oregon State Bar number, and relation of the attorney signing the document to the trustee is made evident in the document.

OREGON STATE BAR
Legislative Proposal
Part I – Legislative Summary

RE: ATTORNEY FEES AND COSTS IN PROTECTIVE PROCEEDINGS

Submitted by: Elder Law Section

Legislative Contact(s): Michael A. Schmidt
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- 1. Does this amend current law or program?**
 a. Yes **ORS 125.095. It also adds a new Chapter, 125.097.**
 b. No

- 2. PROBLEM PRESENTED** (including level of severity):

As to ORS 125.095:

ORS 125.095 provides for the payment of attorneys fees incurred in a protective proceeding from the funds of the person protected by the proceeding, but only if the fees are approved by the court prior to payment. Protective proceedings are subject to ORCP. According to ORCP68C(4)(a) a request for attorney fees must be filed within 14 days after entry of judgment. This time line for requesting approval of attorney fees does not work in protective proceedings. A protective proceeding is usually on-going case with a guardian or conservator serving for several years. It is not like a civil case that reaches a conclusion by judgment. Often the only judgment entered a protective proceeding for several years is the judgment which appointed the guardian or conservator. Yet legal services on behalf of the protected person or the fiduciary continue through the life of the case. In many protective proceedings it is impractical to submit a request for attorney fees within 14 days after judgment because of legal matters which require attention such as the issuing of a conservator's bond, preparation of the conservator's inventory, or seeking court approval for the sale of property. Because of the practical difference between protective proceedings and civil litigation the bench and bar has generally not applied ORCP68C(4)(a) to attorney fee requests in protective proceedings.

The recent decision of the Court of Appeals in *Derkatsch v. Thorp, et. al.* also needs to be addressed. The case held that the trial court could not approve attorneys fees for a respondent pursuant to ORS 125.095 because the statute only authorized payment of attorney services rendered on behalf of the protected person. Since there is no protected person until a judgment is entered, representation of the respondent prior to entry of the judgment declaring the respondent to be a protected person could not be approved by the court. This outcome makes representation of respondents problematic. If the Respondent has sufficient capacity, a contract for representation could be established, but the question of the Respondent's capacity is usually the issue in the case, clouding the validity of the contract. There are also situations where the respondent clearly does not have contractual capacity, but the interests of the respondent require legal representation. ORCP68C(2)(a) requires a pleading setting forth the right to an award of

attorney fees. It is not practical to plead the right to attorney fees against the respondent when the attorney represents the respondent.

As to ORS 125.097:

Under current law, ORS 20.075 controls the award of attorney fees “in any case in which an award of attorney fees is authorized by statute.” This includes protective proceedings under ORS Chapter 125. However, the factors set forth in ORS 20.075 are expressly suited for adversarial civil litigation, not protective proceedings. For example, petitions seeking guardianships or conservatorships do not state “claims for relief” as that term is used in civil litigation, nor do objections to those petitions state “defenses.” As a result, practitioners in protective proceedings struggle to couch their arguments for or against attorney fee awards in language that both adheres to ORS 20.075’s mandate, and makes sense in light of the special role that the court plays in protecting those subject to conservatorship and guardianships; courts likewise struggle to justify decisions on attorney fee requests on the grounds ORS 20.075 requires.

Because there is a conflict between statutes and practice, and because of the need to provide allegedly incapacitated persons with legal representation, the changes to ORS 125.095 and the proposed ORS 125.097 are critical.

3. SOLUTION:

Amend ORS 125.095 to free approval of attorney fees in protective proceedings from the timing requirements of ORCP 68 and to provide for the ability to seek court approval for attorneys fees incurred in representing respondents in protective proceedings without the pleading requirements of ORCP 68.

Proposed ORS 125.097 will give needed guidance to the bench and bar regarding the criteria governing awards of attorney fees in protective proceedings. Structurally, it is modeled on ORS 20.075. Subsection (1) sets forth criteria courts will use in making the threshold determination of whether an award of attorney fees will be made at all. If the court determines such an award is appropriate, it then considers the factors set forth at both subsections (1) and (2) in setting the amount of the fee award. The factors set forth in proposed ORS 125.097 are designed to address issues that commonly arise in protective proceedings, including the benefit to the protected person of the litigation, and the size of the proposed fee award in light of the protected person’s assets.

4. PUBLIC POLICY IMPLICATION of this proposed legislative change:

The amendment to ORS 125.095 will clarify the procedure for approval of attorneys fees in protective proceedings by matching the statute to the actual practice of the bench and bar. The current practice is based upon the practical necessities of protective proceedings which usually are on-going cases requiring on-going legal representation. It also helps secure representation of respondents in these proceedings by allowing the court to award attorney fees for representation.

The proposed ORS 125.097 gives judges a guideline to determine the appropriateness of an attorney fee request.

5. Could the problem be addressed through a **NON-LEGISLATIVE SOLUTION**, such as administrative rule or education?

No. This is strictly a statutory matter.

6. **COULD ANOTHER SECTION OR GROUP MORE APPROPRIATELY INTRODUCE THE BILL?** If so, have you suggested it to the section or group?

No.

7. **IDENTIFY THE GROUP OR CONSTITUENCIES THAT WOULD BE MOST IMPACTED** or interested in this change. Who would support it and who would oppose it?

Attorneys are most impacted because the amendment deals with the procedure for approval of their fees. Judges, court staff and fiduciaries have an interest because they are also involved in resolving attorney fee issues. We do not expect any opposition.

8. **Has this been introduced in a prior session?**

No.

OREGON STATE BAR
Legislative Proposal
Part II – Legislative Language

Please provide your legislative language below:

125.095 Compensation and expenses payable in protective proceedings. (1) Funds of the protected person may be used to pay reasonable compensation to any visitor, attorney, physician, fiduciary or temporary fiduciary for services rendered in the protective proceeding or for services rendered on behalf of the fiduciary, **respondent**, or protected person.

(2) Prior court approval is required before the payment of the fees of any visitor or physician if the fees are incurred for services relating to proceedings arising out of the filing of an objection to a petition or motion.

(3) Prior court approval is required before payment of compensation to a fiduciary ~~or to the attorneys for a fiduciary~~, except that prior court approval is not required before payment of compensation to a conservator if the conservator is a trust company that has complied with ORS 709.030, or if the conservator is the Department of Veterans Affairs. [1995 c.664 Sec.15; 1997 c.631 Sec.409; 2005 c.625 Sec.65]

(4) Prior court approval is required before payment from the funds of the protected person of the fees of any attorney who has filed an appearance in the protective proceeding. Prior court approval is not required for attorney services rendered to the respondent or protected person prior to the filing of the protective proceeding unless the services are related to the protective proceedings.

(5) Notwithstanding ORCP 68C(4)(a) a party or attorney seeking court approval of attorney fees may file motions to seek approval at any time prior to the closing of the protective proceeding. Unless otherwise ordered by the court, a motion to approve the payment of attorney fees must be filed no later than two years of the service rendered except upon good cause shown.

(6) Notwithstanding ORCP 68C(2)(a) no allegation as to the basis for the award of attorney fees from the protected person needs to be pled in order to request court approval of attorney fees for the representation of the respondent or protected person.

125.097 Factors to be considered by the court in awarding attorney fees. (1) A court shall consider the following factors in determining whether to award attorney fees in any protective proceeding:

(a) Whether the relief sought by the party in the proceeding was granted in whole or in part.

(b) The party's pecuniary self-interest in the proceeding.

(c) The benefit to the protected person of the party's efforts in the protective proceeding.

(2) A court shall consider the factors specified in subsection (1) of this section in determining the amount of an award of attorney fees in any protective proceeding. In addition, the court shall consider the following factors in determining the amount of any award of attorney fees:

(a) The time and labor required in the proceeding, the novelty and difficulty of the questions involved in the proceeding and the skill needed to properly perform the legal services.

(b) The likelihood, if apparent to the client, that the acceptance of the particular employment by the attorney would preclude the attorney from taking other cases.

(c) The fee customarily charged in the locality for similar legal services.

(d) The time limitations imposed by the client or the circumstances of the case.

(e) The experience, reputation and ability of the attorney performing the services.

(f) The proportionality of the fee requested relative to the protected person's assets, regardless of whether those assets are subject to the direct or indirect control of a conservator.

(3) In any appeal from the award or denial of an attorney fee in a protective proceeding, the court reviewing the award may not modify the decision of the court in making or denying an award, or the decision of the court as to the amount of the award, except upon a finding of an abuse of discretion.

OREGON STATE BAR
Legislative Proposal
Part I – Legislative Summary

RE: UNIFORM TRUST CODE REVISIONS

Submitted by: Estate Planning and Administration Section

Legislative Contact(s): Chuck Mauritz

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1. Does this amend current law or program?

a. Yes **Oregon Uniform Trust Code (ORS Chapter 130)**

b. No

2. PROBLEM PRESENTED (including level of severity):

There are numerous sections of the Uniform Trust Code that either contain errors, or are simply outdated in the modern world. Some of these are simple matters of conflicting definitions or imprecise use of language. Other problems have resulted from changes in technology, and new ways of conducting business that did not exist when the UTC was created.

3. SOLUTION:

Adopt the following legislative changes to improve the OUTC's functionality.

4. PUBLIC POLICY IMPLICATION of this proposed legislative change:

None

5. Could the problem be addressed through a NON-LEGISLATIVE SOLUTION, such as administrative rule or education?

No.

6. COULD ANOTHER SECTION OR GROUP MORE APPROPRIATELY INTRODUCE THE BILL? If so, have you suggested it to the section or group?

Probably not. Estate Planning practitioners are the group that most directly deal with the Uniform Trust Code.

7. IDENTIFY THE GROUP OR CONSTITUENCIES THAT WOULD BE MOST IMPACTED or interested in this change. Who would support it and who would oppose it?

We are unaware of any groups that would oppose these changes.

8. Has this been introduced in a prior session?

No.

OREGON STATE BAR
Legislative Proposal
Part II – Legislative Language

Please provide your legislative language below:

Summary of proposed legislative changes:

PROPOSED OUTC STATUTORY CORRECTIONS/AMENDMENTS

130 Generally

1. The OUTC doesn't seem to establish a consistent policy for using the terms "beneficiary", "qualified beneficiary" and "permissible distributee." Most situations that require the participation of all "beneficiaries" do not stand out as unique or deserving of the expanded involvement. Consider whether "all beneficiaries" should be largely abandoned in favor of only employing "qualified beneficiaries" or "permissible distributees," both of which are defined terms.

Definitions: How Trust is Created

3. 130.010(16), 130.310, 130.315, 130.350: Clarify definition of "Settlor" to include a withdrawal power holder, but only during the period the power is exercisable and only over the assets subject to the power. Clarify that references to settlor in a joint trust relate solely to the portion of the trust attributable to the contribution of that settlor. (See attached article on and selected sections of Arizona UTC.)

4. 130.150(1): Clarify that each part of a trust that divides into sub-trusts or shares is a wholly separate trust for purposes of Chapter 130.

The OUTC defines "Settlor" but fails to include power holders. Also, the statute assumes a "one settlor equals one trust" equation. This concept does not work when a single document may have multiple settlors and create multiple trusts, either simultaneously or in succession, all of which are independent trusts. This issue becomes critically important in seeking consent for modifications, sending trustee reports, creditor rights, etc. The Arizona and Washington UTC are more sensitive to the issue due to community property rights in joint trusts.

Trustee Performance

5. 130.022(1), 130.055, 130.065: Clarify definition of "principal place of business" for purposes of determining situs and venue.

6. Consider: What are the consequences of co-trustees in multiple jurisdictions?

In this age of electronic banking and the internet, the term "principal place of business" is meaningless for determining situs, venue and jurisdiction. (See attached RCW 11.98 in CLE material on Washington adoption of selected portions of UTC.)

6. 130.022(3)(c), 130.045(5)(e) & (6)(a), 130.730(1): Specify the form, content, filing and resolution process of an objection to a proposed action by the trustee, i.e., change of trust situs, non-judicial settlement agreement, proposed plan of distribution, etc.

The OUTC includes several provisions that allow a beneficiary to object to a proposed action, i.e., change of situs, but does not offer any direction for resolving the objection. Without a default resolution provision, it appears that a beneficiary's objection is final. The content of the objection and resolution process need to be specifically described.

7. 130.022(3)(d): Authorize co-trustees to realign assets among themselves for administration purposes.

The authority of co-trustees to allocate asset responsibilities among themselves is unclear.

Non-Judicial Settlement Agreements

8. 130.045(1): Redefine “interested persons” as qualified beneficiaries.
10. 130.045(4)(d): Authorize non-judicial settlement agreement to include designation of co-trustees.
11. 130.045(5)(c) & (e): Reduce objection period from 120 days to 60 days.
12. 130.045(5)(e) & (6)(a): Clarify that objections to the agreement may only be filed by persons who have not participated in and signed the settlement agreement, i.e., persons other than qualified beneficiaries.
13. New: Substitute the attorney general as the only person whose consent is required to modify an irrevocable charitable trust if the settlor retains the power to change the charitable beneficiaries.

The non-judicial settlement concept of Oregon’s prior trust law was included in the OUTC, but some of the terminology and concepts of the two are still not harmonious and need to be cleaned up.

Role of Court in Trust Administration

14. 130.050(3): Include non-exclusive examples of issues for which resolution or instructions may be requested from a court, i.e., approval of accountings, fees, affirmative injunctions, allocations of assets, document interpretation, trustee releases, etc.

The description of the court’s role in the administration of a trust is abbreviated at best. Illustrative samples of the court’s role and authority will be helpful to demonstrate the broad authority of the court.

Virtual Representation

15. 130.110(5): An ancestor may represent any minor descendant and unborn descendants in the absence of a conflict.
16. New: The holder of a general power of appointment or of a limited power of appointment in which only the power holder is the excluded appointee may represent all permissible appointees and takers in default. (See RCW 11.96A.120).
18. New: The attorney general may represent all charitable beneficiaries in a charitable trust in which the trustor or other power holder retains or has the right to change the charitable beneficiaries.

Several gaps in the representation matrix exist that should be filled. For CRT’s and other irrevocable charitable trusts, the representation by the Attorney General of contingent or more remote charitable beneficiaries could facilitate the process

Creditor Claims Against Beneficiary

26. 130.315(3): Upon the lapse, release, or waiver of a power of withdrawal, the power holder is not treated as a settlor of the trust for any purpose. (See AZ 14-10505(B)(2)).
27. New: Designate the spouse-beneficiary of an intervivos QTIP trust as the settlor of the trust and terminate the original settlor’s role as a settlor for purposes of creditor claims. (See ARS 14-10505.E, Va Code 55-545.05.B.3, FS 736.0505(3))
28. New: Creditor cannot reach any trust property based on trustee’s discretionary authority to reimburse a settlor of an irrevocable trust for income taxes paid because of grantor trust status or for amounts paid to taxing authorities on behalf of the settlor or to compel

distributions for the benefit of a beneficiary of a special needs trust. (See ARS 14-10505.A.2)

A number of states adopting the UTC have restricted the rights of creditors of beneficiaries to access the trust assets. I think we should move in that direction even though we may not be able to successfully mount a frontal assault.

Revocable Trusts

29. ORS 130.500(2): Clarify that a trust is still considered to be revocable by the settlor for purposes of ORS 130.520 – 130.575 even though the consent of a third party is required to revoke or modify it.

The general description of a revocable trust in ORS 130.500(2) does not contemplate trustee or third party involvement in the revocation process.

30. 130.520: For purposes of ORS 130.520 – 130.575, a revocable trust is one that is revocable on the occurrence of each of the events described in those sections.

The definition of a revocable trust in ORS 130.525 and the application of the automatic revocation sections due to marriage, divorce, etc. do not completely mesh (ORS 130.525 – 130.575). The definition of revocable trust only requires the trust to be revocable at some point during the settlor's lifetime, but does not require the trust to be revocable as of the date of death or at the time of one of the events of automatic revocation. That means one of these events could occur after the trust became irrevocable and the settlor no longer has the power to change it.

Pretermitted Child

31. 130.555(1): Substitute “acknowledged” for “provided for” in definition.

32. 130.555(1): Limit pretermitted child to one born before or within 9 months after the death of the settlor.

33. 130.555(1): Limit pretermitted child to one whose paternity is acknowledged by the decedent.

34. 130.555(1): Limit time within which pretermitted child claim may be made, but consider due process notice issue.

35. 130.555(4): Limit pretermitted child share to specific percentage of trust estate, omitting all probate and non-probate assets.

36. 130.555(5)(b) & (c): Consider how the share of a pretermitted child is distributable: outright, in trust, to a custodian, or consistent with settlor's probable intent or estate plan. If in trust, for how long?

This part of the OUTC was lifted from the probate/wills statute without much modification. The rights of the pretermitted child are far more expansive than expected, poorly defined in relation to the trust, and, in the age of post-mortem conception, could be used to defeat the testamentary plan of the settlor/decedent.

Co-Trustees

37. 130.610(3)(c): Substitute “in writing” for “properly” in delegation of authority between co-trustees since “properly” does not relate to a statutory standard.

38. 130.610(6): Clarify that the co-trustee delegating authority is not liable for acts of co-trustee holding delegated authority unless the delegating co-trustee has knowledge of the act and it constitutes a “serious breach of trust” as described in ORS 130.610(7)(a). (See ORS 130.610(5) & (6) for interplay between delegation and liability of objecting co-trustee).

Co-trustees can create their own process for delegation of responsibilities among themselves.

Vacancy in Trusteeship

39. 130.615(4)(b): Trustee vacancy in a charitable trust may be filled by unanimous consent of all qualified non-charity beneficiaries and the attorney general.

Facilitate the appointment of a successor trustee of a charitable trust.

Removal of Trustee

40. 130.625(2)(d)(B): Delete “removal not inconsistent with a material purpose of the trust” as a criteria for removal. By definition, the services of a trustee are not a material purpose of the trust since the trustee’s participation is not required to modify a trust under ORS 130.200 et. seq.

Eliminate speculative trustee removal criteria.

Compensation of Trustee

42. 130.635: Add a provision that, if the trust does not specify the trustee’s compensation and the trustee expects to be compensated for services, then the trustee must within a reasonable time after acceptance of the trusteeship send qualified beneficiaries a written description of the method of compensation to be paid.

43. 130.635: Add a provision that, if co-trustees are serving and the trust does not specify the trustee’s compensation, the compensation paid pursuant to ORS 130.635(1) will be based on the totality of services provided by the cotrustees as a group.

44. 130.635: Add a provision that the use of third party advisors to perform trustee functions will be taken into account in determining reasonable trustee compensation.

45. 130.710(2)(d): Eliminate requirement for advance notice of trustee fee changes, but include beneficiary objection process.

The statute seems to contemplate a corporate trustee with established fee arrangements. Private trustees rarely have such protocols. Clarify how co-trustees are compensated and what impact, if any, the use of outside advisors have on trustee compensation.

Duty of Loyalty

46. 130.650, 130.655: The duty of the trustee to administer the trust according to its terms and the duty of loyalty do not require the trustee to object to any attempted modification or termination of the trust.

Some trustees have contended that their duty of loyalty requires them to resist any attempted modification of a trust.

Trustee Notices and Reports

47. 130.020(2)(i) & (3), 130.710(1) & (3): Reconsider the trustor’s control over the obligation to give notice and reports to beneficiaries. Reconsider the content of those reports. Authorize Settlor to establish system for alternative notice. (See ARS 14-10813).

49. 130.710(3): The trust report due at the termination of the trust should include the period following the terminating event to the date of distribution.

50. 130.710(5): Specify fees and costs chargeable to a beneficiary requesting information other than annual report.

51. 130.710(9): The first trustee report after the death of the settlor of a revocable trust should include the period preceding the death of the settlor during which the trustee served and no report was given.

While the trustee cannot avoid providing information if the beneficiary requests it, the settlor should have greater control over the disclosure process. Also, the extent of the information required to be

distributed needs to be clarified, especially in the area of multiple trusts or pot trusts for multiple beneficiaries.

Trust Termination and Distribution

53. 130.730(1): Describe the objection criteria, how it is filed or delivered and a process to resolve it. See the objection process of ORS 130.045(5) & (6).

The trustee's distribution plan is approved by the beneficiaries under ORS 130.730(1) if no one objects. No description of the objection's content or the process to resolve it is included.

54. 130.730(2): Specify the point at which title to trust assets vests in beneficiaries upon the occurrence of the trust termination or division event.

Questions have arisen over the point in time that legal title (or testamentary authority) to trust assets passes to the ultimate beneficiary, i.e., upon the occurrence of the triggering event or when the trustee actually distributes the asset. See ORS 114.215(1).

55. 130.730(3): The beneficiary is rebuttably presumed to know of the trustee's conduct if the trustee has provided "adequate" annual reports that comply with the standard of (revised) ORS 130.710(3).

The trustee may ask for and the beneficiaries may give a release upon termination of the trust or distribution of a beneficiary's share. The release is invalid, however, if the beneficiary did not know that breach of trust had occurred. The onus is on the trustee to inform the beneficiary of its conduct that could be considered a breach in order for the release to be valid. An appropriate standard for information supplied to the beneficiary should be sufficient to shift the burden to the beneficiary.

56. 130.730: The trustee's plan of distribution may include a requirement for a release and waiver of claims from the beneficiary.

The trustee should be able to require a release from a beneficiary prior to distribution. Such a requirement should not be a conflict of interest, breach of trust or breach of duty of loyalty.

Trust Advisor

57. 130.735(1): Include a reference to the settlor's right to create a succession process for advisors.

58. New: Include an advisor removal process similar to the removal of a trustee under ORS 130.625.

The settlor may appoint a trust advisor, but there is no mention of the right to also provide for the succession of advisors or the removal of an advisor.

The following proposal is taken from the newly revised Washington trust statute (SHB 1051) that will become effective 1/1/12

59. Consider: A 3-year statute of limitations for the commencement of a suit against a trustee for breach of trust if an "adequate trust report" was sent to beneficiary. Describe contents of an "adequate" report. See RCW 11.96A.070(a) & (b)

60. Consider: A 3-year statute of limitation for the commencement of a suit to challenge the validity of an irrevocable trust. See ORS 130.515(1)

Oregon does not have a statute of limitations specifically related to trusts and claims against the trustee.

OREGON STATE BAR
Legislative Proposal
Part I – Legislative Summary

RE: AMENDMENTS TO:

- ORS 111.005(13)(14)&(27)** (Definitions for probate law)
- ORS 114.305(26)** (Transactions authorized for personal representative)
- ORS 114.____** (**NEW: Digital assets**)
- ORS 114.505(3)** (Definitions for small estates)
- ORS 125.005(2)&(3)** (Definitions for protective proceedings)
- ORS 125.445(29)** (Acts [of conservator] authorized to be performed without prior court approval)
- ORS 125.____** (**NEW: Digital assets**)
- ORS 130.010(5)(6)&(13)** (UTC 103 Definitions)
- ORS 130.____** (**NEW: Digital assets**)

Submitted by: Estate Planning & Admin Section

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- 1. Does this amend current law or program?**
- a. Yes Amends **ORS 111.005(13)(14) & (27)**
ORS 114.305(26) + adds new statute in Chapter 114
ORS 114.505(3)
ORS 125.005(2) & (3)
ORS 125.445(29) + adds new statute in Chapter 125
ORS 130.010(5)(6) & (13) + adds new statute in Chapter 130
 - b. No

2. PROBLEM PRESENTED (including level of severity):

The advent of the internet and computers has changed how we access and store information. In particular, it has changed how we manage our financial lives. An increasing number of persons and businesses communicate by email or social networking sites, bank electronically, and have

electronically accessed credit. It is expected that credit cards will soon be replaced by smart phone applications that serve the same functions.

Another dynamic is the existence of value in some electronically stored assets. This would include value in an email address or social networking account, the content of a financial account such as Paypal, internet domain names and online photographs.

While we are alive and competent, access to and possession of digital assets and information poses no legal problems. However, at the death or incompetence of the owner, the fiduciary (personal representative, conservator or trustee) may find his or her authority under Oregon law non-existent or unclear.

The duly appointed fiduciary is statutorily charged to take possession of the assets of the estate or the protected person. A trustee may be charged to take possession of the trust corpus. In all instances, the fiduciary must have access to the necessary information to carry out his or her tasks. Current statutes do not clearly authorize this.

The reason for the ambiguity in the statutes is that electronic communication and storage has developed independently of the historical definitions of assets. Current statutes use the historical terms of “real property” and “personal property.” See, for example:

- ORS 111.005(6), (15), (23), (25) and (27) for probate estates
- ORS 114.505(3) for small estates
- ORS 125.005(3) and ORS 125.445(29) for conservatorships
- ORS 130.010(13)

Ambiguity may create unintended criminal and civil consequences for alleged cybercrime or financial elder abuse or financial exploitation when an authorized fiduciary seeks to access, control, or transfer digital assets or accounts. See, for example:

- ORS 164.377(2)(b) (computer crimes include accessing a computer to obtain “money, property or services by means of false or fraudulent pretenses, representations or promises”)
- ORS 124.050(4)(c) (“transferring without authorization”)
- ORS 124.110(1)(a) (“wrongfully takes or appropriates money or property of a vulnerable person”)
- 18 USC §1030(a)(2)(Computer Fraud and Abuse Act allows federal criminal charges for one that “exceeds authorized access”)

The goals of the proposed statutory changes are to:

- (1) extend the authority of fiduciaries to (1) access and (2) possess digital assets and information;
- (2) provide a working definition of digital assets and information; and
- (3) not affect the underlying contractual relations between the decedent, protected person or beneficiary, and the internet-based entity holding the asset or information.

3. SOLUTION:

The solution to the problem is to amend the following Oregon statutes:

- (a) Add definitions to ORS 111.005 for “digital assets” and “digital accounts;”
- (b) Amend ORS 111.005(27) to expand the definition of “property” to include the decedent’s digital assets;
- (c) Amend ORS 114.305(26) to clarify the powers of the personal representative regarding the decedent’s digital assets;
- (d) Create new statute in Chapter 114 to provide a procedure for a personal representative to obtain digital assets or accounts through written requests or order of the court.
- (e) Amend ORS 114.505(3) to expand the definition of “estate” to include the decedent’s digital assets;
- (f) Add definitions to conservatorship statutes in ORS 125.005 for “digital assets” and “digital accounts;”
- (g) Amend ORS 125.005(3) to expand the definition for a conservator to “manage financial resources” to include digital assets;
- (h) Create new statute in Chapter 125 to provide a procedure for a conservator to obtain digital assets or accounts through written requests or order of the court;
- (i) Add definitions to Oregon Uniform Trust Code ORS 130.010 for “digital assets” and “digital accounts;”
- (j) Amend ORS 130.010(13) to expand the definition of “property” to include digital assets; and
- (k) Create new statute in Chapter 130 to provide a procedure for a trustee to obtain digital assets or accounts through written requests or order of the court.

4. PUBLIC POLICY IMPLICATION of this proposed legislative change:

The implications of these changes are:

Fiduciaries will be able to perform the obligation of identifying, marshaling and protecting assets of a decedent, protected person, or trust beneficiary with greater efficiency and lower costs.

This express inclusion of digital assets and information will not necessarily override the terms of a licensing agreement between the online service provider and decedent, protected person, or trust beneficiary. These types of user license agreements are currently in flux, and some may expressly allow fiduciary access to user accounts. However, in the absence of either express permission or denial of fiduciary access in a licensing agreement, the amendments to the Oregon legislation should give an online service provider greater confidence in allowing a fiduciary prompt access and control.

5. Could the problem be addressed through a NON-LEGISLATIVE SOLUTION, such as administrative rule or education?

No.

6. COULD ANOTHER SECTION OR GROUP MORE APPROPRIATELY INTRODUCE THE BILL? If so, have you suggested it to the section or group?

No. The Uniform Law Commission recently formed a virtual assets study group, but it is unexpected ULC progress will meet the current demand for clarification of fiduciary authority.

If so, have you suggested it to the section or group? The ULC is aware of the OSB virtual asset work group and we will continue to offer input as the ULC study group proceeds over the next few years.

7. IDENTIFY THE GROUP OR CONSTITUENCIES THAT WOULD BE MOST IMPACTED or interested in this change. Who would support it and who would oppose it?

This legislation would impact the following groups: heirs, beneficiaries, protected persons, estate representatives, conservators/guardians, trustees, individuals holding fiduciary powers, lawyers, estate planners, banks/investment/financial institutions, accountants/tax preparers, email providers, software companies, social network or media companies, file sharing companies, domain registration/domain name service companies, web hosting companies and online providers.

We believe that the goals of this legislation will be supported by all of the groups listed above, but some groups may have concerns that we hope to address during the drafting of this legislation.

8. Has this been introduced in a prior session?

No.

OREGON STATE BAR
Legislative Proposal
Part II – Legislative Language

Please provide your legislative language below:

111.005 Definitions for probate law. As used in ORS chapters 111, 112, 113, 114, 115, 116 and 117, unless the context requires otherwise:

(1) "Abate" means to reduce a devise on account of the insufficiency of the estate to pay all claims, expenses and devises in full.

(2) "Action" includes suits and legal proceedings.

(3) "Administration" means any proceeding relating to the estate of a decedent, whether the decedent died testate, intestate or partially intestate.

(4) "Advancement" means a gift by a decedent to an heir to enable the donee to anticipate the inheritance to the extent of the gift.

(5) "All purposes of intestate succession" means succession by, through or from a person, both lineal and collateral.

(6) "Assets" includes real, personal and intangible property.

(7) "Claim" includes liabilities of a decedent, whether arising in contract, in tort or otherwise.

(8) "Court" or "probate court" means the court in which jurisdiction of probate matters, causes and proceedings is vested as provided in ORS 111.075 (Probate jurisdiction vested).

(9) "Decedent" means a person who has died leaving property that is subject to administration.

(10) "Devise," when used as a noun, means property disposed of by a will, and includes "legacy" and "bequest."

(11) "Devise," when used as a verb, means to dispose of property by a will, and includes "bequeath."

(12) "Devisee" includes "legatee" and "beneficiary."

(13) "Digital accounts" means, but is not limited to, email, financial, personal and other online accounts which currently exist or may exist as technology develops or such comparable items as technology develops.

(14) "Digital assets" means text, images, multimedia information, or personal property stored in a digital format, whether stored on a server, computer, or other electronic device which currently exists or may exist as technology develops, and regardless of the ownership of the physical device upon which the digital asset is stored. Digital assets include, without limitation, any words, characters, codes, or contractual rights necessary to access the digital assets.

~~(15)(13)~~ "Distributee" means a person entitled to any property of a decedent under the will of the decedent or under intestate succession.

~~(16)~~ ~~(14)~~ "Domicile" means the place of abode of a person, where the person intends to remain and to which, if absent, the person intends to return.

~~(17)~~ ~~(15)~~ "Estate" means the real and personal property of a decedent, as from time to time changed in form by sale, reinvestment or otherwise, and augmented by any accretions or additions thereto and substitutions therefor or diminished by any decreases and distributions therefrom.

~~(18)~~ ~~(16)~~ "Funeral" includes burial or other disposition of the remains of a decedent, including the plot or tomb and other necessary incidents to the disposition of the remains.

~~(19)~~ ~~(17)~~ "General devise" means a devise chargeable generally on the estate of a testator and not distinguishable from other parts thereof or not so given as to amount to a specific devise.

~~(20)~~ ~~(18)~~ "Heir" means any person, including the surviving spouse, who is entitled under intestate succession to the property of a decedent who died wholly or partially intestate.

(21) ~~(19)~~ "Interested person" includes heirs, devisees, children, spouses, creditors and any others having a property right or claim against the estate of a decedent that may be affected by the proceeding. It also includes fiduciaries representing interested persons.

(22) ~~(20)~~ "Intestate" means one who dies without leaving a valid will, or the circumstance of dying without leaving a valid will, effectively disposing of all the estate.

(23) ~~(21)~~ "Intestate succession" means succession to property of a decedent who dies intestate or partially intestate.

(24) ~~(22)~~ "Issue" includes adopted children and their issue and, when used to refer to persons who take by intestate succession, includes all lineal descendants, except those who are the lineal descendants of living lineal descendants.

(25) ~~(23)~~ "Net estate" means the real and personal property of a decedent, except property used for the support of the surviving spouse and children and for the payment of expenses of administration, funeral expenses, claims and taxes.

(26) ~~(24)~~ "Net intestate estate" means any part of the net estate of a decedent not effectively disposed of by the will.

(27) ~~(25)~~ "Personal property" includes all property other than real property.

(28) ~~(26)~~ "Personal representative" includes executor, administrator, administrator with will annexed and administrator de bonis non, but does not include special administrator.

(29) ~~(27)~~ "Property" includes both real and personal property, **including digital assets.**

(30) ~~(28)~~ "Real property" includes all legal and equitable interests in land, in fee and for life.

(31) ~~(29)~~ "Settlement" includes, as to the estate of a decedent, the full process of administration, distribution and closing.

(32) ~~(30)~~ "Specific devise" means a devise of a specific thing or specified part of the estate of a testator that is so described as to be capable of identification. It is a gift of a part of the estate identified and differentiated from all other parts.

(33) ~~(31)~~ "Will" includes codicil; it also includes a testamentary instrument that merely appoints an executor or that merely revokes or revives another will. [1969 c.591 §1]

114.305 Transactions authorized for personal representative. Subject to the provisions of ORS 97.130 (2) and (10) and except as restricted or otherwise provided by the will of the decedent, a document of anatomical gift under ORS 97.965 or by court order, a personal representative, acting reasonably for the benefit of interested persons, is authorized to:

(1) Direct and authorize disposition of the remains of the decedent pursuant to ORS 97.130 and incur expenses for the funeral, burial or other disposition of the remains in a manner suitable to the condition in life of the decedent. Only those funeral expenses necessary for a plain and decent funeral and disposition of the remains of the decedent may be paid from the estate if the assets are insufficient to pay the claims of the Department of Human Services and the Oregon Health Authority for the net amount of public assistance, as defined in ORS 411.010, paid to or for the decedent and for care and maintenance of any decedent who was at a state institution to the extent provided in ORS 179.610 to 179.770.

(2) Retain assets owned by the decedent pending distribution or liquidation.

(3) Receive assets from fiduciaries or other sources.

(4) Complete, compromise or refuse performance of contracts of the decedent that continue as obligations of the estate, as the personal representative may determine under the circumstances. In performing enforceable contracts by the decedent to convey or lease real property, the personal representative, among other courses of action, may:

(a) Execute and deliver a deed upon satisfaction of any sum remaining unpaid or upon receipt of the note of the purchaser adequately secured; or

(b) Deliver a deed in escrow with directions that the proceeds, when paid in accordance with the escrow agreement, be paid to the successors of the decedent, as designated in the escrow agreement.

- (5) Satisfy written pledges of the decedent for contributions, whether or not the pledges constituted binding obligations of the decedent or were properly presented as claims.
- (6) Deposit funds not needed to meet currently payable debts and expenses, and not immediately distributable, in bank or savings and loan association accounts, or invest the funds in bank or savings and loan association certificates of deposit, or federally regulated money-market funds and short-term investment funds suitable for investment by trustees under ORS 130.750 to 130.775, or short-term United States Government obligations.
- (7) Abandon burdensome property when it is valueless, or is so encumbered or is in a condition that it is of no benefit to the estate.
- (8) Vote stocks or other securities in person or by general or limited proxy.
- (9) Pay calls, assessments and other sums chargeable or accruing against or on account of securities.
- (10) Sell or exercise stock subscription or conversion rights.
- (11) Consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution or liquidation of a corporation or other business enterprise.
- (12) Hold a security in the name of a nominee or in other form without disclosure of the interest of the estate, but the personal representative is liable for any act of the nominee in connection with the security so held.
- (13) Insure the assets of the estate against damage and loss, and insure the personal representative against liability to third persons.
- (14) Advance or borrow money with or without security.
- (15) Compromise, extend, renew or otherwise modify an obligation owing to the estate. A personal representative who holds a mortgage, pledge, lien or other security interest may accept a conveyance or transfer of the encumbered asset in lieu of foreclosure in full or partial satisfaction of the indebtedness.
- (16) Accept other real property in part payment of the purchase price of real property sold by the personal representative.
- (17) Pay taxes, assessments and expenses incident to the administration of the estate.
- (18) Employ qualified persons, including attorneys, accountants and investment advisers, to advise and assist the personal representative and to perform acts of administration, whether or not discretionary, on behalf of the personal representative.
- (19) Prosecute or defend actions, claims or proceedings in any jurisdiction for the protection of the estate and of the personal representative in the performance of duties as personal representative.
- (20) Prosecute claims of the decedent including those for personal injury or wrongful death.
- (21) Continue any business or venture in which the decedent was engaged at the time of death to preserve the value of the business or venture.
- (22) Incorporate or otherwise change the business form of any business or venture in which the decedent was engaged at the time of death.
- (23) Discontinue and wind up any business or venture in which the decedent was engaged at the time of death.
- (24) Provide for exoneration of the personal representative from personal liability in any contract entered into on behalf of the estate.
- (25) Satisfy and settle claims and distribute the estate as provided in ORS chapters 111, 112, 113, 114, 115, 116 and 117.
- (26) Access, take control of, handle, conduct, continue, distribute, dispose of, or terminate any digital assets and digital accounts of a deceased person.**
- (27) (26)** Perform all other acts required or permitted by law or by the will of the decedent.

New Statute in Chapter 114 Digital Asset Recovery.

- (1) **Within fourteen (14) days of the receipt of a written request from the personal representative or receipt of an order from the court administering the estate, a custodian shall provide to the personal representative:**
 - a. **access to any digital accounts of the deceased person operated by the custodian; and**
 - b. **copies of any digital assets of the deceased person stored by the custodian.**
- (2) **A custodian may not destroy, disable or dispose of any digital asset or digital account of the Decedent for two (2) years after the custodian receives a request or order under subsection (1).**
- (3) **As used in this section, "custodian" means any person, company or entity who electronically stores the digital assets of the Decedent or who operates the digital accounts which were accessed by the Decedent and the Decedent's representatives.**
- (4) **Any custodian that transfers, delivers, provides access to or allows possession of digital assets or information in the manner provided by this section is discharged and released from any liability or responsibility for the digital assets and accounts and for providing such access or making such transfer or delivery.**

114.505 Definitions. As used in ORS 114.505 (Definitions for ORS 114.505 to 114.560) to 114.560 (Exclusive remedy):

- (1) "Affiant" means the person or persons signing an affidavit filed under ORS 114.515 (Value of estate).
- (2) "Claiming successors" means:
 - (a) If the decedent died intestate, the heir or heirs of the decedent, or if there is no heir, an estate administrator of the Department of State Lands appointed under ORS 113.235 (Appointment of estate administrators by Director of Department of State Lands);
 - (b) If the decedent died testate, the devisee or devisees of the decedent; and
 - (c) Any creditor of the estate entitled to payment or reimbursement from the estate under ORS 114.545 (Duties of person filing affidavit) (1)(c) who has not been paid or reimbursed the full amount owed such creditor within 60 days after the date of the decedent's death.
- (3) "Estate" means decedent's property subject to administration in Oregon, **including digital assets of the decedent.**

125.005 Definitions. As used in this chapter:

- (1) "Conservator" means a person appointed as a conservator under the provisions of this chapter.
- (2) **"Digital accounts" means, but is not limited to, email, financial, personal and other online accounts which currently exist or may exist as technology develops or such comparable items as technology develops.**
- (3) **"Digital assets" means text, images, multimedia information, or personal property stored in a digital format, whether stored on a server, computer, or other electronic device which currently exists or may exist as technology develops, and regardless of the ownership of the physical device upon which the digital asset is stored. Digital assets include, without limitation, any words, characters, codes, or contractual rights necessary to access the digital assets.**
- (4) ~~(2)~~ "Fiduciary" means a guardian or conservator appointed under the provisions of this chapter or any other person appointed by a court to assume duties with respect to a protected person under the provisions of this chapter.

(5) ~~(3)~~ "Financially incapable" means a condition in which a person is unable to manage financial resources of the person effectively for reasons including, but not limited to, mental illness, mental retardation, physical illness or disability, chronic use of drugs or controlled substances, chronic intoxication, confinement, detention by a foreign power or disappearance. "Manage financial resources" means those actions necessary to obtain, administer and dispose of real and personal property, intangible property, business property, benefits and income, **including digital assets.**

(6) ~~(4)~~ "Guardian" means a person appointed as a guardian under the provisions of this chapter.

(7) ~~(5)~~ "Incapacitated" means a condition in which a person's ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that the person presently lacks the capacity to meet the essential requirements for the person's physical health or safety. "Meeting the essential requirements for physical health and safety" means those actions necessary to provide the health care, food, shelter, clothing, personal hygiene and other care without which serious physical injury or illness is likely to occur.

(8) ~~(6)~~ "Minor" means any person who has not attained 18 years of age.

(9) ~~(7)~~ "Protected person" means a person for whom a protective order has been entered.

(10) ~~(8)~~ "Protective order" means an order of a court appointing a fiduciary or any other order of the court entered for the purpose of protecting the person or estate of a respondent or protected person.

(11) ~~(9)~~ "Protective proceeding" means a proceeding under this chapter.

(12) ~~(10)~~ "Respondent" means a person for whom entry of a protective order is sought in a petition filed under ORS 125.055 (Petitions in protective proceedings).

(13) ~~(11)~~ "Visitor" means a person appointed by the court under ORS 125.150 (Appointment of visitors) for the purpose of interviewing and evaluating a respondent or protected person. [1995 c.664 §1; 2007 c.70 §31]

125.445 Acts authorized to be performed without prior court approval. A conservator may perform the following acts without prior court authorization or confirmation if the conservator is acting reasonably to accomplish the purposes for which the conservator was appointed:

(1) Collect, hold and retain assets of the estate including land wherever situated, until, in the judgment of the conservator, disposition of the assets should be made. Assets of the estate may be retained even though those assets include property in which the conservator is personally interested.

(2) Receive additions to the estate.

(3) Continue or participate in the operation of any business or other enterprise.

(4) Acquire an undivided interest in an estate asset in which the conservator, in any fiduciary capacity, holds an undivided interest.

(5) Invest and reinvest estate assets and funds in the same manner as a trustee may invest and reinvest.

(6) Deposit estate funds in a bank including a bank operated by the conservator.

(7) Except as limited in ORS 125.430 (Sale of protected person's residence), acquire or dispose of an estate asset including real property wherever situated for cash or on credit, at public or private sale.

(8) Manage, develop, improve, exchange, partition, change the character of or abandon an estate asset in connection with the exercise of any power vested in the conservator.

(9) Make ordinary or extraordinary repairs or alterations in buildings or other structures, demolish any improvements, or raze existing or erect new party walls or buildings.

(10) Subdivide, develop or dedicate land to public use, make or obtain the vacation of plats and adjust boundaries, adjust differences in valuation on exchange or partition by giving or receiving considerations, and dedicate easements to public use without consideration.

(11) Enter for any purpose into a lease as lessor or lessee with or without option to purchase or renew for a term within or extending beyond the term of the conservatorship.

- (12) Enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement.
- (13) Grant an option involving disposition of an estate asset or take an option for acquisition of any asset.
- (14) Vote a security, in person or by general or limited proxy.
- (15) Pay calls, assessments and any other sums chargeable or accruing against or on account of securities.
- (16) Sell or exercise stock subscription or conversion rights, or consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution or liquidation of a corporation or other business enterprise.
- (17) Hold a security in the name of a nominee or in other form without disclosure of the conservatorship so that title to the security may pass by delivery. The conservator is liable for any act of the nominee in connection with the stock so held.
- (18) Insure the assets of the estate against damage or loss, and the conservator against liability with respect to third persons.
- (19) Borrow money to be repaid from estate assets or otherwise and mortgage or pledge property of the protected person as security therefor.
- (20) Advance money for the protection of the estate or the protected person, and for all expenses, losses and liability sustained in the administration of the estate or because of the holding or ownership of any estate assets. The conservator has a lien on the estate as against the protected person for advances so made.
- (21) Pay or contest any claim, settle a claim by or against the estate or the protected person by compromise, arbitration or otherwise, and release, in whole or in part, any claim belonging to the estate to the extent that the claim is uncollectible.
- (22) Pay taxes, assessments, compensation of the conservator and other expenses incurred in the collection, care, administration and protection of the estate.
- (23) Allocate items of income or expense to either income or principal, including creation of reserves out of income for depreciation, obsolescence or amortization, or for depletion in mineral or timber properties.
- (24) Pay any sum distributable to a protected person or a dependent of a protected person by paying the sum to the protected person or the dependent, or by paying the sum either to a guardian, custodian under ORS 126.700 (Payment or delivery for benefit of minor), or conservator of the protected person or, if none, to a relative or other person with custody of the protected person.
- (25) Employ persons, including attorneys, auditors, investment advisers or agents, even though they are associated with the conservator, to advise or assist the conservator in the performance of administrative duties, acting upon their recommendation without independent investigation, and instead of acting personally, employing one or more agents to perform any act of administration, whether or not discretionary, except that payment to the conservator's attorney of record is subject to the provisions of ORS 125.095 (Compensation and expenses payable in protective proceedings).
- (26) Prosecute or defend actions, claims or proceedings in any jurisdiction for the protection of estate assets and of the conservator in the performance of duties.
- (27) Prosecute claims of the protected person including those for the personal injury of the protected person.
- (28) Execute and deliver all instruments that will accomplish or facilitate the exercise of the powers vested in the conservator.
- (29) Access, take control of, handle, conduct, continue, distribute, dispose of, or terminate any digital assets and digital accounts of a protected person.**

New Statute in Chapter 125 - Digital Asset Recovery.

- (1) **Within fourteen (14) days of the receipt of a written request from the conservator or receipt of an order from the court administering the assets of the Protected Person, a custodian shall provide to the conservator:**
 - a. **access to any digital accounts of the Protected Person operated by the custodian; and**
 - b. **copies of any digital assets of the Protected Person stored by the custodian.**
- (2) **A custodian may not destroy, disable or dispose of any digital asset or digital account of the Protected Person for two (2) years after the custodian receives a request or order under subsection (1).**
- (3) **As used in this section, "custodian" means any person, company or entity who electronically stores the digital assets of the Protected Person or who operates the digital accounts which were accessed by the Protected Person and the Protected Person's representatives.**
- (4) **Any custodian that transfers, delivers, provides access to or allows possession of digital assets or information in the manner provided by this section is discharged and released from any liability or responsibility for the digital assets and accounts and for providing such access or making such transfer or delivery.**

130.010 UTC 103. Definitions. For the purposes of this chapter:

- (1) "Ascertainable standard" means an ascertainable standard relating to an individual's health, education, support or maintenance within the meaning of section 2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Code, as in effect on January 1, 2006.
- (2) "Beneficiary" means a person that:
 - (a) Has a present or future beneficial interest in a trust, whether vested or contingent; or
 - (b) Holds a power of appointment over trust property in a capacity other than that of trustee.
- (3) "Charitable trust" means a trust, or portion of a trust, described in ORS 130.170 (UTC 405. Charitable purposes) (1).
- (4) "Conservator" means a person appointed by a court to administer the estate of a minor or adult individual.
- (5) **"Digital accounts" means, but is not limited to, email, financial, personal and other online accounts which currently exist or may exist as technology develops or such comparable items as technology develops.**
- (6) **"Digital assets" means text, images, multimedia information, or personal property stored in a digital format, whether stored on a server, computer, or other electronic device which currently exists or may exist as technology develops, and regardless of the ownership of the physical device upon which the digital asset is stored. Digital assets include, without limitation, any words, characters, codes, or contractual rights necessary to access the digital assets.**
- (7) (5) "Environmental law" means a federal, state or local law, rule, regulation or ordinance relating to protection of the environment.
- (8) (6) "Financial institution" has the meaning given that term in ORS 706.008 (Additional definitions for Bank Act).
- (9) (7) "Financially incapable" has the meaning given that term in ORS 125.005 (Definitions). "Financially capable" means not financially incapable.
- (10) (8) "Guardian" means a person appointed by a court to make decisions regarding the support, care, education, health and welfare of a minor or adult individual. "Guardian" does not include a guardian ad litem.

(11) ~~(9)~~ "Interests of the beneficiaries" means the beneficial interests provided in the terms of a trust.

(12) ~~(10)~~ "Permissible distributee" means a beneficiary who is currently eligible to receive distributions of trust income or principal, whether the distribution is mandatory or discretionary.

(13) ~~(11)~~ "Person" means an individual, corporation, business trust, partnership, limited liability company, association, joint venture, public body as defined in ORS 174.109 ("Public body" defined) or any other legal or commercial entity.

(14) ~~(12)~~ "Power of withdrawal" means a presently exercisable general power of appointment, other than a power exercisable by a trustee that is limited by an ascertainable standard or that is exercisable by another person only upon consent of the trustee or a person holding an adverse interest.

(15) ~~(13)~~ "Property" means anything that may be the subject of ownership, whether real or personal, legal or equitable, or any interest therein, **including digital assets.**

(16) ~~(14)~~ "Qualified beneficiary" means a beneficiary who:

(a) Is a permissible distributee on the date the beneficiary's qualification is determined;

(b) Would be a permissible distributee if the interests of all permissible distributees described in paragraph (a) of this subsection terminated on the date the beneficiary's qualification is determined; or

(c) Would be a permissible distributee if the trust terminated on the date the beneficiary's qualification is determined.

(17) ~~(15)~~ "Revocable trust" means a trust that can be revoked by the settlor without the consent of the trustee or a person holding an adverse interest.

(18) ~~(16)~~ "Settlor" means a person, including a testator, who creates a trust or contributes property to a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution and of the portion as to which that person has the power to revoke or withdraw.

(19) ~~(17)~~ "Spendthrift provision" means a term of a trust that restrains both voluntary and involuntary transfer of a beneficiary's interest.

(20) ~~(18)~~ "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands or any territory or insular possession subject to the jurisdiction of the United States. "State" includes an Indian tribe or band recognized by federal law or formally acknowledged by a state.

(21) ~~(19)~~ "Terms of a trust" means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding.

(22) ~~(20)~~ "Trust instrument" means an instrument executed by a settlor that contains terms of the trust, including any amendments to the instrument.

(23) ~~(21)~~ "Trustee" means an original trustee, an additional trustee, a successor trustee or a cotrustee. [2005 c.348 §3; 2009 c.275 §1; 2009 c.294 §16]

New Statute in Chapter 130 - Digital Asset Recovery.

(1) Within fourteen (14) days of the receipt of a written request from the Trustee or receipt of an order from the court having jurisdiction over the Trust, a custodian shall provide to the Trustee:

a. access to any digital accounts of the Trust or Trustee operated by the custodian; and

b. copies of any digital assets of the Trust or Trustee stored by the custodian.

- (2) A custodian may not destroy, disable or dispose of any digital asset or digital account of the Trust or Trustee for two (2) years after the custodian receives a request or order under subsection (1).
- (3) As used in this section, "custodian" means any person, company or entity who electronically stores the digital assets of the Trust or Trustee or who operates the digital accounts which were accessed by the Trust or Trustee's representatives.
- (4) Any custodian that transfers, delivers, provides access to or allows possession of digital assets or information in the manner provided by this section is discharged and released from any liability or responsibility for the digital assets and accounts and for providing such access or making such transfer or delivery.

OREGON STATE BAR
Legislative Proposal
Part I – Legislative Summary

RE: ORS CHAPTERS 107 & 109 TECHNICAL CORRECTIONS BILL

Submitted by: Family Law Section

Legislative Contact(s): Ryan Carty
Phone: (503) 362-9330
E-mail: Ryan@youratty.com

- 1. Does this amend current law or program?**
 a. Yes **ORS Chapters 107 and 109**
 b. No

2. PROBLEM PRESENTED (including level of severity):

This proposal addresses four issues in ORS Chapters 107 and 109. Each is discussed below.

- 1) Taxability of Spousal Support (ORS 107.105)
- 2) Clarification to statutory restraining order provisions (ORS 109.103)
- 3) Where to file a filiation proceeding (ORS 109.135(2))
- 4) Replacing archaic use of the word “suit” (ORS 109.135(1))

1 - Taxability of Spousal Support

Prior to 1987, IRC § 71(b)(1)(D) required the divorce or separation instrument to expressly declare the payor's nonliability for continuation of the payment obligation after the payee's death. Omission of such an express declaration from the divorce or separation instrument effectively disqualified the payment obligation from being deemed as alimony, thus eliminating the payments from being tax deductible to the payor. However, section 1843(b) of the Tax Reform Act of 1986, Pub L 99-514, amended 26 USC § 71(b)(1)(D) so as to delete from the statute the words "and the divorce or separation instrument states that there is no such liability."

Under present IRC § 71(b)(1)(D), all that is required is that there be no liability to make any such payment for any period after the death of the payee spouse and no liability to make any payment (in cash or property) as a substitute for such payments after the death of the payee spouse. This requirement will be deemed as satisfied if (1) the dissolution judgment expressly so declares or (2) the payor's payment liability ceases upon the death of the payee spouse by operation of state law. Either or both.

There are at least two Oregon appellate cases that address the issue of spousal support liability after the death of the payee spouse. In *Kemp v. Dept. of Rev.*, OTC-RD No 4241, WL 477958 (July 27, 1998) (unpublished opinion), the Oregon Tax Court said that spousal support under Oregon law is deemed to terminate upon the death of payee spouse absent a provision in the judgment providing otherwise). And in *Miller and Miller*, 207 Or App 198, 203, 140 P3d 1172

(2006), the Court of Appeals observed that "a hallmark of spousal support is that the beneficiary's death terminates the obligation." (This appears to be quite reasonable, given that a deceased spouse or former spouse generally has no further need for spousal support.)

Nonetheless, confusion and uncertainty appears to abound, particularly in light of *Fithian v. US*, 45 Fed Appx 700, 90 AFTR2d 6210 (9th Cir. 2002), an officially unpublished (but nonetheless widely circulated) opinion in which the 9th Circuit Court of Appeals viewed the spousal support provisions of an Oregon dissolution judgment as being ambiguous on the question of whether the husband's spousal support obligation terminated upon wife's death. Although the federal court opinion did not make a definitive determination of Oregon law nor does it serve as any binding precedent on the legal issue involved, the existence of the opinion certainly suggests the need for a definitive statutory declaration providing, in essence, for automatic termination of spousal support upon the payee spouse's death.

The proposed amendment to ORS 107.105(1) echoes the wording of IRC § 71(b)(1)(D). It codifies but does not change presently-existing Oregon case law. It will eliminate any lingering confusion that may otherwise exist, eliminate potential malpractice trips for lawyers, and avoid potential conflicts between Oregon taxpayers and the IRS.

Solution

Amend ORS 107.105(1) to expressly provide that unless otherwise expressly provided in the judgment, liability for the payment of spousal support shall terminate on the death of either party.

2 - Statutory Restraining Order Provisions

ORS 109.103 provides that only those provisions of ORS 107.093 that relate to custody, support and parenting time apply to the custody proceeding. The insurance terms of ORS 107.093 presumably apply because health insurance directly relates to support via the ORS 25.275 computation. Life insurance also relates to support because of the provisions of ORS 107.810:

“It is the policy of the State of Oregon to encourage persons obligated to support other persons as the result of a dissolution or annulment of marriage or as the result of a legal separation to obtain or to cooperate in the obtaining of life insurance adequate to provide for the continued support of those persons in the event of the obligor’s death.”

ORS 107.820 provides that, “A court order for the payment of [...] child support [...] constitutes an insurable interest in the party awarded the right to receive the support.”

The provisions of ORS 107.093(c) presumably do not apply because they deal with transferring, encumbering, concealing or disposing of property in which the other party has an interest. An unmarried parent who has an interest in the other parent’s property would file a Dissolution of Domestic Partnership proceeding under ORS Chapter 106.

The provisions of ORS 107.093(d) might apply. This part of the statute restrains each party from making extraordinary expenditures without providing written notice and an accounting of such expenditures of the other party. Extraordinary expenditures would theoretically impact the obligor's ability to pay support and the obligee's need for support. These two factors would be most applicable in determining whether a rebuttal is appropriate. Both factors, therefore,

arguably do relate to support, although most practitioners would say unmarried couples need not be restrained from making extraordinary expenditures because the question is one of income, not of resources.

The issue then, is that ORS 107.093 is unclear as to what provisions apply to ORS 109 proceedings. More specificity is necessary.

Solution

Amend ORS 109.103(1) to exclude ORS 107.093 from the ORS Chapter 107 provisions that apply to ORS Chapter 109 cases. New language should concurrently be adopted that creates new material as ORS 109.103(5) that imposes more specific restrictions on the parties.

3 - Where to file suit in filiation proceedings

Strict application of this statute presents a persistent and patently perplexing procedural predicament in cases in which mother and her out-of-wedlock child both reside out-of-state and mother seeks to initiate a filiation proceeding in Oregon against the child's putative Oregon father. If neither mother nor child resides in any Oregon county, ORS 109.135(2) as presently enacted effectively bars the action from being filed in Oregon.

Solution

Amend ORS 109.135(1) to remove the words “the initiating.”

4 - Archaic use of the term ‘suit’

As explained by the Court of Appeals in *Maresh and Maresh*, 193 Or. App. 69, 87 P.3d 1154 (2004):

“The term ‘suit,’ like ‘decree,’ is a vestige from the era preceding the abolition of the procedural distinction between actions at law and suits in equity. Cf. Welsh v. Case, 180 Or.App. 370, 375, 43 P.3d 445, rev. den., 334 Or. 632, 54 P.3d 1042 (2002) (observing that a distinction between ‘law’ and ‘equity’ nonetheless persists in determining, for example, whether the right to jury trial exists in an action). The current proper descriptive terms are ‘action’ and ‘judgment.’ As we said in State ex rel Olson v. Renda, 171 Or.App. 713, 715 n. 3, 17 P.3d 514 (2000).

In 1979, ORCP 2 abolished all procedural distinctions between actions at law and suits in equity at the trial level, including the distinction between judgments and decrees. ‘Judgment’ is the proper term for the final determination of the rights of the parties in an action. ORCP 67 A; Webber v. Olsen, 330 Or. 189, 190 n. 1, 998 P.2d 666 (2000). Although ‘decree’ retains no independent legal meaning, its use has persisted, especially in domestic relations practice. For the dual sakes of consistency and clarity, its decent burial is long overdue.

The 2003 legislature enacted numerous statutory amendments that deleted usages of the word ‘decree’ and substituted in its place the word ‘judgment.’ See, e.g., Or. Laws 2003, ch. 576, § 109 (amending ORS 107.105(5) to make that change).

However, those amendments generally did not replace the term 'suit' with 'action.'
Id. We encourage the legislature to make appropriate amendments to ORS 107.105
and other statutes that retain the archaic usage of 'suit.'"

Solution

Amend ORS 109.135(1) to replace the term "suit" with the term "action."

3. SOLUTION:

See above.

4. PUBLIC POLICY IMPLICATION of this proposed legislative change:

There are no major policy changes in this proposal. The proposal is intended to clarify existing law and to correct apparent mistakes.

5. Could the problem be addressed through a NON-LEGISLATIVE SOLUTION, such as administrative rule or education?

No.

6. COULD ANOTHER SECTION OR GROUP MORE APPROPRIATELY INTRODUCE THE BILL? If so, have you suggested it to the section or group?

No.

7. IDENTIFY THE GROUP OR CONSTITUENCIES THAT WOULD BE MOST IMPACTED or interested in this change. Who would support it and who would oppose it?

Family law practitioners are the most impacted, and are likely to support the changes.

8. Has this been introduced in a prior session?

No.

OREGON STATE BAR
Legislative Proposal
Part II – Legislative Language

Please provide your legislative language below:

1 - Taxability of Spousal Support

ORS 107.105(1). Whenever the court renders a judgment of marital annulment, dissolution or separation, the court may provide in the judgment:

[...]

(d) For spousal support, an amount of money for a period of time as may be just and equitable for one party to contribute to the other, in gross or in installments or both. **Unless otherwise expressly provided in the judgment, liability for the payment of spousal support shall terminate on the death of either the payee or payor spouse and there shall be no liability to make any payment (in cash or property) as a substitute for such payments for any period after the death of the payee or payor spouse.** The court may approve an agreement for the entry of an order for the support of a party. In making the spousal support order, the court shall designate one or more categories of spousal support and shall make findings of the relevant factors in the decision. The court may order.

[...]

2 - Statutory Restraining Order Provisions

109.103 Proceeding to determine custody or support of child.

[...]

(5) After a petition is filed and upon service of summons and petition upon the respondent as provided in ORCP 7, a restraining order is in effect against the petitioner and the respondent until a final judgment is issued, until the petition is dismissed, or until further order of the court.

(a) The restraining order issued under this section shall restrain the petitioner and respondent from:

(A) Cancelling, modifying, terminating or allowing to lapse for nonpayment of premiums any policy of health insurance that one party maintains to provide coverage for a minor child of the parties, or any life insurance policy that names either of the parties or a minor child of the parties as a beneficiary.

(B) Changing beneficiaries or covered parties under any policy of health insurance that one party maintains to provide coverage for a minor child of the parties, or any life insurance policy.

(b) Either party restrained under this section may apply to the court for further temporary orders, including modification or revocation of the restraining order issued under this section.

(c) The restraining order issued under this section shall also include a notice that either party may request a hearing on the restraining order by filing a request for hearing with the court.

(d) A copy of the restraining order issued under this section shall be attached to the summons.

(e) A party who violates a term of a restraining order issued under this section is subject to imposition of remedial sanctions under ORS 33.055 based on the violation, but is not subject to:

(A) Criminal prosecution based on the violation; or

(B) Imposition of punitive sanctions under ORS 33.065 based on the violation.

3 - Where to file suit in filiation proceedings

109.135 Circuit court jurisdiction; equity suit; place of commencement.

[...]

(2) All filiation proceedings shall be commenced and tried in the county where either [*the initiating*] party or the child resides.

4 - Archaic use of the term ‘suit’

109.135 Circuit court jurisdiction; equity suit; place of commencement. (1) All filiation proceedings shall be commenced in the circuit court and shall for all purposes be deemed [*suits*] **actions** in equity. Unless otherwise specifically provided by statute, the proceedings shall be conducted pursuant to the Oregon Rules of Civil Procedure.

OREGON STATE BAR
Legislative Proposal
Part I – Legislative Summary

RE: INSURANCE PROVISIONS, AMEND ORS 107.820 AND ORS 109.103(1)

Submitted by: Family Law Section, Oregon State Bar

Legislative Contact(s): Ryan Carty
Phone: (503) 362-9330
E-mail: Ryan@youratty.com

- 1. Does this amend current law or program?**
- a. Yes **Amends ORS 107.820 to provide the court with authority to award attorney fees and costs; Amends ORS 109.103(1) by including an additional cross reference to sections of Chapter 107.**
 - b. No

2. PROBLEM PRESENTED (including level of severity):

As currently written, ORS 107.810 through 107.830 establishes the court’s authority to order a payor of support to obtain life insurance to provide continuing support in the event of the obligor’s death when parents were married. There is no authority for the court to award attorney fees in the event court action is necessary to obtain the benefits of such a policy in the event the obligor dies without the ordered amount of coverage or if obligee is not named as a beneficiary.

As currently written, ORS 109.103 cross references provisions of ORS Chapter 107 that pertain to custody, support, and parenting time. In the 2009 session, the legislature passed HB 2686, at our request, updating ORS 109.10’s references to Chapter 107 but we overlooked 107.810 through 107.830. ORS 107.810 through 107.830 830 establishes the court’s authority to order a payor of support to obtain life insurance to provide continuing support in the event of the obligor’s death when parents were married. Such a requirement is appropriate for unmarried parents as well as formerly married parents. The level of severity is very low.

3. SOLUTION:

Amend ORS 107.820 to include a provision authorizing the court to award fees and costs and amend ORS 109.103(1) to specifically include ORS 107.810 through 107.830 in the existing list of sections of Chapter 107 applicable to proceedings under Chapter 109.

4. PUBLIC POLICY IMPLICATION of this proposed legislative change:

These changes to ORS 107.820 and ORS 109.103 do not create or change public policy. The addition to ORS 107.820 adds relief found elsewhere in Chapter 107 but not currently available in an effort to collect insurance proceeds. The amendment to ORS 109.103 extends existing policy equally to parents that were married and those who were unmarried.

5. Could the problem be addressed through a **NON-LEGISLATIVE SOLUTION**, such as administrative rule or education?

No.

6. **COULD ANOTHER SECTION OR GROUP MORE APPROPRIATELY INTRODUCE THE BILL?** If so, have you suggested it to the section or group?

No. The Family Law Section of the Oregon State Bar has taken the lead in correcting unintended omissions and inconsistencies in the family law statutes such as we did with HB 2686 in 2011.

7. **IDENTIFY THE GROUP OR CONSTITUENCIES THAT WOULD BE MOST IMPACTED** or interested in this change. Who would support it and who would oppose it?

The people most impacted by this proposal are those seeking relief from the court when obtaining benefits from a life insurance policy the court ordered to be in place and the unmarried parents who pay or receive child support. Currently, some judges order an obligor to obtain life insurance unaware that Chapter 109 does not have a reference to ORS 107.810, 820 or 830. Support is expected to be universal and opposition, if any, would be expected by obligors ordered to obtain life insurance.

8. **Has this been introduced in a prior session?**

No.

OREGON STATE BAR
Legislative Proposal
Part II – Legislative Language

Please provide your legislative language below:

107.820 Support order as insurable interest; order to obtain, renew or continue insurance; right of beneficiary to purchase insurance or pay premiums. A court order for the payment of spousal or child support whether issued prior to, on or following November 1, 1981, constitutes an insurable interest in the party awarded the right to receive the support. In any case of marital annulment, dissolution or separation, the issue of life insurance shall be determined as follows:

[...]

(7) In any proceeding pursuant to this section, the court may award reasonable attorney fees and costs and expenses reasonably incurred in favor of a party or in favor of a party's attorney.

109.103 Proceeding to determine custody or support of child. (1) If a child is born to an unmarried woman and paternity has been established under ORS 109.070, or if a child is born to a married woman by a man other than her husband and the man's paternity has been established under ORS 109.070, either parent may initiate a civil proceeding to determine the custody or support of, or parenting time with, the child. The proceeding shall be brought in the circuit court of the county in which the child resides or is found or in the circuit court of the county in which either parent resides. The parents have the same rights and responsibilities regarding the custody and support of, and parenting time with, their child that married or divorced parents would have, and the provisions of ORS 107.093 to 107.449 **and 107.810 to 107.830** that relate to custody, support and parenting time, and the provisions of ORS 107.755 to 107.795 that relate to mediation procedures, apply to the proceeding.

[...]

OREGON STATE BAR
Legislative Proposal
Part I – Legislative Summary

RE: AMEND ORS 237.600 AND ORS 238.465 TO PROTECT SURVIVOR BENEFITS FOR FORMER SPOUSES OF MEMBERS IN A PUBLIC RETIREMENT PLAN

Submitted by: Family Law Section, Oregon State Bar

Legislative Contact(s): Ryan Carty
Phone: (503) 362-9330
E-mail: Ryan@youratty.com

1. Does this amend current law or program?
 - a. Yes Amends ORS 237.600 and ORS 238.465 to specifically address the survivor benefit in a public retirement plan.
 - b. No
2. **PROBLEM PRESENTED** (including level of severity):

ORS 238.465 provides for payment of PERS benefits to an alternate payee on divorce, annulment or unlimited separation. ORS 237.600 deals with payment of benefits from a member of other state and local public retirement plans other than PERS.

The purpose of the proposed legislation is to protect survivor benefits for former spouses of members in a public retirement plan. Where the terms of the retirement plan provide that the spouse is entitled to survivor benefits if the member dies before retirement, then that entitlement should not be deprived by the plan just because the parties become divorced. The plan should still be required to continue that survivor benefit to the former spouse to the extent provided in a court order. The plan is already committed to provide that benefit to the spouse while the parties are married. To be relieved of providing that benefit due to divorce of the parties creates a windfall to the plan and deprives a former spouse of an important protection.

This is exactly what happened in *Rose v. Board of Trustees for the Portland Fire & Police Disability and Retirement Fund*. In this case, Wife divorced Husband (a firefighter with the City of Portland) when he was age 46 and by QDRO she was awarded a survivor benefit should he die before retirement. Husband then died of cancer at age 47, not having remarried, less than three years before his early retirement date at age 50. The City denied survivor benefits to Wife and she received nothing. After a long fight at the City and then through the Multnomah County Circuit Court, the Court of Appeals affirmed the City. The entire benefit earned by husband during his 20-year career reverted back to the City, save the partial benefit that was paid to their minor child under the terms of the plan. The City's attorneys admitted that Wife would have received a survivor benefit if either: (1) the parties had not divorced; or (2) Husband had remarried someone else before he died at age 47 so that a survivor benefit was payable under the terms of the plan; or (3) he had survived to age 50 before he retired. However, because the parties divorced and Husband died single before age 50, Wife received nothing. This is not logical, and is the result of a hole in the statute. The City avoided paying a benefit worth hundreds of thousands of dollars because of these very unfortunate circumstances.

The *Rose* case turned on the specific language of ORS 237.600(1), which says in relevant part: ". . . payment of any . . . death benefit . . . under any public employer retirement plan . . . *that would otherwise be made to a person entitled to benefits under the plan* shall be paid, in whole or in part, to an alternate payee if and to the extent expressly provided for in the terms of any court decree . . . (emphasis supplied)." The plan argued, and the court held, that since there is no survivor benefit at all on the death of a single person in the City of Portland plan, then a survivor benefit cannot be paid to Wife in the *Rose* case. It did not matter that the parties had been married and that she was entitled to the survivor benefit while married. By virtue of the divorce, she automatically lost that benefit notwithstanding what the QDRO said.

At each level in *Rose*, Wife argued that the statute should be read to mean ". . . that would otherwise be made *but for the divorce* . . .," as was the intent, but to no avail. Wife pointed to legislative history that showed the intent of the statute was to make Oregon law co-extensive with federal law (ERISA) as it applies to private sector plans. ERISA provides plainly that a survivor benefit to which a spouse is entitled can be perpetuated after the divorce to the extent provided in a QDRO. Wife also pointed out that during the hearings for the bill enacting this statute (Senate Bill 210) in 1993, the attorney for the City of Portland plan testified to the Legislature on this very issue, complaining that the bill would require the City of Portland plan to provide a benefit to a former spouse that it didn't then provide. But the Legislature did not change the bill and passed it anyway. So Wife argued that, implicitly at least, the Legislature intended the statute to require that survivor benefits be continued a former spouse if so ordered. Wife ultimately lost that argument, with the Court of Appeals ruling that legislative history was irrelevant because the statute was plain on its face.

Practitioners believed this was a very narrow issue because the City of Portland plan is virtually the only public plan in Oregon that provides such restricted survivor benefits. For example, PERS Tier One and Tier Two allow survivor benefits to anyone - they are not restricted just to a spouse, much less a former spouse.

But now the issue has surfaced again under OPSRP (the Oregon Public Service Retirement Plan, ORS Chapter 238A), which is the new defined benefit plan for government employees first hired after 2003. This is a pure defined benefit plan, and provides benefits only to the member and the member's spouse, just like the City of Portland plan. Oregon PERS has taken the position that a divorced member of OPSRP who remains single cannot designate a former spouse to receive survivor benefits, at all. Only if the member remarries a second spouse can the member be required to provide benefits to a first spouse. Again, not logical. See the last sentence on page 1 of PERS form #535, found at this website:

<http://www.oregon.gov/PERS/MEM/docs/forms/535.pdf>, which states: "Pre-retirement death benefits are only payable to the surviving spouse of the member per ORS 238A.230. If the member is not married at the time of death, no benefits are payable to the AP (alternate payee)."

So with PERS taking this position with regard to survivor benefits under OPSRP, this will become a more significant issue over time. This issue was highlighted in the June 2011 Family Law Newsletter, in which Clark Williams (one of the drafters of Senate Bill 210) wrote on page 5, that:

"Further, the member must be remarried at the time of the member's pre-retirement death, or else no death benefit is payable to anyone. This is an anomaly in the law (i.e., that the member who dies before retirement has to be married to a new spouse for a survivor benefit to be payable to a former spouse, even by court order) that may require a legislative fix."

The level of severity is moderate to high – moderate at present because of the small number of OPSRP plans effected, but growing to a high level of severity as the number of OPSRP participants and retirees grows.

3. SOLUTION:

See above.

4. PUBLIC POLICY IMPLICATION of this proposed legislative change:

The proposed legislation is consistent with the legislature’s intent when it first enacted these statutes in 1993. The legislative history is clear, but the court’s interpretation of the statute differs from the drafters’ intent.

5. Could the problem be addressed through a NON-LEGISLATIVE SOLUTION, such as administrative rule or education?

No.

6. COULD ANOTHER SECTION OR GROUP MORE APPROPRIATELY INTRODUCE THE BILL? If so, have you suggested it to the section or group?

No. The Family Law Section of the Oregon State Bar has taken the lead in correcting unintended omissions and inconsistencies in the family law statutes such as we did with HB 2686 in 2011.

7. IDENTIFY THE GROUP OR CONSTITUENCIES THAT WOULD BE MOST IMPACTED or interested in this change. Who would support it and who would oppose it?

It is likely that Oregon PERS will oppose this change given the stance now taken regarding OPSRP retirement plans. Other public retirement plans, such as the Portland Fire & Police Disability and Retirement Fund, may oppose this legislation. Practitioners and plan participants will support the legislation. A portion of the public retirement plan’s value is derived from the survivor benefit, so it makes sense that the plan participants will support a change that entitles them to receive the benefit of their bargain.

8. Has this been introduced in a prior session?

No.

OREGON STATE BAR
Legislative Proposal
Part II – Legislative Language

Please provide your legislative language below:

To ORS 237.600, add new section (2)(d), as follows:

"(d) That pre-retirement survivor or death benefits to which the alternate payee has been entitled as the spouse of the member shall be continued to the alternate payee after the effective date of the judgment of annulment or dissolution of marriage or of separation, notwithstanding the fact that the alternate payee is no longer the member's spouse. Any such pre-retirement survivor or death benefit payable to an alternate payee under this section shall not be payable to a subsequent spouse, if any."

2. To ORS 238.465, add new section (2)(e) as follows:

"(e) That pre-retirement survivor or death benefits to which the alternate payee has been entitled as the spouse of the member shall be continued to the alternate payee after the effective date of the judgment of annulment or dissolution of marriage or of separation, notwithstanding the fact that the alternate payee is no longer the member's spouse. Any such pre-retirement survivor or death benefit payable to an alternate payee under this section shall not be payable to a subsequent spouse, if any."

OREGON STATE BAR
Legislative Proposal
Part I – Legislative Summary

RE: ORS 419B.100

Submitted by: Judith Swanson on behalf of the Juvenile Law Executive Committee

Legislative Contact(s): Judith Swanson
Phone: (503) 988-5318
E-mail: Judith.Swanson@MCDA.US

- 1. Does this amend current law or program?**
a. Yes **“clean-up” bill to remove reference to non-existent subsection**
b. No

2. PROBLEM PRESENTED (including level of severity):

ORS 419B.100 (1) refers to “subsection 6” in the body of the text. However, subsection 6 no longer exists after the changes to the statute made in the 2011 session. In the 2011 session, the legislature removed all of subsection 3 that referred to parental treatment by prayer, thus leaving only 5 subsections to the statute. However, when the statute was republished, subsection 1 still refers to the now non-existent subsection 6.

3. SOLUTION:

In the first sentence of ORS 419B.100 (1), change the numbering to read, “[e]xcept as otherwise provided in subsection (5) of this section . . .”

4. PUBLIC POLICY IMPLICATION of this proposed legislative change:

None

- 5. Could the problem be addressed through a NON-LEGISLATIVE SOLUTION, such as administrative rule or education?**

No.

6. COULD ANOTHER SECTION OR GROUP MORE APPROPRIATELY INTRODUCE THE BILL? If so, have you suggested it to the section or group?

No.

- 7. IDENTIFY THE GROUP OR CONSTITUENCIES THAT WOULD BE MOST IMPACTED** or interested in this change. Who would support it and who would oppose it?

Juvenile law attorneys and judges; no opposition

8. Has this been introduced in a prior session?

No.

OREGON STATE BAR
Legislative Proposal
Part II – Legislative Language

Please provide your legislative language below:

Except as otherwise provided in subsection (5) of this section and ORS 107.726, the juvenile court has exclusive jurisdiction in any case involving a person who is under the age of 18 and: etc

OREGON STATE BAR
Legislative Proposal
Part I – Legislative Summary

RE: PROPOSED AMENDMENT OF ORS 10.095(3)

Bar Group: Uniform Criminal Jury Instructions Committee

Submitted by: Uniform Criminal Jury Instructions Committee

Date: March 22, 2012

Committee Approval? Yes No

Legislative Contact(s): Dean Land
Phone: (503) 431-6306
E-mail: dland@osbar.org

Contact: Monte Ludington
Phone: (541) 278-6270
E-mail: montel@umatillacounty.net

Contact: Hon. Terry Leggert
Phone: (503) 622-0574
E-mail: tleggertmac@gmail.com

Contact: Phil Duong
Phone: (541) 241-2245
E-mail: pduong13+law@gmail.com

1. Does this amend current law or program?

- a. Yes** **Amends ORS 10.095(3)**
b. No

2. PROBLEM PRESENTED (including level of severity):

Case law conflicts with the statute. ORS 10.095 requires trial judges to instruct juries, “on all proper occasions: ... (3) That a witness false in one part of the testimony of the witness is to be distrusted in others.” By using the term “is to be distrusted” the statutory instruction appears to require jurors to disregard the entire testimony of a witness who is “false in one part” of his or her testimony. However, the Oregon Supreme Court has stated that “[t]he jury may reject [such] a witness’ testimony, but it need not do so.” *Ireland v. Mitchell*, 226 Or 286, 290, 359 P2d 894 (1961). In other words, despite the statute’s mandatory language, it is actually advisory. Courts have been instructing in the advisory language of *Ireland* as opposed to the mandatory language of the statute.

The committee believes that the case law directly contradicts the statute. An argument can be made that *Ireland* is merely an interpretation of the statute and not in conflict with it. *See, e.g., State v. Goff*, 71 Or 352, 364, 142 P 564 (1914) (“To distrust a witness is not necessarily to

reject his evidence.”). In any event, whether the case law is viewed as interpreting the statute or conflicting with it, the committee believes that amending the statute would clarify Oregon law. Considering that this conflict has existed for 40 years or more, the problem is not severe. However, a minor change could resolve the conflict and possibly prevent future litigation.

3. SOLUTION:

A slight change in the wording of ORS 10.095(3) would solve the problem. Instead of “is to be distrusted,” it will read “may be distrusted.” See Part II.

4. PUBLIC POLICY IMPLICATION of this proposed legislative change:

This change would clarify Oregon law and make the statute consistent with case law.

5. Could the problem be addressed through a NON-LEGISLATIVE SOLUTION, such as administrative rule or education?

No.

6. COULD ANOTHER SECTION OR GROUP MORE APPROPRIATELY INTRODUCE THE BILL? If so, have you suggested it to the section or group?

No. But the Uniform Civil Jury Instructions Committee may want to support the bill, too.

7. IDENTIFY THE GROUP OR CONSTITUENCIES THAT WOULD BE MOST IMPACTED or interested in this change. Who would support it and who would oppose it?

Judges and trial lawyers, both civil and criminal, would be most interested in this change. The committee does not anticipate any organized opposition.

OREGON STATE BAR
Legislative Proposal
Part II – Legislative Language

Please provide your legislative language below:

ORS 10.095 is amended to read:

10.095. The jury, subject to the control of the court, in cases specified by statute, are the judges of the effect or value of evidence addressed to them, except when it is thereby declared to be conclusive. They are, however, to be instructed by the court on all proper occasions:

...

(3) That a witness false in one part of the testimony of the witness ~~is to~~may be distrusted in others;

...

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: April 27, 2012
Memo Date: April 16, 2012
From: Kateri Walsh
Re: New Lawyer Mentor Program: Mentor Nominees

Action Recommended

Review the attached list of volunteer mentors for the New Lawyer Mentoring Program, and approve appointment recommendations for submission to the Oregon Supreme Court.

Background

All mentors participating in the New Lawyer Mentoring Program require recommendation by the Board of Governors and appointment by the Oregon Supreme Court. The criteria include:

- Seven years of experience as a practicing attorney.
- No pending disciplinary prosecutions.
- A reputation for competence, ethics and professionalism.

Please review and approve all appropriate volunteers. Contact Kateri Walsh directly with any questions or concerns about the process, or about any volunteer mentors.

[enter comm. name]

[enter meeting date]

MENTORS FOR BOG APPROVAL, APRIL 2012 --- New Lawyer Mentoring Program

Bar#	Sal.	F.Name	M.Name	L.Name	City.State.Zip
770998	Mr.	Howard	G.	Arnett	Bend, OR 97701
781270	Mr.	Ronald		Atwood	Portland, OR 97204
974240	Ms.	Kristy	Kay	Barrett	Portland, OR 97213
821973	Mr.	Ronald	L.	Bohy	Beaverton, OR 97008
863439	Mr.	Jon		Correll	Eugene, OR 97401
042762	Ms.	Sarah		Drescher	Portland, OR 97232
710506	Mr.	Charles		Duncan	Eugene, OR 97401
852697	Ms.	Jean		Fischer	Keizer, OR 97303
870450	Mr.	Brad		Garber	Lake Oswego, OR 97035
721040	Mr.	Roger		Gould	Coos Bay, OR 97420
832904	Mr.	James	T.	Guinn	Oregon City, OR 97045
772370	Mr.	Roland	W.	Johnson	Enterprise, OR 97828
963262	Mr.	Joel		Kent	Bend, OR 97701
862264	Mr.	David		Kuhns	Salem, OR 97302
842740	Mr.	David	P.	Levine	Lake Oswego, OR 97035
870625	Mr.	Eric	R.	Miller	Portland, OR 97223
803136	Mr.	Scott		Monfils	Portland, OR 97204
873117	Ms.	Mary	Kathryn	Olney	Salem, OR 97312
935585	Ms.	Jodie		Polich	Milwaukie, OR 97269
823781	Mr.	Robert		Radler	Beaverton, OR 97008
791045	Ms.	Dianne		Sawyer	Portland, OR 97223
944368	Mr.	Matthew		Shirtcliff	Baker City, OR 97814
003996	Ms.	Kristin		Sterling	Portland, OR 97204
921356	Ms.	Deborah		Stoll-Underwood	Eugene, OR 97401
044445	Ms.	Rebecca		Watkins	Portland, OR 97204
833452	Mr.	Brian		Whitehead	Salem, OR 97302
743432	Mr.	Steven		Wilgers	Coos Bay, OR 97420
853926	Mr.	David	O.	Wilson	Eugene, OR 97401
861068	Ms.	Robin		Wright	Portland, OR 97204

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: April 27, 2012
From: Sylvia E. Stevens, Executive Director
Re: Courthouse "Bar Cards" for OSB Members

Action Recommended

Consider whether to revive the discussion about courthouse passes for OSB members.

Background

Recently a bar member inquired about why there isn't a "bar card" that would entitle OSB members to access all courthouses in the state without having to go through security. Attached is a memo from former OSB President Rick Yugler summarizing the work that was done on this issue from 2006 to 2009. Our records contain no information after the date of the last meeting mentioned in Mr. Yugler's report.

As indicated in Rick's memo, one big impediment was the fact the courthouse security is the province of each county sheriff and there was not consistent agreement among them as to what kind of security risk lawyers present. It also appeared that the OSB was expected to finance the creation of the system.

Memorandum

TO: Kathleen A. Evans, President, Oregon State Bar
FROM: Richard S. Yugler
DATE: February 19, 2010
RE: Courthouse Access Card Project

This memorandum is in response to a request from Kathy Evans, OSB President, to summarize my closed OSB file concerning the work undertaken to establish a courthouse access card for OSB members.

My initial involvement in this issue stemmed from communications to President Albert Menashe in 2007. For several years numerous Bar members have complained about long access lines at courthouses and the need for multiple "attorney access cards" in those courthouses that would allow direct attorney access. Executive Director Karen Garst had proposed that the OSB, as part of the issuance of new Bar cards provide its members a card "encoded" for access to courthouses, provide a scanner at the entrance to all courthouses, and link that card scanner to an OSB database to ensure that the person using a Bar card was an OSB member. The original plan was to be furnished as a membership service at a cost of approximately \$20,000 to \$30,000 to permit all OSB members access to all courthouses through use of their Bar card. In several of our regular meeting with Chief Justice Paul De Muniz, the Chief became supportive of the idea, and, thereafter, in the Fall of 2007, I was directed to the "Statewide Court Security Committee," then chaired by the Honorable Paul J. Lipscomb.

As Chair of the Member Services Committee of the Board and President-Elect I made a presentation to the Statewide Court Security Committee, accompanied by Chief Justice De Muniz. The Committee consisted of the Honorable Paul J. Lipscomb, Sarah Gates, Larry Raaf, Evan West, and Brad Green. A copy of the presentation made to the Committee is attached, and probably was included in one or more BOG packets for the membership services committee.

The outcome of this presentation and several others was to favorably support a project that would ease access to courthouses by OSB members, and would enhance courthouse security at the same time, but a number of issues needed to be tackled and problems solved in order to turn the idea into a practical reality, generally as follows:

1. We needed cooperation from the Sheriffs Associations because each courthouse is controlled by a different county sheriff, and every sheriff has a different idea about the type of courthouse security needed at their courthouse. While certain courthouses currently have some form of attorney access (Marion and Multnomah County have attorney access cards), many other counties have no security (*e.g.*, Wallowa County), and still others required all persons without exception to pass through security (such as Deschutes County). We developed the idea that a statewide project could be launched based on a pilot project of a few key counties. Multnomah

County participation was essential, Marion County was willing to participate, and the Chief Justice was enthusiastic about including the Supreme Court Building in a pilot project. "If you build it, they will come." Therefore, if successful, additional county sheriffs may become comfortable with the idea of a single attorney access card, eventually growing to all counties.

2. We learned that if attorneys are given courthouse access cards, there is a necessary balance between convenience and safety because not all attorneys are a good risk. Judges sometimes view certain attorneys as a risk to safety, and, not all attorneys would be granted access merely because of their status as a member of the Bar. In those counties that presently permit attorney access, a background security check is undertaken by each local sheriff. Sheriffs charge a fee for this service. Therefore several sub-issues would need to be solved:

(a) Working out a common security background check that could be undertaken at one source without the need for a background check by each and every county's sheriff. As events developed, consensus appeared to support a single background check undertaken by the state police that could then be sent on to the local sheriff. If the sheriff would accept it, the local sheriff could then check with the local judges, or look at any other information deemed necessary to permit access. In other words, notwithstanding a statewide background check, each local sheriff necessarily retained the right to "red light" or "green light" each attorney's access to their courthouse. Most attorneys probably would be green-lighted for all courthouses where the sheriff participates, but some attorneys may be limited.

(b) Terms and conditions for access would need to be written and accepted for those attorneys who apply for an access card. Since access would be a privilege, sheriffs did not want to explain the reason for denying access or face financial liability if they chose to revoke or deny access. Multnomah County already has most of the terms in its application, but these would need to be expanded in a uniform manner acceptable to all sheriffs.

(c) Local sheriffs would need to work out an arrangement for sharing application fees because the current system generated some revenue for the sheriff's office, and if that revenue were affected, a deal would need to be negotiated. Since OSB members currently needed to pay a fee for access, it seemed reasonable to continue a fee in one form or another for the cost of the background check. One of the complaints about the current system was the duplicative cost of paying for the background check and access card for separate courthouses. A fee-sharing program would need to be negotiated between and among the sheriffs. I attended a later meeting arranged by Chief Justice De Muniz, with Paul Ramirez, Executive Director of the Oregon State Sheriffs Association, and with Mike McArthur, Executive Director of the Association of Oregon Counties. We were successful in obtaining their support as well,

although, the details would need to be worked out after launching a pilot program.

3. Two of the attractions of the program, particularly for Larry Raaf, the Security and Preparedness Manager for the state court system, were (1) the willingness of the OSB to devote economic resources and equipment on a statewide basis, and (2) improvement in courthouse security. This would be of assistance to his effort to implement a statewide security standard and plan for courthouses. Larry recognized that courthouse employees also provide a significant security risk. Any access badge scanner could be coordinated with the OSB card scanner and linked to a centralized database that would be updated on a day-by-day basis. Thus, there could be verification of the access/lack of access for every person holding a badge or card. In Multnomah County, for example, people with security badges and entry cards simply hold the card in their hand and show it to a deputy sheriff, who may have only two or three seconds to look at a small photograph and expiration date; they do so without any information about whether the attorney has been disbarred the prior day, or whether the employee entering the courthouse is seeking access as a litigant rather than to perform work. In Marion County there has been an unguarded door with a scanner for an entry card, and, thus, no verification of the identity of the person entering. Accordingly, it would be necessary to not only link the OSB database to a centralized database, and link a local sheriff's database of "approved" persons who have passed a background check, but it would also be highly desirable to link that database to a statewide system of court employees and photographs. If the end result was the requirement that a person scan their card or badge, with a current photograph of the person coming up on a monitor, and an ensuing "red light or green light" flashing to describe the current access status of the person, then the procedure would enhance security at courthouses. If properly designed, a courthouse access system that included attorneys would improve security over the current condition and ease attorney access.

4. Following the initial meeting, a number of subsequent meetings occurred in order to try to work through the myriad details needed to make the program work as a pilot project. One important meeting included Deputy Sheriff Elizabeth Daly, Program Supervisor for the Multnomah County Sheriff's Office. At that time, Bernie Giusto was the Sheriff of Multnomah County and was having political problems that detracted attention from this effort. Deputy Sheriff Daly supported the program, but clearly needed approval from the Sheriff, who was transitioning to Sheriff Bob Skipper, whom she thought would support the program. Diane Rea, Court Manager for the Marion County Courthouse, also came on board. There were several meetings in the Spring of 2008 with Ana Zanolli of the OSB to provided technical support from the OSB about how the type of information that could be "encoded" on the chip in different cards and how a scanner could be linked to the OSB database. General agreement was reached that sheriffs would need to determine the fiscal impact of this type of program if all state employees were going to be issued security badges that could be scanned connected to a central

database that the sheriffs or State of Oregon controlled. There would need to be a high level of coordination about the technology embedded in the OSB Bar cards, preferably the same technology used for access to the OSB Bar building or whether different technology would be needed to meet the goal of a statewide access card. It was later determined that the photographs to be embedded on the card and/or entered into the database would need to be taken by the sheriffs or state police because they wanted to verify the identity of persons receiving a card. Accordingly, the Bar's interest in posting member photographs on the OSB website, linked to the Bar card, would need to give way to photographs taken by the state police and/or sheriffs.

5. Because of the amount of time the project was taking, and because it was apparent this was a long-term project that would take at least a year or two to implement, Steve Piucci and Tim Gerking were added to the roster of participants to move this effort forward and to report to the Membership Services Committee on its status. Given my responsibilities as president it made sense to have the work delegated to Steve, who would be on the Board for years to come and could carry it forward.

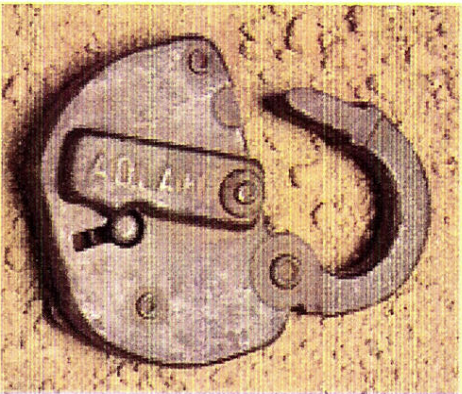
6. A meeting of all participants took place on June 17, 2008. My handwritten notes are attached. All players were enthusiastic about moving the project forward by meeting the specific challenges summarized above. Karen Garst attended the meeting and, plainly, was unhappy with the direction this project was taking. She was adamant that the OSB should not participate in the program unless all attorneys had access to all courthouses, without expense to them, because that was the original vision. Participants explained that sheriffs would necessarily need to exercise control over their courthouses, that the Bar's contribution of hardware, software, and links would provide a valuable membership service, and that all the problems were solveable. It was clear following the meeting that, notwithstanding the work on this issue for several months, Karen was no longer supportive.

7. Following the June 17, 2008 meeting, Steve was working on solving some of the issues until the end of 2009, when we had a new Executive Director. Steve provided a number of verbal reports to the Membership Committee on the status, such as waiting to hear back from Sheriff Skipper, but the trail runs cold at the end of my term. I have no information about what, if anything, has been undertaken in 2009 to continue this effort.

I hope this information has been helpful. If you need additional information, please let me know.

Enclosure (presentation and RSY notes)

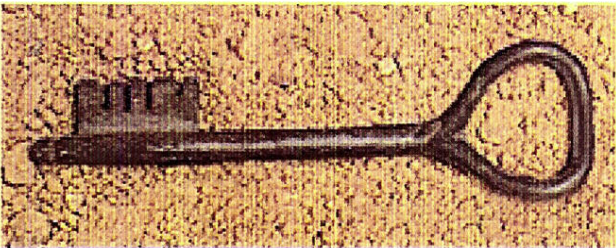




Courthouse Access Cards

Richard S. Yugler

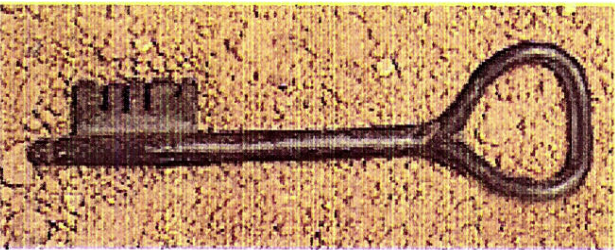
Oregon State Bar



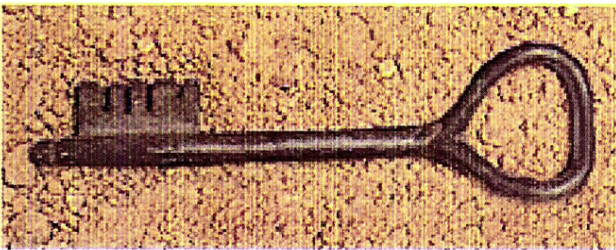
Current Status

- Security requirements differ at each courthouse
 - None; sign-in; metal detector; baggage and personal search
 - Time and cost to clients for attorney clearance time
 - Security “threat” from attorneys vs. staff vs. public
- Attorney access varies by Sheriffs
 - Practice varies for issuance of attorney security badge
 - Cost and income generated vary and are duplicative for each county;
 - Extent of security “clearance” uncertain
 - Lack of timely update on OSB admission status
 - Badges are easily forged/copied

Security Technology



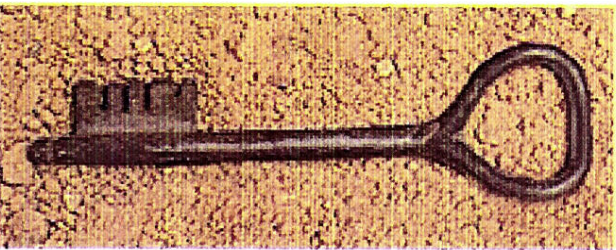
- Photo ID vs. imprintable identification cards
 - Verification of credentials
 - Bar codes, magnetic bar, chips – security increases with each technology
- Data on the card can include:
 - Text: name; firm; OSB #; expiration date; photo; signature
 - {Enhanced with anti-counterfeit technologies ; e.g embedded or laminated holographic images and designs; UV images (black light); color shifting graphics}
 - All of these can be visibly printed on the card and / or encoded on one of the other previously mentioned technology
- OSB has capability to provide “Bar Card” with text and data



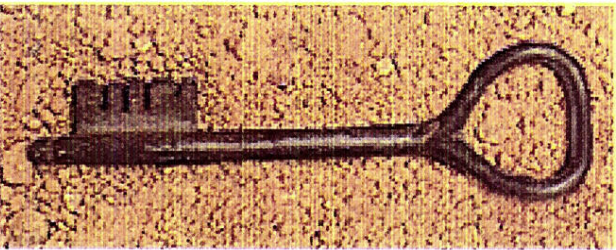
Database Linkage

- A desktop or wall “reader” can be provided to read a unique identification number
- Bar is willing to provide “reader” at all courthouses
- This information can be validated and forwarded by phone or internet link to an external interface for “authorization” in the event the on-card validation has been revoked
 - Relevant attorney information, including identification data, and certifications can be kept in a centrally managed single database
 - Validations and verifications of and on attorney credential can be done remotely at the various courthouse or other locations. e.g. Photo and data confirmation on card swipe
- OSB “status” database updated daily: Greenlight/Redlight

Challenges



- Sheriff Department Security Requirements
 - Lack of confidence in OSB database
 - Optional red flag security risks
 - Software/Linkage to secondary database
 - Redlight/Greenlight by each Sheriff for each courthouse
- Loss of fees for security card
 - Requires political compromise for universal Bar card
 - Additional fees or multiple fees are not an improvement
 - Or income sharing among jurisdictions for security “clearance”
- Gain of opportunities for hardware cost savings with OSB
 - Linkage to courthouse staff security badge information
 - Requires linkage with State of Oregon employment database



Charge to Task Force

- Implement universal “Bar” card for attorney security clearance at ALL courthouses without additional cost to users
 - Identify requirements needed to persuade ALL Sheriffs
 - Identify requirement for buy-in by largest counties with option to add system to each jurisdiction
- Identify essential stakeholders
 - Appoint or request participation from individuals with knowledge and authority to propose solution
- The proper proposal should be easily implemented, affordable and create better security.

June 17th

Mason for hire
Chris - inappropiate talk

Katrina Row
Mike Jony (3)
Rick Pol (2)
Dev
Skip
Phil

Diane Rapp → Meras City
Mike Fisher → Meras City
Liz Day - Mt of Sheriff.
Brad Green - Arroyo Mt of
Abbie Corbett - Mt of
Larry Raf - OJD Security.

→ Muskogee
→ Meras
→ Spp. Ct

Background check is same for
concealed weapons permit

- 1 - Advise/Inquire
- 2 → state background check
- 3 → County yes/no

~~Self~~
Lt. wheel. - Mt of Sheriff + Sheriff Skipper

Mt. City - 4 facilities → All/Same
Marion City - 2 facilities All/Same

State Police → budget cut

Photos - why by law enforcement

Paul Lipscomb - chair
Eras west - Security Agency
Academy Centre -

RM
Bred Green north of
Leam Road, Security Agency

Atty - Invalley

Moras - most don't go into security

Talk to Daniel Atty

- Moras City likes tight security

RM were more conservative + security @ same time

Get background check packet
for ASB admission
to Bred Green

Bred - Contractors do 2 year background check
→ 3 year check for M.H. City

Go to City Council + approx 25-50 to
(w/ Kelly + J. Cooper) have great close
Architects City Access.

~~Staff~~
Mentor of 2X

Mentor - open state of Adairville
does background check on hiring
+ if leave service + return after 1 year.

Mentor of don't have clip for scanner
(but they don't use scanner)

Want to see OSB Cards work of Mentor of

Petelee [Background
Search]

OSB IT person

↳ Type of Card to scope

if face request

Mentor of - working

(2) Career/being done,

need 1 piece of equipment + Card type

↳ staff + OSB

Stewart's Family Herbal

Actual Costs of Herb Costs

→ Focus examined on stock running Herbal

Family Available

↳ Trip to E. Coast
lots of Corporations

In Merit of - 3 different systems

Mkt of - 4 different locations

Major costs really don't decrease

hardware & writing

↳ Maintenance of system.

Mkt of of costs
spot deals,

Maybe best City fee, add as to security
It's there.

Lead after a heavy Atty years go through.

① But Teller's use of Proci + Bal

② Get background check to Brief

Squid

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: April 27, 2012
From: Sylvia E. Stevens, Executive Director
Re: CSF Claim No. 2012-01 HOWLETT (Castellanos/Uriarte)-Appeal

Action Recommended

Consider the claimant's request for the BOG to review their claim for reimbursement, which was denied by the CSF Committee.

Background

At its meeting on March 10, 2012, the CSF Committee denied the claim of Mirna Uriarte and Adolfo Castellanos.¹ Upon receiving the Committee's decision, Ms. Uriarte submitted a timely request for BOG review pursuant to CSF Rule 4.10.1.²

Mirna Uriarte hired Bruce Howlett in May 2011 to represent Castellanos, who had been arrested on federal drug charges (possession with intent to distribute); he was also placed on an immigration hold because he is undocumented. She was referred to Howlett by friends who had been represented by him previously.

Ms. Uriarte had to brief conversations with Mr. Howlett before deciding to hire him. She paid Howlett a flat fee of \$7500 to defend Castellanos. There was no written fee agreement making the fee earned on receipt.

Ms. Uriarte claims that after receiving the money, Howlett failed to deliver any services, that he failed to attend two court hearings and was evasive when she tried to talk to him. She went to his home office without an appointment on a couple of occasions but he refused to see her; on the last visit Howlett threatened to call the police if she showed up again without notice. The next time Ms. Uriarte contacted Howlett, she was informed by his widow that he had died unexpectedly from heart failure on October 11, 2011.

Prior to hiring Howlett, Castellanos had been represented by a public defender, Robert Shrenk. According to Shrenk, Howlett performed some work on the case prior to his death, including negotiating a plea bargain. The case was prosecuted by AUSA Bud Fitzgerald. His file reflects that he had several conversations with Howlett beginning in May 2011 and he felt that Howlett worked actively on the case. Their conversations eventually led to a plea agreement that was accepted in August 2011. In accepting the plea, the court confirmed that Castellanos was satisfied with Howlett and the work he done on the Castellanos' behalf.

¹ Mr. Castellanos has authorized Ms. Uriarte to pursue his claim.

² "The denial of a claim by the Committee shall be final unless a claimant's written request for review by the Board of Governors is received by the Executive Director of the Bar within 20 days of the Committee's decision."

The CSF investigators believed there was a significant language barrier that likely affected Ms. Uriarte's understanding of what was happening and also likely didn't understand that Howlett couldn't discuss the case with her.³

However, the Committee concluded there was no evidence of dishonesty on Howlett's behalf that would entitle Castellanos and Uriarte to reimbursement of any portion of Howlett's fee. While he likely failed to maintain the client funds in trust until the matter was complete, that is evidence only of a violation of the rules of professional conduct and not of dishonesty. Whether his fee was unreasonable for the amount of work that was required is also not evidence of dishonesty.

Claimants' request for review offers no new facts or argument, but only repeats the assertion in the claim for reimbursement that Howlett "didn't do his job very well."

Attachments: Investigative Report
Request for BOG Review

³ The CSF public member is a native Spanish-speaker and facilitated the investigation of this claim.

CLIENT SECURITY FUND
INVESTIGATIVE REPORT

FROM: Jessica Cousineau & Carlos Calderon

DATE: March 10, 2012

RE:

CLIENT SECURITY FUND CLAIM NO: 2012-01

CLAIMANT: Adolfo Castellanos/Mirna Uriarte

ATTORNEY: Bruce Howlett

Investigator's Recommendation

We recommending denial of the claim in full.

Statement of the Claimant & Investigation

We spoke with Ms Uriarte regarding her claim. According to her, Mr. Castellanos was arrested, in Eugene, by DEA agents on 11-30-2010 on drug (heroin) charges relating to possession with intent to distribute. He has been confined in federal custody waiting for trial since that date. Mr. Castellanos is also currently on "Immigration Hold".

At the time of the arrest, Mr. Castellanos was living with Ms. Mirna Ibeth Uriarte. Ms. Uriarte claims to be the companion (girlfriend) of Mr. Castellanos. Ms. Uriarte said that she contacted Mr. Howlett to represent Mr. Castellanos. Mr. Howlett's name came as a recommendation from close friends who had been represented by him in the past. Ms. Uriarte first contacted Mr. Howlett sometime during April of 2011. She says that she also had two other short conversations with Mr. Howlett between April and May, before making the \$7,500 payment for Mr. Howlett to take Mr. Castellanos' case. Ms. Uriarte explained that all the discussions with Mr. Howlett were relatively brief (10 minutes or so) due to her difficulty with the English language. All of her meetings with Mr. Howlett were at his place of residence. Mrs. Uriarte has provided a copy of the receipt given by Mr. Howlett for the aforementioned amount, dated May 11, 2011. She also affirms that she did not sign any type of agreement with Mr. Howlett that would make such payment be earned upon receipt. Ms. Uriarte explained to Mr. Howlett that Mr. Castellanos was also being held on immigration charges and that he was undocumented. She said that Mr. Howlett acknowledged the situation and that he was still willing to represent Mr. Castellanos.

Ms. Uriarte said that after she paid Mr. Howlett, he failed to deliver any service with respect to representing Mr. Castellanos, and did not attend two court hearings set to listen to Mr. Castellano's plea. She also said that Mr. Howell was evasive towards her attempts to contact him over the phone. Ms. Uriarte said that on one occasion, she spoke with Mr. Howlett and that he said that Mr. Castellanos immigration status had raised serious complications in the case.

Ms. Uriarte said that she showed up at Mr. Howlett's residence without having an appointment on several occasions and that he declined to receive her. On her last visit, Mr. Howlett threatened to call the police if she continued to show up without giving him notice.

Ms. Uriarte finally decided to seek outside help and discussed the situation with a Mr. Rick Puente, an acquaintance of hers. Ms. Uriarte said that Mr. Puente is a detective for the Woodburn Police Dept. and that he advised her to contact the Oregon State Bar.

At that point, Mr. Howlett had already passed away (Oct., 2011). Ms. Uriarte learned about Mr. Howlett's death when she called and Mr. Howlett's widow answered the phone and informed her of the situation.

We also spoke with the current public defender for Mr. Castellanos, Robert Shrenk, who said that he was also the initial attorney assigned by the court to deal with the case. Mr. Howlett took over once Ms. Uriarte hired him. Mr. Shrenk stated that he believes that Mr. Howlett performed some work with respect to this case. Mr. Howlett was the attorney that negotiated the plea bargain with the court. That was done before he passed away.

Bud Fitzgerald was the Assistant US Attorney that prosecuted Mr. Castellanos' case. He looked back through his file and noted that he spoke with Mr. Howlett several times, starting in May of 2011, regarding the case. He felt that Mr. Howlett was actively working on the case. These conversations eventually led to the plea agreement that was accepted on August 8, 2011. Mr. Fitzgerald also noted that at the time the plea was entered into the court, the judge confirmed that Mr. Castellanos was satisfied with the attorney and the work done.

According to the OSB Discipline Office, Mr. Howlett has had at least two substantiated claims for failing to maintain good accounting. In both instances the complaint revolved around Mr. Howlett not depositing funds into his Client Trust Account. However, in both of the cases the end result also showed that all client funds were accounted for and returned to clients. In reading the discipline reports, it appears that there was sloppy bookkeeping, but not outright theft. Because there has been no formal accounting sought in this investigation, there is no way to tell if all of the funds collected were correctly deposited and fully earned. However, given that both Mr. Castellanos' current attorney and the prosecutor felt that the representation was competent, these investigators did not find evidence to warrant pursuing it further. Because the representation ultimately resulted in a plea agreement, we feel that any investigation regarding the use of funds would appropriately be covered either through a fee dispute claim or a malpractice claim through the PLF.

Findings and Conclusions

- Mr. Howlett was an active member of the bar at the time of his death, and was working in Oregon with an office in Portland.
- The claimant, Mr. Castellanos, had an attorney client relationship with the attorney.
- There was no loss. The attorney provided significant services of value to the client resulting in the plea agreement. Both the current public defender and the prosecutor noted that Mr. Howlett's work on behalf of Mr. Castellanos led to the plea agreement.
- The investigators feel that there is a significant language barrier that has led to the filing of this claim. Ms. Uriarte filed the claim herself (after having Mr. Castellanos sign it from in the prison). She speaks only Spanish and would likely have had a difficult time understanding if Mr. Howlett were trying to tell her, in English, that he could not divulge confidential client information relating to Mr. Castellanos to her.

3/28/12

Adolfo Castellanos

SID #1208466 101 West 5th Ave

Eugene, OR 97401

Mirna Uriate

311 S. Evergreen Rd A#101

RE:RE: Client Security Fund Claim No.2012-01

Lawyer: Bruce Howlett

Dear Oregon State Bar,

My name is Mirna Uriarte and I write this letter so that you may reconsider my claim for reimbursement. You have denied my claim for \$7500 against Bruce Howlett. This lawyer did not do his job. There were two times where he should have went to court for Adolfo Castellanos, but he was never present at any of the two times. I ask you to please reconsider this because I didn't pay the lawyer \$7500 so he wouldn't do his job. The lawyer worked for about 10 hours.

I hope that you will understand.

Sincerely,

Mirna Uriarte

Oregon State Bar
Meeting of the Board of Governors

February 10, 2012

Open Session Minutes

The meeting was called to order by Vice-President Steve Larson at 12:00 p.m. on February 10, 2012. President Mitzi Naucler arrived at 2:00 p.m. and presided over the remainder of the meeting. The meeting adjourned at 5:00 p.m. Members present from the Board of Governors were Jenifer Billman, Barbara Dilaconi, Hunter Emerick, Ann Fisher, Michelle Garcia, Mike Haglund, Matthew Kehoe, Ethan Knight, Theresa Kohlhoff, Tom Kranovich, Audrey Matsumonji, Maureen O'Connor, Travis Prestwich, Richard Spier and David Wade. Staff present were Sylvia Stevens, Rod Wegener, Helen Hierschbiel, Jeff Sapiro, Kay Pulju, Susan Grabe, Mariann Hyland, George Wolf, Catherine Petrecca, Dani Edwards and Camille Greene. Others present were Ira Zarov, PLF CEO, Jason Hirshon, ONLD Chair and Dexter Johnson, Public Service Advisory Committee Chair.

1. Department Presentation

Ms. Pulju presented an overview of OSB Member and Public Services, which encompasses– the OSB *Bulletin*, Marketing, Media and Communications, Member Services, Customer Service/Reception, and Referral and Information Services. The department's projects include market research/surveys, social media development, online event calendar, website advertising, membership directory, listserve maintenance, elections, leadership training, and Legal Links in-house production.

2. Report of Officers & Executive Staff

A. Report of the President

As written.

B. Report of the President-elect

As written.

C. Report of the Executive Director

ED Operations Report as written. Ms. Stevens presented the Western States Bar Conference schedule for March 21-24 in Las Vegas. She announced that May 25 BOG committee meetings have been moved to May 24 to avoid a conflict with Memorial Day Weekend. Ms. Stevens announced that Kenneth Mitchell-Phillips accepted employment outside of the region from which he was elected, thereby terminating his position on the board. A special election will be held to fill the vacant Region 5 position.

A. Director of Diversity & Inclusion

Ms. Hyland reported on the recent projects and programs of the s Diversity & Inclusion department, including a diversity branding launch, collaboration with US Department of Agriculture to settle discrimination claims, and updating OLIO database for fundraising purposes.

B. MBA Liaison Reports

Mr. Knight reported on the February 1, 2012 MBA meeting.

3. Professional Liability Fund [Mr. Zarov]

Mr. Zarov gave a general update and presented the financial report and goals for 2012. The PLF hired Holli Houston as a new claims attorney effective January 1, 2012. The excess program has decreased in number of law firms and attorneys that are covered due to competition from other excess programs. Payment by credit cards has increased and is helpful to covered members. The PLF is exploring insurance for cyber and electronic losses that are excluded from the existing coverage plan.

4. Emerging Issues

Ms. Naucler initiated a discussion on the relevance of the current House of Delegates (HOD) model. The board agreed to develop an *ad hoc* HOD committee comprised of one member from each HOD region. The Policy and Governance committee will facilitate this study. The charge would include but not be limited to looking at whether or not the HOD should exist, and whether it would be more effective to have the entire membership vote via email.

Ms. Naucler encouraged the board members to bring up topics for future discussion as emerging issues.

5. Rules and Ethics Opinions

A. Legal Ethics Committee

Ms. Stevens presented the proposed formal opinion addressing communicating through Facebook and similar social media. After discussion about whether a lawyer must disclose his or her identity in making a "friend" request to an unrepresented party, the board referred the opinion to the LEC for further consideration and possible revision of the answer to question 2. **[Exhibit A]**

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 his written report. He also presented the 2012 ONLD calendar of events. ONLD closed its second round of recruitment for the popular Practical Skills through Public Service Program with more than 40 applicants.

B. CSF Claim No. 2011-16 HARRISON (Szal)

In his request for review, Mr. Szal emphasized his concern over the veracity of Harrison's itemization of additional time and his belief that she performed no services for him after November 2006.

Motion: Mr. Haglund moved, Mr. Kehoe seconded, and the board voted unanimously to affirm the CSF's denial of the claim.

C. Public Service Advisory Committee LRS Recommendation

Mr. Johnson presented the Public Service Advisory Committee's (PSAC) recommendations for a Lawyer Referral Service (LRS) funding model. This "cafeteria-style" model would allow panelists to choose one of three percentage fee structures that best fit their needs, equalize the economic impact on panelists, and perhaps encourage less "fall-off" upon implementation of the new fee structure. Mr. Emerick inquired about the impact of these fees on low-volume cases, and Mr. Wade questioned the need for the middle level of fees. Mr. Haglund questioned the increased IT costs to create and administer an untested multi-level fee model. Mr. Wegener explained that new software is being purchased from an experienced vendor, but that it would have to be tailored to handle a "cafeteria-style" model. Mr. Wegener said a blueprint of this project is needed before costs could be more accurately estimated, but he guessed it could be between \$25,000 and \$40,000. Based on staff's survey of other bars using percentage-fee models, Mr. Wegener suggested that any fee less than 15% would likely not entirely cover the cost of operations. . Other points made by various BOG members were: (1) investing perhaps \$25,000 to modify software is a good investment to produce revenue of \$275,000 per year; (2) the 3-tier model may be more acceptable to members who feel the bar is "pushing something down their throats;" (3) increasing the amount panelists pay demands providing them with a superior product; and (4) if the goal of changing the model is to maximize revenues, why allow panelist to choose the option that will return the least money to the bar?

Motion: Ms. Fisher presented the Policy & Governance committee motion to accept the report as presented by PSAC for the OSB Lawyer Referral Service (LRS). See Report, Revised LRS Policies, and Operating Procedures **[Exhibit B]**. The board rejected the motion (4-13-0). Yes: Billman, Kranovich, Fisher, and Wade; No: Naucler, Matsumonji, O'Connor, Knight, Prestwich, Emerick, Garcia, Haglund, Kohlhoff, Kehoe, Larson, Dilaconi, and Spier. No one abstained.

Motion: Mr. Haglund then presented the Budget and Finance committee motion to accept a single percentage fee (12%) model with no threshold. Mr. Prestwich offered a friendly amending changing the percentage to 10%, but died for lack of a second. The board voted to approve the original motion (14-3-0). Yes: Billman, Spier, Naucler, Matsumonji, O'Connor, Knight, Emerick, Garcia, Haglund, Kohlhoff, Wade, Kehoe, Larson, and Dilaconi; No: Kranovich, Prestwich, and Fisher. No one abstained.

Motion: Mr. Wade moved, seconded by Mr. Haglund, to accept the task force report and recommendations as amended by the previous vote. The board voted unanimously in favor.

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

A. Access to Justice Committee

Motion: The board voted unanimously to approve the Access to Justice Committee’s motion to increase the salary cap from \$50,000 to \$55,000 for public service lawyers applying for the Oregon State Bar Loan Repayment Assistance Program and change the Policies and Guidelines to reflect that the Advisory Committee will consider the forgivable nature of the student loans of the applicants. **[Exhibit C]**

B. Member Services Committee

Motion: The board voted unanimously to approve the Sustainable Future Section’s motion to approve the “Oregon State Bar Partners in Sustainability” program. **[Exhibit D]**

C. Policy and Governance Committee

Motion: The board voted unanimously to approve the committee motion to retire the Joint Statements of Principles by removing them from the OSB website, but retain them in archives for historical reference.

Motion: The board voted unanimously to approve the committee motion to sunset (abolish) the OSB standing committee on Access to Justice.

Motion: The board voted unanimously to approve the committee motion to present the proposed amendment of ORPC 1.8(e) to the HOD for consideration. **[Exhibit E]**

D. Public Affairs Committee

Motion: The board voted to approve the committee motion to pay for the economic survey to document the effects of court budget reductions on the Oregon economy. All voted yes except Fisher. No one abstained. **[Exhibit F]**

E. New Lawyer Mentoring Program

Motion: Mr. Larson presented the NLMP motion to approve the list of potential mentors. Mr. Kehoe moved, Ms. Dilaconi seconded, and the board approved a list of mentors, with the exception of one candidate, for submission to the Supreme Court. All voted yes except Fisher, Kranovich and Spier. No one abstained. **[Exhibit G]**

8. Consent Agenda

Motion: M moved, M seconded, and the board voted unanimously to approve the consent agenda including various appointments **[Exhibit H]** and the Client Security Fund Claims for repayment **[Exhibit I]**.

9. Closed Sessions – see CLOSED Minutes

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

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

None.

PROPOSED-FORMAL OPINION 2012-XXX

Accessing Information about Third Parties Through a Social Networking Website

Facts:

Lawyer wishes to investigate a person in the course and scope of an ongoing legal matter by accessing the person's online activity through social media websites. Lawyer would like to view the publicly available information and would also like to obtain access to the person's non-public information stored online behind the person's privacy settings. To obtain the latter information, Lawyer must seek permission from the holder of the account.

Questions:

1. May Lawyer review a person's publicly available information on the internet?
2. May Lawyer, or an agent on behalf of Lawyer, access a person's non-public information?
3. May Lawyer use deception in obtaining access to non-public information?

Conclusions:

1. Yes.
2. See discussion.
3. See discussion.

Discussion:

1. Lawyer may access publicly available information on the internet.¹

Oregon RPC 4.2 provides:

In representing a client or the lawyer's own interests, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject unless:

¹ Although Facebook and MySpace are current popular social media sites, this opinion is meant to apply to any similar social networking website on the internet.

- (a) the lawyer has the prior consent of a lawyer representing such other person;
- (b) the lawyer is authorized by law or by court order to do so; or
- (c) a written agreement requires a written notice or demand to be sent to such other person, in which case a copy of such notice or demand shall also be sent to such other person's lawyer.

OSB Ethics Op No 2005-164 discussed the propriety of a lawyer accessing the public portions of an adversary's website and concluded that doing so is not "communicating" with the site owner within the meaning of RPC 4.2. The Opinion compared accessing a website to reading a magazine article or purchasing a book written by an adversary. By the same analysis, accessing the publicly available information on a person's social media website is not a "communication" prohibited by RPC 4.2.²

2. Lawyer may request access to non-public information if person is not represented by counsel on the subject and no actual misrepresentation of disinterest is made by Lawyer.

To access non-public information on a social media website, a lawyer may need to make a specific request to the holder of the account.³ Typically that is done by clicking a box on the public portion of a person's social media site which triggers an automated notification to the person asking if they want to accept the request. If Lawyer has actual knowledge that the person about whom Lawyer seeks information is represented by counsel, RPC 4.2 prohibits Lawyer from making the request except through the person's counsel or with the counsel's prior consent. *See* OSB Formal Ethics Op No. 2005-80 (discussing the extent to which certain employees of organizations are deemed represented for purposes of RPC 4.2).

If, however, Lawyer does not "know" the person is represented, a direct request for access to the entire site is permissible. OSB Formal Ethics Op No 2005-164. However, communication with unrepresented persons is governed by Oregon RPC 4.3 which provides, in pertinent part:

In dealing on behalf of a client or the lawyer's own interests with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

The purpose of the rule is to avoid the possibility that a nonlawyer will believe lawyers "carry special authority" and that a nonlawyer will be "inappropriately deferential" to someone else's attorney. 71.503, ABA/BNA Lawyers' Manual on Professional Conduct. See also ABA Model

² This analysis is not limited to adversary parties, but applies to a lawyer who is accessing the publicly available information of any person including a juror, witness or alleged victim during trial.

³ This is sometimes called "Friending", although it may go by different names on different services.

Rule 4.3, Cmt. [1] (“An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client.”) The rule imposes no affirmative duty on a lawyer to identify oneself as such and state the nature of the lawyer’s role. Available authorities suggest that the rule applies only when the unrepresented person knows he or she is dealing with a lawyer.⁴ - See OSB Formal Ethics Op No. 2005-80 (discussing the extent to which certain employees of organizations are deemed represented for purposes of RPC 4.2).

If a person who receives a “friend” request is unaware that the requestor is a lawyer, there can be no misunderstanding of the lawyer’s role and no duty on the part of the lawyer to correct anything. The person using the social media site has control over who views the non-public portions by either accepting or declining “friend” requests; the person’s failure to inquire about the identity or purpose of unknown requestors is not the equivalent of misunderstanding a lawyer’s role.⁵

3. Lawyer may not advise or supervise the use of deception in obtaining access to non-public information unless ORCP 8.4(b) applies.

Oregon RPC 8.4 prohibits a lawyer from engaging in “conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer’s fitness to practice law.”⁶ See also RPC 4.1(a) (prohibiting a lawyer from knowingly making a false statement of material fact to a third person in the course of representing a client). Accordingly, Lawyer may not engage in subterfuge designed to shield Lawyer’s identity from the person when making the request, and may not ask an agent to do so.⁷

As an exception to RPC 8.4(a)(3), RPC 8.4(b) allows a lawyer to advise clients and others about or supervise, “lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer’s conduct is otherwise in compliance with these Rules of Professional Conduct.” For purposes of the rule “covert activity” means:

[A]n effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. ‘Covert activity’ may be commenced by a lawyer or involve a lawyer as

⁴ See 71:505, ABA/BNA Lawyers’ Manual on Professional Conduct and cases cited therein.

⁵ See also, *Murphy v. Perger* [2007] O.J. No. 5511, (S.C.J.) (Ontario, Canada) (requiring personal injury plaintiff to produce contents of Facebook pages, noting that “[t]he plaintiff could not have a serious expectation of privacy given that 366 people have been granted access to the private site.”)

⁶ See *In re Carpenter*, 337 Or 226, 95 P3d 203 (2004) (lawyer received public reprimand after assuming false identity on social media website and engaging in improper conduct).

⁷ Also See, The Committee on Professional and Judicial ethics of ABCNY, Formal Opinion 2010-2, opining that a lawyer may ethically “friend” an unrepresented party or witness without revealing the lawyer’s true motives for the request, provided that the lawyer does not misrepresent her identity.

Note, however, that contacting the victim of a crime through social networking sites, criminal defense lawyers should ensure that they meet the legal requirements for contacting a victim in a criminal case.

an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.

In the limited instances allowed by the RPC 8.4(b) (more fully explicated in OSB Formal Ethics Op No 2005-173), Lawyer may advise or supervise another's deception to access a person's non-public information on a social media website.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: February 10, 2012
Memo Date: January 31, 2012
From: Public Service Advisory Committee
Re: Lawyer Referral Service -- Percentage Fee Funding

Action Recommended

Approve the percentage fee funding model for the OSB Lawyer Referral Service (LRS), as specified in this report and in revised LRS Policies and Operating Procedures

Background

Currently the LRS Program operates at an annual deficit of about \$250,000. At its June 2011 meeting the BOG approved adoption of a percentage fee funding model for LRS and charged the Public Service Advisory Committee (PSAC) with developing specific program recommendations. In developing its recommendations the PSAC and bar staff have researched various percentage models and sought feedback from LRS panelists through a survey and several focus groups. A detailed timeline of progress since the BOG's initial charge to the PSAC in 2009 is attached.

Survey of LRS Panelists

In September, bar staff sent an electronic survey to 822 LRS panelists. Forty-one percent responded. The survey solicited panelist feedback on: percentage fee models; LRS consultation fee policies and amounts; how to address office location in both panelist registration and client referral processing; whether to add additional "subject matter panels" with minimum education/experience requirements; and whether to expand the Modest Means Program into new areas of law at the same time LRS changes are implemented.

The first question on the survey was a "forced choice" that asked why the respondent participated in LRS -- to provide a public service (19%) or to market their practice (80%). In questions about percentage fees, the majority (61%) indicated they would wait for more details before deciding whether to renew and a minority (23%) indicated they would probably not renew. The two greatest concerns about the new model were: "New reporting and payment procedures may increase my non-billable/administrative time" (82%) and "It will make participation too expensive/more expensive than it is worth" (77%). The survey showed that a majority did not want to expand the Modest Means

Program (55%) or change the number of subject matter panels (69%). A strong majority (59%) also preferred to keep referrals limited by geography. In response to questions about the initial consultation through LRS, approximately half judged the \$35 consultation fee “about right,” with most others thinking it should be higher. Clear majorities favored a 30-minute time limit on consultations as well as the ability to offer consultations over the phone (70% and 74%, respectively).

Focus Groups

To expand on the survey results and clarify options, staff coordinated two sets of focus groups of 20 and 30 panelists. The first set of groups discussed the LRS program generally. The strongest theme that emerged from these discussions was “let the panelists choose” wherever possible. That sentiment was particularly strong regarding initial consultations, e.g., panelists should be free to charge or waive fees, consult over the phone, etc. Both groups also reached a clear consensus that office location is important but no longer a first consideration, and that LRS locations or regions should be based on population and should be roughly equivalent for rural and urban practitioners as much as practical.

The second set of focus groups considered percentage fee specifics. The discussions focused on the relative pros and cons of three sample percentage fee models: A) 20% over a threshold of \$600, B) 15% over a threshold of \$300, and C) 10% with no threshold. No consensus was reached, with most participants preferring whichever approach offered simplicity and resulted in the lowest fees for their particular practice area(s). The main arguments in favor of the basic differences in approach were:

Higher Percentage/Higher Threshold Approach

- Easier bookkeeping/less paperwork and fewer small payments
- Psychologically less of a problem to pay on larger amount (have made money)
- Those who take only small cases will pay little or nothing, which should be encouraged

Lower Percentage/Lower Threshold

- More fair because all pay, not just those who get one good case
- Easiest to remember and apply -- consistent
- Believe total fees would be less

Participants in the second set of focus groups also discussed registration fees. Generally they favored retaining some type of enrollment fee but thought they should be lowered with the implementation of percentage fees.

The PSAC reviewed the survey results, participated in the focus groups and discussed recommendations as a committee over six meetings between October 2011 and January, 2012. The PSAC also reviewed percentage fee model policies, procedures and rules from around the country. The committee presents its recommendations in two parts, following the order of the focus group discussions. The recommendations discussed below are incorporated into the revised policies and procedures, along with details on calculation and remittance of percentage fees.

Recommendations on Program Operations.

The committee recommends the following program changes:

- The fee for an LRS and Modest Means Program (MMP) initial consultation should remain \$35, but there should be a 30-minute time limit; regular or MMP hourly rates may apply if the consultation exceeds 30 minutes. A panelist may waive the initial consultation fee.
- Remove the requirement that the initial consultation must be held in person. Each panelist may decide whether to offer initial consultations over the phone or by any other method acceptable to both attorney and potential client.
- LRS locations should be regional and based on roughly equivalent population size. Panelists should be able to register for adjacent regions or for referrals statewide. Client preferences will dictate the importance of location in the matching criteria.
- LRS should not add additional subject matter panels at this time.
- Expansion of the Modest Means Program should occur after the LRS percentage fee model is in place. The expansion should occur at a measured pace with the advice and counsel of substantive law sections' executive committees.
- The percentage fee model should be fine-tuned over time and with advice from substantive law sections' executive committees on the impact of the percentage fee model on particular practice areas. This process should begin with the Workers Compensation Section, which has expressed

particular concern about the impact of percentage fees on workers comp practitioners.

Recommendation on Panelist Fees.

Based on panelist feedback, recognition of the lack of detailed economic data and promotion of goals of simplicity and panelist choice, PSAC recommends a “cafeteria plan” model that will allow each panelist to select one of three percentage/threshold combinations. The percentage/threshold combinations recommended are:

- A. 18% with a per-matter threshold of \$400
- B. 15% with a per-matter threshold of \$200
- C. 12% with no threshold

The committee understands that implementation of a “choose-your-own-plan” may require additional time and expense for software customization now and in the future. Central to the viability of this proposal is the ability of the software to easily and reliably compute amounts due from panelists based on only three factors: their choice of plan, the date representation on the matter began and the net amount collected from clients. (Staff were unable to provide firm estimates on software capability in the timeframe given for committee consideration.) After discussion, however, a strong majority of committee members concluded that the benefit of offering panelists a choice outweighs the likely increase in administrative costs. In addition, implementing a range of options to start will allow the bar to gather actual data for projecting the revenue potential of the different rates, the absence of which makes settling on a single rate difficult at this point. The committee also concluded that having the range in differences between the three plans be narrow would enhance the likelihood of continued participation by existing panelists.

Consistent with the BOG’s June 2011 approval of a percentage fees model, the committee further recommends retaining panelist registration fees, but reducing and simplifying the registration fees while LRS funding transitions to the percentage fee model. In addition, the fees for registering in multiple locations should be reduced, and a new fee created for a new option to receive referrals statewide. The recommended panelist registration fees are:

- Basic registration, including home location and up to four areas of law:
 - \$50 for those admitted in Oregon for less than 3 years
 - \$100 for those admitted in Oregon for 3 years or more
- \$50 for each additional geographic region

- \$300 for a statewide listing
- \$30 for each additional area of law (beyond the four included in a basic registration)

Lawyer Referral Service Policies

- I. Goal: The goal of the Lawyer Referral Service (LRS) is to serve lawyers and the public by referring people who seek and can afford to pay for legal assistance (Potential Clients) to lawyers who are willing to accept such referrals, and also to provide information and other resources as appropriate. All lawyers participating in the LRS (Panelists) agree to abide by these Lawyer Referral Service Policies (Policies) and Lawyer Referral Service Operating Procedures (Procedures).
- II. Eligibility: Lawyers satisfying the following requirements shall be eligible to apply for participation in the LRS. The lawyer must:
 - A. Maintain a private practice;
 - B. Be an Active Member of the Oregon State Bar in good standing;
 - C. Maintain malpractice coverage with the Professional Liability Fund (PLF); and
 - D. Have no formal disciplinary, protective or custodianship proceedings pending.Additional standards apply for special subject matter panels; the special subject matter panels and qualifications are stated in the Procedures.
- III. Complaints:
 - A. Ethics Complaints: Complaints about possible ethical violations by Panelists shall be referred to the Oregon State Bar Client Assistance Office.
 - B. Customer Service Complaints: LRS Staff monitor complaints concerning the level of customer service provided by Panelists. The character, number, and/or frequency of such complaints may result in removal from the LRS, with or without prior notice.
- IV. Removal:
 - A. Panelists against whom disciplinary, protective or custodianship proceedings have been approved for filing shall be automatically removed from the LRS until those charges have been resolved. A matter shall not be deemed to be resolved until all matters relating to the disciplinary proceedings, including appeals, have been concluded and the matter is no longer pending in any form.
 - B. A Panelist whose status changes from "active member of the Oregon State Bar who is in good standing" shall be automatically removed from the LRS.
 - C. A Panelist who leaves private practice, fails to maintain coverage with the PLF, or files an exemption with the PLF shall be automatically removed from the LRS.
 - D. A Panelist may be removed from the LRS or any LRS panel if the Panelist violates these Policies and/or the Procedures.
 - E. In all instances in which the Panelist is removed, automatically or otherwise, prior notice need not be given to the Panelist.
- V. Funding & Refunds:
 - A. Funding: All Panelists shall pay the annual LRS registration fees (Registration Fees) and percentage remittances on all attorneys' fees earned and collected (Remittances) from each potential client referred by the LRS and accepted as a client (Client).
 1. Registration Fees: The Board of Governors (BOG) shall set the Registration Fees. All Panelists shall pay Registration Fees annually for each program year and, except as provided in Paragraph (B) "Refunds" (below), Registration Fees are non-refundable and not prorated.

Lawyer Referral Service Policies

2. Remittances: As provided below and explained further in the Procedures, if a Panelist and Client enter into an agreement whereby the Panelist will provide legal services to the Client for which the Client will pay a fee, then Remittances will be due the LRS upon payment of the fees by the Client. The combined fees and expenses charged a Client may not exceed the total charges that the Client would have incurred had no referral service been involved. The BOG sets the percentage rate(s) to be applied to all Panelists' attorneys' fees earned and collected from Clients in excess of any applicable threshold. Remittances owed to the LRS are calculated by multiplying the percentage rate(s) by the earned and collected attorney fees. If a Panelist fails to pay the appropriate Remittance(s) to the LRS in accordance with these Policies and the Procedures, the Panelist will be ineligible for referrals until all Remittance(s) have been paid in full. A Panelist's obligation to pay Remittances owed to the LRS continue regardless of whether the Panelist is in breach of this agreement, fails to comply with these Policies or the Procedures, is removed from the LRS, is no longer eligible to participate in the LRS, or leaves the LRS.
 3. Communications Regarding Remittances: Upon settlement of a matter, the Panelist shall be obligated to include the LRS with those who have a right to know about a settlement to the extent necessary to allow the LRS to have knowledge of the terms of the settlement (including all fees paid in the case, whether paid directly by another party, or by settlement proceeds) so that the LRS may determine the portion of the fees to which it is entitled.
- B. Refunds: Upon written request, a Panelist who has been automatically removed from the LRS shall be entitled to a prorated refund of registration fees. The amount of the refund shall be based on the number of full months remaining in the Program Year for which the fees were paid, as measured from the date the written request is received. An automatically removed Panelist who again meets all of the eligibility and registration requirements prior to the expiration of the Program Year during which the automatic removal occurred may reapply and be reactivated for the remainder of that Program Year upon written request and payment of any amount refunded.
- VI. Review and Governance:
- A. Public Service Advisory Committee (PSAC):
 1. The PSAC advises the Board of Governors on the operation of the LRS. The PSAC works with LRS Staff in the development and revision of these Policies and the Procedures. Amendments to these Policies must be approved by the BOG. Amendments to the Procedures may be approved by a simple majority of the PSAC, with the exception that proposed revisions to the amount of the Registration Fees and the percentage rate(s) and threshold used to calculate Remittances shall be submitted to the BOG for approval.
 2. Upon written request, the PSAC shall review an LRS Staff decision to remove a Panelist at its next regularly scheduled meeting. Such written request shall be submitted to the PSAC within 30 calendar days of the date notice of the LRS Staff decision is given to the removed Panelist.

Lawyer Referral Service Policies

3. Upon written request, the PSAC may review an LRS Staff decision regarding a Panelist's registration, renewal, and/or special subject matter panel registration (collectively, "Registration Issues"). Such written request shall be submitted to the PSAC within 30 calendar days of the date notice of the LRS Staff decision is given to the lawyer. The PSAC's review and decision regarding Registration Issues shall be final.
- B. Board of Governors (BOG):
1. Upon written request by any PSAC member or LRS Staff, PSAC decisions regarding proposed revisions to the Procedures may be reviewed by the BOG. Upon written request of a Panelist, a decision of the PSAC regarding Panelist eligibility or removal may be reviewed by the BOG, which shall determine whether the PSAC's decision was reasonable. The written request shall be submitted to the BOG within 30 calendar days of the date notice of the PSAC decision is given to the affected Panelist.
 2. The BOG shall set the amount of the Registration Fees and the percentage rate(s) and threshold used to calculate Remittances.
 3. These Policies may be amended, in whole or in part, by the BOG.

P:\Referral and Information Services\Percentage Fees Implementation\Policies_revised_draft_2.doc (rev. 2012)

Lawyer Referral Service Operating Procedures

1) How It Works:

- a) Screening: LRS Staff process referrals using information gathered from the potential client during the screening process -- legal need, geographic area, language spoken, and other requested services (credit cards accepted, evening appointments, etc.) – to find a lawyer participating in the LRS (Panelist) who is the best match for each potential client.
- b) Rotation: Referrals are made in rotation to ensure an equitable distribution of referrals among similarly situated Panelists.
- c) Processing: Generally, potential clients receive one referral at a time and will not be provided more than three (3) referrals within a 12-month period for the same legal issue. Under certain circumstances, LRS Staff may provide more than three (3) referrals and may also provide several referrals at the same time. Such circumstances may include but are not limited to emergency hearings, referral requests from those who live out-of-state, lawyers interviewing Panelists to represent their clients in other matters, etc. Potential clients are told by LRS:
 - i) To tell the Panelist that they have been referred by the Oregon State Bar’s Lawyer Referral Service;
 - ii) That they are entitled to an initial consultation of up to 30 minutes for \$35;
 - iii) That the Panelist’s regular hourly rate will apply after the first 30 minutes; and,
 - iv) That all fees beyond the initial consultation will be as agreed between the client and the Panelist.
- d) Follow-up: After processing a referral, LRS Staff email a referral confirmation to the Panelist and, if possible, to the potential client as well. A comprehensive status report is sent to Panelists on a monthly basis. LRS Staff will also send follow-up surveys to potential clients and clients referred by the LRS.
- e) Initial Consultations:
 - i) Amount: Panelists agree to charge potential clients who live in Oregon and are referred by the LRS no more than \$35 for an initial consultation; except that no consultation fee shall be charged where:
 - (1) Such charge would conflict with a statute or rule regarding attorneys’ fees in a particular type of case (e.g., workers’ compensation cases), or
 - (2) The Panelist customarily offers or advertises a free consultation to the public for a particular type of case.
 - ii) Duration: Potential clients are entitled to 30 minutes for a maximum of \$35. If the potential client and Panelist agree to continue consulting beyond the first 30 minutes, the Panelist must make clear what additional fees will apply.
 - iii) Telephone, Computer and/or Video Consultations: It is up to the Panelist whether the Panelist will provide initial consultations by any communication method other than a face-to-face meeting with the potential client. Panelists may indicate their preferences on their LRS applications.

Lawyer Referral Service Operating Procedures

- iv) Location of Face-to-Face Consultations: All lawyer-client meetings must take place in an office, conference room, courthouse, law library, or other mutually agreeable location that will ensure safety, privacy, and professionalism.
- 2) Customer Service: Panelists agree to participate only on those panels and subpanels reasonably within the Panelist's competence and where the LRS has qualified the Panelist to participate on one or more special Subject Matter Panels, as applicable. In addition, Panelists must demonstrate professional reliability and integrity by complying with all LRS Policies and Procedures, including the following customer services standards:
- a) Panelists will refrain from charging or billing for any fee beyond the initial consultation fee unless and until the Panelist and potential client have agreed to the attorneys' fees and costs for additional time or services beyond the initial 30-minute consultation;
 - b) Panelists will use written fee agreements for any services performed on behalf of clients that are not completed at the initial consultation;
 - c) Panelists will communicate regularly with LRS staff, including updating online profiles and providing notice if a Panelist is unable to accept referrals for a period of time due to vacation, leave of absence, heavy caseload or any other reason;
 - d) Panelists will keep clients reasonably informed about the status of the clients' legal matters and respond promptly to reasonable requests for information. Panelists will return calls and e-mails promptly, and will provide clients with copies of important papers and letters. Panelists will refer back to the LRS any potential client with whom the Panelist is not able to conduct an initial consultation in the timeframe requested by the potential client or for any other reason; however, in order to provide a high level of customer service, the Panelist may offer the potential client a referral to another lawyer provided:
 - i) The subsequent lawyer is a Panelist;
 - ii) The potential client is informed of the potential client's option to call the LRS back for another referral rather than accepting the offered substitution;
 - iii) The potential client agrees to the substitution; and,
 - iv) Both the referring Panelist and subsequent lawyer keep the LRS apprised of the arrangement and disposition of all referrals, and ensure that all reports to the LRS clarify and document all resulting lawyer-client agreements and relationships, if any.
 - e) Panelists will submit any fee disputes with LRS-referred clients to the Oregon State Bar Fee Arbitration Program, regardless of who submits the petition for arbitration and regardless of when the dispute arises.
- 3) How To Join the LRS:
- a) Before submitting your application and payment, please read through the Lawyer Referral Service Policies (Policies) and these Procedures completely and contact LRS Staff with any questions you may have;
 - b) Complete and submit the LRS Application Form (Application) (login at www.osbar.org and click on the link for the Application);

Lawyer Referral Service Operating Procedures

- c) Complete and submit Subject Matter Qualification Forms for certain designated panels (if required);
 - d) Ensure that your Professional Liability Fund (PLF) coverage is current and that all outstanding PLF invoices are paid; and,
 - e) Pay all Registration Fees.
- 4) Program Year: The LRS operates on a 12-month program year (Program Year). The Program Year begins July 1 and ends June 30. Although the LRS will accept applications at any time, Registration Fees are not prorated for late registrants. Payment of the Registration Fee shall entitle the Panelist to participation only for the remainder of the applicable Program Year. The LRS may refund Registration Fees only if requested prior to the beginning of the applicable Program Year.
- 5) Regions: LRS registration uses geographic regions based upon population density, counties, court locations, as well as potential client and Panelist convenience. A chart of the regions and the county(ies) in each region may be found on the Application. Payment of the Base Registration Fee (see below) includes registration for one (1) region, which shall be the region in which a Panelist's Office is located (Home Region). For an additional fee, Panelists may elect to register for additional regions outside of the Panelist's Home Region for some or all of the general areas of law (Panels) selected.
- 6) Subject Matter Panel Qualifications: Registration for special Subject Matter Panels requires a separate form and affirmation showing that the Panelist meets basic competency standards. The Subject Matter Panels currently include: 1) felony defense, 2) interstate/independent adoption, 3) deportation, and Department of Labor-referred FMLA/FLSA matters. Additional information and forms are available by logging in at www.osbar.org.
- 7) Registration Fees (effective 07/01/12):
- a) Base Registration Fee:
 - b) Enhanced Services Fees:
 - i) Additional Regions:
 - ii) Additional Panels:
- 8) Remittances:
- a) Percentage Rate: X
 - b) Threshold: Y
 - c) The Math: Panelists will pay the LRS a remittance on each and every LRS-referred matter in which the earned and collected attorneys' fees meet or exceed the threshold or "deductible." The remittance is a percentage only of the Panelist's professional fees and does not apply to any costs advanced and recovered.
 - d) Remittance Payments to the LRS: Panelists will report and submit remittances to the LRS in the next status report period after the fees have been paid (either in response to a bill or if the Panelist has billed against funds held in trust). If a Panelist fails to pay the appropriate remittances to the LRS within the next reporting period, LRS Staff shall notify the Panelist requesting immediate payment of the appropriate Remittances to the LRS. LRS Staff may

Lawyer Referral Service Operating Procedures

remove the Panelist from rotation and cease referrals to the Panelist until all remittances are paid in full.

Final Case Status Reports and Payment: Panelists must submit a final report at the conclusion of the matter reflecting the dates and amounts of all fees paid by or on behalf of the client, accompanied by a copy of the final client billing or settlement statement. The final payment of all remittances due on the matter must be received by the LRS within 30 days of the Panelist's receipt of the client's final payment.

If the Panelist fails to pay the appropriate Remittance to the LRS within 30 days LRS Staff shall remove the Panelist from all referral panels and cease all referrals to the Panelist until all Remittances owed are paid. If the Panelist fails to respond within 10 business days of a delinquency notice sent by LRS Staff, the matter will be presented to the Public Service Advisory Committee (PSAC). The PSAC may authorize LRS staff to undertake collection efforts or may refer the matter to OSB General Counsel's Office.

A Panelist who has been delinquent in payment three times is subject to permanent expulsion from the LRS. The PSAC's decision on the expulsion is final.

- e) Special Circumstances:
 - i) If an LRS-referred client puts other potential clients in touch with the Panelist for the same matter (a multiple-victim auto accident or multiple wage claims against the same employer, for instance), the remittance due to the LRS applies to all fees earned on the matter.
 - ii) If an LRS-referred matter closes and some time later the client contacts the Panelist on an unrelated matter, no remittance is due to the LRS on the new unrelated matter.
 - iii) If a Panelist elects to share or co-counsel a client matter with another lawyer for any reason, the Panelist is solely responsible to the LRS for Remittances on all fees generated during the course of representation of the client in that matter (including any fees paid to the other lawyer brought in on the matter).
- 9) Renewals: To remain an active Panelist in the LRS and continue to receive referrals, Panelists must:
 - a) Be current with all Remittances owed to the LRS and pay all Registration Fees owed for the upcoming Program Year by the deadline stated in the renewal notice; and,
 - b) Continue to be eligible to participate in the LRS and otherwise be in compliance with the Policies and these Procedures.
- 10) Reporting:
 - a) LRS will provide Panelists a monthly report listing all the Panelist's pending or open referral matters. Panelists will complete the report indicating the status of each matter; failure to complete all such reports within 30 days will be grounds for removal from rotation. Reports are considered delinquent until completed and all Remittances are paid.

Lawyer Referral Service Operating Procedures

- b) If, in its sole discretion, the LRS deems it necessary, the LRS may audit the client file and the Panelist's records to determine if the correct remittances have been paid.
- 11) Follow-up: LRS sends follow-up surveys to Panelists asking if clients consulted with the Panelist, amounts of fees paid, and if they were satisfied with the LRS process. Any pertinent information will be forwarded to Panelists, and, if deemed necessary by LRS Staff, to the PSAC. The LRS also routinely monitors referrals by checking court dockets, legal notices, etc.
- 12) Remittance Disputes/Audits: Remittance disputes between the LRS and Panelists that cannot be resolved through intervention by the Executive Director or the PSAC are subject to collection actions. Participation in the LRS constitutes the Panelist's and the client's authorization for the LRS Staff or a duly authorized agent to examine and audit the Panelist's financial records and the legal files with regard to clients. The audit may include but is not limited to charts of accounts, general account records, court filing records, calendars, appointment records, time sheets, docket sheets, engagement letters, fee agreements and contracts with clients – in any and all forms and formats, media, files, devices, computers and accounts, whether electronic or otherwise.
- 13) Participation in other Referral & Information Services Programs: In addition to administering the LRS, the OSB Referral & Information Services Department also administers the following other programs that provide referrals in the same or similar areas of law: Military Assistance Panel, Problem Solvers Program and Modest Means Program. More information can be found at www.osbar.org/forms.

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October 2009: At its annual retreat and strategic planning session the BOG assigned the following charge to its Access to Justice Committee: “RIS funding models: Receive reports on various funding models, national trends, stakeholder interests in Oregon, financial impact, meet with consultants from the ABA.”

January 2010: Lish Whitson, an ABA Program of Assistance (PAR) consultant with extensive LRIS experience (also an OSB member and out-of-state HOD delegate), met with the PSA Committee to discuss percentage fee models, ethics and implementation concerns, and whether there would be any necessary changes to OSB bylaws, bar policies and/or the Oregon Rules of Professional Conduct.

February 2010: Access to Justice Committee meeting addressed authority for percentage fees (pursuant to PSA Committee recommendation and conclusion that percentage fees model appears to be a viable option and that future action should be pursued).

April 2010: Staff conducted focus group with LRS and MMP panelists to discuss percentage fee models and existing LRS policies and procedures.

May 2010: Access to Justice and Budget & Finance Committees discuss development of percentage fee funding for LRS.

June 2010: Joint meeting of the Access to Justice and Budget and Finance Committees with stated goal to: “Determine desired revenue goal for Referral & Information Services program for guidance in developing a proposed new funding model.”

September 2010: Access to Justice Committee meeting with three representatives of the national LRIS community –(the LRIS Director from the Columbus Bar Association, Staff Counsel for the ABA’s Standing Committee on Lawyer Referral & Information Services, and the prior ABA PAR consultant) – to discuss all aspects of adopting and implementing a percentage fees revenue model.

November 2010: Planning Session at BOG retreat with specific discussion of the RIS Funding Model as one of the Emerging Issues for 2011.

(January – December 2010): PSA Committee met 5 times to continue research and evaluation of the information gathered to date.

January 2011: Access to Justice Committee meeting with Lawyer Referral & Information Services as the predominant agenda item.

March 2011: Access to Justice Committee meeting and teleconference with Alameda County Bar Association LRS Program Administrator and LRS of Central Texas (Austin) Executive Director;

April 2011: Special Work Session with full BOG to address the RIS business model, which concluding that a percentage fee system is in the best interests of the LRS and the bar the PSA Committee submitted its recommendation that the BOG move forward with implementation of a percentage fees model for the 2012 program year, i.e., July 1, 2012.

May 2011: Special agenda and full board meeting with the ABA PAR consultant Lish Whitson (his third visit).

June 2011: The Budget & Finance Committee evaluated LRS funding and the BOG took up the PSA Committee recommendation and passed a motion that the BOG approve and authorize the OSB LRS to shift to a percentage-fee model.

September/October 2011: Conducted a survey of 822 LRS panelists (with a 41% response rate) to gather feedback on percentage fee implementation.

December 2011: Conducted focus groups with approximately 20 LRS and MMP panelists to address service improvements and program operations. The PSA Committee met to review focus group results.

January 2012: Conducted focus groups with approximately 30 LRS and MMP panelists to addressing percentage fee implementation. The PSA Committee met three times (1/7, 1/21 and 1/28) to evaluate all of the foregoing, review and revise LRS Policies and Procedures, and finalize its percentage fee model recommendation.

I have been a Lawyer Referral Service panelist for:

Answer Options	Response Percent	Response Count
1 year or less	6.0%	20
Between 1 and 5 years	35.3%	118
Between 5 and 10 years	17.4%	58
Between 10 and 20 years	23.4%	78
20 or more years	18.0%	60
	<i>answered question</i>	334
	<i>skipped question</i>	4

OSB Public Service Advisory Committee
Meeting Minutes
January 7, 2012

Members Present: Dexter Johnson (Chair), William Jones (Secretary), Erin Fitzgerald, Jennifer Li, Brenda Terreault, Barbara Smythe, Diane Weisheit, Daniel Griffith, Ann Fisher (BOG Member), Tom Kranovich (BOG Member). By phone: Bruce Harrell, Rebekah Dohrman

Staff: Kay Pulju, George Wolff

Discussion:

The PSA committee approved the minutes of the December, 10, 2011, meeting.

George and Kay explained the current roll of the PSA to new committee members including defining the current task of the PSA as it relates to implementation of a new percentage fee model. Ann further defined the BOG's expectations of the PSA as it relates to a new revenue model within the LRS and encouraged the PSA to look at all possible options including a "hybrid" model.

Kay discussed a summary of the focus groups conducted on January 5, 2012, at which time three focus groups were conducted by bar staff and attended by several PSA and BOG members. The purpose of these focus groups were to further define the details of a percentage fee model. The general concerns of bar members were widely varied both within individual groups and from group to group. General concerns were:

- Ethical concerns of sharing fees
- High threshold amounts with higher percentage fees v. low threshold amounts with lower percentage fees
- Administrative expense of participation
- Defining of geographic regions
- Usage of generated revenue

At the request of the committee George explained participant attrition in transition to a percentage fee model in other jurisdictions.

The committee discussed the proposed draft of the LRS policies and procedures along with relevant concerns of a hybrid model including an increase or decrease in "sign-up-fees," along with the implementation of a percentage fee model. Various concerns were raised in light of participant attrition, possible revenue loss or gain and administrative burden for the LRS and participants, as compared against several defined models.

Tom recommended a three-tiered approach to the percentage fee model whereby participants in the LRS would be allowed to select from three defined percentage fee structures ranging from low threshold amounts with lower fee percentages to a mid level, then a higher threshold amount

with a higher fee percentage. Concerns were raised concerning software functionality, administrative burden and participant attrition.

Dexter further defined a three-choice model which would allow LRS participants to have three choices (A, B, C,) which would allow participants to select one of the three percentage fee models at the beginning of the LRS program year. A participant's selection would run for an entire LRS program year and would not be allowed to change until the next LRS program cycle. Bruce moved to present the three-tiered model to the BOG. Following clarification by the committee which removed any defined numbers or percentages from the three-tiered model, the motion of Bruce was seconded by Erin, and passed by vote (10-1).

Dexter proposed a meeting date of January 21, 2012, to further define the PSA recommendation to the BOG.

Next meeting: PSA Committee meeting, January 21, 2012.

OSB Public Service Advisory Committee

Meeting Minutes

January 21, 2012

Members Present: Dexter Johnson (Chair), William Jones (Secretary), Erin Fitzgerald, Jennifer Li, Barbara Smythe, Diane Weisheit, Daniel Griffith, Ann Fisher (BOG Member), Tom Kranovich (BOG Member). By phone: Bruce Harrell, Jill Brittle

Staff: Kay Pulju (present), Sylvia Stevens (present), George Wolff (by phone)

Discussion:

The PSA committee approved the minutes of the January 7, 2012 meeting.

Dexter brought forth the agenda for the meeting consisting of one hour dealing with collateral issues and the second hour focusing directly upon the percentage fee model.

Kay pointed out the recent edits to the LRS policies which consisted of mostly grammatical and clerical changes. Jennifer sought clarification of the policies dealing with percentage fees attaching to either the "same matter" or to the same "referral." The general consensus of the committee was that percentage fees should attach to a "referred matter." Sylvia sought to have the LRS policies reflect a clarification in the language of "legal fees" versus "costs."

The committee then discussed a modification of the regions that would be used to register and panelists. Kay explained the current location based model which focuses on the city a panelist resides within. According to the results of focus groups the regional model should reflect first an area of law then location in selecting a referred panelist. Dexter presented a proposed motion

consisting of regions of roughly equal population densities, including a second additional fee to register a panelist for an additional region and a third fee payable by a panelist for statewide registration. Jennifer moved the proposed motion, Bruce seconded, the motion passed unanimously. Dexter later clarified that initial registration includes a panelist's home region.

Kay then explained the current annual registration fees consisting of \$50 for first year attorney's, \$75 for second year and \$100 for three or more years of membership. Concerns were brought forward concerning the timing of projected revenue with an expected drop in registration fee revenue and a later increase in overall revenue from the percentage fee model. Dexter brought forth a proposed motion consisting of modifying the registration fee to \$50 for a panelist's first two years followed by a registration fee of \$100 for three or more years of membership and including a panelist's home region within the registration fee. Bruce moved the proposed motion, Diane seconded and the motion passed unanimously.

The committee then discussed the subject matter panels included within the current LRS system. Dexter proposed a motion that there be no change in the subject matter panels under the percentage fee model. Bruce moved the proposed motion, Jennifer seconded, the motion carried unanimously.

The committee then turned to the topic of \$35 initial consultations, which have no time limitation currently. George discussed the findings from the focus groups where the panelists were in approval of a \$35 initial consultation so long as the consultation was limited to 30 minutes. Kay brought forth the trend of many other jurisdictions to eliminate or reduce the initial consultation fee. Bruce moved to retain the current fee of \$35, which could be waived by individual panelists, with a maximum time limit of 30 minutes. Diane seconded the motion. The motion carried with two in opposition. Bruce brought forward concerns regarding the necessity of a written fee agreement when a referred client exceeds thirty minutes. The committee agreed to hold this issue for later review.

The committee then discussed concerns in moving towards the percentage fee model. Dexter clarified that on January 7, 2012, the committee carried a motion to recommend a three tiered model to the BOG. Dexter then brought forth specific concerns regarding the possibility that a panelist could change "tiers" while still retaining a "referred matter" resulting in confusion upon what tier applies to each matter. Additionally, Dexter brought forth concerns from a technical perspective, which Kay and George clarified in dealing with more complex software to employ a tiered system and the additional costs associated with such a system. George explained that a tiered system would be unique to Oregon as no other LRS uses such a model. George also explained that nationwide percentage fee models break even at a 15% remittance while LRS systems operating at a 10% remittance tend to struggle to break even, if they break even at all.

Dexter proposed a meeting date of January 28, 2012, to further define the percentage fee recommendation to the BOG.

Next meetings: PSA Committee meeting, January 28, 2012.

OSB Public Service Advisory Committee
Meeting Minutes
January 28, 2012

Members Present: Dexter Johnson (Chair), William Jones (Secretary), Jill Brittle, Erin Fitzgerald, Jennifer Li, Barbara Smythe, Daniel Griffith, Ann Fisher (BOG Member), Tom Kranovich (BOG Member). By phone: Bruce Harrell, Diane Weisheit

Staff: Kay Pulju, George Wolff, Sylvia Stevens

Discussion:

Dexter summarized the prior decisions of the committee as outlined in the January 21, 2012, committee minutes followed by a summary of the “three-tiered” model. Dexter also outlined the agenda for the meeting as attempting to reach the goals of the LRS program by defining the specific undecided items to be added to the committee recommendation to the BOG.

Kay brought forth the technical aspects and costs of a three-tiered model versus a single fee model within the LRS. Additional expenses are expected to be in the neighborhood of \$44,000 in addition to an additional four months to prepare the software. The total project cost is expected to be near \$120,000, including the additional costs in developing the three-tiered model. Of the additional expense, \$27,000 is expected to be a capital outlay while the remainder is consumed by staff labor.

Dexter then outlined the goals of the percentage fee model including, 1. Elimination of the LRS budget shortfall, 2. Retaining and improving LRS service levels, 3. Receiving additional funds from those who benefit from the LRS program, 4. Promoting access to legal services. Concerns were raised regarding various percentage fees and thresholds resulting in excessive administrative burden (if no threshold is used) and concerns of panelists’ who may never remit payment as fees may continually be beneath the threshold in a higher threshold model.

On the topic of administrative burden, Bruce proposed aggregate yearly billing as an option to avoid non-remittance for panelists’ who may not have individual cases exceeding a minimum threshold. George brought forth concerns of administrative expense and pointed out that an aggregate model is not used in other jurisdictions.

The committee then discussed the complexities of the three-tiered model. A specific concern was raised concerning a panelist who changes between tiers at the end of a program cycle while retaining a referred matter from the prior program year. George and Sylvia voiced specific concerns regarding the Legacy system which must be integrated in order to retain a single source for member data. George also expressed concerns in having custom software developed for the three-tiered model and the lack of technical support or updates available for custom software that would be available in software currently used in other jurisdictions.

Dexter then proposed a vote to rescind the three-tiered proposal to the BOG which was moved by Erin and Seconded by Jennifer. The motion did not carry with two in opposition.

The board then discussed the threshold amounts and percentages to be proposed within a three-tiered model to the BOG. The initial percentages proposed were 20%, 15% and 10% respectively. Dexter proposed moving to an 18%, 15% and 12%. Erin proposed a change in threshold amounts under each of the three percentage fee models. After discussion throughout the committee, Dexter moved to adopt the following structure in a three tiered percentage fee model to be presented to the BOG, Jill seconded the motion which passed with two in opposition.

- 18% remittance with a \$400 threshold
- 15% remittance with a \$200 threshold
- 12% remittance with no threshold

In addition, the issue of initial consultation policies between the LRS and Modest Means program was addressed by the committee. The committee agreed that the Modest Means policies concerning initial consultations should be revised to match the proposed changes to the LRS system.

Finally, the committee discussed an issue raised by the workers compensation section's executive committee: Whether there ought to be a different percentage rate or different policy for workers compensation matters since workers comp attorneys feel that their fees are already so low. The committee decided this should be addressed after implementation of a percentage fees model in consultation with substantive law executive committees, and in conjunction with evaluation of possible expansion of the Modest Means Program.

Next meeting: PSA Committee meeting, May 12, 2012 at 10:00 a.m.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: February 10, 2012
Memo Date: January 26, 2012
From: Access to Justice Committee
Re: Changes to the LRAP Policies and Guidelines

Action Recommended

The Access to Justice Committee recommends that the BOG approve an increase of the salary cap from \$50,000 to \$55,000 for public service lawyers applying for the Oregon State Bar Loan Repayment Assistance Program and that the Policies and Guidelines be changed to reflect that the Advisory Committee will consider the forgivable nature of the student loans of the applicants.

Background

The Loan Repayment Assistance Program (LRAP) is now in its sixth year of providing forgivable loans to lawyers pursuing careers in public service law. Through this program, lawyers working in public service may receive loans for up to \$5,000 per year for three years to aid them in repaying their educational debt. Each loan is forgiven at the end of the year, provided that the lawyer remains in public service. The LRAP Advisory Committee seeks to refine the Policies and Guidelines to make clear that the forgivable nature of outstanding loans is a factor in determining who obtains the loans. Since 2008, most law student debt is owed directly to the federal government. The unpaid portions of those federally direct loans are able to be completely forgiven for any lawyer who works in public service and makes appropriate loan payments for ten years. The LRAP Advisory Committee wants to make clear that the availability of that forgiveness is a factor used by the Advisory Committee in determining who will receive OSB LRAP funds as the program moves forward. Consequently, Section 4(B)(i) of the Policies and Guidelines would be changed as follows:

Educational debt and/or monthly payment to income ratio;

Will be changed to:

Educational debt, monthly payment to income ratio; and/or forgivability of debt;

In addition, the Advisory Committee wishes to increase the current salary cap of \$50,000 to \$55,000. The salary cap has not been raised since 2009, when it increased from the original \$45,000 cap to \$50,000. Increasing the salary cap will allow attorneys to apply for the LRAP funds who have served for up to twelve years in public service. Those attorneys are not eligible for federal loan forgiveness and have disproportionately higher loan payments to make compared with newly admitted attorneys.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: February 10, 2012
Memo Date: January 27, 2012
From: BOG member Services Committee
Re: Request from the OSB Sustainable Future Section

Action Recommended

Approve the Sustainable Future Section's request to use the designation "OSB Partner in Sustainability" in its new program promoting sustainable office practices.

Background

The OSB Sustainable Future Section is launching a new "Partners in Sustainability" program. The purpose of the program is to encourage and recognize Oregon law firms that meaningfully implement a prescribed set of sustainable office practices. The program objectives are consistent with the sustainability goals articulated in Section 26 of the Bylaws of the Oregon State Bar. Each law firm that certifies compliance with the criteria will become a Partner in Sustainability. The Section will recognize the commitment of Partners in Sustainability on the Section's website, in advertising in Bar publications and in other media, including the bar's website.

Criteria for the program, which are attached, encompass paper management, reduction of energy and water usage, waste reduction, sustainable purchasing, and office education. In some categories, application of the criteria differs based upon whether the law office is small (1-5 attorneys), medium (6-24 attorneys), or large (25 or more attorneys). To be eligible to become a Partner in Sustainability, the firm must adopt a sustainability policy containing specified elements, select a sustainability coordinator, and implement an education program focused on sustainability matters. In connection with the program, the Section will publish a Model Law Office Sustainability Policy, which is attached, containing the required program elements and other recognized sustainable office practices. The Model Policy may be used by law firms without modification or adapted to the firm's circumstances or needs.

The Sustainable Future Section would like to refer to each law firm satisfying the criteria as an "Oregon State Bar Partner in Sustainability." Accordingly, the Section requests the approval of the Oregon State Bar regarding this label. No further BOG involvement will be required as the Section will coordinate all program activities.

[enter comm. name]

[enter meeting date]

**SUSTAINABLE FUTURE SECTION
OF THE OREGON STATE BAR**

Partners in Sustainability Program

© OSB SUSTAINABLE FUTURE SECTION 2011
DRAFT OF DECEMBER 20, 2011

Notes:

1. This Program includes criteria for an Oregon law office to meet in order to qualify as an Oregon State Bar Partner in Sustainability.
 2. To become a Founding Partner for 2012, to be announced on Earth Day 2012, an application must be submitted by March 15 to the Sustainable Future Section at the address noted on the application form.
-

Background on Program

The Sustainable Future Section (the Section) of the Oregon State Bar (OSB) seeks to encourage law offices to adopt sustainable practices. This Partners in Sustainability Program (the Program) is in line with the goals of (1) Article 26 of the OSB Bylaws on sustainability and (2) ORS 184.423 enacted to encourage sustainable practices in public agencies.

The Program will recognize law offices of all sizes that meet the criteria set forth below. For this program, three categories of office size have been selected, based on the number of attorneys in a contiguous office in the state of Oregon. Organizations with law offices in multiple locations may qualify each location based on the number of lawyers with their primary office at that location:

Small office	1 to 5 attorneys
Medium office	6 to 24 attorneys
Large office	25 or more attorneys

An office satisfying the criteria set forth below will be recognized as an Oregon State Bar [need permission] Partner in Sustainability, and will be publicized by the Sustainable Future Section, and listed on its website. If an organization qualifies more than one office, the organization name shall be listed only once, with office locations noted.

An application may be submitted to the Section at any time. A law office will be recognized as a Partner in Sustainability on the Section's web site and in *The Long View* as soon as practicable after acceptance of the application. However, the failure to apply by particular dates will preclude recognition of the law firm in any scheduled media advertisements or press releases. In general, a firm that has its application accepted before September 30 of any year will be listed as a Partner in Sustainability for that year

with other Partner firms in any Section communication about current Partners or advertisement in selected media. Furthermore, those firms submitting applications before March 15, 2012 will be recognized as Founding Partners in Sustainability in any Section Earth Day 2012 communication or advertisement.

After the application is accepted by the Section, a law office may state that it is an Oregon State Bar Partner in Sustainability or OSB Partner in Sustainability, but shall not state that it is “certified” because no third-party certification is involved in this program. [need permission]

Criteria for OSB Partners Program

Note: Bold items are required for all law offices.

A. General

- **A sustainability policy has been adopted by the office including required elements noted in the [Model Law Office Sustainability Policy](#) of the Sustainable Future Section.**
- **A sustainability coordinator (can be volunteer and/or part-time) has been appointed by the office with responsibilities defined by the office.**
- **An education program for office personnel is in place. See elements in IV below.**

B. Office Operations

I. Paper Management

- **Copy/printer paper and other writing paper products have at least 50% post-consumer recycled content.**
- **Office policy on data and document storage is intended to minimize the use of paper.**
- **Office policy on court and agency filing procedures favors using the least paper that courts allow.**
- **Paper towels and toilet paper, if supplied by the law office, have at least 50% post-consumer recycled content and shall be non-chlorine bleached and un-dyed.**
- **Copy and print jobs should be double-sided unless otherwise specified. The default on copiers and printers is set at duplex.**

Large offices must satisfy all 3 of the following:

Medium offices must satisfy 2 of the following:

- *Documents are processed electronically when appropriate, including the use of the scan option on copier, rather than printing hard copies.*
- *Payroll information is provided to employees online, eliminating paper paystubs, envelopes, and mail delivery.*
- *Office employs hardware and software to scan for electronic document distribution and storage.*

II. Energy and Water Reduction

- **Office policy calls for individual computers and printers to be turned off at the end of each day, with exceptions allowed for standard maintenance.**
- **Procedures are in place for shared copy machines and printers to be turned off, or put in standby mode, at the end of each day.**
- **(1) Lights are controlled by timers or motion sensors, or (2) office policy calls for lights to be turned off at the end of the day and when leaving the office for more than thirty minutes;**
- **(1) Monitors are set to go to sleep after 30 minutes or less, or (2) personnel have been instructed to turn off monitors when leaving the office for 30 minutes or more;**

Large and Medium offices must satisfy the following:

- If the law office is in rented space, discussions have been held with a representative of the building owner to discuss how to reduce energy and water use in the building generally and the feasibility of the following steps:
 - More switches installed to reduce lights per switch, ambient light levels in office spaces adjusted to no more than 1.4 watts per square foot, law office space sub-metered or energy-star appliances installed.
 - Low-flow faucets and, if applicable, shower heads and dual flush toilets installed.
- If the law office is in owned space, the office has considered the items listed in the preceding bullet point and implemented those that are feasible.
- If the law office occupies space certified as LEED Gold or Platinum, the two criteria above shall not apply and this requirement shall be satisfied.

III. Waste and Toxics Reduction

- **Desk-side recycling boxes with or without attached pitch cans, but no trash cans, are at each workstation.**
- **Durable plates, cups, glasses, utensils, and coasters are provided in kitchen and conference rooms (if any).**
- **Collection containers are set up for bottles, cans, newspapers, magazines, and cardboard, and a procedure has been established for their recycling.**
- **A procedure has been established to provide for non-curbside recycling of non-reusable items, such as batteries, plastic bags, clamshells, electronics, CFL's, etc.**

Large offices must satisfy 3 of the following:

Medium and small offices must satisfy 2 of the following:

- *Office has held discussions with the building owner's representative regarding the hazards of chemicals in the workplace including paints, glues, and other products used in tenant improvements, and requested that cleaning supplies are certified by Green Seal or meet US EPA's Design for the Environment standard, and that the janitorial staff be trained in the benefits of non-toxic cleaners. If the building contracts with a janitorial service, law office has requested that building owner requires service to use non-toxic cleaners and methods by negotiating them into the contract. If the law office controls the cleaning practices, it implements the same requirements on itself.*
- *Old office equipment, furniture, and supplies are sold or donated for reuse when feasible.*
- *Food scraps are composted.*
- *Office purchases remanufactured ink cartridges and/or makes arrangements for its used cartridges to be reused.*

IV. Office Education

- **All employees have been, or will be within three months of submitting an Application to become a Partner, educated about the office sustainability policy and portions of the Partners' certification criteria that relate to their work, and such education is part of new employee orientation.**
- **The office has an ongoing education program calling for at least two noontime or work-time education programs each year focused on matters pertinent to sustainability.**
- **Attorneys/staff are trained on paperless options, waste reduction, toxics reduction, and resource conservation;**

V. Sustainable Purchasing

- **Office has a written purchasing policy regarding the purchase and delivery of supplies, equipment and services (including cleaning supplies, electronics and food) with a goal of minimizing packaging, disposables, and toxics and maximizing recycled and recyclable content.**
- **If lunches are ordered by the office regularly, the policy encourages the utilization of lunch caterers that minimize disposables and purchase locally grown, organic food.**
- **If plates, cups, glasses or utensils are provided for use in the office, they are permanent ware and not single-use disposable items.**
- **Individual plastic bottles of water are not provided by the office.**
- **If coffee is purchased by the office, consideration has been given to organic, fair-trade and/or shade-grown varieties.**

C. Transportation Energy Reduction

- **Office encourages reduction in use of fossil fuels for business travel through teleconferencing and other electronic conferencing technologies.**
- **If public transportation is available to firm personnel, the office provides a subsidy of at least 50% for bus or light rail passes for employees who commute regularly by public transportation.**

Large offices must satisfy 3 of the following:

Medium offices must satisfy 2 of the following:

- *Office does not provide free pay individually for parking for any personnel.*
- *Incentives are provided for bike commuters in the form of subsidies and/or items like showers and/or secure bike storage.*
- *Office provides a carpool pairing resource.*
- *Office has purchased one or more car-sharing memberships.*
- *Office reimburses cab fares for employees who commute by alternative methods who must work beyond a certain time in the evening.*
- *Office personnel have use of a Level 2 charging station (for car batteries) provided by the law office or building manager.*

**PARTNERS IN SUSTAINABILITY PROGRAM
OREGON STATE BAR
January __, 2012**

Law Office Application to Qualify as Partner in Sustainability

1. Contact information:

Name of law office:

Address(es) in Oregon:

Contact person:

Phone number: E-mail:

2. Law office size:

Lawyers with a primary personal office by address listed above: _____

3. Law office certification:

The undersigned Oregon lawyer, being a principal, partner, or manager of the law office, certifies that the office at each address listed above meets the current Criteria for OSB Partners Program* and intends to continue meeting the criteria in the future.

Name and title (for law office)

*The current criteria for the OSB Partners Program can be found on the website for the Sustainable Future Section of the Oregon State Bar.

Acceptance:

The OSB Sustainable Future Section accepts the application. The law office is qualified as a Partner in Sustainability for calendar year(s) _____.

Name and Title (for Sustainable Future Section)

SUSTAINABLE FUTURE SECTION
OF THE OREGON STATE BAR

Model Law Office Sustainability Policy

© OSB SUSTAINABLE FUTURE SECTION 2011
DRAFT OF DECEMBER 16, 2011

Notes:

1. This policy may be adopted and used by an office as written without credit to the Sustainable Future Section. Although the model policy has been drafted for widespread use by law offices generally, it will also satisfy the office-policy requirements of the SFS Partners in Sustainability Program.
 2. An asterisk (*) and italics in paragraphs below identify the only minimum requirements to satisfy the office policy criteria in the SFS Partners in Sustainability Program and have no other significance. See footnote below about Partners Program.
-

Our firm seeks to establish sustainable office practices consistent with its overall commitment to provide excellent legal services to clients. The best-known definition of sustainability is contained in a 1987 report *Our Common Future* commissioned by the UN World Commission of Environment and Development:

Sustainable development is meeting the needs of the present without compromising the ability of future generations to meet their own needs.

We recognize that all human activity, including the operation of a law office, has an impact on the environment and the natural world. Within the firm we make daily choices in performing work that can either reduce or increase that impact. As a firm we seek to reduce the impact.

**This policy has been adopted by the [management team] [law office] to implement that intent.*

***Sustainability Coordinator.** *One person shall be designated as the Sustainability Coordinator for the firm. The time allocated for work as the Coordinator shall be determined by the [Firm Administrator] [Managing Partner]. The Coordinator shall be responsible for educating firm personnel on sustainability, making recommendations to firm management to implement the policy, and maintaining awareness of this policy among firm personnel generally.*

***Education.** *The Coordinator shall establish an education program to include the following elements. First, all existing personnel shall be introduced to this policy and its goals in a short training. All incoming personnel shall receive an introduction to the policy and goals in new personnel orientation. Second, the Coordinator shall plan at least two educational sessions each year, open to all office personnel, on matters related to sustainability.*

Sustainability Team. A Sustainability Team, organized by the Coordinator, shall meet periodically to evaluate current practices, determine priorities in carrying out this policy, and consider ways to educate and motivate lawyers and staff to adopt more sustainable practices. Anyone with ideas for improving the firm's performance is encouraged to contact a member of the Sustainability Team.

***Purchasing.** *Sustainability shall be considered in the purchase of supplies, equipment, and services. Examples of sustainability criteria are recyclability, biodegradability, recycled content, waste minimization, hazardous-chemical free, energy conservation, resource conservation, locally manufactured, and organic.*

***Waste Reduction and Recycling.** *Subject to security and other requirements, policies shall be established that minimize the use of paper in printing, copying, internal and external communications, and data storage. Systems will be established to minimize disposables and packaging, reuse equipment and supplies where feasible, and maximize recycling of all items that can be recycled in this region.*

***Energy.** *Policies shall be established to encourage energy conservation and efficiency in heating/cooling, lighting, and equipment. For matters not within the control of the office, negotiations with the building manager may be appropriate to seek best practices.*

Travel. The Sustainability Team shall consider means for reducing business travel, including teleconferencing options, and strategies for reducing the impact of travel, including fuel efficiency, flexible car options, and carbon offsets.

Commuting. The firm management shall establish commuter incentives to encourage use of mass transit, carpooling, biking, running, and walking.

Carbon Credits/Green Power. The firm shall consider the purchase of carbon credits to offset all or a portion of the greenhouse gas emissions associated with our internal operations and the purchase of green power to encourage alternatives to fossil fuels.

Tenant Improvements. When tenant improvements are made, where possible the firm shall specify materials that are the least hazardous and most natural and give preference to those that are high in recycled content, recyclable or biodegradable, certified sustainable, and durable.

Implementation and Measuring Success. In implementing this policy, where practicable baselines shall be established for practices that can be measured--such as paper used, recycled content of supplies, disposables purchased, percentage of office waste that is recycled, and electricity used--and progress shall be reported to the firm at least annually.

***Reports.** *The Sustainability Coordinator will make periodic reports, not less than once a year, to the firm management regarding the progress the firm is making toward sustainability.*

MEMORANDUM

TO: Oregon State Bar Board of Governors

FROM: Steve D. Larson

DATE: April 10, 2012

RE: Changing Professional Rule Regarding Costs Advanced

Any lawyer that has handled a contingency fee case is familiar with Oregon Rule of Professional Conduct 1.8(e). For the benefit of the rest of us, following is what Oregon Rule of Professional Conduct 1.8(e) provides:

While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the lawyer's client, except that a lawyer may advance or guarantee the expenses of litigation, provided the client remains ultimately liable for such expenses to the extent of the client's ability to pay.¹

This Rule of Professional Conduct is based on outdated concepts of champerty and maintenance, and is interfering with access to justice for people that want to hire Oregon lawyers, but may not have the resources to be ultimately liable for filing fees, deposition expenses, expert witness fees, and other costs that have risen dramatically in recent years. It is also inhibiting the opportunity for Oregon lawyers to represent clients in deserving cases. This rule is also inconsistent with common practice, because lawyers do not necessarily pursue their clients to recover costs if a case is unsuccessful.

Oregon lawyers that take cases on a contingency fee are making decisions about the value and viability of a case. If a lawyer is willing to represent a client on a contingency fee basis and take the risk of paying the costs of the litigation with no right to recover costs from the client if the case is unsuccessful (and be willing to tell the client that up front in writing), why should the Oregon State Bar want to preclude that lawyer from representing the client. Often, a client will be unwilling to bring a valid claim for a relatively modest amount of money if there is a chance he or she might have to pay for out of pocket expenses if the case is unsuccessful.

¹ The Oregon State Bar Approved Explanation of Contingent Fee Agreement that lawyers are required to send to potential contingent fee clients goes further. It states: If we advance money for filing fees, witness fees, experts reports, court reporter's services or other expenses on your behalf, you must repay us whether the case is won or lost.

In the majority of other states, lawyers may advance court costs and expenses of litigation, and the repayment of those costs can be contingent on the outcome of the matter. That is because those states have adopted the ABA Model Rule 1.8(e). I am unaware of any statistical or anecdotal evidence that the adoption of this rule in these other states led to any problems. Sylvia Stevens sent out an inquiry on the listserv that goes to all the general counsel for state bar organizations and every jurisdiction that responded to her inquiry said they have no problem with the model rule.

When Oregon adopted the Oregon Rules of Professional Conduct, we retained the language of former DR 5-103(B). Only a small minority of states (Michigan, New York, New Mexico, Oregon, Virginia, and Washington) still use this outmoded approach.

I would like to propose that the Oregon State Bar adopt ABA Model Rule 1.8(e). That rule and the comments to it follow:

ABA Model Rule 1.8:

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

- (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
- (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

Comment [10]:

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

Excerpt from ABA/BNA Lawyers' Manual on Professional Conduct:

Court Costs and Litigation Expenses

Although Model Rule 1.8(e) generally prohibits the advancement or guarantee of financial assistance by a lawyer to a client in connection with litigation, the rule provides an exception for the expenses of the litigation itself, including court costs.

Allowing lawyers to advance court costs and litigation expenses is comparable to allowing lawyers to charge contingent fees, and rests on the same justification of ensuring access to justice for those who could not otherwise afford to pursue their claims. Model Rule 1.8 cmt. [10]; Restatement (Third) of the Law Governing Lawyers §36 cmt. c (2000).

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: February 9, 2012
From: Steve Larson, Public Affairs Committee Chair
Re: Stable Court Funding Economic Survey

Action Recommended

Consider PAC recommendation regarding economic survey to document the effects of court budget reductions on the Oregon economy.

Background

As part of the coalition on stable court funding discussions, and at the request of the Chief Justice, coalition participants concluded that it would be more persuasive to document the effects of court budget reductions on the Oregon economy rather than present anecdotal evidence to the legislature. Other states, including Florida, California and Georgia, have undertaken similar studies with beneficial results.

Please see attached description of the scope of work product from EcoNorthwest.

January 20, 2011

TO: Susan Grabe, Amber Hollister
FROM: Bryce Ward, Ed MacMullan
SUBJECT: REVISED DRAFT SCOPE OF WORK AND BUDGET

In this memo we describe our revised draft scope of work and budget based on your comments on our previous draft.

Task 1: Background

Since the beginning of the Great Recession, much has been written on declining budgets for state courts and the associated socioeconomic consequences. In this task, Task 1, we will review a sampling of this literature. Our review will focus on the types and amounts of budget cuts, how budget cuts affect court services, and the resulting socioeconomic consequences of reduced court services. We will also briefly describe state courts in Oregon. This description will include the functions of state courts, how they operate and the relationship between the functions of state courts and the socioeconomic wellbeing of the state's residents, businesses and local governments.

Budget: \$3,100.

Task 2: Effects of Budget Cuts on State Courts in Oregon

In Task 2, we will describe how budget cuts have and will affect the operations of state courts in Oregon. To the extent the available data will allow, we will describe past budget cuts and their effects on state courts in Oregon. We will also describe the direct economic consequences measured in the numbers of court-related jobs and employment income of an illustrative budget cut of \$X million. Using economic multipliers, we will then describe the indirect effects of this illustrative budget cut on the larger Oregon economy.

Budget: \$4,300.

Task 3: Effects of Budget Cuts on Socioeconomic Wellbeing

In Task 3, we will describe how an illustrative budget cut of \$X million, could affect the socioeconomic wellbeing of Oregon residents, businesses, and local governments. To the extent the available data will allow, we will describe the consequences quantitatively, e.g., amounts of business investments at risk, financial resources tied up in delayed judgments, etc.

Budget: \$3,000.

Task 4: Summary Memo

In Task 4, we will summarize our analysis, results and conclusions in a memo.

Budget: \$1,200.

Total Budget for Tasks 1 – 4: \$11,600.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: February 10, 2012
Memo Date: February 10, 2012
From: Kateri Walsh, NLMP Administrator
Re: New Lawyer Mentor Program: Mentor Nominees

Action Recommended

Review the attached list of volunteer mentors for the New Lawyer Mentoring Program, and approve appointment recommendations for submission to the Oregon Supreme Court.

Background

All mentors participating in the New Lawyer Mentoring Program require recommendation by the Board of Governors and appointment by the Oregon Supreme Court. The criteria include:

- Seven years of experience as a practicing attorney.
- No pending disciplinary prosecutions.
- A reputation for competence, ethics and professionalism.

Please review and approve all appropriate volunteers. Contact Kateri Walsh directly with any questions or concerns about the process, or about any volunteer mentors.

MENTORS FOR BOG APPROVAL, FEBRUARY 2012 --- New Lawyer Mentoring Program

Bar#	Sal.	F.Name	M.Name	L.Name	City.State.Zip
800099	Hon.	Ann		Aiken	Eugene, OR 97401
981752	Ms.	Traci		Anderson	Portland, OR 97204
911947	Ms.	Dawn		Andrews	Portland, OR 97204
690061	Mr.	Gavin		Armstrong	Eugene, OR 97401
901990	Mr.	Dave		Bahr	Eugene, OR 97402
760504	Mr.	William	D.	Bailey	Tigard, OR 97223
915144	Mr.	James		Baker	Portland, OR 97214
022457	Ms.	Wendy		Baker	Eugene, OR 97401
951927	Mr.	Andy		Balyeat	Bend, OR 97701
030785	Mr.	Glen		Banfield	Portland, OR 97204
690093	Mr.	Albert	J.	Bannon	Portland, OR 97201
011960	Ms.	Mary-Beth		Baptista	Portland, OR 97204
760568	Ms.	Cynthia		Barrett	Portland, OR 97201
881556	Mr.	Jesse	Wm.	Barton	Salem, OR 97304
821887	Mr.	Fritz		Batson	Eugene, OR 97440
012027	Mr.	David		Bean	Portland, OR 97205
951830	Mr.	Carson		Bowler	Portland, OR 97204
012113	Mr.	Douglas		Bragg	Portland, OR 97224
850065	Mr.	Richard		Braun	Portland, OR 97204
912416	Ms.	Anne	Corcoran	Briggs	Boise, ID 83706
050206	Ms.	Adrian		Brown	Portland, OR 97204
822070	Mr.	Jon		Buerstatte	Eugene, OR 97440
881674	Mr.	B	Kevin	Burgess	Eugene, OR 97401
640088	Mr.	Carl		Burnham, Jr.	Ontario, OR 97914
011770	Mr.	John	F.	Butler	Eugene, OR 97401
710362	Mr.	Win		Calkins	Eugene, OR 97401
930114	Ms.	Alison	Kean	Campbell	Portland, OR 97232
032816	Mr.	David	C.	Campbell	Portland, OR 97204
771363	Ms.	Cynthia		Carlson	Eugene, OR 97401
970394	Mr.	John		Casalino	Portland, OR 97204
911915	Mr.	James	C.	Chaney	Eugene, OR 97401
904926	Mr.	Jeffrey	M.	Cheyne	Portland, OR 97204
830043	Mr.	Jay	R.	Chock	Portland, OR 97204
831709	Ms.	Christine		Chute	Dallas, OR 97338
760970	Mr.	Art		Clark	Eugene, OR 97440
833871	Hon.	Mark D.		Clarke	Medford, OR 97501
920411	Mr.	Tom		Cleary	Portland, OR 97204
824655	Hon.	Thomas		Coffin	Eugene, OR 97401
965776	Mr.	Michael		Cohen	Portland, OR 97204
972378	Mr.	Andrew		Coit	Eugene, OR 97401
811930	Mr.	Mark		Comstock	Salem, OR 97308
781675	Mr.	Richard		Condon	Salem, OR 97301
932373	Mr.	Joseph		Connelly	Eugene, OR 97401
560237	Mr.	Thomas	E.	Cooney	Lake Oswego, OR 97035
871964	Mr.	Brad		Copeland	Eugene, OR 97440

Bar#	Sal.	F.Name	M.Name	L.Name	City.State.Zip
610180	Mr.	William B.		Crow	Portland, OR 97204
924654	Mr.	Thomas		Cupani	Salem, OR 97301
850373	Mr.	Paul		Dakopolos	Salem, OR 97308
025873	Mr.	Brian		Davidson	Portland, OR 97204
851817	Ms.	Gwen		Dayton	Portland, OR 97223
962586	Ms.	Heather		Decker	Milwaukie, OR 97267
944787	Ms.	Tammy		Dentinger	Salem, OR 97308
822370	Mr.	Joel		DeVore	Eugene, OR 97440
922814	Mr.	Peter	C.	Diamond	Portland, OR 97230
962636	Mr.	Christopher		Drotzmann	Portland, OR 97204
922932	Ms.	Gilion		Dumas	Portland, OR 97209
932588	Mr.	Brendan		Dummigan	Portland, OR 97205
754030	Mr.	Daniel		Dziuba	Portland, OR 97204
893605	Hon.	Cynthia		Easterday	McMinnville, OR 97128
041186	Mr.	Patrick		Ehlers	Portland, OR 97204
854133	Mr.	Kenneth		Elmore	Eugene, OR 97401
912606	Mr.	Ronald		Elzinga	Portland, OR 97205
730843	Mr.	Stephen		English	Portland, OR 97209
670340	Mr.	William		Flinn	Bend, OR 97701
923078	Ms.	Meagan		Flynn	Portland, OR 97201
091858	Ms.	Margaret "Gosia"		Fonberg	Portland, OR 97204
914779	Ms.	Kitri		Ford	Bend, OR 97702
033166	Mr.	David	S.	Foster	Portland, OR 97204
872243	Ms.	Cynthia		Fraser	Portland, OR 97204
812298	Ms.	Jaye		Fraser	Salem, OR 97312
590331	Mr.	Robert	H.	Fraser	Eugene, OR 97440
832041	Mr.	Douglas		Fredricks	McMinnville, OR 97128
892448	Mr.	Marc		Friedman	Eugene, OR 97440
002592	Mr.	Mark		Friel	Portland, OR 97204
741061	Mr.	Donald		Gallagher	Eugene, OR 97440
002600	Mr.	Paul		Galm	Beaverton, OR 97005
792352	Mr.	Frank		Gibson	Eugene, OR 97440
851222	Mr.	Kirk		Gibson	Portland, OR 97205
670397	Mr.	James		Gidley	Portland, OR 97209
000096	Mr.	David		Giles	Portland, OR 97239
660458	Hon.	W.	Michael	Gillette	Portland, OR 97204
990535	Mr.	John	Phillip	Gilroy	Lake Oswego, OR 97035
812400	Mr.	Jimmy		Go	Portland, OR 97207
890504	Ms.	Debbie		Goldberg Menashe	Portland, OR 97204
830423	Mr.	Timothy		Grabe	Portland, OR 97212
771901	Mr.	Paul		Graham	Salem, OR 97301
990542	Ms.	Erin		Greenawald	Salem, OR 97301
882175	Ms.	Melinda		Grier	Eugene, OR 97401
754317	Mr.	Jim		Griggs	Salem, OR 97308
940845	Mr.	John		Gutbezahl	Lake Oswego, OR 97035
731179	Hon.	Ancer		Haggerty	Portland, OR 97204
822743	Mr.	Michael		Halligan	Portland, OR 97205

Bar#	Sal.	F.Name	M.Name	L.Name	City.State.Zip
792542	Mr.	Bruce		Hamlin	Portland, OR 97204
992787	Mr.	Todd		Hanchett	Portland, OR 97204
943320	Mr.	Thomas		Hanrahan	Portland, OR 97201
975454	Mr.	Douglas	C.	Hanson	Salem, OR 97309
721129	Mr.	Edwin		Harnden	Portland, OR 97204
842432	Mr.	Tilman		Hasche	Portland, OR 97214
010050	Mr.	Michael		Heilbronner	Portland, OR 97232
862067	Hon.	Marco		Hernandez	Portland, OR 97204
820602	Mr.	Robert	G.	Higgins	McMinnville, OR 97128
710860	Hon.	Michael		Hogan	Eugene, OR 97401
003370	Mr.	Susan		Howard	Portland, OR 97204
640429	Hon.	John		Jelderks	Portland, OR 97204
690860	Mr.	David		Jensen	Eugene, OR 97401
023377	Mr.	Scott		Jerger	Portland, OR 97205
772355	Mr.	David		Jewett	Springfield, OR 97477
882340	Mr.	Derek		Johnson	Eugene, OR 97401
933230	Ms.	Lara		Johnson	Eugene, OR 97401
992913	Mr.	Todd		Johnston	Eugene, OR 97440
954092	Ms.	Janis	Searles	Jones	Portland, OR 97202
802825	Mr.	Ivan		Karmel	Portland, OR 97205
014666	Mr.	Benjamin		Kearney	Eugene, OR 97440
923512	Mr.	Eric		Kekel	Portland, OR 97204
970735	Mr.	Sean	David	Kelly	Cottage Grove, OR 97424
60801	Ms.	Karen		Kemper	Corvallis, OR 97339
060801	Ms.	Karen		Kemper	Corvallis, OR 97339
690925	Mr.	Andrew	P.	Kerr	Portland, OR 97205
630432	Hon.	Garr		King	Portland, OR 97204
933301	Mr.	Brent		Kinkade	Bend, OR 97701
081879	Mr.	James	R.	Kirchoff	Medford, OR 97501
953244	Mr.	Ken		Kissir	Gresham, OR 97030
812123	Ms.	Chris		Kitchel	Portland, OR 97204
933319	Ms.	Ronnee		Kliwer	Portland, OR 97232
811400	Mr.	Bill		Kloos	Eugene, OR 97401
015088	Mr.	Scott		Kocher	Portland, OR 97204
992991	Mr.	John		Kodachi	Portland, OR 97258
560237	Mr.	Thomas	E.	Cooney	Lake Oswego, OR 97035
903174	Mr.	David		Kracke	Portland, OR 97239
802911	Mr.	Steve		Krasik	Salem, OR 97301
023350	Ms.	Angela		Kuhn	Medford, OR 97501
760353	Mr.	Louis		Kurtz	Eugene, OR 97401
951389	Mr.	John		Lamborn	Burns, OR 97720
821554	Hon.	Hon. Jack		Landau	Salem, OR 97301
013248	Mr.	Ernest		Lannet	Salem, OR 97301
943645	Mr.	Daniel	P.	Larsen	Portland, OR 97209
980739	Mr.	Andrew		Lauersdorf	Portland, OR 97204
943660	Ms.	Linda		Law	Portland, OR 97204
820784	Mr.	Henry "Chip"		Lazenby	Portland, OR 97214
700835	Mr.	Joseph		Leahy	Springfield, OR 97477

Bar#	Sal.	F.Name	M.Name	L.Name	City.State.Zip
080031	Mr.	Andrew		Lewinter	Eugene, OR 97401
904625	Mr.	Andy		Lewis	Eugene, OR 97440
772631	Mr.	Jerome		Lidz	Eugene, OR 97401
871101	Mr.	Russell		Lipetzky	Salem, OR 97301
993113	Mr.	E.	Bradley	Litchfield	Eugene, OR 97440
015095	Mr.	Paul		Logan	Portland, OR 97201
980753	Mr.	Matt		Longtin	Eugene, OR 97401
691078	Mr.	Donald		Loomis	Eugene, OR 97401
802975	Mr.	Robert		Lowry	Eugene, OR 97440
970030	Mr.	Scott		Lucas	Eugene, OR 97401
933490	Mr.	Gregory		Lusby	Eugene, OR 97440
025422	Mr.	Matthew		Lysne	Salem, OR 97301
031182	Mr.	Bradley		Maier	Portland, OR 97204
000791	Ms.	Julia		Markley	Portland, OR 97209
540594	Hon.	Malcolm		Marsh	Portland, OR 97204
001522	Mr.	Douglas		Marteeny	Albany, OR 97321
903332	Ms.	Christine		Mascal	Portland, OR 97204
820849	Mr.	Jeffrey		Matthews	Portland, OR 97258
850650	Mr.	Scott		McCleery	Eugene, OR 97440
841520	Mr.	Nathan		McClintock	Coos Bay, OR 97420
073050	Mr.	Eric		McCormick	Portland, OR 97205
044753	Ms.	Margaret		McWilliams	Sisters, OR 97759
823323	Mr.	Gary		Meabe	Portland, OR 97204
034008	Mr.	Shawn	N.	Menashe	Portland, OR 97204
071510	Ms.	Jennifer		Middleton	Eugene, OR 97401
943899	Mr.	Gregory		Moawad	Portland, OR 97239
732099	Mr.	Gerald	E.	Montgomery	Portland, OR 97223
871119	Hon.	Michael		Mosman	Portland, OR 97204
903450	Mr.	Anthony		Motschenbacher	Portland, OR 97204
933760	Ms.	Katherine		Moyer	Eugene, OR 97401
880872	Hon.	Lynn		Nakamoto	Salem, OR 97301
034086	Ms.	Jennifer	A.	Nelson	Portland, OR 97204
012328	Ms.	Sarah		Nelson	Portland, OR 97204
973495	Ms.	Christine		Nesbit	Eugene, OR 97402
014627	Ms.	Devon	Zastrow	Newman	Portland, OR 97204
973510	Ms.	Kelly		Noor	Salem, OR 97308
926043	Mr.	Brad		Nye	Bend, OR 97701
953710	Ms.	Karen		O'Connor	Portland, OR 97204
963832	Mr.	Melvin		Oden-Orr	Portland, OR 97205
870704	Mr.	Arden		Olson	Eugene, OR 97401
742393	Mr.	Wm Kelly		Olson	Portland, OR 97204
024985	Ms.	Ellen		Osoinach	Portland, OR 97204
822539	Ms.	Mary	Ellen	Page Farr	Portland, OR 97239
832990	Ms.	Martha		Pagel	Salem, OR 97301
764073	Mr.	R	Scott	Palmer	Eugene, OR 97440
762788	Mr.	Frank		Papagni	Eugene, OR 97401
013778	Mr.	Matthew		Perkins	Portland, OR 97208

Bar#	Sal.	F.Name	M.Name	L.Name	City.State.Zip
823750	Ms.	Nancy		Popkin	Portland, OR 97204
783444	Mr.	William		Potter	Eugene, OR 97440
853087	Mr.	Mike		Pugh	Eugene, OR 97401
853094	Mr.	Michael		Purcell	Portland, OR 97204
965056	Mr.	Chris		Ramras	Portland, OR 97204
043944	Mr.	Jesse		Ratcliffe	Salem, OR 97301
793510	Mr.	John R.		Ratto	Portland, OR 97204
821088	Mr.	Ralph		Rayburn	Beaverton, OR 97005
550803	Hon	James A.		Redden	Portland, OR 97204
953918	Mr.	Donald	N.	Rees	Portland, OR 97204
964752	Mr.	Brent		Renison	Portland, OR 97209
973789	Mr.	James	B.	Rich	Salem, OR 97306
973796	Mr.	Ian		Richardson	Eugene, OR 97440
770665	Mr.	Stephen		Riedlinger	Portland, OR 97201
893461	Mr.	Charles		Ringo	Bend, OR 97701
950230	Mr.	Matthew		Rizzo	Portland, OR 97205
034330	Ms.	Nicole		Robbins	Clackamas, OR 97015
742734	Mr.	Gary		Roberts	Portland, OR 97204
013975	Mr.	Glenn		Robles	Portland, OR 97205
953964	Ms.	Charese		Rohny	Portland, OR 97201
984545	Ms.	Judith		Rosenberg	Portland, OR 97213
773275	Mr.	Daniel		Rosenhouse	Portland, OR 97201
773290	Ms.	Linda		Rudnick	Beaverton, OR 97008
971007	Ms.	Karen	Stenard	Sabitt	Eugene, OR 97401
853238	Mr.	Douglas		Schaller	Eugene, OR 97401
014089	Mr.	Scott		Schiefelbein	Portland, OR 97204
843417	Mr.	Jens		Schmidt	Eugene, OR 97401
763232	Mr.	Kirk		Schmidtman	Woodburn, OR 97071
910930	Ms.	Karen		Schoenfeld	Portland, OR 97214
044080	Mr.	Andrew		Schpak	Portland, OR 97204
003799	Mr.	John		Schroedel	Portland, OR 97205
980990	Ms.	Diane		Schwartz Sykes	Portland, OR 97201
883318	Ms.	Concetta		Schwesinger	Salem, OR 97309
035480	Mr.	Keith		Semple	Eugene, OR 97401
814690	Mr.	Dennis		Shen	Portland, OR 97204
801073	Ms.	Lynn		Shepard	Eugene, OR 97401
801066	Mr.	Pete		Shepherd	Salem, OR 97301
031680	Ms.	Teresa		Shill	Portland, OR 97205
961873	Mr.	Scott		Shorr	Portland, OR 97204
793946	Mr.	Scott		Sideras	Oregon City, OR 97045
860908	Hon.	Michael		Simon	Portland, OR 97204
681519	Mr.	Daniel		Skerritt	Portland, OR 97204
813795	Mr.	Steve		Smucker	Portland, OR 97205
732834	Ms.	Judy	Danelle	Snyder	Portland, OR 97205
873496	Mr.	Marco		Spence	Eugene, OR 97401
994491	Mr.	Darian		Stanford	Portland, OR 97204
914407	Ms.	Teresa	A.	Statler	Portland, OR 97204

Bar#	Sal.	F.Name	M.Name	L.Name	City.State.Zip
671167	Mr.	Kenneth		Stephens	Portland, OR 97204
770712	Hon.	Janice M.		Stewart	Portland, OR 97204
873883	Ms.	Tina		Stupasky	Eugene, OR 97401
783942	Hon	Patricia A.		Sullivan	Vale, OR 97918
954347	Mr.	Nathan		Sykes	Portland, OR 97232
753619	Mr.	Thomas		Tankersley	McMinnville, OR 97128
893519	Ms.	Cathy	Steele	Tappel	Portland, OR 97258
965790	Mr.	Charles		Tebbutt	Eugene, OR 97402
841229	Mr.	Terence		Thatcher	Portland, OR 97204
102144	Mr.	Troy	E.	Thompson	Portland, OR 97202
934998	Mr.	Henry		Tilghman	Portland, OR 97213
961218	Mr.	Jamie		Troy	Portland, OR 97213
994151	Mr.	Richard		Vangelisti	Portland, OR 97204
784823	Mr.	Gregory		Veralrud	Eugene, OR 97401
931217	Mr.	David		Wade	Eugene, OR 97440
833667	Mr.	Theodore		Walker	Eugene, OR 97401
014483	Ms.	Victory		Walker	Grants Pass, OR 97526
002926	Ms	Sarah	EK	Wallace	Salem, OR 97308
863120	Mr.	James	K.	Walsh	Eugene, OR 97405
711838	Mr.	John		Watkinson	Eugene, OR 97440
974297	Mr.	Don		Webb	Eugene, OR 97403
974312	Ms.	Linda		Weimar	Beaverton, OR 97006
974320	Ms.	Julie		Weis	Portland, OR 97201
763794	Mr.	Bruce	M.	White	Portland, OR 97204
774267	Mr.	Douglas		Wilkinson	Springfield, OR 97477
034940	Mr.	Timothy L.		Williams	Bend, OR 97701
911470	Mr.	Jeffrey		Wing	Eugene, OR 97401
014555	Ms.	Caroline		Wong	Portland, OR 97204
843908	Mr.	Jeffrey		Wong	Portland, OR 97210
861075	Ms	Valerie		Wright	Bend, OR 97701
050238	Ms.	Jane		Yates	Eugene, OR 97440
794597	Mr.	David		Zarosinski	Portland, OR 97204
743543	Mr.	Ira		Zarov	Tigard, OR 97281
753980	Mr.	Gary		Zimmer	Portland, OR 97258

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: February 10, 2012
Memo Date: February 10, 2012
From: Barbara Dilaconi, Appointments Committee Chair
Re: Volunteer Appointments to Various Boards, Committees, and Councils

Action Recommended

Approve the following Appointments Committee recommendations.

MCLE Committee

Recommendation: Kristie L. Gibson, term expires 12/31/2014

Recommendation: Sean E. O'Day, term expires 12/31/2013

Pro Bono Committee

Recommendation: Sara A. Bateman, term expires 12/31/2014

Judicial Administration Committee

Recommendation: Carla Piluso, public member, term expires 12/31/2014

Uniform Civil Jury Instructions Committee

Recommendation: Roy Fernandes, term expires 12/31/2012

Disciplinary Board

Region 2 Recommendation: Debra Velure, term expires 12/31/2014

Local Professional Responsibility Committee

Recommendation: Paul Bovarnick, term expires 12/31/2012

Commission on Judicial Fitness and Disability

Recommendation: Gene Hallman, term expires 2/10/2016

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: February 10, 2012
From: Sylvia E. Stevens, Executive Director
Re: CSF Claims Recommended for Payment

Action Recommended

Approve the following claims recommended for payment by the Client Security Fund:

No. 2010-36 GINSLER (Kitchens)	\$1,363.00
No. 2010-40 DALRYMPLE (Stockberger)	\$1,945.00
TOTAL	\$3,308.00

Background

No. 2010-36 GINSLER (Kitchens) \$1,363

This is the third claim the CSF has received from former clients of Portland attorney William Ginsler. Kitchens hired Ginsler in June 2008 to handle a Chapter 13 bankruptcy. Kitchens alleges that Ginsler misappropriated approximately \$8,200, but after reviewing the client's extensive file, the CSF concluded that all but the \$1,363 discussed below was accounted for.

Ginsler instructed Kitchens to turn over his tax refund check of \$1,363 to the trustee, but Kitchens mistakenly cashed it. Kitchens withdrew the appropriate amount from his credit union account and gave it to Ginsler in a cashiers' check. Ginsler said he would remit the funds to the Chapter 13 trustee. The trustee has no record of receiving the money.

As the bankruptcy case neared a close in early 2010, Ginsler petitioned the court for additional attorney fees. Kitchens objected to any additional fees for Ginsler, and pointed out the missing \$1,363 to the court. The bankruptcy judge ordered Ginsler to appear and account for the missing funds. (Ginsler withdrew from representing Kitchens, who retained substitute counsel to conclude the Chapter 13.) Ginsler also hired counsel. At the hearing, Ginsler's counsel reported that Ginsler would not appear, citing health reasons, but acknowledged that Ginsler had received the \$1,363 and hadn't remitted it to the trustee.

Ginsler resigned Form B in October 2010 with eleven complaints pending including this one. The CSF Committee recommends that Kitchens be awarded \$1,363 to reimburse him for Ginsler's misappropriation. No judgment is required because the claim is for less than \$5,000 and Ginsler's resignation arose in part from his representation of Kitchens.

No. 2010-40 DALRYMPLE (Stockberger) \$1,945

Stockberger hired Klamath Falls attorney Richard Dalrymple in mid-2007 for assistance with refuting DHS allegations arising out of Stockberger's visitation with his grandson. He deposited a retainer of \$2,500. Between June and September 2007, Dalrymple had applied \$555 of the deposit to his fees. The October 2, 2007 statement showed a remaining trust balance of \$1,945. Stockberger doesn't believe that Dalrymple provided any further services. However, for reasons that are not clear, Stockberger also acknowledges that he did not request a refund of his retainer balance until he learned that Dalrymple had committed suicide on February 2, 2009.

Stockberger received a letter from attorney Gary Hedlund, who was assisting Dalrymple's widow with winding up Dalrymple's affairs. Hedlund gave Stockberger his file, but advised Stockberger to contact Mrs. Dalrymple regarding funds in the lawyer trust account. Despite several contacts, Stockberger got no satisfaction from Mrs. Dalrymple and he appears to have dropped the matter until he learned about the Client Security Fund in late 2010 and filed this claim.

Mrs. Dalrymple was not very cooperative with the CSF investigation into this an one other claim (including ignoring a subpoena). Nevertheless, she reported that there was some money in Dalrymple's trust account at the time of his death and claims she distributed the available trust account funds to clients who asked until the funds were gone.

Hedlund initially told the CSF investigator that no probate had been filed, but further investigation revealed that a probate was filed in Klamath County in mid-February 2009, with Mrs. Dalrymple as personal representative. Among the claims was one for \$12,000 for "unearned legal fees." (The estate was essentially insolvent; Mrs. Dalrymple had to sell the family home to satisfy outstanding personal obligations.) Despite Stockberger's correspondence with Hedlund and Mrs. Dalrymple, he was not given notice of the probate and learned of it only after filing his CSF claim. The estate was closed in September 2010 with a "small estate affidavit."

The CSF Committee was troubled by Stockberger's unexplained delay in taking any action to recover the balance of his trust deposit in late 2008. At the same time, it agreed that Stockberger had no reason to believe that his remaining trust balance wasn't being held by Dalrymple until he chose to retrieve it and cannot be faulted for failing to file a claim in a probate of which he had no knowledge. The committee also recognized that there were insufficient funds in Dalrymple's trust account to satisfy all the client claims.

The CSF Committee ultimately concluded there was sufficient evidence of dishonesty (Dalrymple's apparent failure to maintain the unearned portion of Stockberger's fees in trust or to account for earning the remainder) to make Stockberger's claim eligible for reimbursement from the CSF. The committee also recommends waiving the requirement for a judgment, since the estate was insolvent and is closed.

**Oregon State Bar
Board of Governors Meeting
February 10, 2012
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. Derek L. Caplinger – 942646

Motion: Ms. Dilaconi presented information concerning the BR 8.1 reinstatement application of Mr. Caplinger. Ms. Dilaconi moved, and Ms. O'Connor seconded, to recommend to the Supreme Court that Mr. Caplinger's reinstatement application be approved. The motion passed unanimously.

2. L. Ross Brown – 700219

Motion: Ms. Fisher presented information concerning the BR 8.2(b) reinstatement application of Mr. Brown. Ms. Fisher moved, and Ms. Dilaconi seconded, to deny the application and make an adverse recommendation on the application to the Supreme Court pursuant to BR 8.2(f) and BR 8.7(a). The motion passed unanimously.

3. Tara M. Hendison – 980635

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

4. James J. Kolstoe – 852586

Motion: Mr. Kehoe presented information concerning the BR 8.1 reinstatement application of Mr. Kolstoe. Mr. Kehoe moved, and Ms. Matsumonji seconded, to recommend to the Supreme Court that Mr. Kolstoe's reinstatement application be approved, conditioned on Mr. Kolstoe completing a two-year probationary period with terms as recommended by staff. The motion passed (13-4-0). Ms. Billman, Mr. Spier, Mr. Kranovich, Ms. Naucler, Ms. Matsumonji, Mr. Knight, Mr. Prestwich, Ms. Garcia, Mr. Haglund, Ms. Fisher, Mr. Wade, Mr. Kehoe, and Mr.

Larson voted in favor. Ms. O'Connor, Mr. Emerick, Ms. Kohlhoff, and Ms. Dilaconi were opposed. No one abstained.

5. Parrish E. Pynn– 983277

Motion: Mr. Wade presented information concerning the BR 8.1 reinstatement application of Mr. Pynn. Mr. Wade moved, and Mr. Kehoe seconded, to recommend to the Supreme Court that Mr. Pynn's reinstatement application be approved. The motion passed unanimously.

6. James M. Pippin– 711354

Motion: Mr. Larson presented information concerning the BR 8.1 reinstatement application of Mr. Pippin. Mr. Larson moved, and Mr. Wade seconded, to temporarily reinstate Mr. Pippin per BR 8.7(b). The motion passed. Mr. Emerick abstained.

7. David A. Urman – 853768

Motion: Mr. Knight presented information concerning the BR 8.1 reinstatement application of Mr. Urman. Mr. Knight moved, and Mr. Kehoe seconded, to recommend to the Supreme Court that Mr. Urman's reinstatement application be approved, conditioned on Mr. Urman completing 25 MCLE credits before his reinstatement becomes effective. The motion passed unanimously.

8. Lisette M. Spencer– 963398

Motion: Mr. Haglund presented information concerning the BR 8.1 reinstatement application of Ms. Spencer to satisfy the one meeting notice requirement set forth in Bar Bylaw 6.103. Ms. Spencer's application will be placed on a future agenda for consideration and action.

9. Eric A. Trice – 991154

Motion: Mr. Kehoe presented information concerning the BR 8.1 reinstatement application of Mr. Trice. Mr. Kehoe moved, and Ms. Dilaconi seconded, to recommend to the Supreme Court that Mr. Trice's reinstatement application be approved, conditioned on Mr. Trice completing 45 MCLE credits before his reinstatement becomes effective. The motion passed unanimously.

10. Hadley Howell Van Vactor – 060138

Motion: Mr. Emerick presented information concerning the BR 8.1 reinstatement application of Ms. Van Vactor to satisfy the one meeting notice requirement set

forth in Bar Bylaw 6.103. Ms. Van Vactor's application will be placed on a future agenda for consideration and action.

B. Disciplinary Counsel's Report

Mr. Sapiro reported on developments regarding the bar's custodianship over the law practice of Bryan W. Gruetter.

**Oregon State Bar
Board of Governors Meeting
February 10, 2012
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. Unlawful Practice of Law

1. The UPL Committee recommended the Board rescind its decision to seek injunctive relief against Ms. Shields.

Motion: Ms. Dilaconi moved and Mr. Kehoe seconded to accept the recommendation that the Board rescind its decision to seek injunctive relief against Ms. Shields. The board unanimously approved the motion.

2. The UPL Committee recommends the Board seek injunctive relief against Mr. Klosterman to prevent his continued unlawful practice of law.

Motion: Mr. Wade moved and Mr. Kehoe seconded to accept the recommendation that the Board seek injunctive relief against Mr. Klosterman. The board unanimously approved the motion.

B. Pending or Threatened Non-Disciplinary Litigation

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

C. Other Matters

2. The BOG received status reports on the non-action items.

**Oregon State Bar
Special Open Meeting of the Board of Governors
March 30, 2012
Minutes**

The meeting was called to order by President Mitzi Naucler at 3:00 p.m. on March 30, 2012. The meeting adjourned at 3:30 p.m. Members present from the Board of Governors were Jenifer Billman, Barbara Dilaconi, Patrick Ehlers, Hunter Emerick, Ann Fisher, Michael Haglund, Matthew Kehoe, Theresa Kohlhoff, Tom Kranovich, Richard Spier and David Wade. Staff present were Sylvia Stevens, Helen Hierschbiel, Rod Wegener, Judith Baker and Camille Greene. Board members not present: Michelle Garcia, Ethan Knight, Steve Larson, Audrey Matsumonji, Maureen O'Connor and Travis Prestwich.

1. Swearing-In of New Board Members

BOG President Mitzi Naucler swore in new board member Patrick J. Ehlers, Jr.

2. Appointment of New PLF Board of Directors Member

Appointments Committee Chair, Barbara Dilaconi, presented the committee's recommendations for interim appointments.

Motion: The board voted unanimously to approve the committee motion for the appointments as listed in **[Exhibit A]**.

3. Abandoned Funds

On behalf of the Budget & Finance Committee and the Access to Justice Committee, Mr. Haglund recommended that the BOG approve the committees' recommendations regarding the distribution of abandoned client funds.

Motion: The board voted unanimously to waive the one meeting notice.

Motion: The board voted unanimously to approve the joint committee motion that the OSB enter into an agreement with the legal aid providers in which the legal aid providers agree to reimburse the OSB if the allotted reserve gets diminished or depleted, and that the abandoned client funds appropriated to the OSB Legal Services Program be disbursed pursuant to the recommendation outlined. **[Exhibit B]**

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: March 30, 2012
Memo Date: March 30, 2012
From: Barbara Dilaconi, Appointments Committee Chair
Re: Volunteer Appointments to Various Boards, Committees, and Councils

Action Recommended

Approve the following Appointments Committee recommendations.

Affirmative Action Committee

Recommendation: Linda Meng, Secretary, term expires 12/31/2012

Unlawful Practice of Law Committee

Recommendation: Simon Whang, Chair, term expires 12/31/2012

Recommendation: Britney Colton, Chair-Elect, term expires 12/31/2012

Recommendation: Laura Rufolo, Secretary, term expires 12/31/2012

Recommendation: David Doughman, term expires 12/31/2015

Recommendation: Andrew McStay, term expires 12/31/2014

Recommendation: Katharine von Ter Stegge, term expires 12/31/2014

Oregon Law Foundation Board

Recommendation: Katharine West, term expires 12/31/2012

Professional Liability Fund Board of Directors

Recommendation: Julia Manela, term expires 12/31/2016

OREGON STATE BAR

Access to Justice Committee and Budget and Finance Committee

Meeting Date: March 30, 2012
Memo Date: March 19, 2012
From: Legal Services Committee
Re: Abandoned Client Funds Appropriated to the OSB Legal Services Program

Action Recommended

Recommend to the BOG that they approve the following recommendations regarding the abandoned client funds:

- 1) that the OSB enter into an agreement with the legal aid providers in which the legal aid providers agree to reimburse the OSB if the allotted reserve gets diminished or depleted. (See the Repayment, Recoupment and Set-Off Agreement included in the packet).
- 2) that the abandoned client funds appropriated to the OSB Legal Services Program be disbursed pursuant to the recommendation outlined below.

Background

When money held in a lawyers' trust account is declared abandoned, it is sent to the Oregon State Bar (OSB), pursuant to ORS 98.386. Revenue received by OSB pursuant to ORS 98.386 may be used for the funding of legal services provided through the Legal Services Program established under ORS 9.572, the payment of claims allowed under ORS 98.392(2) and the payment of expenses incurred by the OSB in the administration of the Legal Services Program. Although this revenue may be used for funding of legal services, a person who has a claim of ownership to abandoned funds held by the OSB may file a claim seeking the return of the money. The money must be returned if the claim is found to be valid by the OSB, even if the claim is filed years later.

Since the statute was changed in 2009, OSB has received a current total of \$225,000 (includes interest earned). During this same period, OSB received five claims for the return of abandoned property totaling \$2,539. The claims ranged in amounts from \$10 to \$1,212. Almost all of the abandoned money sent to OSB was in relatively smaller amounts, ranging from \$100 to \$5,000 for each client. Two were larger. One was \$30,070 and one was \$26,259.

It is a goal of the LSP to disburse the abandoned property to the legal service providers as intended by the 2009 legislature. It is also a goal to protect against forcing OSB to use revenue from OSB general fund or reserves, to pay a claim under ORS 98.392(2). These goals can be achieved by keeping a reserve from abandoned property revenue and requiring legal aid providers to pay back or permit recoupment/set-off in the event that the

reserve is not adequate to cover the likely claims for the return of abandoned property.

Ongoing Disbursement Recommendation

It is recommended that the LSP hold \$100,000 in reserve to cover potential claims for the return of abandoned property and to distribute the revenue that arrives each year above this amount. This disbursement will happen in March and the amount can change from year to year depending on the abandoned funds received each year. It is recommended that the funds be disbursed using a standard formula based on poverty population sending 11% to Lane County Legal Aid and Advocacy Center, 6% to the Center for Nonprofit Legal Services, 1% to Columbia County Legal Aid and 82% to LASO and OLC, which cover the rest of the state. If there is a recommendation from the legal aid providers that this disbursement formula be revised in the future it will be approved at the discretion of the LSP Committee.

2012 Disbursement Recommendation

It is also recommended that in 2012 the amount over the \$100,000 reserve or \$125,000 be disbursed as follows:

- 1) Disburse \$32,000 off the top to LASO to help cover one-time expenses related to layoffs and an office closure in 2012.
- 2) Disburse the remainder using percent of poverty population sending 11% to Lane County Legal Aid and Advocacy Center, 6% to the Center for Nonprofit Legal Services, 1% to Columbia County Legal Aid and 82% to Legal Aid Services of Oregon and Oregon Law Center which cover the rest of the state. The percentage to be disbursed between LASO and OLC will be determined at a later date. The Director of Legal Services Program will be given the discretion to approve and disburse funds pursuant to the recommendation forwarded by the LASO and OLC boards.

REPAYMENT, RECOUPMENT AND SET-OFF AGREEMENT

Parties. This agreement is entered between the Oregon State Bar (OSB) and the five nonprofit corporations identified below (legal aid provider/s).

Recitals. Each legal aid provider currently receives money from the OSB Legal Services Program including money from state court filing fees and pro hac vice fees. The legal aid providers seek to receive additional money from the OSB Legal Services Program from lawyer trust account funds that have been reported abandoned and turned over to the OSB pursuant to ORS 98.386 (“abandoned trust account funds”).

Although abandoned trust account funds may be used for funding of legal services, the money must be returned to a person who files a valid claim for such funds at any time in the future pursuant to ORS 98.392. The OSB does not want to use OSB general revenue or reserves to pay such claims. The OSB will hold an amount of the unclaimed funds in reserve in order to cover claims (“reserve”).

In exchange for the mutual promises set forth herein, the parties therefore agree as follows:

Distribution. On or after March 1 of each year, OSB shall make an annual distribution to each of the legal aid providers from any amounts above the reserve, in accordance with a distribution formula established by the OSB Legal Services Program. The reserve is currently set at \$100,000 but may be changed at any time in the sole discretion of the OSB.

Request to Return Money if Reserve is Not Adequate. In the event that OSB has exhausted its reserve, or is likely to soon exhaust its reserve, OSB may request that each of the legal aid providers return monies that the legal aid providers received from abandoned trust account funds. Such request must be in writing and must specify the amount requested, which shall be calculated as a pro rata amount of the total amount requested based on the percentage of the total distribution that each legal aid provider received from the abandoned trust account funds in the preceding calendar year.

Promise to Pay OSB. Each legal aid provider shall pay to the OSB the requested amount within ten days of receipt of OSB’s written request for payment.

Agreement to Permit Set-Off or Recoupment. If the legal aid provider fails to pay OSB the requested amount within ten days, OSB may recoup the requested amount from any other monies that are earmarked for distribution to the legal aid providers through the OSB Legal Services Program.

Standards and Guidelines. Each legal aid provider shall use all revenue distributed from the abandoned trust account funds in a manner that complies with the OSB Standards and Guidelines.

Effective Date. The agreement will be effective as of March 1, 2012.

Term/Termination. This Agreement will be effective for an initial term of one year from its Effective Date and will automatically renew for successive additional one-year terms unless a party gives 30 days advance written notice to the other parties that this Agreement will expire at the end of the then-current term.

Entire Agreement. This agreement is the final expression of, and contains the entire agreement between the parties with respect to the subject matter of the agreement and supersedes all prior understandings with respect to it.

Authority. Each person signing below has been duly authorized by the governing body of each respective organization to approve this agreement.

Dated this ____ day of April, 2012.

OREGON STATE BAR

LEGAL AID SERVICES OF OREGON

By _____

By _____

OREGON LAW CENTER

LANE COUNTY LEGAL AID & LAW CENTER

By _____

By _____

COLUMBIA COUNTY LEGAL SERVICES

CENTER FOR NONPROFIT LEGAL SERVICE

By _____

By _____

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: April 27, 2012
From: Sylvia E. Stevens, Executive Director
Re: CSF Claims Recommended for Payment

Action Recommended

Consider the CSF Committee's recommendation to make the following award:

CSF Claim No. 2010-19 DICKERSON (Rawson) - \$3100

Background

On February 1, 2008, Claimant entered into an agreement to pay Daniel Dickerson a flat fee of \$5000 to pursue litigation arising from misrepresentation in a real estate matter. The agreement provided that the funds were "deemed to be earned, in full, upon receipt." She paid Dickerson \$600 upon signing the agreement and the balance in three installments.

Claimant says she heard nothing from Dickerson after the initial meeting and she professes no knowledge about what happened in her case. Nevertheless, she paid Dickerson \$1000 on February 11, 2008; \$300 on May 22, 2008; and \$3100 on February 17, 2009.

The court file indicates that Dickerson filed a complaint on Claimant's behalf on February 21, 2008. On May 30, 2008, the court issued a general judgment of dismissal for want of prosecution. Sometime thereafter Dickerson effected service on the defendants, who filed a notice of intent to appear in July 2008. The file contains nothing else. The statute of limitations has run and Claimant's claim cannot be revived.

Dickerson was disbarred in August 2010 for multiple violations of the RPCs, but this representation was not part of his disciplinary case. The matters leading to Dickerson's disbarment were similar, however: Dickerson took on a client's matter, accepted a fee in advance, then did little or no work and stopped communicating with the clients. The trial panel opinion notes that Dickerson's violations occurred during a relatively short period of time (mid-2006 to mid-2008) when he was experiencing personal problems. Nevertheless, the panel was found no excuse for Dickerson's failure to inform his clients that he was unable to perform adequately. In at least one matter, the panel found his failure to refund the unearned portion of a flat fee paid in advance was an intentional misappropriation.

The CSF Committee acknowledged that Dickerson did some work on Claimant's matter (preparation, filing and service of the complaint) for which he was entitled to be compensated. However, the Committee concluded that Dickerson was dishonest in accepting \$3100 more than 9 months after Claimant's matter had been dismissed (a fact which he failed to convey) and long after he essentially abandoned her matter.

MINUTES

BOG Access to Justice Committee

Meeting Date: March 30, 2012
Location: Oregon State Bar Center
Chair: Maureen O'Connor
Vice-Chair: Ann Fisher
Members Present: Tom Kranovich, Ann Fisher, David Wade, Jenifer Billman
Members Absent: Maureen O'Connor, Audrey Matsumonji
Staff Members: Judith Baker,

ACTION ITEMS

1. **Topic:** Approved minutes of the January 6, 2012 meeting.

2. **Topic: Legal Service Program Accountability Report**

The LSP Committee forwarded to the Access to Justice Committee a report called the Legal Services Program Accountability Analysis. Staff explained that the Achievements and Results report forward in 2011 was an educational piece on what legal aid is doing in Oregon. This report is an evaluative or analytical report with conclusions and recommendations. Staff gave an overview of the contents of the report and also explained that all the legal aid providers were in compliance with the Legal Service Program Standards and Guidelines.

Action: The committee agreed unanimously to forward the Legal Services Program Accountability Analysis Report to the BOG.

MINUTES

BOG Access to Justice Committee and Budget and Finance

Meeting Date: March 30, 2012
Location: Oregon State Bar Center
Chair: Mike Haglund
Members Present: Ann Fisher, Theresa Kohloff, Jenifer Billman David Wade, Hunter Emerick, Tom Kranovich
Members Absent: Maureen O'Connor, Audrey Matsumonji, Ethan Knight, Michelle Garcia, Steve Larson
Staff Members: Judith Baker, Rod Wegener, Helen Hirschbiel, Sylvia Stevens

ACTION ITEMS

1. Topic: **Abandoned Client Funds**

The LSP Committee forwarded a recommendation to both the Access to Justice Committee and Budget and Finance Committee asking them to approve a recommendation to the BOG regarding disbursing the abandoned client funds held by the LSP Program.

The Director Legal Services Program explained that the bar's Legal Services Program is currently holding \$225,000 in abandoned client funds. Although this revenue may be used for funding of legal services, a person who has a claim of ownership to abandoned funds held by the bar may file a claim seeking the return of the money at any time. It is the goal of the LSP to disburse the abandoned property to the legal service providers and it is also a goal to protect against forcing OSB to use revenue from the OSB general fund to pay a claim. These goals can be achieved by keeping a reserve from abandoned property revenue and requiring legal aid providers to pay back or permit recoupment/set-off in the event that the reserve is not adequate to cover the likely claims for the return of abandoned property.

The LSP Committee recommends as an ongoing disbursement method that the LSP hold \$100,000 in reserve to cover potential claims for the return of abandoned property and to distribute the revenue that arrives each year above this amount. This disbursement will happen in March and the amount can change from year to year depending on the abandoned funds received each year. It is recommended that the funds be disbursed using a standard formula based on poverty population sending 11% to Lane County Legal Aid and Advocacy Center, 6% to the Center for Nonprofit Legal Services, 1% to Columbia County Legal Aid and 82% to LASO and OLC, which cover the rest of the state. If there is a recommendation from the legal aid providers that this disbursement formula be revised in the future it will be approved at the discretion of the LSP Committee.

The LSP further recommends for 2012 that the amount over the \$100,000 reserve or \$125,000 be disbursed as follows:

1) Disburse \$32,000 off the top to LASO to help cover one-time expenses related to layoffs and an office closure in 2012.

2) Disburse the remainder using percent of poverty population sending 11% to Lane County Legal Aid and Advocacy Center, 6% to the Center for Nonprofit Legal Services, 1% to Columbia County Legal Aid and 82% to Legal Aid Services of Oregon and Oregon Law Center which cover the rest of the state. The percentage to be disbursed between LASO and OLC will be determined at a later date. The Director of Legal Services Program will be given the discretion to approve and disburse funds pursuant to the recommendation forwarded by the LASO and OLC boards.

Action: The committees unanimously approved the following recommendation to the BOG:

1) That the OSB enter into the Repayment, Recoupment and Set-Off Agreement with the legal aid providers in which the legal aid providers agree to reimburse the OSB if the allotted reserve gets diminished or depleted.

2) That the abandoned client funds appropriated to the OSB Legal Services Program be disbursed pursuant to the recommendation outlined above.

Minutes
Budget & Finance Committee
February 9 & 10, 2012
Salem Conference Center
Salem, Oregon

Present - Committee Members: Mike Haglund, chair; Steve Larson, vice-chair; Hunter Emerick; Michelle Garcia; Ethan Knight; Theresa Kohlhoff; David Wade. **Staff:** Sylvia Stevens; Helen Hierschbiel; Mariann Hyland; Rod Wegener.

1. Minutes – January 6, 2012 Committee Meeting

The minutes of the January 6, 2012 meeting were approved.

2. Committee Meeting

The Committee met on two occasions – Thursday, February 9 and Friday, February 10. On February 9 the Committee met exclusively with the two investment management firms.

3. Financial Report – December 31, 2011

Mr. Wegener reported the final 2011 financial statements are not available yet, but the preliminary statements indicate the bar will end 2011 with a net operating revenue of approximately \$300,000 and none of the reserves will be transferred to revenue for the operating fund.

4. Meeting with the Bar's Investment Managers

The Committee met for approximately thirty minutes each with representatives of Becker Capital and Washington Trust Bank. The purpose of the meeting was to review the bar's portfolio performance for 2011 and discuss with the firms their short-term and long-term investment strategy for the bar's portfolio.

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

There was no new information other than what is included in the agenda, except Mr. Wegener reported a prospective tenant had toured the larger vacant space on the first floor the previous day.

6. CLE Seminars – What Next?

No discussion or action.

7. Item Not on the Agenda

The Committee agenda on February 10 was dedicated to discussion of the report and recommendation of the Public Service Advisory Committee (PSAC) which was included on the BOG agenda. The Policy & Governance Committee had discussed the report the previous day and approved the report and recommendation as presented.

The Committee debated at length the PSAC recommendation for a “cafeteria plan” model which will allow each LRS panelist to select one of three percentage and threshold combinations for sharing revenue earned from a LRS referral. After discussing the implications of the “cafeteria plan” model, the Committee recommended the panelist fee sharing plan should be only one formula and recommended the formula be 12% with no threshold, which was one of the three models in the cafeteria plan.

8. Next Committee meeting

The next meeting is scheduled for March 30, 2012 at the bar center.

Minutes
Budget & Finance Committee
March 30, 2012
Oregon State Bar Center
Tigard, Oregon

Present - Committee Members: Mike Haglund, chair; Hunter Emerick; Theresa Kohlhoff; David Wade. **Other BOG Members:** Patrick Ehlers. **Staff:** Sylvia Stevens; Mariann Hyland; Rod Wegener.

1. Minutes – February 9 & 10, 2012 Committee Meeting

The minutes of the February 9 & 10, 2012 meetings were approved.

2. Joint Meeting with Access to Justice Committee

The Budget & Finance and Access to Justice Committees met to review the recommendation of the Legal Services Committee (LSC) to enter into an agreement between the bar and the five legal aid providers. The agreement defines the term and reimbursement for allocating to the legal aid providers a portion of the abandoned claims from lawyer trust accounts which have been forwarded to the bar.

The two committees recommended approval of the agreement with a minor change to the Board of Governors for action at its next meeting.

3. Request for Change in Fee for BarBooks for Inactive or Retired Members

Upon reviewing the letter from an inactive member asking for a lower rate for inactive members for BarBooks, the Committee agreed to reduce the price to \$290.00. Using the base active member fee of \$447, the Committee reduced the rate by the \$110 inactive fee and the \$50 fee an inactive member pays for Fastcase subscription. The Committee agreed there still should be a substantial fee for a BarBooks subscription for inactive members since the cost of the product is factored into the active member fee.

4. Investment Policy and Portfolio

Upon reviewing the Washington Trust Bank policy statement included with the agenda, the committee tabled action on any changes to the bar's existing investment policy, specifically action on targets or ranges of asset classes, and asked Mr. Wegener to gather the following information from the managers for the next meeting:

- Inquire of Washington Trust Bank if it would change in the bar's existing investment policy, especially in light of the two asset classes the representative addressed at the February meeting.
- Contact Becker Capital to ascertain in what asset classes the bar's funds are authorized to be invested, and if our agreement should specify permissible asset classes.
- What asset class targets or ranges is Becker using in managing the bar's portfolio.

5. Financial Report – February 29, 2012

Mr. Wegener stated the February 29 financial statements report a net operating revenue in line with the seasonal budget, but as most Program Fee revenue is below the levels of the prior year after two months there is cause for concern for achieving the 2012 budget target. He reported the net operating revenue for the 2012 budget is \$33,206 includes using \$200,000 from the bar's reserves to achieve that amount.

The committee reviewed the two charts on the bar's investment portfolio included in the report. Both charts display positive performance for the portfolio as one showed steady growth the past few months and the second showed the portfolio balance in excess of the required fund balances and reserves at the end of 2011.

6. Discussion of CLE Seminars

Mr. Wegener distributed financial material developed by the CLE Seminars Manager Karen Lee. The committee will review the material and any recommendations developed from the data at its next meeting.

7. Next Committee meeting

The next meeting is scheduled for April 27, 2012 at the bar center.

MINUTES

BOG Member Services Committee

Meeting Date: February 10, 2012
Location: Salem Conference Center, Salem
Chair: Matt Kehoe
Vice-Chair: Tom Kranovich
Members Present: Barbara Dilaconi, Ann Fisher, Matt Kehoe, Travis Prestwich, Richard Spier, Audrey Matsumonji
Guests: Jenifer Billman (BOG), Maureen O'Connor (BOG), Ira Zarov (PLF)
Staff Members: Danielle Edwards, Helen Hirschbiel, Kay Pulju

ACTION ITEMS

- Topic:** Minutes of the January, 2012, meeting were approved as offered.
- Topic:** Senior Lawyers Task Force Report. The Committee discussed the task force report and existing services offered by the bar and the PLF. Members of the committee expressed concern with creating a division where membership was automatic as some members may not welcome the status such membership may entail. The committee did identify areas senior bar members may be interested in learning about, bar volunteer opportunities, PLF assistance with transitioning out of practice, and other services offered by the OAAP. Members of the committee expressed an interest in working with the Multnomah Bar Association. The committee approved moving forward with development of a page on the bar's website to make information of interest to senior lawyers easily accessible. The roles of bar groups, including SLAC and the OAAP, should be highlighted. The web page and the services it promotes should be marketed to senior bar members through both electronic and print publications.

INFORMATION ITEMS

Topic: BOG and HOD recruitment. Staff provided an update on the 2012 election status and provided information on the region 5 BOG special election.

Topic: Affinity relationships. Members of the committee are interested in at affinity program options with a focus on ensuring any offerings would provide a benefit to bar members. It was noted that the Multnomah Bar Association relies heavily on non-dues income derived from their member benefit options. The committee will discuss an approach for developing affinity relationships at its next meeting.

MINUTES

BOG Member Services Committee

Meeting Date: March 30, 2012
Location: OSB Center, Tigard
Chair: Matt Kehoe
Vice-Chair: Tom Kranovich
Members Present: Barbara Dilaconi, Ann Fisher, Matt Kehoe, Travis Prestwich, Richard Spier
Guests: Jenifer Billman (BOG), Maureen O'Connor (BOG), Ira Zarov (PLF)
Staff Members: Danielle Edwards, Helen Hirschbiel, Christine Kennedy, Kay Pulju

ACTION ITEMS

1. **Topic:** Minutes of the February, 2012, meeting were approved as offered.
2. **Topic:** **Affinity Programs.** The Committee discussed affinity programs and member benefits that might be useful to the bar and its members. There was a consensus not to pursue affinity programs, which involve profit-sharing to benefit the OSB, at this time but to explore discount programs that could benefit bar members. Initial suggestions focused on technological tools, meeting support and insurance programs. Staff will provide additional background at the next meeting.
3. **Topic:** **Member Survey.** The Committee discussed an increase in survey requests from member groups and the potential for an all-member poll regarding bar programs and services. Questions on potential member discount programs, including insurance benefits, could be included. Staff will provide the committee members with copies of a draft survey prepared (but not used) in 2010 as a starting point in developing a poll.

INFORMATION ITEMS

4. **Topic:** **Section Bylaws.** Ann Fisher led a discussion on proposed revisions to the model section bylaws, which were recently provided to section leaders for comment. This item will be added to the April agenda, allowing time for the Committee to develop recommendations for consideration by the BOG's Policy & Governance Committee before presentation to the full board.

MINUTES

BOG Policy & Governance Committee

Meeting Date: February 9, 2012
Location: Salem Conference Center, Salem, Oregon
Chair: Ann Fisher
Vice-Chair: David Wade
Members Present: Jenifer Billman, Barbara Dilaconi, Ann Fisher, Matt Kehoe, Travis Prestwich, Richard Spier, David Wade
Others Present: Mitzi Naucner
Staff Present: Sylvia Stevens, Helen Hirschbiel, Mariann Hyland

ACTION ITEMS

- | |
|--|
| <p>1. Topic: Approval of Minutes of January 6, 2012 meeting. The minutes as submitted were approved unanimously.</p> |
| <p>2. Topic: Amending RPC 1.8(e). The committee continued its discussion of Steve Larson’s proposal that RPC 1.8(e) be amended to conform to the ABA Model Rule and specifically allow for contingent costs. Points raised were: whether a change was needed, given current practice; whether the change would give some lawyers a competitive edge; and whether the proposed change would have any ethical implications for how lawyers handle the case. After discussion, Mr. Wade moved, seconded by Mr. Kehoe, and the committee voted 5-1-1 to recommend that the BOG put the issue on the HOD agenda. Yes: Wade, Fisher, Dilaconi, Spier, Prestwich; No: Kehoe; Abstain: Billman.</p> |
| <p>3. Topic: LRS Business Model Recommendation. Ms. Fisher explained that the Public Service Advisory Committee worked very hard to produce a thoughtful report and recommendations. She also raised a “caveat,” that certain aspects of the LRS program need improvement and that any change in the business model should include a director to staff to address those problems. It was noted that 80% of panelists surveyed indicated that they view the LRS as a marketing opportunity rather than an access to justice program. Mr. Wade moved, seconded by Mr. Kehoe, to recommend to the BOG adoption of the report and recommendations of the PSAC as presented.</p> |

MINUTES

BOG Policy and Governance Committee

Meeting Date: March 30, 2012
Location: OSB Center
Chair: Ann Fisher
Vice-Chair: David Wade
Members Present: Ann Fisher, David Wade, Jenifer Billman, Barbara Dilaconi, Matt Kehoe, Richard Spier
Members Absent: Travis Prestwich
Guests: Pat Ehlers
Staff Members: Sylvia Stevens, Helen Hirschbiel, Denise Cline, Judith Baker

ACTION ITEMS

1. **Approve Minutes of February 9, 2012 meeting.** Mr. Wade moved, seconded by Mr. Kehoe, and the minutes were approved as submitted.
2. **Committee Goals and Objectives.** Ms. Fisher opened a discussion about the role of the committee and the importance of providing input on a wide variety of governance issues. There followed a spirited discussion about several topics that committee members were interested in studying further including:
 - a) HOD Review: the committee expressed interest in performing this review itself rather than recommending a task force to the BOG. Ms. Fisher emphasized the need that any review have structure and clear directions. To that end, she asked committee members to bring ideas to the April meeting and to work hard. Preliminary questions raised were whether there should be a HOD at all? If yes, should it meet in person or electronically? If no, what other governance model should replace the HOD?
 - b) Judicial Professionalism/Judicial Selection: Ms. Fisher suggested that, because the OSB devotes considerable resources to helping the courts and judges, the bar should get something in return, namely a commitment to professionalism and excellence. Concerns were expressed about the value of the BOG's appellate screening, how the BOG might be involved in circuit court selections, and how to ensure that new judges learn the skills they need.
 - c) Discipline Review: The last thorough review of the discipline system was in 2002. Several committee members agreed that the process can be too slow. Questions were also raised about the reinstatement process and whether there are adequate standards for the BOG to apply in making reinstatement recommendations.
 - d) Proactive BOG/HOD on Socio-political Issues: Several committee members expressed frustration at the BOG's conservative approach to issues that might implicate *Keller* and whether the BOG (and the HOD) should do more for social justice. Same-sex marriage was cited as an issue of civil rights on which lawyers have special expertise and could be a force for positive social change.These issues will be revisited at the next meeting; staff will put together background materials to assist the committee in deciding how to move forward.

3. Centralized Public Notice System. Ms. Baker gave a brief overview of the Oregon Law Foundation's request that the BOG pursue the creation of an electronic centralized public notice system and encouraged the committee members to read the OLF memo that was included with the agenda. The OLF is confident that such a system could generate significant net revenue that could be allocated to the OLF to advance its low-income legal services funding goals.

4. Other Business. The remaining items on the March 30 agenda were deferred until the April 27 meeting.

MINUTES

BOG Public Affairs Committee

Meeting Date: February 9, 2012
Location: Oregon State Bar, Tigard, OR
Chair: Steve Larson
Vice-Chair: Hunter Emerick
Members Present: Audrey Matsumonji, Michael Haglund, Tom Kranovich, Maureen O'Connor (by Ph)
Members Absent: Kenneth Mitchell-Phillips
Guests: Mitzi Naucler, Chief Justice Paul De Muniz and members of the OSB Judicial Administration Committee
Staff Members: Susan Grabe, David Nebel, Matt Shields

ACTION ITEMS

1. **Minutes:** The minutes were unanimously approved.
2. **Economic impact of Court reductions.** The committee unanimously approved asking the MBA managing partner roundtable to help defray the costs of the economic survey with the remainder to be paid by the bar and is forwarding the recommendation to the board for consideration.

INFORMATION ITEMS

3. **Speakers Bureau.** The Chief Justice addressed a joint meeting of the PAC and the OSB Judicial Administration Committee regarding what the bar can do to reenergize the Speakers bureau concept. The Chief shared his vision of what he would like to see the bar do: Develop an information campaign that educates the public about what the courts do and why it matters to them. While he believes that Oregon is out in front of other states regarding messaging he believes the message needs to be refined and outreach more carefully coordinated. The committee discussed the benefits of different approaches at length. This is a topic that will require further consideration at the next series of meetings.
4. **Court Funding Coalition.** Steve Larson informed the committee of progress made to date in developing the coalition and reaching out to legislators about the court budget.
5. **Legislative reception and update.** The bar is anticipating a good turnout for its reception this evening from the court, the local bar and legislators.
6. **2013 Legislative proposals.** The committee discussed the process and timeline for bar groups to develop legislative proposals for the 2013 session.

MINUTES

BOG Public Affairs Committee

Meeting Date: April 5, 2012
Location: Conference Call
Chair: Steve Larson
Vice-Chair: Hunter Emerick,
Members Present: Maureen O'Connor, Patrick Ehlers
Members Absent: Audrey Matsumonji, Tom Kranovich, Mike Haglund
Staff Members: Susan Grabe

ACTION ITEMS

1. **ABA Lobby Day topics.** Maureen O'Connor moved and Hunter Emerick seconded the motion to approve the OSB support all three topics for ABA Lobby Day in Washington, DC: Legal Services Corporation funding; the Court Intercept Bill; and, reauthorization of the Violence Against Women Act. The committee vote was unanimous.
2. **Jurisdictional issues.** The committee also declined to include two additional legislative proposals in the 2013 package of Law Improvement proposals for consideration because they were proposed by a bar member directly. The committee determined the more appropriate route for individual member proposals would be through that member's personal legislative representative or to a bar group for consideration.

INFORMATION ITEMS

3. **Legislative Forum.** The committee discussed the timing and format for the April 23 Legislative forum where bar groups will provide an overview of each proposal and answer any question or concerns other interested parties may have. This meeting is intended to ensure all proposals adhere to the OSB legislative guidelines and to ensure that any questions or concerns from other interested parties are brought to Public Affairs' attention and addressed.

Minutes

BOG Unclaimed Lawyer Trust Account Special Committee

Meeting Date: January 6, 2012
Location: OSB Center, Tigard
Members Present: Ethan Knight, Ken Mitchell-Phillips, Theresa Kohlhoff
Members Absent: None
Guests: None
OSB Liaison: Helen Hierschbiel

ACTION ITEMS

1. Approval of Minutes. The Committee approved the minutes for the June August 26, 2011 ULTA Committee meeting.	
2. Jensen & Leiberan. Ethan Knight moved and Ken Mitchell-Phillips seconded, to approve Jensen & Leiberan's request for return of funds delivered to the bar. Approval of the claim was unanimous.	

OREGON STATE BAR
Client Security - 113
For the Two Months Ending February 29, 2012

Description	February 2012	YTD 2012	Budget 2012	% of Budget	February Prior Year	YTD Prior Year	Change v Pr Yr
REVENUE							
Interest	\$358	\$587	\$3,400	17.3%	\$316	\$524	11.9%
Judgments	385	385	6,000	6.4%	360	720	-46.5%
Membership Fees	210	215,070	226,200	95.1%	180	211,350	1.8%
TOTAL REVENUE	953	216,042	235,600	91.7%	856	212,594	1.6%
EXPENSES							
SALARIES & BENEFITS							
Employee Salaries - Regular	2,130	4,260	27,700	15.4%	2,761	5,523	-22.9%
Employee Taxes & Benefits - Reg	760	1,436	10,100	14.2%	830	1,606	-10.6%
TOTAL SALARIES & BENEFITS	2,891	5,696	37,800	15.1%	3,591	7,129	-20.1%
DIRECT PROGRAM							
Claims			200,000				
Collection Fees			2,000				
Committees			250				
Pamphlet Production	11	11	150	7.6%			
Travel & Expense			1,400				
TOTAL DIRECT PROGRAM EXPENSE	11	11	203,800	0.0%			
GENERAL & ADMINISTRATIVE							
Messenger & Delivery Services			100				
Office Supplies			150				
Photocopying			150				
Postage	46	99			17	37	163.1%
Professional Dues			200				
Telephone	6	6	450	1.4%			
Training & Education			600		200	200	-100.0%
Staff Travel & Expense			2,116		469	469	-100.0%
TOTAL G & A	52	105	3,766	2.8%	687	707	-85.2%
TOTAL EXPENSE	2,954	5,812	245,366	2.4%	4,278	7,836	-25.8%
NET REVENUE (EXPENSE)	(2,001)	210,230	(9,766)		(3,422)	204,758	2.7%
Indirect Cost Allocation	1,119	2,238	13,425		1,079	2,158	3.7%
NET REV (EXP) AFTER ICA	(3,120)	207,992	(23,191)		(4,501)	202,600	2.7%
Fund Balance beginning of year		607,132					
Ending Fund Balance		815,124					
Staff - FTE count		.35	.30			.35	

2012 JUDGMENTS COLLECTED

Date	Attorney	Payment Received
1/30/2012	Kelley, Phil	360.00
2/17/2012	Shinn, Michael	25.00
3/7/2012	Kelley, Phil	360.00
3/19/2012	Shinn, Michael	15.00
4/3/2012	Kelley, Phil	360.00

TOTAL

\$1,120.00

CLAIM #	NAME	ATTORNEY	CLAIM	PENDING	AMOUNT PAID	DATE PAID	DATE DENIED W/DRAWN	UNPAID BALANCE	ASSIGNED TO
10-16	Bazurto, Cecilia	Fields, Stanley	\$25,000.00	25,000.00				25,000.00	Angus
10-19	Rawson, Kathryn Eilene	Dickerson, Daniel	5,000.00	5,000.00				5,000.00	Welch
10-21	Sisney, Bryan	Harrison, Pamela	8,142.50	8,142.50				8,142.50	Brown
10-25	Kiker, Jeffrey Allen	Ginsler, B. William	8,868.03	8,868.03				8,868.03	Cousineau
10-31	Johns, Frank and Chongnak	Connall, Des	25,300.00	25,300.00				25,300.00	Wright
11-02	Risch, Stephen R	Connall, Des & Shannon	57,000.00	50,000.00				50,000.00	Wright
11-05	Raske, Karen	Connall, Shannon	3,250.00	3,250.00				3,250.00	Wright
11-07	Stratton, Laurence Eugene	Connall, Shannon and Des	10,000.00	10,000.00				10,000.00	Wright
11-13	Suanders, Ima Jean Lousie	Burns, Suan Ford	400.00	400.00				400.00	Calderon
11-21	Roelle, Brian D	Connall, Des	23,000.00	23,000.00				23,000.00	Wright
11-22	Olive, Wendy	Schannauer, Peter	800.00	800.00				800.00	McGean
11-23	Baker, Lori Marie	Morasch, Marsha	5,000.00	5,000.00				5,000.00	Kekel
11-27	Noble, Wendy D	Hayes, Keith	4,000.00	4,000.00				4,000.00	Barrack
11-28	Morning Star Missionary Baptist Church	Dickerson, Daniel	355,000.00	50,000.00				50,000.00	Angus
11-29	Foster, Elisha Leon	Gruetter, Bryan	45,000.00	45,000.00				45,000.00	Welch
12-01	Uriarte, Mirna (Castellanos)	Howlett, Bruce	7,500.00				3/10/2012	Appealed	Stevens (BOG)
12-02	Wetter, Kendra Jean	Morasch, Marsha	2,000.00	2,000.00				2,000.00	Kekel
12-03	Key, Veryl (aty Jennifer Coughlin)	Gruetter, Bryan	60,000.00	50,000.00				50,000.00	Welch
12-04	Liebzeit, Leann	Gruetter, Bryan	48,400.00	48,400.00				48,400.00	Miller
12-06	Gravance, David	Gruetter, Bryan	51,000.00	50,000.00				50,000.00	Miller
12-07	Runkel, Lana	Gruetter, Bryan	142,000.00	50,000.00				50,000.00	Bennett
12-08	Burk, Alice Elizabeth	Gruetter, Bryan	6,940.00	6,940.00				6,940.00	Wright
12-09	Mills, Carolyn Betty	Gruetter, Bryan	3,696.50	3,696.50				3,696.50	Wright
12-10	Schnee, Cynthia	Hammond, Paula	1,500.00	1,500.00				1,500.00	Brown
12-11	Hines, Donna Conservator for TS	Gruetter, Bryan	65,133.67	50,000.00				50,000.00	Calderon
12-12	Riggs, Amy Lynn Evadora	Gruetter, Bryan	100,000.00	50,000.00				50,000.00	Cousineau
12-13	Standley, Gina	Gruetter, Bryan	13,855.63	13,855.63				13,855.63	Cousineau
12-14	Ferguson, Norma	Gruetter, Bryan	7,171.67	7,171.67				7,171.67	Kekel
12-15	Gordon, Tae Mee	Gruetter, Bryan	66,504.14	50,000.00				50,000.00	Kekel
12-16	Ihrig, Sandra	Gruetter, Bryan	500.00	500.00				500.00	Brown
12-17	Thornhill, Cheryl and Laird	Gruetter, Bryan	28,934.83	28,934.83				28,934.83	Brown
12-18	Strohm, Mary Jo	Gruetter, Bryan	16,319.22	16,319.22				16,391.22	Kekel
12-19	Ray, Michael	Gruetter, Bryan	100,000.00	50,000.00				50,000.00	Cousineau
12-20	Vice, Monroe Edward Joe	Gruetter, Bryan	130,173.79	50,000.00				50,000.00	Angus
12-21	Meekins, Constance Anna Lorene	Gruetter, Bryan	12,000.00	12,000.00				12,000.00	Angus
12-22	Lyons, Angela	Gruetter, Bryan	4,530.99	4,530.99				4,530.99	Eggert
12-23	Leece, Gerald and Kimberly	Hammond, Paula	2,699.00	2,699.00				2,699.00	Brown
12-24	Steinbeck, Theodore C	Howlett, Bruce	950.00	950.00				950.00	Brown
12-25	McClain, Kathryn A	Gruetter, Bryan	23,767.96	23,767.96				23,767.96	Welch
12-26	Shore, Ryan	Gruetter, Bryan	18,390.34	18,390.34				18,390.34	Eggert
12-27	Boyer, Robbyn Lynn	Gruetter, Bryan	20,000.00	20,000.00				20,000.00	Eggert
12-28	Love, Jenny M	Gruetter, Bryan	2,843.82	2,483.82				2,483.82	Franco

Oregon  State Bar

2011 **Disciplinary
Counsel's Office**

Annual Report

April 2012

Jeffrey D. Sapiro
Disciplinary Counsel

TABLE OF CONTENTS

I. INTRODUCTION	1
II. STATE PROFESSIONAL RESPONSIBILITY BOARD (SPRB)	1
III. SYSTEM OVERVIEW	1
A. Complaints Received.....	1
B. SPRB	3
C. Local Professional Responsibility Committee (LPRCs)	4
D. Formal Proceedings.....	4
E. Dispositions Short of Trial.....	5
F. Appellate Review	5
G. Contested Admissions/Contested Reinstatements.....	7
IV. DISPOSITIONS	7
V. SUMMARY OF CASELOAD	8
VI. STAFFING/FUNDING	9
VII. OTHER DEVELOPMENTS	9
A. Ethics School.....	9
B. Trust Account Overdraft Notification Program	9
C. IOLTA Compliance.....	10
D. Public Records.....	10
E. Pro Hac Vice Admission and Arbitration Registration.....	11
F. Custodianships.....	11
G. Continuing Legal Education Programs.....	11
VIII. CONCLUSION	11
Appendix A - 2011	12
Appendix B - 2010.....	13
Appendix C.....	14
Appendix D	19

I. INTRODUCTION

This is the Annual Report of the Oregon State Bar Disciplinary Counsel's Office for 2011. The report provides an overview of Oregon's lawyer discipline system, an analysis of the caseload within the system, along with the dispositions in 2011, and a discussion of significant developments over the last year.

II. STATE PROFESSIONAL RESPONSIBILITY BOARD (SPRB)

The principal responsibility of Disciplinary Counsel's Office is to serve as counsel to the State Professional Responsibility Board (SPRB), the body to which the investigative and prosecutorial functions within the discipline system are delegated by statute. The SPRB seeks to enforce the disciplinary rules in the Rules of Professional Conduct (the RPCs), while operating within the procedural framework of the Bar Rules of Procedure (the BRs). The SPRB is a ten-member board of unpaid volunteers, consisting of one lawyer each from Board of Governors (BOG) Regions 1 through 4, 6, and 7, two lawyers from Region 5 and two public members. (The creation of Region 7 effective January 2011, increased the size of the SPRB from nine to ten.)

The SPRB met 12 times in 2011. With regular meetings and conference calls combined, the SPRB considered approximately 250 case-specific agenda items during the year. This does not include the many policy matters also considered by the board.

The Bar was fortunate to have the following individuals on the SPRB in 2011:

Jana Toran (Portland) – Chairperson
Chelsea Dawn Armstrong (Salem)
Peter R. Chamberlain (Portland)
Judy Clarke (Portland) – Public Member
Danna Fogarty (Eugene)
Michael G. Gentry (Lake Oswego)
Greg Hendrix (Bend)
Timothy L. Jackle (Medford)
William B. Kirby (Beaverton)
Dr. S. Michael Sasser (Medford) – Public Member

The term of Jana Toran expired at the end of 2011. The new appointment for 2012 was Whitney Patrick Boise (Portland). Peter R. Chamberlain is the SPRB Chairperson for 2012.

III. SYSTEM OVERVIEW

A. Complaints Received

The Bar's Client Assistance Office (CAO) handles the intake of all oral and written inquiries and complaints about lawyer conduct. Only when the CAO finds that there is sufficient evidence to support a reasonable belief that misconduct may have occurred is a matter referred to Disciplinary Counsel's Office for investigation. *See* BR 2.5.

The table below reflects the number of files opened by Disciplinary Counsel in recent years, including the 459 files opened in 2011.

Files Opened by Disciplinary Counsel					
Month	2007	2008	2009	2010	2011
January	30	30	43	29	20
February	49	39	25	25	36
March	42	36	39	26	25
April	30	26	40	30	42
May	19	35	21	119*	146*
June	29	30	142*	26	20
July	31	37	16	34	28
August	23	38	35	25	23
September	16	125*	31	36	29
October	38	27	34	33	23
November	46	15	31	21	27
December	23	29	26	24	40
TOTAL	376	467	483	428	459

*includes IOLTA compliance matters

The breakdown of the open files for 2011 was: 260 referrals from the Client Assistance Office, 86 trust account overdraft notices from financial institutions that came directly to Disciplinary Counsel's Office, 91 inquiries concerning lawyer compliance with the IOLTA rules, and 22 other matters opened by Disciplinary Counsel on the office's initiative.

For 2011, statistical information regarding complainant type and complaint subject matter is found in Appendix A to this report. Similar information for 2010 is found in Appendix B for comparison purposes.

Every complaint Disciplinary Counsel's Office received in 2011, was acknowledged in writing by staff, analyzed and investigated to varying degrees depending on the nature of the allegations. As warranted, staff corresponded with the complainant and the responding attorney, and obtained relevant information from other sources, to develop a "record" upon which a decision on merit could be made.

If, after investigation, staff determined that probable cause did not exist to believe that misconduct had occurred, the matter was dismissed by Disciplinary Counsel. BR 2.6(b). Complainants have the right under the rules of procedure to contest or appeal a dismissal by Disciplinary Counsel staff. In that case, the matter is submitted to the SPRB for review. The SPRB reviewed 20 such appeals in 2011, affirming all but one of the dismissals.

When Disciplinary Counsel determined from an investigation that there may have been probable cause of misconduct by a lawyer, the matter was referred to the SPRB for review and action. Each matter was presented to the board by means of a complaint summary (factual review, ethics analysis and recommendation) prepared by staff. Each file also was made available to the SPRB. In 2011, the SPRB reviewed 150 of these probable cause investigations. The following section describes that process of review in more detail.

B. SPRB

The SPRB acts as a grand jury in the disciplinary process, determining in each matter referred to it by Disciplinary Counsel whether probable cause of an ethics violation exists. Options available to the SPRB include dismissal if there is no probable cause of misconduct; referral of a matter back to Disciplinary Counsel or to a local professional responsibility committee (LPRC) for additional investigation; issuing a letter of admonition if a violation has occurred but is not of a serious nature; offering a remedial diversion program to the lawyer; or authorizing a formal disciplinary proceeding in which allegations of professional misconduct are litigated. A lawyer who is offered a letter of admonition may reject the letter, in which case the Rules of Procedure require the matter to proceed to a formal disciplinary proceeding. Rejections are rare.

A lawyer who is notified that a formal disciplinary proceeding will be instituted against him or her may request that the SPRB reconsider that decision. Such a request must be supported by new evidence not previously available that would have clearly affected the board's decision, or legal authority not previously known to the SPRB which establishes that the decision to prosecute is incorrect.

In 2011, the SPRB made probable cause decisions on 13 reports submitted by investigative committees and 171 matters investigated by Disciplinary Counsel staff. Action taken by the SPRB in recent years and in 2011 is summarized in the following table:

Action Taken by SPRB					
Year	Pros.	Admon. Offered	Admon. Accepted	Dismissed	Diversion
2007	133	40	40	77	2
2008	123	31	30†	90	2
2009	128	29	28†	59	5
2010	72	34	34	38	5
2011	98	34	34	46	4

† One admonition letter offered was later reconsidered by the SPRB and the matter was dismissed.

Note that the figures for prosecutions reflect the number of complaints that were authorized for prosecution, not necessarily the number of lawyers being prosecuted. For example, one lawyer may be the subject of numerous complaints that are consolidated into one disciplinary proceeding.

In addition to the normal complaint review process, the SPRB also is responsible for making recommendations to the Supreme Court on matters of urgency including temporary and immediate suspensions of lawyers who have abandoned their practice, are suffering under some disability, have been convicted of certain crimes, or have been disciplined in another jurisdiction subjecting them to reciprocal discipline here in Oregon. There were five (5) such matters in 2011.

C. Local Professional Responsibility Committee (LPRCs)

Most complaints are investigated in-house by Disciplinary Counsel staff. However, some matters that require in-depth field investigation are referred by staff or the SPRB to local professional responsibility committees (LPRCs). There are seven such committees throughout the state. Total membership for all LPRCs is approximately 52.

Each year LPRC members are provided with a handbook prepared and updated by the Disciplinary Counsel's Office. The handbook describes in detail the responsibilities each LPRC member is asked to undertake. It also provides practical suggestions in conducting an LPRC investigation, contains copies of resource materials including the applicable statutes and procedural rules, and includes examples of final LPRC reports in a standardized format requested by the SPRB.

Under the applicable rules of procedure, Disciplinary Counsel staff arranges for an assignment to be made to an individual committee member, and the committee member is authorized to report back his or her findings without going through the entire committee. A committee member has 90 days to complete an assignment, with one extension of 60 days available. If an investigation is not completed by then, the rules require the matter to be referred back to Disciplinary Counsel for completion. BR 2.3(a)(2)(C). Thirteen (13) matters were referred to LPRCs in 2011.

D. Formal Proceedings

(1) Prosecution Function

After the SPRB authorizes formal proceedings in a given matter, attorneys in Disciplinary Counsel's Office draft a formal complaint and may, but don't always, arrange for volunteer bar counsel to assist in preparation for trial. Bar Counsel are selected from a panel of lawyers appointed by the Board of Governors.

Discovery methods in disciplinary proceedings are similar to those in civil litigation. Requests for admission, requests for production, and depositions are common. Disputes over discovery are resolved by the trial panel chairperson assigned to a particular case.

Pre-hearing conferences to narrow the issues and to explore settlement are available at the request of either party. Such conferences are held before a member of the Disciplinary Board who is not a member of the trial panel in that case.

(2) Adjudicative Function

Members of the Disciplinary Board, appointed by the Supreme Court, sit in panels of three (two lawyers, one non-lawyer) and are selected for each disciplinary case by a regional chairperson. The panel chair rules on all pretrial matters and is responsible for bringing each case to hearing within a specific time frame established by the rules.

After hearing, the panel is required to render its decision within 28 days (subject to time extensions), making findings of fact, conclusions of law and a disposition. Panels rely on the ABA *Standards for Imposing Lawyer Sanctions* and Oregon case law in determining appropriate sanctions when misconduct has been found.

Seventeen (17) disciplinary cases were tried in 2011, although some of these matters went by default and did not require full evidentiary hearings.

E. Dispositions Short of Trial

Fortunately, many of the disciplinary proceedings authorized by the SPRB are resolved short of trial with resignations or stipulations. Form B resignation (resignation “under fire”) does not require an admission of guilt by an accused lawyer but, because charges are pending, is treated like a disbarment such that the lawyer is not eligible for reinstatement in the future. Seven (7) lawyers submitted Form B resignations in 2011, thereby eliminating the need for further prosecution in those cases. While a resignation ends a formal proceeding, it is often obtained only after a substantial amount of investigation, discovery and trial preparation. For example, one lawyer resigned in 2011, but only after trial on the bar’s petition for the lawyer’s interim suspension, a decision on the petition and submission of the decision to the Supreme Court.

A significant number of cases are resolved by stipulations for discipline in which there is no dispute over material fact and both the Bar and the accused lawyer agree on the violations committed and appropriate sanction. Stipulations must be approved by the SPRB or its chairperson on behalf of the Bar. Once that approval is obtained, judicial approval is required from the state and regional chair of the Disciplinary Board in cases where sanctions do not exceed a 6-month suspension, or from the Supreme Court for cases involving greater sanctions. Judicial approval is not always given, in which case the parties must negotiate further or proceed to trial.

In 2011, 55 formal proceedings were concluded: 14 by decision in a contested case; 28 by stipulation; 7 by Form B resignation; and 4 by diversion. Another two matters resulted in the Supreme Court imposing reciprocal discipline by court order.

F. Appellate Review

The Supreme Court does not automatically review discipline cases in Oregon. Trial panel decisions, even those imposing disbarment, are final unless either the Bar or the accused lawyer seeks Supreme Court review. Appellate review by the court is mandatory if requested by a party.

When there is an appeal, lawyers in Disciplinary Counsel’s Office prepare the record for submission to the court, draft and file the Bar’s briefs and present oral argument before the court. The SPRB decides for the Bar whether to seek Supreme Court review.

In 2011, the Supreme Court rendered five (5) discipline opinions in contested cases. The court also approved two (2) stipulations for discipline, revoked a probation, imposed reciprocal discipline in two (2) cases, and issued orders in two (2) other cases suspending lawyers on an interim basis while the disciplinary proceedings against them were pending.

Among the noteworthy court decisions were:

In re Groom, 350 Or 113, 249 P3d 976 (2011). In this case, the court identified factors that it will consider in deciding whether, under RPC 1.4, a lawyer reasonably communicates with a client and provides sufficient information to allow the client to make informed decisions in a legal matter. The lawyer represented a client on appeal in a habeas corpus matter. Another lawyer

represented the same client in a related civil action for unlawful imprisonment. Concerned that the outcome in the habeas appeal would adversely affect the civil action, the lawyer in the civil matter asked Groom to file a particular motion with the appellate court. Groom advised he would consider doing so, but later decided against it and did not advise either the civil lawyer or the client of this decision until the habeas appeal was dismissed. In assessing whether Groom failed to keep the client reasonably informed under RPC 1.4, the court looked at the length of time between his decision not to file the requested motion and when he ultimately told the client about it, whether Groom failed to respond promptly to reasonable requests for information from the client, and whether he knew or should have foreseen that a delay in communicating with the client would have prejudiced the client. After considering these factors, the court dismissed the charges of misconduct in this case.

In re Lopez, 350 Or 192, 252 P3d 325 (2011). This was a reciprocal discipline case, initiated after the lawyer was disciplined in California for multiple rule violations in several client matters in that state. The California Supreme Court suspended Lopez for one year, but stayed all but 90 days of the suspension pending completion of a one-year probation. However, the Oregon Supreme Court determined that it was not bound by the sanction imposed in California and that the California sanction was not sufficient to protect Oregon clients and the public, given the nature of the misconduct and the lawyer's prior disciplinary history. Therefore, the court suspended Lopez in Oregon for nine months, with none of the suspension stayed.

In re Lawrence, 350 Or 480, 256 P3d 1070 (2011). The bar charged this lawyer with conduct prejudicial to the administration of justice, RPC 8.4(a)(4), when he had the official audio recording of a controversial juvenile hearing transcribed and then released the transcript to the press without court permission. Oregon law restricts the public release of certain information and documents from a juvenile proceeding without consent of the court. In the discipline case, the court determined that, even if the lawyer violated state law by releasing the hearing transcript, the bar made an insufficient showing that the release was prejudicial to the administration of justice. The judge who presided at the hearing had permitted members of the media to attend the proceedings, the judge was not overly concerned about the release of the transcript, and there was no evidence that the release harmed the interests of the juveniles, the victims of the juveniles' conduct or the state.

The Supreme Court also considered three cases in which the accused lawyers timely filed petitions for review, but then failed to file opening briefs or otherwise appear in the appeals. The court determined that, although its review of disciplinary appeals is *de novo*, the court is free to circumscribe the extent of its review in the absence of any briefs or arguments challenging a trial panel opinion and that the court will generally affirm the trial panel under these circumstances. The court did, in fact, affirm the trial panels in these three cases: *In re Oh*, 350 Or 204, 252 P3d 325 (2011) (disbarment); *In re Richardson*, 350 Or 237, 253 P3d 1029 (2011) (disbarment); *In re Castanza*, 350 Or 293, 253 P3d 1057 (2011) (60-day suspension).

G. CONTESTED ADMISSIONS/CONTESTED REIN-STATEMENTS

Disciplinary Counsel's Office also represents the Board of Bar Examiners (BBX) in briefing and arguing before the Supreme Court those cases in which the BBX has made an adverse admissions recommendation regarding an applicant. The actual investigation and hearing in these cases are handled by the BBX under a procedure different from that applicable to lawyer discipline cases. The Supreme Court issued one admissions opinion in 2011, denying admission to that applicant.

For reinstatements, Disciplinary Counsel's Office is responsible for processing and investigating all applications. Recommendations are then made to either the bar's Executive Director or the Board of Governors, depending on the nature of the application. Many reinstatements are approved without any further level of review. For reinstatement applicants who have had significant, prior disciplinary problems or have been away from active membership status for more than five years, the Board of Governors makes a recommendation to the Supreme Court. In cases when the board recommends against reinstatement of an applicant, the Supreme Court may refer the matter to the Disciplinary Board for a hearing before a threemember panel much like lawyer discipline matters, or may direct that a hearing take place before a special master appointed by the court. Disciplinary Counsel's Office has the same responsibilities for prosecuting these contested cases as with disciplinary matters. The office also handles the appeal of these cases, which is automatic, before the Supreme Court. A number of these proceedings were in progress in 2011.

IV. DISPOSITIONS

Attached as Appendix C is a list of disciplinary dispositions from 2011. The following table summarizes dispositions in recent years:

SANCTION TYPE	2007	2008	2009	2010	2011
Disbarment	1	5	1	2	5
Form B Resignation	10	18	8	7	7
Suspension	35	22	18	23	19
Suspension stayed/probation	0	2	0	5	1
Reprimand	20	23	12	16	15
Involuntary inactive Transfer	0	1	0	0	0
TOTAL Lawyer Sanctions	66	71	39	53	47
Dismissals after Adjudication	0	2	0	2	4
Dismissed as moot	0	1	1	0	0
Diversion	2	2	5	4	4
Admonitions	42	30	28	34	34

In conjunction with a stayed suspension or as a condition of admission or reinstatement, it is common for a period of probation to be imposed upon a lawyer. Disciplinary Counsel's Office was monitoring seven (7) lawyers on probation at the end of 2011, along with seven (7) lawyers in diversion. Most probations and diversions require some periodic reporting by the lawyer. Some require more active monitoring by a probation supervisor, typically

another lawyer in the probationer’s community. One probation was revoked by the Supreme Court in 2011, after the lawyer reoffended and stipulated that he had violated his probationary terms.

The types of conduct for which a disciplinary sanction was imposed in 2011, or a Form B resignation was submitted, varied widely. The following table identifies the misconduct most often implicated in those proceedings that were concluded by decision, stipulation, order, or resignation in 2011:

Type of misconduct	% of cases in which misconduct present
Inadequate client communication	40%
Failure to respond to OSB	30%
Dishonesty or misrepresentation	28%
Neglect of legal matter	21%
Trust account violation	19%
Criminal conduct	17%
Improper withdrawal	17%
Conduct prejudicial to justice	15%
Failure to return property or funds	15%
Excessive or illegal fees	13%
Multiple client conflicts	11%
Inadequate accounting records	9%
Incompetence	9%
Self-interest conflicts	9%
Disregarding a court rule or ruling	9%
Unauthorized practice	4%
Improper communication	4%
Advertising	2%
Other	15%

V. SUMMARY OF CASELOAD

A summary of the pending caseload in Disciplinary Counsel’s Office at the end of 2011 follows:

New complaints pending.....	213
Pending LPRC investigations.....	5
Pending formal proceedings	73*
Probation/diversion matters.....	14
Contested admission/contested reinstatement matters.....	3
TOTAL.....	308

* Reflects no. of lawyers; no. of complaints is greater.

In addition to disciplinary matters, Disciplinary Counsel's Office processed and investigated approximately 134 reinstatement applications in 2011; processed approximately 535 membership status changes (inactive and active pro bono transfers and voluntary resignations); issued 931 certificates of good standing; and responded to roughly 2,800 public record requests during the year.

VI. STAFFING/FUNDING

In 2011, Disciplinary Counsel's Office employed fifteen staff members (14 FTE), along with occasional temporary help. In addition to Disciplinary Counsel, there were seven staff lawyer positions. Support staff included one investigator, one office administrator, one regulatory services coordinator, three secretaries, and one public records coordinator. Current staff members include:

Disciplinary Counsel

Jeffrey D. Sapiro

Assistants Disciplinary Counsel

Amber Bevacqua-Lynott
Mary A. Cooper
Susan R. Cournoyer
Linn D. Davis
Stacy J. Hankin
Martha M. Hicks
Kellie F. Johnson

Support Staff

Lynn Bey-Roode
Jennifer Brand
Karen L. Duncan
Sandy L. Gerbish
Vickie R. Hansen
R. Lynn Haynes
Christopher Ouellette

Disciplinary Counsel's Office is funded out of the Bar's general fund. Revenue is limited (roughly \$58,500 for 2011) and comes from cost bill collections, reinstatement fees, a fee for good standing certificates and *pro hac vice* admissions, and photocopying charges for public records.

Expenses for 2011 were \$1,675,000 with an additional \$383,600 assessed as a support services (overhead) charge. Of the actual program expenses, 90% consisted of salaries and benefits. An additional 6.4% of the expense budget went to out-of-pocket expenses for court reporters, witness fees, investigative expenses and related items. 3.1% of the expense budget was spent on general and administrative expenses such as copying charges, postage, telephone and staff travel expense.

VII. OTHER DEVELOPMENTS

A. Ethics School

Bar Rule 6.4 became effective in 2011. That rule requires lawyers who have been reprimanded or suspended to attend a oneday course of study presented by the Bar on topics of legal ethics, professional responsibility, and law office management. The first such program was offered in November 2011. Presenters included staff from the Client Assistance Office, Disciplinary Counsel's Office, and the Professional Liability Fund. It is anticipated the program will be offered 2 to 3 times per year.

B. Trust Account Overdraft Notification Program

The Oregon State Bar has a Trust Account Overdraft Notification Program, pursuant to ORS 9.132 and RPC 1.152. Under the program, lawyers are required to maintain their trust accounts in financial institutions that have

agreed to notify the Bar of any overdraft on such accounts. Approximately 65 banks have entered into notification agreements with the Bar.

In 2011, the Bar received notice of 86 trust account overdrafts. For each overdraft, a written explanation and supporting documentation was requested of the lawyer, with follow-up inquiries made as necessary. Many overdrafts were the result of bank or isolated lawyer error and, once confirmed as such, were dismissed by staff. If circumstances causing an overdraft suggested an ethics violation, the matter was referred to the SPRB. A minor violation leading to an overdraft typically results in a letter of admonition issued to the lawyer. More serious or on-going violations result in formal disciplinary action. A summary of the disposition of trust account overdrafts received in 2011 follows:

2011 Trust Account Overdrafts	
Dismissed by staff	75
Dismissed by SPRB	0
Referred to LPRC for further investigation	0
Closed by admonition letter	6
Closed by diversion	1
Formal charges authorized	2
Closed by Form B resignation	0
Pending (as of 3/2011)	2
Total Received	86

C. IOLTA Compliance

Related to trust accounts was the obligation under RPC 1.152(m) for Oregon lawyers to certify annually that they are in compliance with the trust account disciplinary rules, identifying the financial institutions and account numbers in which Interest on Lawyer Trust Account (IOLTA) trust funds are held.

By April 2011, approximately 760 lawyers still had not filed their IOLTA certifications, and their names were turned over to Disciplinary Counsel's Office. Further notices from DCO prompted substantial compliance such that only four (4) lawyers ultimately were charged with a violation of RPC 1.152(m) from 2011.

Effective in 2012, the requirement to file an annual IOLTA certification has been removed from the Rules of Professional Conduct (RPC 1.152(m) was repealed) and now is a statutory obligation. ORS 9.675. Non-compliance will result in an administrative suspension, rather than disciplinary action.

D. Public Records

In Oregon, lawyer discipline files are public record with very limited exceptions. Disciplinary Counsel staff responds to an average of 230 public records requests each month. These requests come from members of the public who inquire into a lawyer's background or from other Bar members who have a need to examine these records.

Disciplinary history data is on computer such that many disciplinary record inquires can be answered without a manual review of a lawyer's file. A significant number of requests, however, require the scheduling of appointments for file review.

During 2011, the Bar followed its established document management and retention policies. Ethics complaints dismissed for lack of probable cause more than ten (10) years ago were destroyed. Retained records were scanned and maintained in electronic format, thereby reducing the physical file storage needs of the Bar.

E. Pro Hac Vice Admission and Arbitration Registration

Uniform Trial Court Rule 3.170 provides that all applications by out-of-state lawyers for admission in a single case in Oregon (*pro hac vice* admission) must first be filed with the Oregon State Bar, along with a fee of \$250. Disciplinary Counsel's Office is responsible for reviewing each application and supporting documents (good standing certificate, evidence of professional liability coverage, etc.) for compliance with the UTCR. The filing fees collected, after a nominal administrative fee is deducted, are used to help fund legal service programs in Oregon.

In 2011, the Bar received and processed 445 *pro hac vice* applications, collecting \$105,688 for legal services.

In addition, RPC 5.5(e) became effective in 2011. That rule requires outofstate lawyers who intend to participate in an Oregon arbitration to pay a fee and file a certificate with the Bar similar to that required for *pro hac vice* admission. Disciplinary Counsel's Office administers this process.

F. Custodianships

ORS 9.705, *et. seq.*, provides a mechanism by which the Bar may petition the circuit court for the appointment of a custodian to take over the law practice of a lawyer who has abandoned the practice or otherwise is incapable of carrying on. In 2011, the Bar did not initiate any custodianship, although facts coming to the Bar's attention in late 2011 resulted in a custodianship proceeding in early 2012.

G. Continuing Legal Education Programs

Throughout 2011, Disciplinary Counsel staff participated in numerous CLE programs dealing with ethics and professional responsibility issues. Staff spoke to law school classes, local bar associations, Oregon State Bar section meetings, specialty bar organizations and general CLE audiences.

VIII. CONCLUSION

In 2011, the Oregon State Bar remained committed to maintaining a system of lawyer regulation that fairly but effectively enforces the disciplinary rules governing Oregon lawyers. Many dedicated individuals, both volunteers and staff, contributed significantly toward that goal throughout the year.

Respectfully submitted,

Jeffrey D. Sapiro

Disciplinary Counsel

APPENDIX A - 2011

COMPLAINANT TYPE	NUMBER	PERCENTAGE
Accused (self-reported)	13	2.9%
Client	118	25.7%
Judge	7	1.5%
Opposing Counsel	48	10.5%
Opposing Party	41	8.9%
Third Party	36	7.8%
Unknown	2	0.4%
OSB	103	22.5%
OSB (IOLTA Compliance)	91	19.8%
TOTAL	459	100.0%
COMPLAINT SUBJECT MATTER	NUMBER	PERCENTAGE
Adoption	2	0.4%
Advertisement	0	0%
Arbitration	1	0.2%
Bankruptcy	11	2.4%
Business	7	1.5%
Civil dispute (general)	32	7.0%
Conservatorship	2	0.4%
Criminal	50	10.9%
Domestic Relations	52	11.3%
Estate Planning	6	1.3%
Guardianship	3	0.7%
Immigration	10	2.2%
Juvenile	1	0.2%
Labor Law	0	0%
Litigation (general)	26	5.7%
Land Use	0	0%
Other	27	5.9%
Paternity	0	0%
Personal injury	19	4.1%
Probate	15	3.3%
Real Estate	4	0.9%
Social Security	5	1.1%
Tenant/landlord	1	0.2%
Tax	2	0.4%
Trust Account (IOLTA)	91	19.8%
Trust Account Overdraft	88	19.2%
Workers Comp.	3	0.7%
Unknown	1	0.2%
TOTAL	459	100.0%

APPENDIX B - 2010

COMPLAINANT TYPE	NUMBER	PERCENTAGE
Accused (self-reported)	19	4.4%
Client	121	28.3%
Judge	16	3.7%
Opposing Counsel	37	8.7%
Opposing Party	26	6.1%
Third Party	27	6.3%
Unknown	0	0%
OSB	93	21.7%
OSB (IOLTA Compliance)	89	20.8%
TOTAL	428	100.0%
COMPLAINT SUBJECT MATTER	NUMBER	PERCENTAGE
Adoption	2	0.5%
Advertisement	0	0%
Arbitration	2	0.5%
Bankruptcy	18	4.2%
Business	10	2.3%
Civil dispute (general)	22	5.1%
Conservatorship	2	0.5%
Criminal	57	13.3%
Domestic Relations	40	9.3%
Estate Planning	2	0.5%
Guardianship	4	0.9%
Immigration	5	1.2%
Juvenile	4	0.9%
Labor Law	2	0.5%
Litigation (general)	23	5.4%
Land Use	0	0%
Other	30	7.0%
Paternity	0	0%
Personal injury	13	3.0%
Probate	7	1.6%
Real Estate	8	1.9%
Social Security	3	0.7%
Tenant/landlord	1	0.2%
Tax	0	0%
Trust Account (IOLTA)	89	20.8%
Trust Account Overdraft	77	18.0%
Workers Comp.	5	1.2%
Unknown	2	0.5%
TOTAL	428	100.0%

OSB Disposition List 2011

14

OSB DISCIPLINARY COUNSEL'S OFFICE 2011 ANNUAL REPORT

	Case No.	Case Name/Cite	Disposition	CC/ Stip	S Ct/ DB	Date of Action	Effective Date	DRs ORS	Bulletin Summary
1	10-147	Ginger Genevieve Mooney	Diversion	-	SPRB	1/15/11	4/1/11	1.15-1(a), 1.15-1(b), 1.15-1(c)	No
2	09-145	J. Stefan Gonzalez 25 DB Rptr 1	60-day suspension	CC	DB	11/28/10	1/28/11	3.4(c), 8.4(a)(4)	April 2011
3	10-127	Arthur P. Slininger 25 DB Rptr 8	Reprimand	Stip	DB	1/27/11	1/27/11	1.3, 1.4(a)	April 2011
4	09-131	Joseph J. Hanna SC S059078	Form B resignation	-	S Ct	2/3/11	2/3/11	1-102A3, 5-101A1, 5-105E, 5108A, 1.7, 1.8(f), 8.4(a)(3)	April 2011
5	10-148	Scott J. Rubin 25 DB Rptr 13	Reprimand	Stip	DB	2/16/11	2/16/11	3.4(c), 8.4(a)(4)	May 2011
6	09-35 10-78	A.E. Bud Bailey 25 DB Rptr 19	Reprimand	Stip	DB	2/16/11	2/16/11	1.2(a), 1.4	May 2011
7	09-40	Marsha M. Morasch SC S059134 25 DB Rptr 25	1-year suspension, 6 months stayed, 2-year probation	Stip	S Ct	2/17/11	2/17/11	8.1(a)(2), 8.1(c)	May 2011
8	10-137	Jack Levy 25 DB Rptr 32	Reprimand	Stip	DB	2/24/11	2/24/11	ORS 9.527(2)	May 2011
9	10-80	Lynn E. Ashcroft 25 DB Rptr 36	60-day suspension	Stip	DB	3/3/11	3/17/11	8.4(a)(4)	May 2011
10	10-06	Antonio Porras, Jr. 25 DB Rptr 42	Disbarment	CC	DB	1/5/11	3/8/11	8.4(a)(2), 8.4(a)(3)	May 2011
11	11-13	Conrad E. Yunker 25 DB Rptr 50	Reprimand	Stip	DB	3/16/11	3/16/11	1.3, 1.4(a)	June 2011
12	10-36	Meg Reinhold SC S059091	BR 3.1 suspension	CC	S Ct	3/21/11	3/21/11	1.15-1(a), 1.15-1(b), 1.15-1(c), 8.4(a)(3)	No
13	08-105	David E. Groom 350 Or 113, 249 P3d 976	Dismissal	CC	S Ct	3/25/11	5/12/11	NG - 1.4	May 2011
14	10-38	James R. Dole 25 DB Rptr 56	Reprimand	Stip	DB	3/25/11	3/25/11	1.4(a), 1.7(a), 1.9(a), 1.9(c)	June 2011
15	09-132 09-133 09-134	Lance E. Erickson 25 DB Rptr 64	90-day suspension	Stip	DB	4/4/11	5/4/11	1.3, 1.4(a), 1.16(d), 8.4(a)(4)	June 2011

OSB Disposition List 2011

	Case No.	Case Name/Cite	Disposition	CC/ Stip	S Ct/ DB	Date of Action	Effective Date	DRs ORS	Bulletin Summary
16	10-64	Anthony Robert Lopez, Jr. 350 Or 192, 252 P3d 312	BR 3.5 reciprocal discipline 9-month suspension	CC	S Ct	4/7/11	6/6/11	1.1, 1.4(a), 1.4(b), 1.5, 1.15-1(d), 7.1(a)(2), 8.4(a)(4)	July 2011
17	08-118 08-119 08-120 08-156 08-157 09-27 09-70 09-71 09-88 09-89	John H. Oh 350 Or 204, 252 P3d 325	Disbarment, with restitu- tion	CC	S Ct	4/7/11	6/6/11	1.3, 1.4(a), 1.5(a), 1.8(a), 1.15-1(c), 1.15-1(d), 1.16(d), 8.1(a)(2), 8.4(a) (3)	June 2011
18	10-131	Derrick E. McGavic SC S059280	Form B resignation	-	S Ct	4/7/11	4/7/11	3.3(a)(1), 8.4(a)(3), 8.4(a)(4)	June 2011
19	10-77	Arthur P. Klosterman 25 DB Rptr 76	Disbarment	CC	DB	2/10/11	4/13/11	5.5(a), 8.1(a)(2), 8.4(a)(3), 8.4(a)(4), ORS 9.160	June 2011
20	07-154	Randy R. Richardson 350 Or 237, 253 P3d 1029	Disbarment	CC	S Ct	4/21/11	6/20/11	1.1, 1.2(c), 1.7(a)(1), 1.7(a)(2), 8.4(a) (2), 8.4(a)(3)	July 2011
21	09-25	Jason D. Castanza 350 Or 293, 253 P3d 1057	60-day suspension	CC	S Ct	5/5/11	7/4/11	1.16(d)	July 2011
22	10-97 10-98 10-99 10-121 11-20 11-21	G. Victor Tiscornia II SC S059351	Form B resignation	-	S Ct	5/5/11	5/5/11	1.1, 1.3, 1.4(a), 1.4(b), 1.5(a), 1.151(a), 1.15-1(d), 3.1, 3.3(a)(1), 3.3(a)(4), 3.4(c), 4.4(a), 8.1(a)(2), 8.4(a)(2), 8.4(a)(3), 8.4(a)(4)	July 2011
23	10-36	Meg Reinhold SC S059091	Form B resignation	-	S Ct	5/5/11	5/5/11	1.15-1(a), 1.15-1(b), 1.15-1(c), 8.4(a) (3)	July 2011

OSB Disposition List 2011

16

OSB DISCIPLINARY COUNSEL'S OFFICE 2011 ANNUAL REPORT

	Case No.	Case Name/Cite	Disposition	CC/ Stip	S Ct/ DB	Date of Action	Effective Date	DRs ORS	Bulletin Summary
24	10-62 10-65 10-66 10-111	J. Stephan Gonzalez 25 DB Rptr 88	4-month suspension, plus BR 8.1 reinstatement	Stip	DB	5/10/11	5/10/11	1.4(a), 4.2, 8.1(a)(2)	July 2011
25	09-22	Barry E. Garley 25 DB Rptr 97	Dismissed	CC	DB	3/17/11	5/17/11	1.15-1(d), 1.15-1(e), 8.4(a)(3)	July 2011
26	09-140	Angela Stewart 25 DB Rptr 106	Reprimand	Stip	DB	5/24/11	5/24/11	1.4(a), 1.4(b), 1.7	July 2011
27	11-23	Steven B. Johnson SC S059275	BR 3.5 reciprocal discipline Disbarment	CC	S Ct	5/26/11	5/26/11	3.3(a)(1), 8.1(a)(1), 8.1(a)(2), 8.4(a)(1), 8.4(a)(3)	July 2011
28	08-29 08-116	James C. Jagger 25 DB Rptr 113	6-month suspension, plus restitution	CC	DB S Ct	12/4/10 5/26/11	8/1/11	9-101A, 1.5(a), 1.15-1(c), 1.151(d), 1.16(d), 8.1(a)(2) NG - 1.3	Aug/Sept 2011
29	09-66 10-53	Kevin T. Lafky 25 DB Rptr 134	4-month suspension	Stip	DB	5/27/11	8/27/11	1.7(a)(2), 1.8(a), 1.15-1(a), 1.151(b), 1.15-1(c)	July 2011
30	09-129	Rick Klingbeil 25 DB Rptr 142	Dismissed	CC	DB	4/11/11	6/14/11	NG - 3.3(a)(1), 8.4(a)(2), 8.4(a)(3), 8.4(a)(4),	July 2011
31	08-115	J. Mark Lawrence 350 Or 480, 256 P3d 1070	Dismissed	CC	S Ct	6/30/11		NG - 8.4(a)(4)	Aug/Sept 2011
32	09-28 09-29 09-104 09-105	David E. Groom SC S059011, 25 DB Rptr 154	180-day suspension	CC/ Stip	DB/ S Ct	6/30/11	6/30/11	1.4(a), 1.15-1(a), 1.15-1(d)	Aug/Sept 2011
33	10-100	Thomas K. Okai SC S059585	Form B resignation	-	S Ct	7/28/11	7/28/11	1.15-1(d), 1.16(d), 8.1(a)(2), 8.4(a)(2), 8.4(a)(3)	Aug/Sept 2011
34	11-24	Steven D. Bryant 25 DB Rptr 167	Reprimand	Stip	DB	8/1/11	8/1/11	1.3, 1.4(a)	Oct 2011
35	10-84	Anthony R. Lopez SC S059624	Form B resignation	-	S Ct	8/18/11	8/18/11	8.1(a)(2), 8.1(b)	Oct 2011
36	11-11	Charles Z. Edelson 25 DB Rptr 172	90-day suspension	Stip	DB	8/22/11	8/22/11	1.3, 1.4(a), 1.16(a)(1), 8.1(a)(2)	Nov 2011

OSB Disposition List 2011

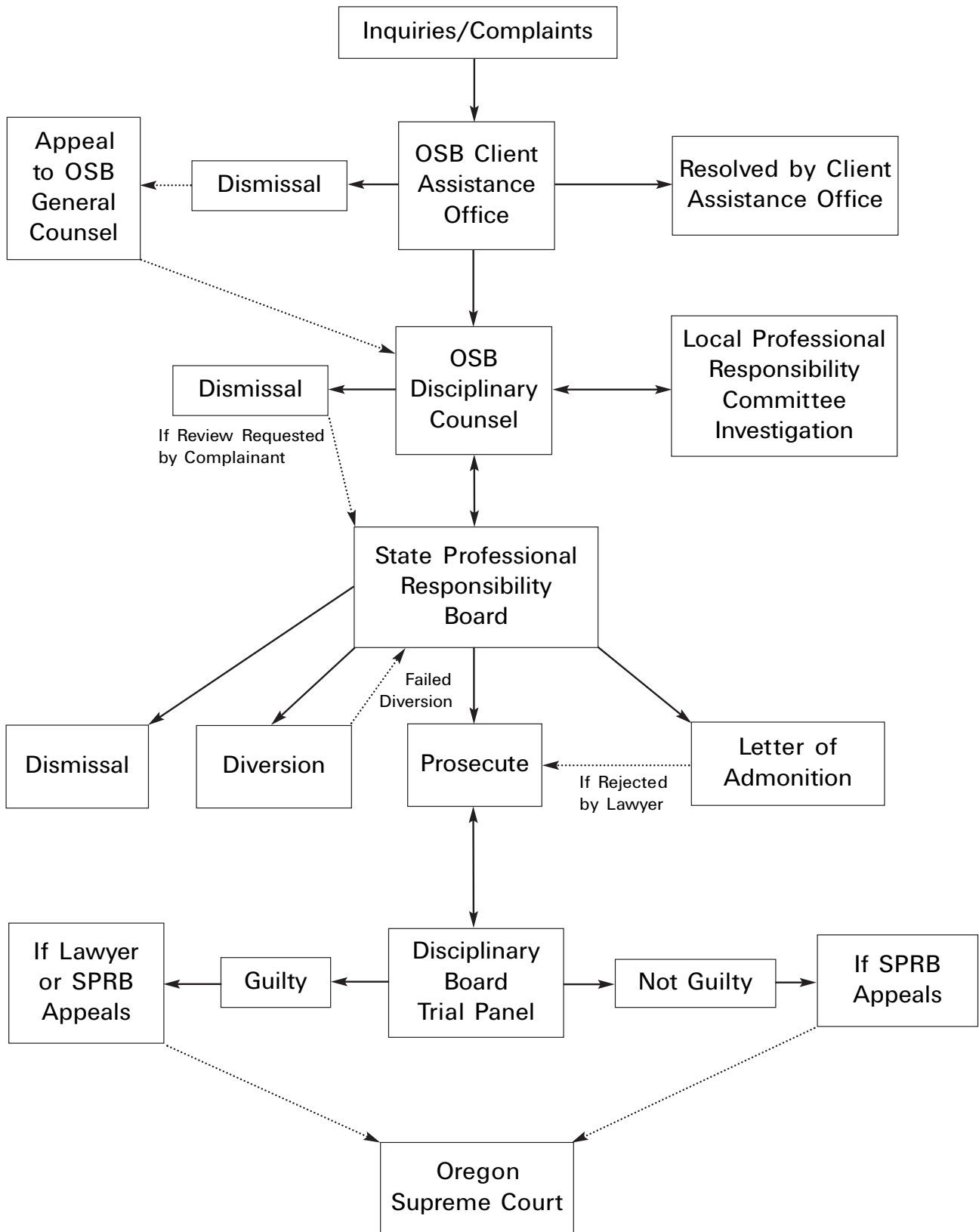
OSB DISCIPLINARY COUNSEL'S OFFICE 2011 ANNUAL REPORT

	Case No.	Case Name/Cite	Disposition	CC/ Stip	S Ct/ DB	Date of Action	Effective Date	DRs ORS	Bulletin Summary
37	10-133	Thomas K. Ono 25 DB Rptr 180	Reprimand	Stip	DB	8/25/11	8/25/11	1.15-2(m), 8.1(a)(2)	Oct 2011
38	11-16	Rand E. Overton 25 DB Rptr 184	60-day suspension	Stip	DB	8/25/11	8/25/11	8.4(a)(2), ORS 9.527(2)	Nov 2011
39	10-70	Amy L. McCaffrey 25 DB Rptr 190	60-day suspension	Stip	DB	8/25/11	9/4/11	1.3, 1.4(a), 1.4(b), 1.5(a), 1.16(a)(2), 1.16(d), 8.4(a)(3)	Oct 2011
40	09-80	Timothy E. Nielson 25 DB Rptr 196	120-day suspension	CC	DB	6/24/11	8/30/11	1.15-2(m), 8.1(a)(2)	Nov 2011
41	11-65	Brent C. Foster 25 DB Rptr 201	30-day suspension	Stip	DB	9/2/11	9/3/11	8.4(a)(3)	Nov 2011
42	09-107	Roger L. Clark 25 DB Rptr 207	Reprimand	CC	DB	7/7/11	9/7/11	9-101C3, 1.7(a) NG - 1.9(c)(1)	Nov 2011
43	11-76	Edgar J. Steele SC S059625	BR 3.4 suspension	CC	S Ct	9/16/11	9/16/11	8.4(a)(2), ORS 9.527(2)	No
44	11-87	Ryan Robert Corbridge	Diversion	-	SPRB	8/12/11	10/1/11	1.15-1(a), 1.15-1(c)	No
45	11-50	Franco A. Lucchin	Diversion	-	SPRB	8/12/11	9/17/11	4.3	No
46	S059555	Justin Robert Steffen 351 Or 106, 261 P3d 1254	Admission denied	CC	S Ct	9/22/11	9/22/11	ORS 9.220(2)	Dec 2011
47	09-127	James Dodge 25 DB Rptr 218	90-day suspension	Stip	DB	9/27/11	12/1/11	1.3, 1.4(a)	Dec 2011
48	10-134 10-135	Michael D. Long	Diversion	-	SPRB	10/14/11	10/14/11	1.4(a), 1.15-1(c), 1.15-1(d), 1.16(d), 3.4(c), 8.1(a)(2), 8.4(a)(4)	No
49	11-83	Thomas P. McElroy 25 DB Rptr 224	Reprimand	Stip	DB	10/18/11	10/18/11	1.15-1(a), 1.15-1(c)	Dec 2011
50	10-132	Theodora H. Lenihan 25 DB Rptr 229	60-day suspension	Stip	DB	10/25/11	10/25/11	1.15-2(m), 8.1(a)(2)	Dec 2011
51	11-10	J. Kevin Hunt 25 DB Rptr 233	Reprimand	Stip	DB	11/1/11	11/1/11	1.4(a) , 1.4(b)	Dec 2011

OSB Disposition List 2011

	Case No.	Case Name/Cite	Disposition	CC/ Stip	S Ct/ DB	Date of Action	Effective Date	DRs ORS	Bulletin Summary
52	11-59	C. Fredrick Burt 25 DB Rptr 238	Reprimand	Stip	DB	12/5/11	12/5/11	8.1(a)(2)	January 2012
53	11-78	Mary J. Grimes 25 DB Rptr 242	Reprimand	Stip	DB	12/14/11	12/14/11	1.5(a), 1.15-1(a), 1.15-1(c)	Feb/Mar 2012
54	09-95 09-96	William E. Carl SC S058149, 25 DB Rptr 248	Probation revoked – 335-day suspension	Stip	S Ct	12/15/11	12/15/11	8.4(a)(2), ORS 9.527(2)	No
55	10-116 10-117 10-118 10-119	Robert D. Dames, Jr. SC S059850	Form B resignation	–	S Ct	12/15/11	12/15/11	1.1, 1.2(a), 1.3, 1.4(a), 1.4(b), 1.151(c), 1.15-1(d), 1.16(d), 3.3(a)(1), 8.1(a)(2), 8.4(a)(2), 8.4(a)(3), 8.4(a) (4)	Feb/Mar 2012
56	11-72	Gary F. Deal 25 DB Rptr 251	Reprimand	Stip	DB	12/19/11	12/19/11	1.4(a)	April 2012
57	11-48	Justin E. Throne 25 DB Rptr 255	30-day suspension	Stip	DB	12/22/11	12/29/11	1.4(a), 1.15-1(d)	Feb/Mar 2012
58	11-104	Sharon T. Oberst DeFala SC S059822	BR 3.5 reciprocal dis- cipline – no discipline imposed	CC	S Ct	12/29/11	12/29/11	Conn. RPC 1.5(a)	No
59	10-144	Robert E. Hill 25 DB Rptr 260	8-month suspension	CC	DB	10/19/11	1/4/12	3.4(c), 3.5(d), 4.2, 5.5(a), 8.4(a)(4), ORS 9.160	Feb/Mar 2012

OREGON STATE BAR DISCIPLINARY PROCESS



APPENDIX D



MEMORANDUM

TO: Oregon State Bar (OSB) Board of Governors and Sylvia Stevens, OSB Executive Director

FROM: Hon. Adrienne Nelson, Marilyn Harbur, Christine Meadows and Ben Eder

SUBJECT: 2012 Midyear Meeting of the American Bar Association and Meeting of the House of Delegates

DATE: March 2, 2012

REPORT ON THE ABA MIDYEAR MEETING

The 73rd Midyear Meeting of the American Bar Association (the “ABA”) was held February 2-6, 2012 at the Sheraton New Orleans Hotel in New Orleans, Louisiana. Wide varieties of programs were sponsored by committees, sections, divisions, and affiliated organizations. The House of Delegates met for one day. The Nominating Committee also met.

The Nominating Committee sponsored a “Meet the Candidates” Forum on Sunday, February 5, 2012. The following candidates seeking nomination at the 2013 Midyear Meeting gave speeches to the Nominating Committee and to the members of the Association present: Timothy L. Bertschy of Illinois and G. Nicholas Casey of West Virginia, candidates for Treasurer; Mary L. Smith of Illinois, Mary T. Torres of New Mexico and Pauline A. Weaver of California, candidates for Secretary; and William C. Hubbard of South Carolina, candidate for President-Elect.

THE HOUSE OF DELEGATES

The House of Delegates of the American Bar Association (the “House”) met on Monday, February 6, 2012, Linda A. Klein of Georgia, presided as Chair of the House. The New Orleans Fire Department presented the colors. The [invocation](#) for the House was delivered by The Honorable Bernette Joshua Johnson, Associate Justice of the Louisiana Supreme Court. Laura V. Farber of California, Chair of the House Committee on Credentials and Admissions, welcomed the new members of the House and moved that the signed roster be approved as the permanent roster for this meeting of the House. The motion was **approved**.

Chair Klein recognized all those lawyers who had served in the House of Delegates for more than 25 years. The Honorable Lawrence Walsh of Oklahoma, former President of the Association from 1975-1976, was recognized on the occasion of his 100th birthday.

Deceased members of the House were named by the Secretary of the Association, Hon. Cara Lee T. Neville of Minnesota, and were remembered by a moment of silence. Chair Klein recognized Michael H. Reed of Pennsylvania on a point of personal privilege to speak about the passing of Jerome J. Shestack, former ABA President and member of the Pennsylvania delegation. Marna S. Tucker of the District of Columbia was recognized to speak about the passing of David B. Isbell, member of the District of Columbia delegation. Robert L. Weinberg of the District of Columbia was recognized to speak about the passing of Timothy J. May, former member of the District of Columbia delegation.

Palmer Gene Vance II of Kentucky, Chair of the Committee on Rules and Calendar, provided a report on the Final Calendar for the House, including recently filed reports. He moved to consider the late-filed reports, adopt the final calendar and approve the list of individuals who sought privileges of the floor. All three motions were **approved**. Mr. Vance noted that the deadline for submission of Resolutions with Reports for the 2012 Annual Meeting is Tuesday, May 8, 2012, while the deadline for Informational Reports is Friday, June 1, 2012. He also referred to the consent calendar, noting the deadline for removing an item from the consent calendar. Later in the day, Mr. Vance moved the items remaining on the consent calendar. The motion was **approved**.

For more details of the House meeting, see the following two-part report of the House session. The first part of the report provides a synopsis of the speeches and reports made to the House. The second part provides a summary of the action on the resolutions presented to the House.

I. SPEECHES AND REPORTS MADE TO THE HOUSE OF DELEGATES

[Welcome by the Mayor of New Orleans](#)

The Honorable Mitchell J. Landrieu, Mayor of New Orleans welcomed the House, sharing that it has been his great honor as an executive to watch the law as it lives. He reminded delegates that lawyers are the protectors of liberty, freedom, and justice. Lawyers understand the tension recognized by our founding fathers that where there is a right, there is a corresponding responsibility. Mayor Landrieu stated that the future of America lies in finding the right balance between the tension of rights and responsibilities.

Mayor Landrieu thanked the members of the House for coming to New Orleans. He told delegates that they are standing in the middle of a great American success story because the city has suffered some catastrophic disasters. New Orleans suffered dramatically from a loss of tourism after 9/11, Hurricanes Katrina and Rita, as well as others, the national recession, and the BP oil spill. Mayor Landrieu stated that the people of New Orleans have demonstrated resilience. He pointed to the new Superdome, as a symbol of resurrection and redemption. He touted our country as the greatest in the world, stating that we are strong, fast, and will continue to lead the world but that we can always strive to do better. He urged lawyers to speak to the nation to

help us get back to the proper balance between rights and responsibilities.

Statement by the Chair of the House

Linda A. Klein of Georgia, Chair of the House, welcomed the delegates in the House and recognized members of the various House committees. She announced that key speeches and debates would be publicized and that the House Committee on Technology and Communications would be reporting on the proceedings of the House via Twitter @ ABAhod.

Chair Klein announced that complimentary copies of the Judges' Journal from the Judicial Division were available. She urged delegates to review the article from President Robinson on the funding crisis of state courts.

She recognized the Committee on Rules and Calendar and reminded members where they could find the House Rules of Procedure. Chair Klein introduced the Tellers Committee and reviewed procedures for speaking.

Chair Klein announced that at the 2012 Annual Meeting, the House will elect one member to the Committee on Scope and Correlation of Work. The position will be a five-year term. She encouraged those interested in the position to contact members of the Scope Nominating Committee and submit an application by March 16, 2012.

Chair Klein emphasized the value of ABA membership and encouraged House members to ask all of the lawyers in their firms to join and participate in the ABA's work. She noted that this year's membership campaign is Rewards for Referrals.

Chair Klein noted that the appointments process for President-Elect Bellows is currently underway.

She explained that the Fund for Justice and Education (FJE) is the Association's charitable arm and encouraged members of the House to continue to financially support FJE programs. She asked members to consider making a donation to the ABA Legal Opportunity Scholarship Fund, which is one of the FJE programs.

Chair Klein discussed the obligations and responsibilities of House members to take legislative priorities to lawmakers in Washington, D.C. She asked each delegate to be part of the Grassroots Action Team and attend ABA Day on April 17-19, 2012 in Washington, D.C. She suggested that members register early, noting that there is no registration fee prior to March 19, 2012.

At the conclusion of the meeting, Chair Klein thanked the members of the House committees, the staff supporting the House committees, and the Committee on Rules and Calendar.

Statement by the Secretary

Hon. Cara Lee T. Neville of Minnesota, Secretary of the Association, moved approval of the House of Delegates Summary of Action from the 2011 Annual Meeting, which was **approved** by the House. On behalf of the Board of Governors, Secretary

Neville presented and referred the House to Report Nos. 177, 177A and 177B, the Board's Informational, Transmittal and Legislative Priorities Reports.

Statement by the ABA President

President Wm. T. (Bill) Robinson of Kentucky focused his remarks to the House on the crisis of state court underfunding. He remarked that it is the most pressing issue facing the legal profession today, as it has the potential to harm clients, threaten our system of justice, and slow the nation's economic recovery. After praising Past President Zack for his foresight in creating the Task Force on the Preservation of the Justice System, President Robinson reported that the Co-Chairs, Theodore Olson and David Boies, had agreed to continue in their leadership roles for another year.

Emphasizing the magnitude of the problem, President Robinson explained that states have reduced their court budgets, suspended the filling of clerk vacancies, reduced staff, cut the courthouse operating hours. Most states devote less than three percent of their operating budget to its judiciary, and no state contributes more than four percent of its operating budget to its judiciary, even though the judiciary is one of the three co-equal branches of government. We need to educate the public, business leaders, and legislators about this problem. To that end, President Robinson unveiled a [video](#) that has been created about the crisis of state court underfunding. He reported that the ABA has placed a steady stream of editorials in newspapers across the country, has sent information about this problem to state and local bar leaders, and has created an online resource on our website. The response has been encouraging and has led to the development of partnerships between the ABA and business/civic associations, such as the U.S Chamber of Commerce, the Association of Corporate Counsel, and the Federalist Society.

President Robinson told members of the House that the Association will continue to pursue this cause under the leadership of President-Elect Bellows and President-Elect Nominee Silkenat. He encouraged delegates to participate in Law Day 2012 where the theme will be "No Courts, No Justice, No Freedom." The goal for Law Day is to have a rally or press conference on the steps of each state capital. An adequately funded and independent court system is the key to constitutional democracy, which is the key to our freedom. President Robinson concluded his remarks with the assurance that the ABA will never stop standing up and speaking out for our courts.

Statement by the Treasurer

The Treasurer, Lucian T. Pera of Tennessee, referred members of the House of Delegates to his written report. He reported that the Association's finances are sound. The ABA received a clean audit for Fiscal Year 2011, after a smooth transition to new auditors. Mr. Pera discussed the downward trend in dues revenue but explained that the leadership and staff have been working hard to reverse this trend. Despite some growth in membership, Mr. Pera reported that the current projection is that dues revenue will be down slightly this year. With regard to non-dues revenue, Mr. Pera reported some growth.

Looking ahead, the Finance Committee of the Board of Governors recently instructed the financial services leadership to budget for next year with the expectation that revenue will remain approximately the same as this year. As a result, the budget for Fiscal Year 2013 is going to be tight. The financial staff and volunteer financial leadership have also been instructed by the Board's Finance Committee to prepare a coherent and sustainable plan of revenue and expenses for the next two to five years. Lastly, Mr. Pera reported that the building in D.C. sold in December 2011 with net sale proceeds of \$47,000,000.00 and that the Board of Governors designated the establishment of a reserve to help defray certain real estate occupancy costs in D.C.

Statement by the Executive Director

Jack L. Rives of Illinois, Executive Director and Chief Operating Officer of the ABA, reported on recent Association developments and progress. He noted that this year's mid-year meeting broke attendance records and he emphasized the importance of membership to the Association. A decline in membership began five years ago and a loss of 10,000 members was forecast for Fiscal Year 2011. In fact, though, the Association gained 5,000 members last year. Mr. Rives expressed his confidence that our membership will continue to grow but cautioned that we must show the value of membership. He highlighted the new Premier CLE programming that is offered as a members-only benefit. Staff is working on a new "Email Preference Center" by which members may selectively receive emails, limited as desired by sender or content. Mr. Rives commended the work of the Standing Committee on Membership, and he spoke of the new member-get-a-member program, Rewards for Referrals. He encouraged members of the House to tell other lawyers, including law firms, about the value of the ABA.

Mr. Rives noted that we have to prioritize how we spend money. To that end, he reported that our new budgeting process is working well. Another significant development has been the sale of the building in D.C. Mr. Rives reported that we are in the final stages of finalizing a lease for new space in D.C.

Mr. Rives observed that our "new" website was launched just one year ago, on February 7, 2011, and he spoke of continuing improvements to the website. He said we are looking to increase the amount of online advertising revenue. He also reported that the Association's business continuity plan is now undergoing a certification process. The certification process is expected to be complete by June, and the ABA will be the first large association to be certified.

Report of the Nominating Committee

The Nominating Committee met on Sunday, February 5, 2012. On behalf of the committee, Robert T. Gonzales of Maryland, Chair of the Steering Committee of the Nominating Committee, reported on the following nominations for the terms indicated:

MEMBERS OF THE BOARD OF GOVERNORS FOR THE 2012-2015 TERM

District Members

District 3: Thomas R. Curtin of New Jersey
District 5: William T. Coplin, Jr. of Alabama
District 9: John S. Skilton of Wisconsin
District 14: Laura V. Farber of California
District 15: Kenneth G. Standard of New York
District 16: Timothy W. Bouch of South Carolina
District 17: Paul T. Moxley of Utah

Section Members-at-Large

Section of Family Law

Timothy B. Walker of Colorado

Section of Taxation

Kenneth W. Gideon of the District of Columbia

Minority Member-at-Large

Michael E. Flowers of Ohio

Judicial Member-at-Large

Jodi B. Levine of Oklahoma

Young Lawyer Member-at-Large

William Ferreira of the District of Columbia

OFFICERS OF THE ASSOCIATION

Chair of the House of Delegates for 2012-2014

Robert M. Carlson of Montana

President-Elect for 2012-2013

James R. Silkenat of New York

Remarks by President-Elect Nominee

In his remarks to the House, James R. Silkenat of New York, President-Elect Nominee, conveyed his gratitude to the Nominating Committee and his hopes for the ABA for the future. He acknowledged that our justice system is facing difficult issues, such as unacceptable cuts in state court funding and the evolution of legal education.

He noted that the ABA is working to increase access to justice for all Americans and to make the ABA the national and international voice of the legal profession. He emphasized that he would welcome ideas, advice, and input from members of the Association concerning ABA priorities. He urged the Association to pursue the work that it has to do in order to make the Association the proud champion of the rule of law that its members need it to be.

Remarks on Commission on Ethics 20/20

Past President Carolyn B. Lamm gave a brief report on the Commission of Ethics 20/20. After providing an overview of the Commission, Past President Lamm explained that the process used by the Commission has been open, transparent, global, and collaborative. The Commission's outreach has included early release of draft proposals, receipt of hundreds of comments, public hearings, and presentations to ABA entities, state, local and international bar associations.

The Commission plans to present its proposals to the House of Delegates in two phases – August 2012 and February 2013. The proposals in August 2012 will address technology as it relates to confidentiality and marketing, outsourcing, and interstate mobility issues, including admissions in new jurisdictions and conflict screening for laterals. The proposals in February 2013 may address conflicts and related choice of law issues, alternative practice structures, including choice of law issues, and inbound foreign lawyers. Past President Lamm stated that the Commission has not yet taken a position on these issues and will do so in view of the comments it receives. She noted that the Commission has previously rejected proposals to amend the model rules to permit multidisciplinary practice, publicly traded law firms or to allow outside non-lawyer ownership and investment in law firms.

Remarks on the "State of the State Courts"

The Honorable Eric T. Washington, President of Conference of Chief Justices, reported that the partnership between the Conference and the ABA has grown stronger, gained momentum, and is making a difference. As an example of the partnership, he referred to the development of standards for language access in the courts to provide equal access to justice for persons with limited English. He wholeheartedly endorsed Resolution 113 and called for its immediate passage.

In addition, Judge Washington explained that a common bond between the Conference and the ABA is the protection of judicial independence. A recent threat to judicial independence has been the chronic underfunding of courts. Under the leadership of President Robinson and Past President Zack, the ABA has put the severity of the court funding crisis in the headlines. Judge Washington emphasized the importance of the rule of law in our courts. Protecting the rule of law requires more than just money; it requires an understanding of the proper role of the courts. Yet the courts' role in our democracy is misunderstood. Both the Conference and the ABA have been working to develop innovative civics education programs. In closing, Judge Washington thanked the members of the House for their work in promoting the fair administration of justice and preservation of American exceptionalism through the protection of the courts and the rule of law.

Report of House Committee on Resolution on Impact Review

Christina Plum of Wisconsin, member of the House Committee on Resolution and Impact Review gave a brief report on archiving and the process used to archive policies.

Committee on Issues of Concern Presentation

The Committee on Issues of Concern to the Legal Profession sponsored a presentation regarding legal education. Dean John F. O'Brien, Chair of the Section of Legal Education and Admissions to the Bar, explained that the Section's mission is to ensure that the system of accrediting law schools is fair and effective and that members of the bar are qualified to practice. He gave an overview of the council and the standards applied by the council. The standard pertaining to employment data was recently tightened to address the issues of accuracy of the data that have arisen, and the Section will continue to work to make sure that law schools are publishing accurate employment information. He reported that the Section has been sued by a school in Tennessee that was not accredited and that the case remains in litigation. Without commenting on the merits of the case, Dean O'Brien emphasized the importance of keeping the gold standard in the accreditation process.

II. RESOLUTIONS VOTED ON BY THE HOUSE

A brief summary of the action taken on resolutions brought before the House follows. The resolutions are categorized by topic areas and the number of the resolution is noted in brackets.

BAR ADMISSIONS

[108] On behalf of the Commission on Women in the Profession, Honorable Cara Lee T. Neville of Minnesota, Secretary of the Association moved and Honorable Erin Masson Wirth of the District of Columbia presented Revised Resolution 108 urging state and territorial bar admission authorities to adopt rules, regulations and procedures that accommodate the unique needs of military spouse attorneys, who move frequently in support of the nation's defense. Estelle H. Rogers of the District of Columbia spoke in favor of the resolution. The resolution was **approved as revised**.

BAR ASSOCIATIONS

[10A] On behalf of the Bar Association of Puerto Rico, Carlos A. Rodriguez-Vidal of Puerto Rico moved Resolution 10A urging the highest courts or legislative bodies of all states, territories and tribes charged with the administration of justice, admission to the bar, and regulation of the legal profession, to respect the organized bar's ability and right to function independently and express its views freely. The resolution was **approved**.

CLIENT PROTECTION

[105] On behalf of the Standing Committee on Client Protection, Janet Green Marbley of Ohio moved Revised Resolution 105 amending the *Model Rules for Fee Arbitration*, dated February 2012, to refine current practices in order to increase productivity, efficiency and fairness. The resolution was **approved as revised**.

COURTS/JUDGES

[10B] On behalf of the Massachusetts Bar Association, Richard B. Campbell of Massachusetts moved Resolution 10B supporting the consent jurisdiction of the United States magistrate judges as being consistent with and not violative of Article III of the United States Constitution. The resolution was **approved**.

[101G] On behalf of the Criminal Justice Section, Cynthia Orr of Texas moved Resolution 101G urging federal, state and territorial courts to adopt jury instructions which are in language understandable by jurors untrained in law and legal terms, in the penalty phase of trials in which the death penalty may be imposed and such instructions should be provided to jurors in written form. The resolution was **approved**.

[112] On behalf of the National Conference of State Trial Judges, Honorable Cara Lee T. Neville of Minnesota, Secretary of the Association moved and Honorable W. Terry Ruckriegle of Colorado presented Revised Resolution 112 amending the *Model Time Standards for State Courts*, dated February 2012, by adding a case type under the criminal category for local ordinances and by extending the length of time for the completion of the administration of estates. The resolution was **approved as revised**.

[113] On behalf of the Standing Committee on Legal Aid & Indigent Defendants, Honorable Cara Lee T. Neville of Minnesota, Secretary of the Association moved and Honorable Vanessa Ruiz presented Resolution 113 adopting the *ABA Standards for Language Access in Courts*, dated February 2012, and urging federal and state legislative and executive branches to provide adequate funding to courts and other adjudicatory tribunals to fully implement language access services. The resolution was **approved**.

CRIMINAL JUSTICE

[101A] On behalf of the Criminal Justice Section, Stephen A. Saltzburg of the District of Columbia moved Revised Resolution 101A adopting the black letter *ABA Criminal Justice Standards on Law Enforcement Access to Third Party Records*, dated February 2012, which provides a framework through which legislatures, courts acting in their supervisory capacity, and administrative agencies can balance the needs of law enforcement and the interests of privacy, freedom of expression and social participation. The resolution was **approved as revised**.

CRIMINAL JUSTICE (cont.)

[101B] On behalf of the Criminal Justice Section, Sidney Butcher of Maryland moved Resolution 101B urging governments to adopt pretrial discovery procedures requiring laboratories to produce comprehensive and comprehensible laboratory and forensic science reports for use in criminal trials that include a number of identified criteria. The resolution was **approved**.

[101C] On behalf of the Criminal Justice Section, Stephen A. Saltzburg of the District of Columbia moved Revised Resolution 101C urging judges and lawyers to consider a number of factors in determining the manner in which expert testimony should be presented to a jury and in instructing the jury in its evaluation of expert scientific testimony in criminal and delinquency proceedings. The resolution was **approved as revised**.

[101D] On behalf of the Criminal Justice Section, William N. Shepherd of Florida moved Resolution 101D urging judges and lawyers to consider potential jurors' understanding of general scientific principles, scientific principles relevant to forensic science, and preconceptions or bias with respect to forensic scientific principles in formulating jury *voir dire* questions. The resolution was **approved**.

[101E] On behalf of the Criminal Justice Section, Stephen A. Saltzburg of the District of Columbia moved Revised Resolution 101E urging the federal government to request that public housing authorities and other owners of federally subsidized rental housing reevaluate their current rules regarding admission, termination, and additions to household to ensure that, while resident safety is protected, those rules do not unfairly punish persons with criminal records. The resolution was **approved as revised**.

[101F] On behalf of the Criminal Justice Section, William N. Shepherd of Florida moved Resolution 101F supporting legislation, policies and practices that allow equal and uniform access to therapeutic courts and problem-solving sentencing alternatives, such as drug treatment and anger management counseling, regardless of the custody or detention status of the individual. The resolution was **approved**.

DISABILITY RIGHTS

[111] On behalf of the Commission on Disability Rights, Honorable Cara Lee T. Neville of Minnesota, Secretary of the Association moved and Scott C. LaBarre of Colorado presented Resolution 111 urging entities that administer a law school admission test to provide appropriate accommodations for a test taker with a disability to best ensure that the exam results reflect what the exam is designed to measure and not the test taker's disability. The resolution was **approved**.

[303] On behalf of the Tort Trial and Insurance Practice Section, Timothy W. Bouch of South Carolina moved Resolution 303 urging legislative bodies and governmental agencies to enact laws and implement policies to ensure that persons with disabilities utilizing service animals are provided access to services, programs and activities of public entities and public accommodations pursuant to the regulations implementing the Americans with Disabilities Act. The resolution was **approved**.

DOMESTIC AND SEXUAL VIOLENCE

[114] On behalf of the Commission on Domestic and Sexual Violence, Cheryl I. Niro of Illinois moved Revised Resolution 114 urging the Federal Bureau of Investigation to implement expeditiously the expanded definition of rape in the Uniform Crime Reporting Summary Reporting Program to include, regardless of gender, or presence of force, all forms of non-consensual penetration of a vagina or anus and all forms of non-consensual penetration by a sexual organ of any orifice. Stephen A. Saltzburg of the District of Columbia moved an amendment, which was **approved**. Estelle H. Rogers of the District of Columbia moved an amendment, which was **approved**. The resolution was **approved as revised and amended**.

ETHICS/PROFESSIONAL DISCIPLINE

[107] The House **approved by consent** Resolution 107 as submitted by the Standing Committee on Professional Discipline reaffirming the black letter of the *ABA Standards for Imposing Lawyer Sanctions*, as adopted February 1986 and amended February 1992, and rescinds its adoption of the Commentary thereto.

FAMILY LAW

[104] On behalf of the Section of Family Law, Marshall J. Wolf of Ohio **withdrew** Resolution 104 adopting the *ABA Model Relocation of Children Act*, dated February 2012, and urging its adoption by state, territorial, tribal and local legislative bodies.

GENERAL PRACTICE

[115] On behalf of the General Practice, Solo and Small Firm Division, Dwight L. Smith of Oklahoma moved Resolution 115 supporting and encouraging the continued efforts of solo, small firm and general practice lawyers to provide access to justice by delivery of legal services to those in need. The resolution was **approved**.

HUMAN RIGHTS

[109] On behalf of the Center for Human Rights, Michael S. Greco of Massachusetts moved Resolution 109 endorsing the United Nations "*Protect, Respect and Remedy*" Framework on Business and Human Rights and the Framework's companion *Guiding Principles for Implementing the Framework* and similar principles promulgated by the Organization for Economic Cooperation and Development, and urging governments, the private sector and the legal community to integrate them into their respective operations and practices. The resolution was **approved**.

INTELLECTUAL PROPERTY LAW

[110] On behalf of the Section of Intellectual Property Law, Donald R. Dunner of the District of Columbia moved Revised Resolution 110 supporting in principle the long-established precedent that patent infringement must be proven by a preponderance of the evidence, and the fact that a product or process accused of infringing a patent-in-suit is itself separately patented does not alter the burden of proof, or create a presumption of non-infringement. The resolution was **approved as revised**.

INTERNATIONAL LAW

[103] On behalf of the Section of International Law, Michael H. Byowitz of New York moved Revised Resolution 103 urging federal, state, territorial, tribal and local courts to consider and respect as appropriate the data protection and privacy laws of any applicable foreign sovereign, and the interests of any person who is subject to or benefits from such laws, with regard to data sought in discovery in civil litigation. Lawrence J. Fox of Pennsylvania moved an amendment. Michael H. Byowitz of New York spoke against the amendment. The amendment was defeated. Stephen P. Younger of New York spoke in favor of the resolution. Clifford E. Haines of Pennsylvania and Lawrence J. Fox of Pennsylvania spoke against the resolution. The resolution was **approved as revised by a vote of 227 to 188**.

LEGAL EDUCATION

[100] The House **approved by consent** Resolution 100 as submitted by the Standing Committee on Paralegals granting approval and reapproval to several paralegal education programs, withdrawing the approval of one program at the request of the institution, and extending the term of approval to several paralegal education programs.

[106A] The House **approved by consent** Resolution 106A as submitted by the Section of Legal Education and Admissions to the Bar concurring in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments to Standard 510 and Rules 3, 5 and 22 of the *ABA Standards and Rules of Procedure for Approval of Law Schools*, dated February 2012.

[106B] The House **approved by consent** Resolution 106B as submitted by the Section of Legal Education and Admissions to the Bar concurring in the action of the Council of the Section of Legal Education and Admissions to the Bar in making non-substantive clarifications to Standard 512 (Student Complaints) of the *ABA Standards and Rules of Procedure for Approval of Law Schools*, to which the House of Delegates previously concurred in August 2011.

[304] On behalf of the Section of Legal Education and Admissions to the Bar, Ruth V. McGregor of Arizona moved Resolution 304 concurring in the action of the Council of the Section of Legal Education and Admissions to the Bar in making non-substantive clarifications to Standard 306 (Distance Education) and Rule 20 (Major Change in the Organizational Structure of a Provisionally or Fully Approved Law School) of the *ABA Standards and Rules of Procedure for Approval of Law Schools*, to which the House of Delegates previously concurred in August 2011. The resolution was **approved**.

STATE AND LOCAL GOVERNMENT LAW

[302] On behalf of the Section of State and Local Government Law, Benjamin E. Griffith of Mississippi moved Resolution 302 supporting the principle that “private” lawyers representing governmental entities are entitled to qualified immunity from 42 U.S.C. Section 1983 claims when they are acting “under color of state law.” Robert S. Peck of the District of Columbia moved to postpone indefinitely consideration of the resolution. Robert Thomas of Hawaii, Karen J. Mathis of Colorado and J. Anthony Patterson of Montana spoke against the motion to postpone indefinitely. The motion to postpone indefinitely was **defeated**. Stephen A. Saltzburg of the District of Columbia moved an amendment, which was **approved**. The resolution was **approved as amended**.

UNIFORM ACTS

[102A] The House **approved by consent** Resolution 102A as submitted by the National Conference of Commissioners on Uniform State Laws approving the *Uniform Certificate of Title for Vessels Act*, promulgated by the National Conference of Commissioners on Uniform State Laws in 2011, as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.

[102B] On behalf of the National Conference of Commissioners on Uniform State Laws, Michael Houghton of Delaware moved Resolution 102B approving the *Uniform Electronic Legal Material Act*, promulgated by the National Conference of Commissioners on Uniform State Laws in 2011, as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein. Robert A. Stein of Minnesota and Ellen J. Flannery of the District of Columbia spoke in favor of the resolution. Michael Reed of Pennsylvania reported that the Pennsylvania delegation no longer opposes the resolution. Talbot D’Alemberte of Florida spoke against the resolution. The resolution was **approved**.

Closing Business

At the conclusion of the meeting of the House on Monday, February 6, after various thank you’s and reminders about the 2012 Chicago Annual Meeting, Chair Linda A. Klein recognized Gene Vance of Kentucky who then moved that the House adjourn *sine die*.

March 8, 2012

Jason E. Thompson
Attorney at Law
515 High Street SE
PO Box 843
Salem, OR 97308

Re: Letter of appreciation from Donald Severy

Dear Mr. Thompson:

This is a follow up of our recent telephone conversation concerning a letter the bar received regarding your recent representation of Donald Severy. It is infrequent that a client takes the time to write the bar commending a lawyer on his or her exemplary professional representation. As you can see from the enclosed copy of the letter, your client truly appreciated the professional approach you took to his case.

I hope you continue to represent your clients as you did with Mr. Severy as it reflects well not only on you but our profession in general. I have taken the liberty to see that the letter is placed in your permanent membership file and I have also asked our Executive Director to bring it to the attention of the Board of Governors at their next meeting.

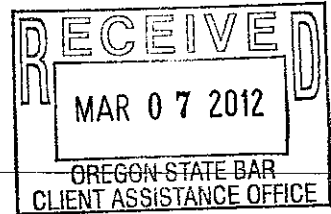
On behalf of the entire bar, thank you for your good work.

Sincerely,

Chris L. Mullmann
Assistant General Counsel
Ext. 392

CLM/kng

cc: Donald Severy
Sylvia E. Stevens, OSB Executive Director



Oregon State Bar Center
P.O. Box 231935
Tigard, OR 97281-1935

RE: Reubin

Dear Oregon State Bar,

I am writing in regards to give personal
acknowledgment and gratitude to my attorney who
represented me: Jason E. Thompson, OSB # 04301.

He is with the law firm of Fender, Coebeer, French
& Thompson, at 515 High Street, SE.

Salem, OR 97308-0843

Over the length of my incarceration I have had
experience with several attorneys dealing with
different aspects including trial, appeals, supreme
court and federal court.

Mr. Thompson has the integrity and professional
ethics and conduct most other attorneys could
only strive for. His legal briefs are filed ahead
of timetables and he devotes time and
tireless energy to prepare for court. He works

page 2.

the extra mile to educate his clients
understanding and what options are available.

My only hope is his firm recognizes the
professionalism and that Mr. Thompson has
a long and rewarding career.

My Very Best Regards,

Don Avery #6710408
2605 State Street
Aloha, OR 97310

Notwithstanding the restrictions on fee-splitting in Model Rule 1.5(e) between lawyers not in the same firm and the prohibition in Model Rule 5.4(a) against sharing legal fees with nonlawyers, the practice of lawyers' paying a nonprofit referral service a percentage of the fee earned from a referred client has generally met with approval. This is often based on the view that percentage fees are a legitimate method of helping the program generate income to defray operating costs as well as making legal services more available to the public.

See *Richards v. SSM Health Care Inc.*, 724 N.E.2d 975, 16 Law. Man. Prof. Conduct 27 (Ill. App. Ct. 2000) (lawyer's referral fee agreement providing that lawyer turn over percentage payment of fees earned to bar association is enforceable and not prohibited by policy considerations in Rules 1.5 and 5.4); Alabama Ethics Op. 1995-08 (1995) (lawyer may pay local bar association referral service percentage fee if it is used either to defray costs of operating referral service or in support of other public service programs); Arkansas Ethics Op. 95-01 (1995) (state bar association's referral service may require participating lawyer to pay percentage of fees earned by respective referrals as fee for service; however, lawyer should not charge client higher fee to account for percentage to be paid to bar association); Michigan Informal Ethics Op. RI-75 (1991) (registered not-for-profit lawyer referral service may charge lawyer 10 percent fee of any amount lawyer collects in excess of \$300, provided that lawyer does not charge client higher fee to cover payment and total fee is not excessive); Pennsylvania Ethics Op. 93-162 (1993) (percentage fee charged by county bar association may be considered "usual charge" under rule so long as fee is used for operating expenses of referral service and lawyer does not raise fee to client in order to cover percentage paid to referral service); Virginia Ethics Op. 1751, 17 Law. Man. Prof. Conduct 374 (2001) (local bar association's lawyer referral program may charge participating lawyers reasonable percentage fee).

See also *Emmons, Williams, Mires & Leech v. California State Bar*, 86 Cal. Rptr. 367 (Cal. 1967) (upholding agreement between lawyer and bar association's referral program that requires lawyer to pay one-third of fee to association); ABA Formal Ethics Op. 291 (1956) (bar association may require members of lawyer referral panel to contribute to expense of running service through "a reasonable percentage of fees collected by them" without violating former Canon 34, which stated that "[n]o division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility"); Kentucky Ethics Op. E-288 (1984) (lawyer may pay 10 percent of fees collected to state bar referral service, provided that funds are used to defray service's operating costs); Ohio Supreme Court Ethics Op. 2000-5 (2000) (online referral service in compliance with Code provisions and other regulations may charge lawyers percentage fee in addition to membership fee).

FURNISS, SHEARER & LEINWEBER

ATTORNEYS AT LAW
700 CROWN PLAZA
1500 S.W. FIRST AVENUE
PORTLAND, OREGON 97201

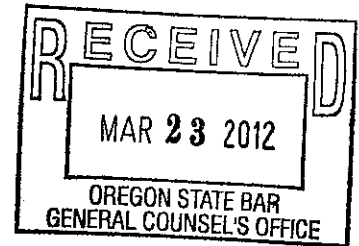
TELEPHONE (503) 243-2608
FAX (503) 323-7373

ANTHONY W. FURNISS
GLEN S. SHEARER
GREGORY J. LEINWEBER
ANNE E. FURNISS

L. M. SCHOUBOE
1920 - 1993

March 22, 2012

OSB General Counsel Administrative Assistant
16037 SW Upper Boones Ferry Rd.
P.O. Box 231935
Tigard, OR 97281-1935



RE: Referral Services

Dear General Counsel:

I have a complaint to make regarding the Oregon State Bar lawyer referral service. They have sent me an e-mail indicating that they are intending to take a percentage of fees earned from a referral of cases. We have been advised in the past (many times) that referral services' intent to take a percentage of the earned fees violate the rules against sharing fees with non-attorneys and practicing law without a license.

I am enclosing a copy of the correspondence that I received from the Oregon State Bar. You will want to look at page 2, paragraph 6.

I am sure that the lawyer referral services thinks that it can do this because it may have some attorneys on staff. However, that would mean that any legal referral service that may employ an attorney to administer things, could take a percentage of the referral fee for referring the cases. This is going to open the flood gates for referral companies.

If you feel that this is valid action of the Oregon State Bar Referral Service, please advise me how it is different from any other private organization that desires to refer cases and retain a percentage of the fee that I earn. I am copying this letter to Jeff Sapiro, Disciplinary Counsel and Director of Regulatory Services and George Wolff, Referral and Information Services Manager. If there is anyone else or another department that this letter should go to, please forward it on.

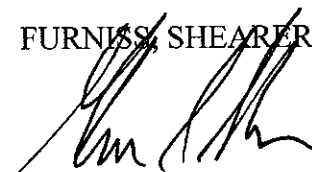
I would appreciate a proper response to this as I will be contacting other referral services if the bar gives an opinion that it is legitimate for referral service to take a percentage of earned fees.

Oregon State Bar
March 22, 2012
Page 2

I look forward to hearing from you shortly.

Very truly yours,

FURNISS, SHEARER & LEINEWEBER

A handwritten signature in black ink, appearing to read "Glen S. Shearer", is written over the firm name.

Glen S. Shearer

GSS:amk
Enclosure
cc: Jeff Sapiro
George Wolff

Glen Shearer

From: "OSB Referral and Information Services" <ris@osbar.org>
To: <glen@fslaw.com>
Sent: Friday, February 24, 2012 10:35 AM
Subject: OSB Lawyer Referral Service - Update on Upcoming Changes

The logo for the Oregon State Bar, featuring the text "Oregon State Bar" in a serif font. The word "Oregon" is in a smaller font size than "State Bar". The text is positioned to the left of a dark, textured rectangular block.

Dear Panelist:

Thank you very much for your continued participation in the Lawyer Referral Service (LRS). And, again, a special "Thank You!" to our survey respondents and focus group participants.

We are sending you this update because the Board of Governors has now finalized the programmatic changes that will go into effect July 1, 2012, and we wanted you to be among the first to have an outline of those changes. We will continue to update you as the changes take shape – the new LRS policies and procedures, for example, will be circulated to you in the near future and well in advance of the 2012-2013 Program Year.

To recap: In July, we wrote to all LRS panelists regarding the Board of Governors' decision to move forward with a percentage fees revenue model for the LRS. The background material for this decision can be accessed from the home page of the bar's website www.osbar.org by clicking on the "[Changes for the Lawyer Referral Service](#)" icon.

In October, many of you responded to our panelist survey, and during December and January panelists from a variety of practice areas and experience levels participated in 5 focus groups. This panelist feedback was crucial to the Public Service Advisory Committee and Board of Governors and had a strong hand in helping shape the changes ultimately adopted. On February 10, the Board of Governors took up the Public Service Advisory Committee recommendations and approved several programmatic changes to the LRS that will now go into effect July 1, 2012:

1. The fee for an LRS and Modest Means Program (MMP) initial consultation will remain \$35, but there will be a 30-minute time limit; regular or MMP hourly rates may apply (at the panelist's discretion) if a consultation exceeds 30 minutes.
2. The requirement under existing LRS rules that the initial consultation must be held in person will be removed. Each panelist may decide whether to offer initial consultations over the phone or by any other method acceptable to both the panelist and potential client.
3. LRS locations will be regional and based on roughly equivalent population-based "territories." Panelists will be able to register for adjacent territories or for referrals statewide. Client preferences will dictate the importance of location in the matching

criteria.

4. LRS will not add additional subject matter panels at this time.
5. Expansion of the Modest Means Program will occur after the LRS percentage fee model is in place. The expansion will occur at a measured pace with the advice and counsel of substantive law sections' executive committees.
6. A 12% remittance rate, with no threshold, will be applicable to all attorneys' fees earned and collected beyond the \$35 initial consultation fee, i.e., the \$35 initial consultation fee will not be subject to any percentage fee remittance.
7. Basic registration, including home territory and up to four areas of law will be:
 - \$50 for those admitted in Oregon for less than 3 years.
 - \$100 for those admitted in Oregon for 3 years or more.
8. Each additional geographic territory will be \$50. A statewide listing will cost \$300.
9. The \$30 fee for each additional area of law (beyond the four included in a basic registration) will remain unchanged.

In addition, LRS is in the process of implementing new software to replace our 23-year old database and effectuate the changes outlined above. We anticipate that the software will offer a web-based interface through the OSB member login page that will allow you to make changes to your profile, put temporary holds on your referrals (when you are in trial or on vacation), access and update your referral history, and automatically calculate percentage fee remittances. We are also exploring the possibility of integrating an online payment option. We are hopeful that the new software will improve your ability to interact with us and greatly enhance our ability to serve you.

Thank you, again, for your support of the Lawyer Referral Service and all of the Referral & Information Services programs. We will keep you apprised of further developments.

Warm regards,

George Wolff
Referral & Information Services Manager
gwolff@osbar.org
(503) 431-6418

Oregon State Bar | 16037 SW Upper Boones Ferry Road | Tigard, Oregon 97224

If you would like to receive your e-mails at a secondary e-mail address go to www.osbar.org/secured/login.asp and log in using your bar number and password, then click on Communication Preferences and set up a secondary e-mail address.

From: tom niebergall [mailto:mollytom@teleport.com]
Sent: Saturday, March 31, 2012 10:55 AM
To: Leone Gholston
Subject: 2012 50-Year Member Recognition Luncheon

Leone,

Many thanks for yesterday's wonderful luncheon. Molly and I had a grand time. Some folks we had not seen for 40 years or more were in attendance. Unfortunately, several of the members I was hoping would attend were not there, for any of a number of reasons. The luncheon was beautifully organized and the food and service were excellent. The chicken (sans garlic) was very delicious. Thanks for your attention to detail. The new bar president also did a good job as master of ceremonies. The exquisite plaque is already hanging on one of our walls. The luncheon was a marvelous experience; thanks so much. Thanks so much for the photograph. It is a fitting climax to a wonderful event. Again, you folks at the Oregon State Bar certainly put on a great event for all of us. Many thanks.

Tom Niebergall

From: Doug [mailto:dshep@madras.net]
Sent: Wednesday, April 18, 2012 10:04 AM
To: Leone Gholston
Subject: reunion

Dear Leone,

I want to thank you and your staff for the celebration of we fifty year members. That was about the nicest thing you people could ever have done. The lunch, the speaker, the books and photo and all were simply outstanding for us old guys and gal. Very much appreciated for all your hard work and to be long remembered.

Sincerely, Doug Shepard

Welcome to the crucible

By Jordan Furlong

Lawyers used to have the Midas Touch: whatever we did, however we did it, we were profitable, because no one else could do it (and no one else was allowed to try). From now on, lawyers' and law firms' profitability hinges completely on *what* we choose to do and *how* we choose to do it.

1. The rise of the online disruptors

When Rocket Lawyer received \$18.5 million in venture capital last summer, heads began spinning throughout the legal profession. Rocket Lawyer provides legal forms that online users can fill out, store and share on the Web; for \$20 a month, customers can also have their documents reviewed by a real lawyer and get legal advice at no additional cost. Rocket Lawyer boasts \$10 million in annual revenue and 70,000 visitors a day.

The \$18.5 million came courtesy of a group of investors that included Google Ventures, which accounted for much of the fuss. It was instructive to read the press release and note the terms used by Google Ventures in describing their interest in Rocket Lawyer: "ease," "accessibility," "affordability," "user-driven," "user experience." These terms have nothing to do with lawyer intelligence or product quality and everything to do with the manner in which clients find and access legal services. Convenience is the new battleground, a fight for which law firms still haven't even shown up.

Google Ventures' first foray into the legal sphere actually came last January, when it invested in Law Pivot, a legal Q&A website that allows companies (especially startups) to receive low-priced, crowd-sourced legal answers from a roster of private lawyers. Similar to Rocket Lawyer, LawPivot gives lawyers a platform to market their legal services by sharing advice and engaging in discussions. Once again, look at the press release: "inefficiencies" and "disruption" were the key terms used.

Now, here's the thing: Rocket Lawyer and Law Pivot are doing nothing that even an average law firm couldn't have done already. The former has created a client-facing document assembly system that provides channels to licensed lawyers who can review the completed documents and answer more complex questions. The latter offers lawyers the opportunity to engage directly with potential clients and demonstrate their expertise through the dissemination of their real-world knowledge. Law firms have had the capacity to create these services for years, but they've been unwilling or unable to risk changing the nature of their business.

These companies (and others like them) have recognized that the production of legal documents and the provision of legal insight have become so systematized that their market value has fallen below law firms' profitability thresholds. So they have converted the legal advice process and legal document assembly system into marketing and business development opportunities for lawyers. They're becoming platforms through which lawyers market their expertise, reach clients, and deliver products and services to them. And when you think about it, that's all a law firm really is — a reliable, high-profile platform upon which lawyers and clients find each other and through which they conduct their business.

But there's one key difference. While law firms were built along old legal market value lines — authority, status, strength, power — these emerging companies are built along new legal market lines: speed, affordability, timeliness, ease of use. “Expertise” and “knowledge” and “authority” are now so widely diffused in the legal marketplace that they're no longer differentiators. Clients are coming to feel (correctly, in my view) that they don't need to choose between a provider who's accessible and a provider who's authoritative.

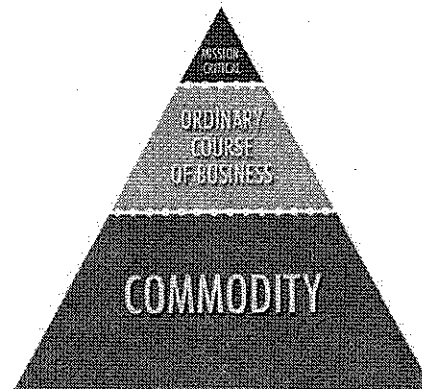
The legal marketplace is finally recognizing and responding to the inefficiencies lawyers have created in the delivery of legal services. Interestingly, so are some law firms.

2. The rise of the super-boutique

The figure below contains a rough approximation of what the market for legal services now looks like. “Mission-critical,” bet-the-company work is at the top, “ordinary course of business” legal tasks are in the middle, and low-value standardized “commodity” work sits at the bottom. I'd estimate that the top tier is shrinking to about 10% of the total market, while the bottom layer is growing to encompass more than half of what clients need. Clients would like some indication that lawyers recognize this reality, but most still find their firms frustratingly amorphous and undifferentiated in their offerings.

London-based global firm CMS Cameron McKenna looks to be a rare exception. Last summer, the firm announced that it was essentially outsourcing its entire immigration law department to an equally global but fully specialized immigration law firm, Fragomen, Del Rey, Bernsen and Loewy. It's important to understand: Camerons isn't sending some low-value aspects of immigration work to Fragomen. They're sending *everything*, lawyers and all. Camerons will no longer provide immigration law services within its offices — but it will still provide those services to its clients, using Fragomen as its preferred supplier.

This is a major mutation in the evolution of the full-service law firm. Camerons hasn't abandoned immigration law altogether; it has simply recognized that this work was neither strategically nor financially significant enough to remain a core activity of the firm, yet was still important to the firm's key clients. But Fragomen might be even more interesting. It looks like an example of a fascinating new development: the rise of the super-boutique.



Fixed-fee work constitutes *ninety-five percent* of Fragomen's business. That is a staggering number for a firm with 250 lawyers that handles 50,000 immigration transactions annually. You can charge fixed fees when you only practice one type of law and come to know the area intimately; you *have* to charge fixed fees when your margins are so thin that you need to know exactly how much it costs you to carry out a given task. That's the world Fragomen lives in, and it has adapted itself accordingly. It's a world foreign to most law firms, which like to do everything and charge it all at cost-plus. But it's a world that's growing.

Take a look at insurance defence mega-firms in the UK. The upcoming merger between Clyde & Co. and Barlow Lyde & Gilbert will produce a firm with 280 partners and revenue just south of half a billion dollars. Think about that for a moment: \$500 million a year largely from insurance defence work, possibly the least remunerative and most demanding corporate legal practice area in existence. And that merger simply lets the new firm tackle rivals that are about to grow in a hurry: Irwin Mitchell (soon to convert to an ABS), Parabis Law (recently purchased by an outside investor) and Minster Law (with aspirations in this area).

This is a change in how legal services are being delivered, a change driven by the volume markets squeezing profit margins and forcing participants to play a different game. Consolidation can only continue in this sector for a limited time before it starts to seep into other key legal areas. Littler Mendelson, for example, has 750 lawyers in 50 offices across the U.S. and annual revenue of \$381 million, and the only thing it does is labour and employment law. Like other super-boutiques, Littler is a sharp, savvy, streamlined and systematized firm that knows how to maximize the value of its resources.

Firms like Littler, Clydes and Fragomen are responding to the realities of a legal marketplace that demands better and more cost-effective ways of producing legal work. That's why Camerons' move is so significant: it has created a structured relationship with a super-boutique, increasing its effective reach and capacity while simultaneously reducing its size and spend. That's a pretty neat trick, one that other firms might find hard to duplicate. As standardized work grows in volume, more law firms are stepping up to take that work and profit from it through a relentless focus on volume, specialization and systematization.

Go back to the pyramid: these firms are eventually going to dominate that third tier of client work (or at least, that percentage of the work that doesn't leave the legal profession altogether). The first tier, mission-critical work, is shrinking, and the very top law firms have already locked in on it. What's left for the vast majority of non-specialist law firms? What do they get? In my opinion, they get an existential crisis.

3. Goodbye to all that

I spent three days last fall at the annual meeting of the International Legal Technology Association. What I saw and heard there about document assembly, contract standardization, reverse auctions, KM advances, outsourcing services and a host of other developments is that the storm we've been warning about for the past few years is finally breaking. Tired of waiting for law firms to lead change, the market has itself developed tools and processes to provide the certainty, efficiency, transparency and cost-effectiveness that legal services have long needed. Clients love these innovations and are telling law firms to use them, even (and especially) where they conflict with firms' traditional ways of working and making money. And firms are obeying, with the vague but dawning realization that they're now being told by their clients how to do their jobs. Law firms are losing control of the legal marketplace.

Law firms used to dictate the terms upon which legal services were performed — work assignment, work flow, scheduling, timeliness, format, delivery, billing, pricing, and many others — because buyers had no other options. Those options have now emerged, powered by technology and driven forward by market demand.

- They promise legal documents not just faster and cheaper but also, incredibly, better, in terms of quality and reliability.
- They promise greater efficiency and transparency in the previously laborious RFP-driven process of choosing and pricing law firms.
- They promise real-time integration of world-class legal knowledge into the legal work production process.
- They promise alignment of a legal task's value with its performer's skills, qualification and location.
- And at ILTA, they demonstrated delivery on all these promises and more.

Law firms could have led the way in developing these innovations, but failed to do so. Now, they're drifting to the periphery of the marketplace, trading places with technology-driven outsiders whose own importance increases daily. Law firms, whether they realize it or not, are settling into a new role: sources of valued specialists called upon to perform certain tasks within a larger legal system that they did not create and that they do not control.

New providers and new technologies are not going to replace lawyers. But they are going to marginalize lawyers and render law firms mostly irrelevant. Lawyers are smart, knowledgeable, creative and trustworthy professionals who, unfortunately, suffer from poor business acumen, terrible management skills, wildly disproportionate aversion to risk, outsized revenue expectations, and a business model about 25 years out of date. The market won't abandon them — they have unique and sometimes extraordinarily valuable skills and characteristics — but it will find the best use for them: expert specialists with limited influence over the larger process.

Law firms are decentralized partnerships that charge on a cost-plus basis, retain virtually no earnings from year to year, and pray every morning that their best assets will walk back through the same doors they exited the previous night. That's not good enough. The new legal market demands systematization, collaboration, transparency, alignment, efficiency and cost-effectiveness within and among its providers. A few law firms have already adapted these traits, and some more will follow. Some law firms are so powerful they won't have to change. The rest are in serious danger.

Let me conclude this article with five questions lawyers and law firms must answer in order to remain relevant in the unfolding marketplace.

What: Identify your inventory — what you sell to clients — and determine how much of it involves the application of lawyers' high-value performance or analytical skills. Assume that the price for everything else you sell will plummet, and that you'll be able to stay in these markets only if you adopt various high-efficiency systems. Absorb the reality that you will need many fewer people within your law firm to be competitive.

How: Study the means by which you accomplish the work you sell to clients and determine whether and to what extent you can adopt new technologies and processes to be more effective in terms of quality, relevance and responsiveness. Don't think in terms of adapting your current

approaches; think in terms of starting from scratch. Use your creativity and ask: How *should* we go about doing what we do?

Who: Identify every person who receives a salary or a draw from your firm and ask: what is this person's primary contribution to the firm? Good answers will include proven business development skills, outstanding professional expertise, and amazing management abilities. These are your irreplaceables, and you're probably underpaying them. Everyone else will require a clear demonstration of why they occupy a place in your office.

Where: In association with the previous entry, determine the best physical location for the services you provide. We are past the time in which a law firm's four walls contain all or almost all of its functionality. Some services might best be performed in a suburban location, others in a home office, others in a low-cost center elsewhere in the country or in the world, and others from a server farm.

Why: This might be the most important question of all: what is the point of your law firm? I don't mean generating profits for partners; I mean your marketplace purpose. *Why do you exist?* What specific need for what specific audience do you meet? If you disappeared tomorrow, who would find the loss irreplaceable? Believe me when I say: The market is asking you that question right now.

We've begun crossing over from the old legal marketplace to the new one. Lawyers still have outstanding value to offer in certain quarters, but we need to concentrate our market offerings around that value, and we need better platforms for our services than traditional law firms provide. We need to understand what technology is doing to legal services and either adopt that technology, adapt to the client expectations it's creating, or leave. We need to understand our role in this new market and appreciate that it does not lie at the center of the legal universe. We've missed our chance to lead the new market, but we can still flourish inside it. It's up to us.

Welcome to the crucible.

Jordan Furlong addresses law firms and legal organizations throughout North America on how to survive and profit from the extraordinary changes underway in the legal services marketplace. He is a partner with Edge International, a senior consultant with Stem Legal, and a blogger at Law21: Dispatches from a Legal Profession on the Brink (<http://law21.ca>), honoured three straight years by the ABA Journal as one of North America's 100 best law blogs.

The future of legal employment

<http://bit.ly/HCHnLM>

April 13, 2012

The American legal profession is on the verge of a full-blown jobs crisis. The Bureau of Labor Statistics estimates that over the course of this decade, 440,000 new law graduates will be competing for 212,000 jobs, a 48% employment level. The BLS's projection does assume law school graduation rates will remain steady during that time, and the latest news is that US law school applications are down nearly 25% in the last two years. But fewer applicants won't necessarily translate to smaller classes; it may simply mean that law schools accept a greater percentage of applicants than in the past. Canada and the UK are likely facing similar long-term trends, although not nearly to so devastating a degree.

There's no question this is serious business, and the sooner we take steps to deal with it, the better. Here's something to think about, though: a "jobs" crisis is not necessarily the same thing as an employment crisis. Put differently, it may be that we should focus less on whether new lawyers can "get a job," and more on whether and how lawyers can be gainfully employed for the use of their legal knowledge and skills.

A "job," as we understand the term today, is in some ways a slightly archaic concept. It's an industrial-era unit of production that became a foundational element of the post-War white-collar economy. When an organization pays you a pre-set amount to perform a range of tasks with defined responsibility in a centralized location during specified hours, that's a "job." Boomers, in particular, believe deeply in "jobs" — they were raised in, and flourished in, an environment where jobs were not only plentiful, but were also considered touchstones of personal success and fulfillment. Gen-Xers like me, and the Millennials streaming into the profession right now, were raised in far more uncertain employment environments, yet "jobs" remained the default format for earning a reliable and respectable living.

Today, "jobs" are becoming more difficult to define and measure. A growing number of economists accept that "unemployment rates" are an imperfect metric because they do a poor job of capturing, for example, part-time and itinerant workers or jobless people who've given up looking for work. At the same time, independent workers and entrepreneurs are gaining increasing traction in the economy — I recall one estimate that as many as one-fifth of all American workers now fit into those categories. The concept of "getting a job" — securing a reliable, medium-term engagement of steady activity in return for steady compensation — might yet prove to be a product its economic era.

What does this mean for lawyers? Technically speaking, private-practice lawyers are entrepreneurs — owners rather than employees, independent professionals who contract directly with purchasers without the involvement of an organizational middleman. And for solos and truly small-firm lawyers, I think this still holds true. But most lawyers in midsize and large firms, if we're talking in practical terms, are really holding down "jobs." The associates certainly are, for anywhere from five to ten years at the start of their careers. But even many partners, if they honestly assessed their position, might concede that they're "employees" of the firm more than "owners," their continued association with the firm still governed by productivity demands imposed by others higher in the partnership chain.

And when you move beyond the private practice of law, you realize that the vast majority of lawyers out there are employees, not owners. Government and public-sector lawyers? Corporate law department lawyers? Law school lawyers? Judicial system lawyers? Administrative agency lawyers? All employees: they get paid by an organization to perform a range of tasks with defined responsibility in a centralized location during specified hours. This is hardly surprising: our legal training, which does nothing to prepare us for entrepreneurship, all but destines most of us to organizational employment, and our natural risk-aversion doubles down on the tendency to favour security over independence. Being an entrepreneur is difficult and stressful, and for many people (not just lawyers), the rewards fail to outweigh the costs.

Nonetheless, I'm coming to believe that entrepreneurship is the best weapon we have to get through the legal jobs crisis. Simply put, the "lawyer job" is starting to disappear. Organizations that require legal services are creating fewer full-time lawyer jobs to deliver those services. They're using substitutes like contract lawyers, overseas lawyers, paralegals, LPO companies, and increasingly sophisticated software. There just aren't going to be as many "lawyer jobs," as we've traditionally understood the term, in future. But there should be a growing number of "lawyer opportunities," some of which the market will make for us and some of which we'll have to make for ourselves.

What might these opportunities look like? Richard Susskind gave us seven to start with in *The End of Lawyers?*, including process analyst, project manager, ODR practitioner and risk manager. Others might include:

- General Contractor, assembling the best team of legal professionals to achieve specific goals or solve one-off problems;
- Knowledge Tailor, creating customized banks of legal know-how uniquely designed for specific clients;
- Strategic Auditor, analyzing organizations for legal risk, strategy disconnects, function variances and productivity leakages;
- Accreditation Monitor, reviewing other lawyers' continued fitness to hold a law licence on behalf of regulators;
- Proficiency Analyst, periodically assessing an organization's legal advisors for competence and client awareness;
- Legal Physician, providing individual clients with annual low-cost checkups of their family's legal health;
- Informal Arbitrator, delivering fast, brief, non-binding "judgments" of disputes to facilitate settlements;

I expect there are a handful of lawyers out there doing these things already, but that's not really my point. What I want you to focus on is what many of these potential future lawyer roles share in common:

1. *They envision multiple clients, not just one:* These aren't single-channel "jobs" in the traditional sense; they're more like engagements or opportunities that are customized multiple times to an ever-changing roster of clients.

2. *They require the application of high-end skills or talents:* Lawyers need to deploy judgment, counsel, business analysis or strategic insight to fill these roles — not process or content, which will be systematized and automated by non-lawyers.

3. *They involve a high degree of customization.* Mass-produced legal products and services will be the province of high-volume, low-cost providers. High-value services will be uniquely tailored, like designer drugs based on a patient's DNA.

4. *They meet a need unfilled by a traditional provider.* Law firms, law schools, legal publishers, CLE providers, governing bodies, and other industry mainstays could provide supply or drum up demand for these roles, but haven't.

5. *They focus far more on preventing problems than on solving them.* Richard Susskind, again, reminds us that clients want a fence at the top of a cliff, not an ambulance at the bottom. These are all fence-building positions.

6. *They presume a high degree of connectedness.* The future of law is collaborative, and successful future law careers will hinge in no small part on the size, quality and effectiveness of

lawyers' networks.

7. *They deliver specific, identifiable, and actionable value to the buyer.* Much of what lawyers now provide is procedural and transactional: hoops that must be jumped through. These roles are rich in direct, verifiable value to clients.

Those seven jobs I dreamed up aren't as important as these seven characteristics. Nobody can actually predict the "jobs of the future" — raise your hand if you thought "app developer" was a viable career as recently as 2005. But we can predict the features people will seek out in their legal professionals, the talents and skills that will deliver value to a more literate, tech-savvy, mobile, frugal and assertive client base than lawyers have served in the past. New lawyers need to understand this; but equally, new lawyers are uniquely positioned to grab this opportunity, because they're not as burdened with assumptions of what a legal career ought to look like. Fresh eyes for a new marketplace are now a distinct advantage.

My message to new lawyers, really, is this: don't gear all your career efforts towards "getting a job," or at least, not one that you'll hold for more than a few years. The legal economy's traditional employment infrastructure is starting to crumble, and if you count on spending your career inside it, you could be caught in the collapse. There are plenty of markets and industries that will continue to make lots of traditional full-time "jobs" available, but I doubt very much that the law will be one of them. If you wind up in a steady law job, that's obviously great; but you should think of that outcome as the exception more than the rule.

So instead, plan for independence. More and more legal employment will be small and entrepreneurial in nature, rewarding the self-starter who builds a reputation for value, effectiveness and foresight. Look at the legal market around you and ask: What's missing? What client needs aren't being met? What needs have clients not even thought of yet? What innovative new industries will flourish in the next ten years, and in what ways will they require assistance that lawyer training and legal skills can deliver? What demographic trends will take full effect in the 2010s, and what are their law-related implications? What technological advances in the legal market, no matter how sophisticated, will still require complementary high-end lawyer services?

The BLS thinks that only 212,000 new law jobs will open up this decade. I say: Prove them wrong. Create new opportunities. Identify and encourage unrealized demand. Find ways to apply your best legal skills — strategic analysis, critical thinking, incisive logic, intellectual coherence, principled persuasion, and more — to *create value for clients*. That's the best way — and it might be the only way — to ensure your ongoing success as a 21st-century lawyer.

Jordan Furlong delivers dynamic and thought-provoking presentations to lawfirms and legal organizations throughout North America on how to survive and profit from the extraordinary changes underway in the legal services marketplace. He is a partner with Edge International and a senior consultant with Stem Legal Web Enterprises.

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From: Jon Benson
Sent: Tuesday, March 20, 2012 1:09 PM
To: Jeff Sapiro; Sylvia Stevens
Subject: Dwindling number of law students - statistics

Attached are a recent *New York Times* article and an LSAT Blog post about the dwindling number of law school applicants. I'm sharing it with you because it may impact some internal and external stakeholders you deal with.

The authors seem to attribute the decline to 2 primary causes: (1) At the start of the recession, many new college grads opted for grad school to "ride out" the recession, but that is no longer working for law schools because of (2) Word of the glutted market for new law grads is filtering back.

My contacts at the Oregon law schools have indicated that there are no plans to significantly change the target size for the entering classes. This could prove a challenge for the schools to maintain their same average LSAT scores and undergraduate GPA numbers – those statistics are important to schools because they are factors in the *US News & World Report* rankings. In Oregon, every indication is that our reciprocity applications will remain strong, even if we see smaller exam applicant pools.

Thanks.

Jon

Jonathan P. Benson

Executive Director,

Oregon Board of Bar Examiners

Oregon State Bar

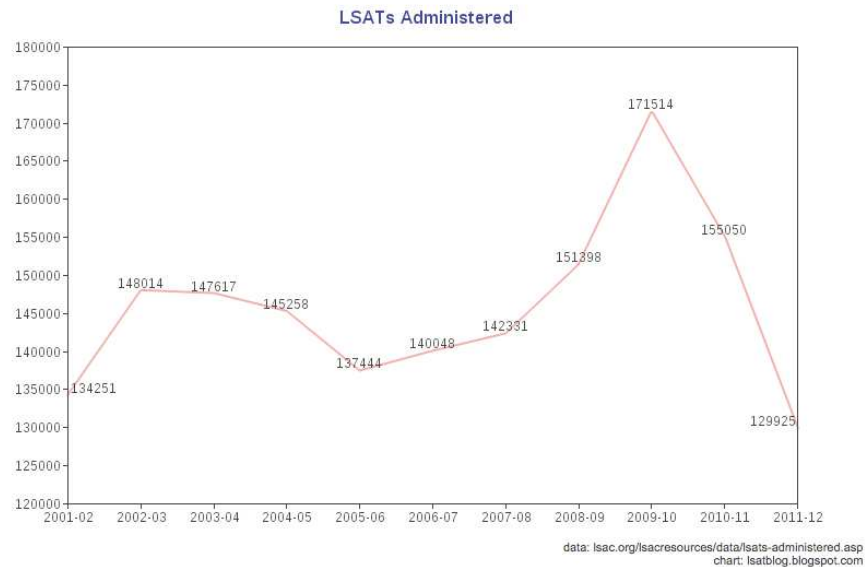
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LSAT BLOG

Fewest LSATs Administered In Over 10 Years



The Law School Admission Council just released the number of February 2012 LSAT-takers, and it's low. In fact, fewer students sat for the February 2012 LSAT than for any LSAT administration in over 10 years.

What's more, the number of LSATs administered in this past admission cycle as a whole was the lowest it's been in over 10 years. In the biggest percentage decrease ever, the number of LSATs administered this cycle dropped by over 16%.

This is a major turn of events. The tide is turning, folks.

You see, for most of the past decade, the number of LSAT test administrations was somewhere in the neighborhood of 142,000 per year. Then, in sudden reaction to the recession (or to Netflix's acquisition of old Law & Order episodes), we saw a major spike in LSAT administrations - the highest number of LSATs ever administered in a single admission cycle (just over 170,000). This represented a 13.3% increase in LSATs administered over the previous year. It looked like the lawyer glut was going to become unimaginably worse, but something changed.

The eager stampede to law school stopped slowly, then all at once.

However, rather than simply returning to the previous normal level of 143,000 administrations per year, give or take a few thousand, it plummeted. In this past cycle, just under 130,000 LSATs were administered - a level not seen since 2001. Here's the full set of numbers [directly from](#) the Law School Admission Council:

Year	June	% Chg	October	% Chg	December	% Chg	February	% Chg	Total	% Chg
1987-1988	18,902		36,804		33,874		26,408		115,988	
1988-1989	23,064	22.0%	40,577	10.3%	42,564	25.7%	30,883	16.9%	137,088	18.2%
1989-1990	22,088	-4.2%	43,274	6.6%	44,044	3.5%	29,459	-4.6%	138,865	1.3%
1990-1991	25,677	16.2%	49,957	15.4%	42,685	-3.1%	34,366	-16.7%	152,685	10.0%
1991-1992	24,211	-5.7%	50,077	0.2%	43,588	2.1%	27,691	-19.4%	145,567	-4.7%
1992-1993	24,778	2.3%	46,491	-7.2%	41,533	-4.7%	27,252	-1.6%	140,054	-3.8%
1993-1994	23,061	-6.9%	46,359	-0.3%	38,982	-6.1%	23,626	-13.3%	132,028	-5.7%
1994-1995	21,880	-5.1%	42,927	-7.4%	39,670	1.8%	24,076	1.9%	128,553	-2.6%
1995-1996	20,336	-7.1%	38,406	-10.5%	36,368	-8.3%	19,646	-18.4%	114,756	-10.7%
1996-1997	19,055	-6.3%	36,020	-6.2%	30,953	-14.9%	19,287	-1.8%	105,315	-8.2%
1997-1998	20,010	5.0%	34,399	-4.5%	29,879	-3.5%	19,703	2.2%	103,991	-1.3%
1998-1999	18,933	-5.4%	33,558	-2.4%	32,116	7.5%	19,629	-0.4%	104,236	0.2%
1999-2000	20,448	8.0%	36,540	8.9%	30,731	-4.3%	19,434	-1.0%	107,153	2.8%
2000-2001	20,151	-1.5%	37,847	3.6%	30,111	-2.0%	20,921	7.7%	109,030	1.8%
2001-2002	23,908	18.6%	46,745	23.5%	38,045	26.3%	25,553	22.1%	134,251	23.1%
2002-2003	27,808	16.3%	52,604	12.5%	41,887	10.1%	25,715	0.6%	148,014	10.3%
2003-2004	27,471	-1.2%	53,701	2.1%	41,215	-1.6%	25,230	-1.9%	147,617	-0.3%
2004-2005	28,600	4.1%	50,386	-6.2%	41,985	1.9%	24,287	-3.7%	145,258	-1.6%
2005-2006	25,984	-9.1%	49,197	-2.4%	40,023	-4.7%	22,240	-8.4%	137,444	-5.4%
2006-2007	24,879	-4.3%	48,171	-2.1%	41,033	2.5%	25,965	16.7%	140,048	1.9%
2007-2008	25,103	0.9%	49,785	3.4%	42,250	3.0%	25,193	-3.0%	142,331	1.6%
2008-2009	28,939	15.3%	50,721	1.9%	43,646	3.3%	28,092	11.5%	151,398	6.4%
2009-2010	32,595	12.6%	60,746	19.8%	50,444	15.6%	27,729	-1.3%	171,514	13.3%
2010-2011	32,973	1.2%	54,345	-10.5%	42,096	-16.5%	25,636	-7.5%	155,050	-9.6%
2011-2012	26,812	-18.7%	45,169	-16.9%	35,825	-14.9%	22,119	-13.7%	129,925	-16.2%

This raises a few questions:

1. What happened?
2. What does this mean for current applicants, law schools, and the legal job market?
3. Is this the new normal?

1. What happened?

There's a simple explanation: college graduates and other victims of the recession sought refuge in law school to wait for an economic recovery, but it turned out that it

wasn't the safe haven they were expecting. As a result, there aren't as many new applicants.

Why such a big drop? The obvious answer is the current state of the legal market. First, it was exhaustively covered by blogs (from law school scam blogs and [Law School Transparency](#) to industry heavyweight [Above The Law](#)), then by the mainstream media itself (notably the New York Times, beginning with [this article](#)). The resulting flood of articles has undoubtedly had an impact.

However, the number of LSATs administered doesn't tell the full story. The LSAT itself teaches us that statistics can be misleading, and LSAT-related statistics are no different.

The June 2009 LSAT was accompanied by a [policy change](#) from the Law School Admission Council (LSAC). It dictated that test-takers had to decide at least 3 weeks before the test date whether they were taking it, whether they were postponing to a later date, or whether they were canceling their test registration altogether. Previously, test-takers could postpone their exam even on the day of the test itself.

LSAC [had its reasons](#), but it undoubtedly had the effect of significantly increasing the number of tests administered over the two-year period in which it was in place (the 2009-10 and 2010-11 cycles). Within the 3 weeks between the postponement deadline and the test date, many registered test-takers faced issues such as illness, jittery nerves, or a change of life plans. Having already paid for a particular test administration, many decided to go ahead and take it for the experience anyway, then immediately cancel the score and take it again in the following administration.

Then, starting with the June 2011 LSAT, the LSAC changed its policy yet again, allowing students to [withdraw their test registrations](#) up to the day before the test. (It also came with a new [photo requirement](#), which may have discouraged vampires and other less-photogenic prospective applicants from sitting for the exam). And now we're seeing far fewer LSATs administered.

There's no question that the economy and the legal job market are largely responsible

for the erratic swings in the numbers of tests administered per cycle, but these policy changes impacting test-takers' decisions whether to sit for the exam have undoubtedly had some impact as well.

2. What does this mean for prospective applicants, law schools, and the legal job market?

Fewer LSATs administered, fewer LSAT-takers, and fewer law school applicants make for a less competitive cycle for **prospective applicants**. While LSAC hasn't posted the full numbers for this past cycle just yet, it looks like they'll be continuing the [downward trend in applicant numbers](#).

However, admission to the top-14 law schools will always be competitive, and admission to Harvard, Yale, and Stanford will always be extremely competitive, no matter their order in the [rankings](#).

For **law schools**, it can only be bad news. A smaller pool of applicants means fewer test-takers with 165+ and 170+ scores to help them boost their rankings. Law schools have become accustomed to the flood of tuition dollars. Some have even been [expanding their facilities](#). They'll be looking to fill those seats, and they may have to take a hit to their LSAT medians in order to do so.

In other words, applicants might be able to gain admission to a particular law school with a slightly lower LSAT score than previously possible. Law schools will do everything in their power to avoid this, of course, but if the applicant pool shrinks enough, they may have no choice. Law schools might invest more in merit aid to court high-scorers, and they might devote even less attention to soft factors (everything besides LSAT/GPA) than they already do.

The turning of the tide will have limited impact on the **legal job market**. The flood of law school matriculants from the past 3 years has yet to graduate, and they'll be hungry for work. And let's not forget all the unemployed and underemployed lawyers and recent graduates. It's not as if anyone's waved a magic wand to solve the fundamental problems

facing the legal field.

3. Is this the new normal?

Only time will tell, but I'm guessing it is. What do you think? Leave your thoughts in the comments!

Related Posts :

LSAC

- [UTampa February LSAT Takers Must Retake Due To Lost Answer Sheets](#)

admissions

- [U.S. News Law School Rankings for 2013 Released](#)

The New York Times

For 2nd Year, a Sharp Drop in Law School Entrance Tests

By DAVID SEGAL

Published: March 19, 2012

Legal diplomas are apparently losing luster.

The organization behind the Law School Admission Test reported that the number of tests it administered this year dropped by more than 16 percent, the largest decline in more than a decade.

The Law School Admission Council reported that the LSAT was given 129,925 times in the 2011-12 academic year. That was well off the 155,050 of the year before and far from the peak of 171,514 in the year before that. In all, the number of test takers has fallen by nearly 25 percent in the last two years.

The decline reflects a spreading view that the legal market in the United States is in terrible shape and will have a hard time absorbing the roughly 45,000 students who are expected to graduate from law school in each of the next three years. And the problem may be deep and systemic.

Many lawyers and law professors have argued in recent years that the legal market will either stagnate or shrink as technology allows more low-end legal work to be handled overseas, and as corporations demand more cost-efficient fee arrangements from their firms.

That argument, and news that so many new lawyers are struggling with immense debt, is changing the way law school is perceived by undergrads. Word is getting through that law school is no longer a safe place to sit out an economic downturn — an article of faith for years — and that strong grades at an above-average school no longer guarantees a six-figure law firm job.

“For a long time there has been this culturally embedded perception that if you go to law school, it will be worth the money,” said Kyle McEntee of Law School Transparency, a legal

education policy organization. “The idea that law school is an easy ticket to financial security is finally breaking down.”

Law schools have also suffered through some withering press in the last couple of years. Some blogs, most of them written by unemployed or underemployed graduates, have accused law schools of enticing students with shady data. Attention has focused on a crucial statistic: the percentage of graduates who are employed nine months after graduation.

In recent months, class-action lawsuits have been filed against more than a dozen law schools, charging that students were snookered into enrolling by postgraduate employment figures that were vastly, and fraudulently, inflated. Even if law schools are able to defeat these lawsuits — and many legal scholars anticipate they will — the media attention has been bruising. Steve Schwartz, an LSAT tutor, said the new LSAT figures were not a surprise, given the steady decline in the number of students seeking one-on-one tutoring.

“This is a major turn of events,” he wrote of the newly reported test numbers on his [LSAT Blog](#), “The tide is turning, folks.”

For some law schools, the dwindling number of test-takers represents a serious long-term challenge.

“What I’d anticipate is that you’ll see the biggest falloff in applications in the bottom end of the law school food chain,” said Andrew Morriss of the University of Alabama School of Law. “Those schools are going to have significant difficulty because they are dependent on tuition to fund themselves and they’ll either have to cut class size to maintain standards, or accept students with lower credentials.”

If they take the second course, Mr. Morriss said, it would hurt the school three years later because there is a strong correlation between poor performance on the LSAT and poor performance on the bar exam. If students start failing the bar, then the prestige of the school will drop, which would mean lowering standards even more. “At that point,” Mr. Morriss said, “the school is risking a death spiral.”

A version of this article appeared in print on March 20, 2012, on page B1 of the New York edition with the headline: For 2nd Year, A Sharp Drop In Law School Entrance Tests.

GOVERNANCE VS. MANAGEMENT

The job of the board of directors for a nonprofit organization is simple: **it is responsible for everything.** This includes both governance and management of the organization. Even if it delegates certain responsibilities to the staff or other professionals, it is responsible for ensuring that the resources of the organization are being effectively applied to meet its mission.

Many nonprofits have the luxury to hire staff to help fulfill parts of these responsibilities. Depending on the size of the staff, the board will delegate key functions that are best suited to the full-time attention provided by professionals. It will retain the functions that are reserved for its fundamental fiduciary responsibility, and for which it is best suited. These functions can be divided between the **governing functions** reserved for the board, and the **management functions** often delegated to staff.

The **governing functions** are those that provide the essential direction, resources and structure needed to meet specific needs in the community. These include:

- ✦ **Strategic Direction** – setting a direction for the organization that reflects community needs.
- ✦ **Financial Accountability** – managing financial resources that ensure honesty and cost-effectiveness.
- ✦ **Leadership Development** – developing the human resources that lead the organization today and in the future.
- ✦ **Resource Development** – developing financial resources that support program activities.

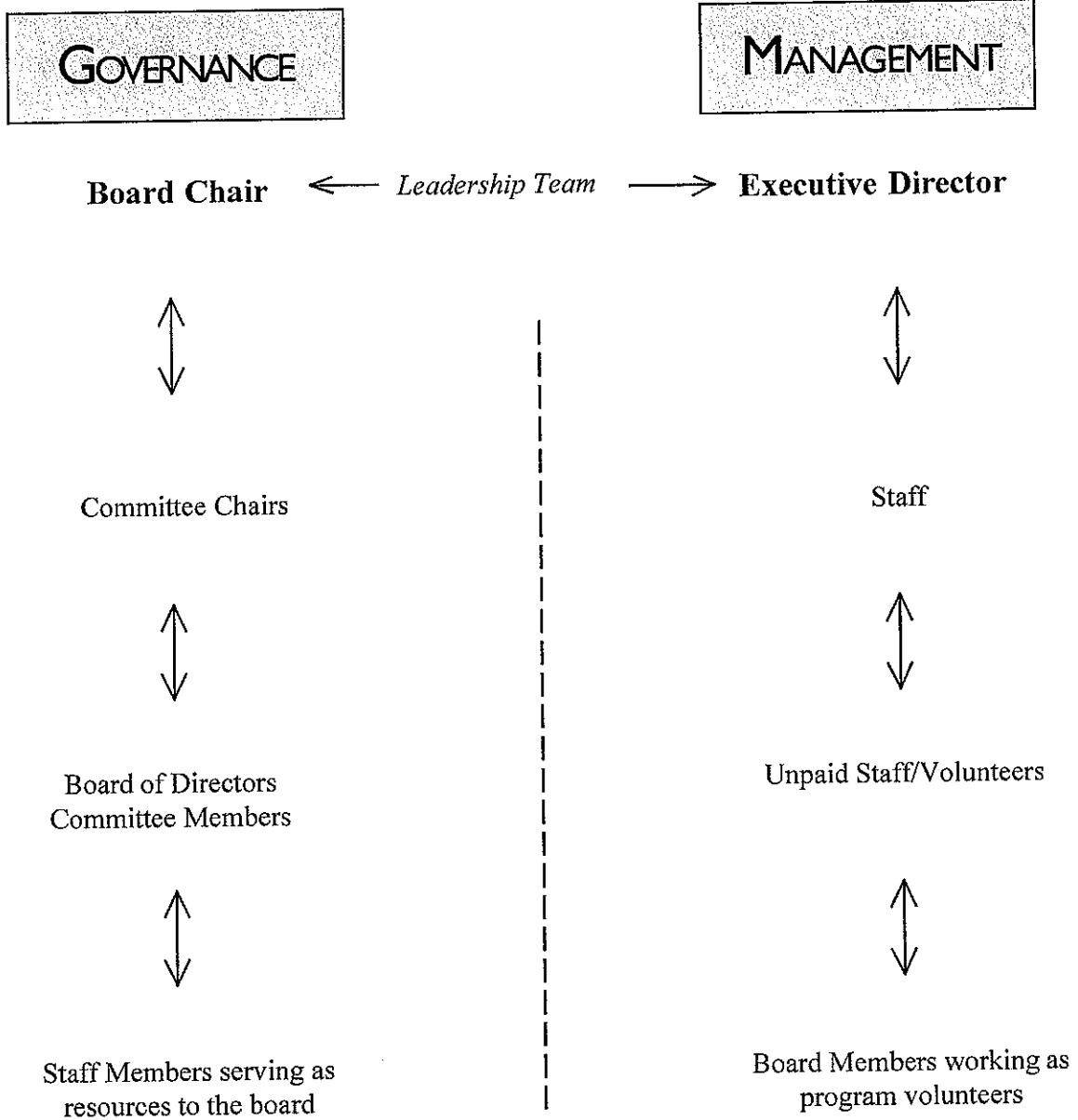
The **management functions** are those that provide the program activities and support to accomplish the goals of the organization. These usually include:

- ✦ **Program Planning and Implementation** – taking the strategic direction to the next level of detail and putting it into action.
- ✦ **Administration** – ensuring the effective management of the details behind programs.

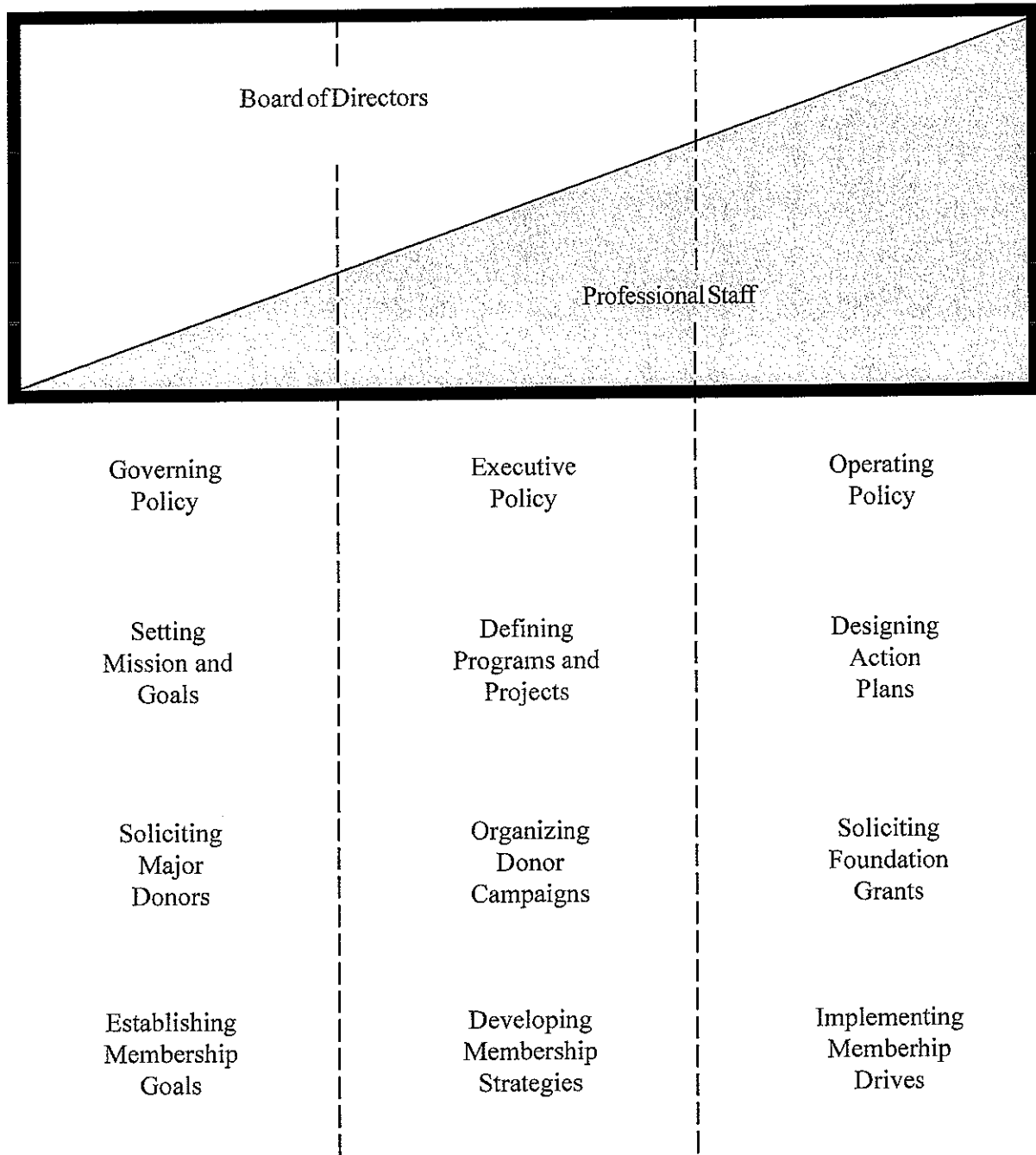
For smaller organizations (with less than four paid staff), the board usually delegates only some of the management functions to staff. For larger organizations (with more than four staff members), the board usually delegates nearly all of the management functions. The board should never delegate the governing functions to staff as these represent its core responsibilities to its constituencies and to the general public.



LINES OF AUTHORITY



LEVELS OF INFLUENCE



THE BASICS OF BOARD DEVELOPMENT

Development of the board of directors is the most fundamental activity needed to build and maintain a strong nucleus for a nonprofit organization. It is a responsibility that boards should put near the top of the list of priorities.

The steps in the development of the board are:

- + **Nomination and Recruitment** — the process of identifying the right individual to meet the needs of the organization and convincing her to become part of the organization.
- + **Orientation** — the steps taken to give new board members information on the background, programs, and culture of the organization.
- + **Training** — the regular efforts to build new skills and abilities among existing board members.
- + **Evaluation** — the annual task of evaluating individual board member's contributions to the board, and evaluating the board's contribution to the individual board members.
- + **Recognition** — the on-going process of recognizing work well-done and thanking board members for their commitment and the contributions they make to the organization.

Each of these elements of board development are critical to the organization's success. For this reason, most boards will develop a specific committee responsible for these board development tasks. Often the committee is called the Nominations Committee or Board Development Committee.

These issues and procedures are applicable not only to the development of board members, but also to the development of non-board committee members and other key volunteers.





Source: ABA/BNA Lawyers' Manual on Professional Conduct: All Issues > 2012 > 04/11/2012 > Court Decisions > Admissions: Grads Can't Sue Law School For Allegedly Inflating Job Data

28 Law. Man. Prof. Conduct 207

Admissions

Grads Can't Sue Law School For Allegedly Inflating Job Data

By Joan C. Rogers

The New York Supreme Court, New York County, March 21 threw out a putative class action brought by nine graduates of New York Law School who claim the school lured them into enrolling there by providing fraudulent information about their prospects for getting jobs as lawyers (*Gomez-Jimenez v. New York Law School*, N.Y. Sup. Ct. N.Y. Cnty., No. 652226/11, 3/21/12).

This opinion marks the first dispositive ruling in more than a dozen actions that disappointed law graduates have filed against their schools.

In dismissing the plaintiffs' claims for deceptive trade practices, fraud, and negligent misrepresentation, Justice Melvin L. Schweitzer said the complaint itself established that plenty of information was publicly available about the realities of the legal job market. Thus, he found, the plaintiffs could not reasonably have been fooled by the school's allegedly misleading job data.

Rosy Scenario

The nine graduates suing New York Law School claimed that the school has been able to attract a large number of applicants and charge expensive tuition because it has disseminated misleading information about graduates' employment profiles.

The plaintiffs said the school's statistics make it appear that the jobs reported are all full-time permanent law positions, without making clear that many of the schools' graduates working in the legal sector hold part-time or temporary employment that pays barely enough to service the debt incurred to finance their law school education.

According to the plaintiffs, this misinformation has caused prospective students to misjudge post-graduate employment prospects and commit to earning a degree from NYLS that has less marketplace value than they reasonably expected.

The plaintiffs claimed that the misleading information was disseminated for the entering classes of 2005 through 2010. The complaint sought \$200 million in damages as the difference between the alleged inflated tuition they paid and what they characterized as the true value of an NYLS degree.

Ruling on the school's motion to dismiss, Schweitzer concluded that the complaint failed to state any viable cause of action.

Not Misleading

As one cause of action, the plaintiffs invoked New York's primary consumer protection law,

BNA Snapshot

Gomez-Jimenez v. New York Law School, N.Y. Sup. Ct. N.Y. Cnty., No. 652226/11, 3/21/12

Key Holding: Law graduates have no viable claims against their school under New York law for allegedly luring them to enroll by giving them misleading job data.

Potential Impact: Bodes ill for the plaintiffs in similar actions against other law schools unless variations in state law make a difference.

N.Y. Gen. Bus. Law §349, or GBL 349. To state a claim under that law, a plaintiff must allege that the defendant's conduct was consumer-oriented, that it was deceptive or misleading in a material way, and that the plaintiff suffered injury as a result.

GBL 349 provides a complete defense if the challenged practices comply with the rules and regulations of any U.S. agency, as interpreted by that agency. NYLS argued that it is entitled to that defense because it complied with federal standards for disclosing graduates' employment data.

Disagreeing, Schweitzer pointed out that although the underlying disclosure regulations were adopted by the U.S. Department of Education, that agency selected the ABA to ensure that consumer information is disclosed as required by the regulations. Because the ABA interprets the regulations and the ABA is not an official U.S. agency, the defense claimed by NYLS is not available, he ruled.

Schweitzer decided, however, that the plaintiffs did not plead, as required by New York case law interpreting GBL 349, that the school's practices are deceptive or misleading in material way "to a reasonable consumer." He explained:

The court does not view these post-graduate employment statistics to be misleading in a material way for a reasonable consumer acting reasonably. By anyone's definition, reasonable consumers—college graduates—seriously considering law schools are a sophisticated subset of education consumers, capable of sifting through data and weighing alternatives before making a decision regarding their post-college options, such as applying for professional school. These reasonable consumers have available to them any number of sources of information to review when making their decisions.

Schweitzer emphasized that the plaintiffs' own complaint cited numerous sources describing the legal job market, such as reports from the National Association for Law Placement, news articles, and *U.S. News & World Report* rankings that provide information about the job prospects of law graduates.

"NYLS applicants ... would have to be wearing blinders not to be aware of these well-established facts of life in the world of legal employment."
Justice Melvin L. Schweitzer

It should come as no surprise to these law school consumers, Schweitzer said, that the most lucrative law jobs are associated with having attended a high-ranking law school. "It is also difficult for the court to conceive that somehow lost on these plaintiffs is the fact that a goodly number of law school graduates toil (perhaps

part-time) in drudgery or have less than hugely successful careers," he said.

"NYLS applicants, as reasonable consumers of a legal education, would have to be wearing blinders not to be aware of these well-established facts of life in the world of legal employment," he declared.

The plaintiffs also asserted that the school's salary data were misleading because they came from a carefully chosen small sample of graduates. On that point, Schweitzer noted that the relatively small percentage of responding students was disclosed whenever the salary data included the average salary statistic. There can be no GBL 349 claim when the allegedly deceptive practice was fully disclosed, he said.

No Reasonable Reliance

Schweitzer also ruled that the plaintiffs could not have reasonably relied on NYLS's claimed misrepresentations because they had ample information from additional sources and thus had the opportunity to discover the actual job prospects for law graduates through the exercise of reasonable due diligence.

In addition, Schweitzer ruled that the plaintiffs' theory of damages was too speculative to

qualify as a remedy under the law. It would be pure guesswork, he found, to try to calculate the difference between what the plaintiffs paid for their law degree and its allegedly lower intrinsic worth.

This case exemplifies the adage, Schweitzer said, that not every ailment afflicting society may be redressed by a lawsuit. But in dismissing the complaint, he lamented the dearth of opportunity for law graduates and said the legal profession owes students "the most transparent data of the state of our profession that we can possibly assemble" so that they can make informed decisions about their livelihoods.

The ABA approved a resolution in August 2011 urging law schools to provide potential students with information that accurately reflects the employment and financial realities that they will face upon graduation. See 27 Law. Man. Prof. Conduct 524.

Attorneys for the plaintiffs were Jesse Strauss, Strauss Law PLLC, New York; David Anziska, Law Offices of David Anziska, New York; and Frank Raimond, Law Offices of Frank Raimond, New York.

Michael Volpe of Venable LLP, New York, represented New York Law School.

For More Information

Full text at <http://op.bna.com/mopc.nsf/r?Open=ksw-n-8stuvy>.

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Source: ABA/BNA Lawyers' Manual on Professional Conduct: All Issues > 2012 > 04/11/2012 > News > Conflicts of Interest: Third-Party Financing for U.S. Litigation Profitable Endeavor for U.K. Funding Firm

28 Law. Man. Prof. Conduct 229

Conflicts of Interest

Third-Party Financing for U.S. Litigation Profitable Endeavor for U.K. Funding Firm

By Eileen Malloy

Third-party litigation funder Burford Capital April 4 reported that in 2011 it generated a \$15.9 million profit.

A newcomer to the litigation funding market, Burford, a U.K. company listed on the London Stock Exchange, was formed in the fall of 2009. Burford experienced a substantial increase in profits compared to 2010, when it realized a profit of \$1.9 million, the firm said.

Explaining its growth, Burford said in its annual report, "While uncertain economic conditions, rising litigation costs and shrinking corporate budgets have helped generate interest in Burford's proposition, the fundamental driver of our success to date has simply been a thirst for financial options."

Ethics Issues

The ABA Commission on Ethics 20/20 studied the impact of alternative litigation funding (or ALF) structures on the client-lawyer relationship and the professional responsibilities of lawyers. See 27 Law. Man. Prof. Conduct 667.

In a draft report released in October 2011 for public comment, the commission tentatively concluded:

Lawyers must adhere to principles of professional independence, candor, competence, undivided loyalty, and confidentiality when representing clients in connection with ALF transactions. In the event that the lawyer's involvement in the funding process significantly limits the lawyer's capacity to carry out these professional obligations, the lawyer must fully disclose the nature of this limitation, explain the risks and benefits of the proposed course of action, and obtain the client's informed consent.

The commission ultimately decided not to make a recommendation to the ABA House of Delegates on this topic, however. It said the issue should be taken up instead by the ABA Standing Committee on Ethics and Professional Responsibility. See 28 Law. Man. Prof. Conduct 100.

Last year, the New York City Bar's ethics committee issued New York City Ethics Op. 2011-2, 27 Law. Man. Prof. Conduct 405, which stated that lawyers are permitted to assist clients in obtaining litigation financing from a third party that in return will receive a portion of the client's settlement or judgment. The committee cautioned, however, that lawyers must remain alert to the numerous ethics issues that can arise in these arrangements. See also "Third-Party Investors Offer New Funding Source for Major Commercial Lawsuits," 26 Law. Man. Prof. Conduct 207.

Burford said of its financing arrangements that it "is simply a provider of investment capital and ... the litigant retains control of its case."

Some Big Returns

Since its formation, Burford has committed \$280 million to a portfolio of more than three dozen lawsuits and arbitrations. Burford has not disclosed precise details about those cases, but said that it has financed legal matters ranging from commercial contract and other business disputes to litigation involving trade secrets, intellectual property, real estate, and environmental liability.

Burford said that its success has continued into 2012. Early in the year, a Burford-financed litigation settled. The company expects its \$3.5 million investment to be returned, along with another \$3 million profit to be paid on an installment basis, producing a 30 percent return.

Over the course of its existence, Burford has committed \$6.8 million on average to individual dispute investments.

Burford considers investment opportunities anywhere in the world, but has a particular focus on the U.S. litigation market and in international arbitration matters, according to the firm's website. With its recent acquisition of FirstAssist, a provider of litigation insurance in the United Kingdom, Burford says that it is now poised to enter the U.K. litigation finance market as well.

Funds for Law Firms

Burford said that it funds cases directly on behalf of corporations and also provides capital for law firms backed by their alternative fee arrangements, such as contingent fee agreements. The financial firm claims to have worked with half of the law firms listed in the *American Lawyer's* Top 50.

Burford said that it offers a variety of investment structures. In addition to direct investments in lawsuits, the company has purchased equity in a vehicle that is bringing litigation claims. Burford has also been asked to and is considering purchase of a species of securities called contingent value rights offered by a listed company.

As an example of how it might finance what the company described as a "normal" case, Burford committed over \$5 million in funding to a small technology firm which wanted to pursue a claim against a large company that allegedly launched a product based on confidential information learned from the small company.

Under Burford's agreement with the small company, the Burford will "receive a preferred return of its capital back plus a further percentage of the amount it ultimately invests and a sliding scale of net proceeds depending on the size and timing of the result, all subject to an overall minimum internal rate of return," according to Burford's website.

Burford Group Limited carries on its operations in the United States through its wholly owned subsidiary, Burford Group LLC, a Delaware limited liability company.

For More Information

Burford's annual report is available on the firm's website at <http://www.burfordfinance.com/en>.

Contact us at <http://www.bna.com/contact/index.html> or call 1-800-372-1033

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