

**Oregon State Bar  
Special Meeting of the Board of Governors  
September 28, 2012  
10:00 AM  
Conference Call**

1. **Call to Order**
2. **Budget & Finance Committee [Mr. Haglund]** **Action**      **Exhibit**
  - a. 2013 Budget Recommendations - The Committee is meeting for another review of the 2013 budget with the specific intent to make recommendations to the board on the active and inactive member fee and the Client Security Fund assessment.
3. **Approve 2012 House of Delegates Agenda [Ms. Naucner]** **Action**      **Exhibit**
4. **Special CLOSED Session ([Agenda - click here](#))**
5. **Good of the Order**

# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** September 28, 2012  
**From:** Sylvia E. Stevens, Executive Director  
**Re:** HOD Agenda Delegate Resolutions

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### Action Recommended

None. This is background information to assist the board in deciding what, if any, position to take on the various delegate resolutions that are on the HOD agenda.

### Discussion

The BOG must review proposed HOD agenda items for conformity with applicable law and bar policy and propose a preliminary agenda for the HOD meeting. HOD Rule of Procedure 5.5. The BOG may exclude resolutions from the agenda that are unconstitutional or are outside the scope of the bar's statutory mission, or would be outside the scope of a mandatory bar's activities as set forth in *Keller v. State Bar of California*. OSB Bylaw 3.4.

In addition, the BOG must independently evaluate the financial impact of each resolution. If the BOG's evaluation of the financial impact differs from the sponsor's both positions must be included when the resolution is presented to the House. OSB Bylaw 3.3.

Finally, the BOG must decide whether to support, oppose, or take no position on each of the resolutions.

### Resolutions

#### Item #12 Online Computer Knowledge Base

This resolution asks that the bar create a task force to "develop and implement" a computer knowledge base comprised of all written materials produced by OSB members and staff.

I spoke with the sponsor when he first raised the idea. He would like bar members to be able to have a single, searchable database that will include not only BarBooks, but "everything else" produced by the bar staff or members. He suggested that the Knowledge Base should include, without limitation, section newsletters and list serve discussions. I have inquired of sections whether they wish to share that information and most have said they would, while a few have declined to share what they consider proprietary information that is a benefit of section membership, and some have not responded.

IDT staff indicates that having all the materials (whatever they turn out to be) in a single searchable database is feasible. However, the BOG should be aware that there are a number of IDT projects (e.g., electronic case and document management for CAO and DCO; online admissions applications) that have been deferred pending the full implementation of the new LRS system and some necessary upgrades to our system's structure. If this resolution passes, this new project will likely not be a "first priority" unless so designated by the BOG.

*Item #13 Metropolitan Court District*

This resolution asks the BOG (presumably through a special ad hoc committee) to study the feasibility of establishing a "metropolitan court district" comprised of Multnomah, Washington and Clackamas counties.

In 2011, the Legislature authorized the Chief Justice to merge the administrative functions of existing judicial districts if he believed it would result in efficiencies. When informed of the pending resolution, Chief Justice Balmer questioned whether a merger of the three largest judicial districts, which are quite different in character and tradition, would result in any improved efficiency.

Another issue for the BOG to consider is whether this is appropriate for the OSB to take up, not because it violates *Keller*, but because a task force of lawyers is not likely to have all the information required to make a meaningful analysis of the merits of the proposal. Instead, this issue seems to be a matter for the Oregon Judicial Department.

*Item #14 Lawyer Referral Service Policy and Procedure Changes*

This resolution asks that the rules of the LRS be amended to eliminate the disqualification of panelists who have disciplinary proceedings pending. LRS rules currently provide that to be eligible to participate, the lawyer must "have no disciplinary proceedings pending" and that "[p]anelists against whom disciplinary proceedings have been approved for filing shall be removed from the LRS until those charges have been resolved." The LRS rule is virtually identical to OSB Bylaw 18.5:

**Section 18.5 Removing Lawyers from the Lawyer Referral Service Panel of Lawyers**

Members of the Bar against whom charges of misconduct have been approved for filing will be removed from the Lawyer Referral Service panel of lawyers until those charges have been resolved. If a member is suspended as a result thereof, the member may not be reinstated to the panel until the member is authorized to practice law again. Charges of misconduct include those authorized to be filed pursuant to BR 3.4.

The perceived unfairness of the disqualification rule has been raised before, most recently in 1988. The Lawyer Referral Committee recommended repealing the rule and the Board asked whether the restriction could be narrowed to apply only when certain misconduct (i.e., theft of client funds) was involved. After hearing the LRS Committee's view that drawing bright lines would be impossible, the BOG rejected the recommendation. The BOG was also concerned both with liability for negligent referral and the reputation of the LRS with the public. In particular, they were concerned that an LRS client might hire a lawyer who would then become unable to continue representation because of disciplinary action.

*Item #15 Amendment to Oregon RPC 1.1 (Competence)*

This resolution began as one to approve an amendment for submission to the Supreme Court. When informed that ORS 9.490(1) requires that the BOG "formulate" rules of professional conduct for approval of the HOD and adoption by the court, the sponsor revised his resolution. It now requests that the BOG submit the proposed rule amendment to the HOD (presumably in 2013).

The language the sponsor wishes to have included comes from the Comment to the ABA Model Rules and might well provide some helpful explanation to practitioners since we don't have Comment to our rules. Regardless, it would be unusual for the BOG to submit an Oregon RPC amendment to the HOD without first having it reviewed by the Legal Ethics Committee.

*Item #18 Fairness in PIP Arbitration Proceedings*

This resolution asks the BOG to study and consider a legislative amendment to ORS 742.521 *Conditions Applicable to Arbitration Proceedings* that would extend Personal Injury Protection (PIP) coverage for the period of time from an insurance company's decision to suspend, deny or terminate PIP coverage until an arbitration award is issued in a PIP arbitration.

PIP coverage for reasonable and necessary expenses incurred as a result of a person's injury is required for one year after the date of the person's injury. The PIP insurance company can terminate PIP payments if it appears that treatment is no longer reasonable or necessary. The injured person can challenge the insurance company's decision by initiating an arbitration proceeding pursuant to ORS Chapter 742. However, while the PIP arbitration is pending, PIP coverage is not provided, and the PIP coverage period continues to run. The sponsor asserts that the insured is thereby left "without the certainty of payment that likely results in loss of payment for medical expenses and in turn loss of access to healthcare providers."

*Item #19 Amend Oregon Rule of Civil Procedure 54E (Offer of Judgment)*

This resolution asks the HOD to recommend and encourage the BOG to recommend to the Council on Court Procedures an amendment to ORCP 54E that would allow Plaintiffs (and not just Defendants) to make an “Offer of Judgment.” The sponsor reasons that doing so would increase opportunities for and likelihood of settlement.

*Item #20 Legal Rate of Interest upon Non-Contract Obligations*

This resolution asks the HOD to recommend and encourage the BOG to study and consider a legislative proposal to amend ORS 82.010(1) to allow for imposition of the statutory rate of interest on “obligations for the payment of money where there is no contract, but the obligation to pay money is reasonably clear.”

*Item #21 Centralized Legal Notice System*

This resolution asks the HOD to instruct the BOG “to support and seek legislative approval for a centralized legal notice system to be operated for the benefit of all Oregonians under the auspices of either the state judicial department or a private nonprofit such as the Oregon Law Foundation.”

The proposal is similar, but not identical, to the proposal the Oregon Law Foundation presented to the BOG. Although the whereas clauses mention the decline of legal aid funding, and the background statement says that the revenue generated from a centralized notice system should be used to benefit legal aid, the resolution itself does not specifically direct the revenue to legal aid organizations. It also does not say who exactly should develop and operate the system.

The sponsor claims no financial impact statement is necessary because when adopted, this will be more than self-supporting. As the BOG knows, there is an upfront financial cost in bringing this type of proposal to the legislature and no guarantee that the legislature will adopt the proposal. Consequently, upfront costs might not be reimbursed, and a financial impact is possible.

*Item #22 Amendment to RPC 3.4 (Fairness to Opposing Party and Counsel)*

This resolution asks the BOG to submit to the HOD for approval an amendment to RPC 3.4(g), which currently reads:

A lawyer shall not . . . (g) threaten to present criminal charges to obtain an advantage in a civil matter unless the lawyer reasonably believes the charge to be true and if the purpose of the lawyer is to compel or induce the person threatened to take reasonable action to make good the wrong which is the subject of the charge.

The sponsor proposes the following changes:

A lawyer shall not . . . (g) threaten to present criminal, administrative or disciplinary charges to obtain an advantage in a civil matter. ~~unless the lawyer reasonably believes the charge to be true and if the purpose of the lawyer is to compel or induce the person threatened to take reasonable action to make good the wrong which is the subject of the charge.~~

Oregon RPC 3.4(g) is identical to former DR 7-105. The language that the sponsor proposes to omit was added to the original DR 7-105 in 1991 because the legal ethics committee and BOG believed the standard to be consistent with the law on extortion and that there are legitimate threats that should be permitted to be made which were prohibited by the terms of the original DR 7-105(A).

The ABA Model Rules of Professional Conduct had a provision similar to Oregon RPC 3.4(g), but it was ultimately removed because it was determined that extortionate, fraudulent and otherwise abusive behaviors by lawyers were covered by other rules of professional conduct. Some states that have a provision prohibiting the threat of criminal charges also prohibit the threat of disciplinary charges.

In any event, as with item 15, it would be unusual for the BOG to submit an Oregon RPC amendment to the HOD without first having it reviewed by the Legal Ethics Committee.

Item #23 Amendment to RPC 7.3 (Direct Contact with Prospective Clients)

This resolution asks the BOG to submit to the HOD for approval an amendment to RPC 7.3 that would add the following language to the existing rule:

*(e) A lawyer shall not, either in an individual capacity or for any firm, corporation, partnership or association, act, employ, or solicit to employ, any runner or capper for any attorneys or to solicit any business for any attorneys in and about the state prisons, county jails, city jails, city prisons, or other places of detention of persons, city receiving hospitals, city and county receiving hospitals, county hospitals, circuit courts, or in any public institution or in any public place or upon any public street or highway or in and about private hospitals, sanitariums or in and about any private institution or upon private property of any character whatsoever.*

*(f) Nothing in this section shall be construed to prevent the recommendation of professional employment where that recommendation is not prohibited by the Rules of*

*Professional Conduct of the Oregon State Bar.*

*(g) Nothing in this section shall be construed to mean that a public defender or assigned counsel may not make known his or her services as a criminal defense attorney to persons unable to afford legal counsel whether those persons are in custody or otherwise.*

The sponsor says that the language he proposes comes in large part from the California Business Code, sections 6150--6156.

The use of runners currently is prohibited by Oregon RPC 7.2(a) and ORS 9.500—9.510. The Legal Ethics Committee is currently reviewing the entirety of the advertising rules, including RPC 7.3. Again, as with items 15 and 22, it would be unusual for the BOG to submit an Oregon RPC amendment to the HOD without first having it reviewed by the Legal Ethics Committee.

**Oregon State Bar**  
**2012 House of Delegates Meeting**

Oregon State Bar Center  
16037 SW Upper Boones Ferry Rd.  
Tigard, Oregon  
Friday, November 2, 2012  
10:00 a.m.

Oregon State Bar

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Dear Oregon State Bar Member:

I am pleased to invite you to the 2012 OSB House of Delegates meeting, which will begin at **11:00 a.m.** on **Friday, November 2, 2012**, at the Oregon State Bar Center.

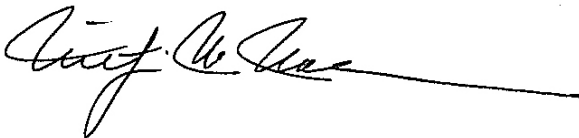
I also want to invite you to a no-cost CLE that will precede the HOD meeting at 9:00 a.m. Jordan Furlong will present *Rise of the Machines: Disruptive Technology and the Future of Law Practice*. It used to be said that computers would never be able to do a lawyer's job. Recent advances in technology, however, have cast doubt on this truism. From contract automation software to legal problem-solving programs to dispute resolution Web sites, new technology is poised to disrupt the traditional order and take over tasks that lawyers have been doing for generations. Jordan Furlong, partner with Edge International Consulting, will detail these new advances and explain how lawyers can respond and thrive in this new marketplace despite the rise of the machines. Seating is limited at this free CLE presentation. To register, please call the OSB CLE Service Center at (503) 431-6413 or toll-free in Oregon at (800) 452-8260, ext. 413 **by or before Friday, October 19**. You can also send an email response **by or before Friday, October 19** to [mcampbell@osbar.org](mailto:mcampbell@osbar.org) – please be sure to include your name, OSB number, and a contact phone number.

The preliminary agenda for the meeting includes a variety of issues including an increase in the inactive membership fee and changes to the Oregon Rules of Professional Conduct. All bar members are welcome and encouraged to participate in the discussion and debate, but only delegates may vote on resolutions. If you are unable to attend, please contact one of your delegates to express your views on the matters to be considered. Delegates are listed on the bar's Web site at [www.osbar.org/docs/leadership/hod/hodroster.pdf](http://www.osbar.org/docs/leadership/hod/hodroster.pdf).

If you have questions concerning the House of Delegates meeting, please contact Camille Greene, Executive Assistant, by phone at 503-431-6386, by e-mail at [cgreene@osbar.org](mailto:cgreene@osbar.org), or toll free inside Oregon at 800-452-8260 ext 386.

Remember that delegates are eligible for reimbursement of round-trip mileage to and from the HOD meeting. Reimbursement is limited to 400 miles and expense reimbursement forms must be submitted within 30 days after the meeting.

I look forward to seeing you at the Bar Center on November 2, and I thank you in advance for your consideration and debate of these items.



Mitzi M. Naucler, OSB President



# OREGON STATE BAR

## 2012 House of Delegates Meeting

Oregon State Bar Center, 16037 SW Upper Boones Ferry Road, Tigard, OR 97281-1935

11:00 a.m., Friday, November 2, 2012

Presiding Officer: Mitzi M. Naucler, OSB President

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### Agenda

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| <p>1. Call to Order<br/><i>Mitzi M. Naucler</i><br/><i>OSB President</i></p> <p>2. Overview of Parliamentary Procedure<br/><i>James N. Westwood,</i><br/><i>Stoel Rives LLP</i></p> <p>3. Report of the President<br/><i>Mitzi M. Naucler</i><br/><i>OSB President</i></p> | <p>4. Adoption of Final Meeting Agenda<br/><i>Mitzi M. Naucler</i><br/><i>OSB President</i></p> <p>5. Comments from the Chief Justice of the Oregon Supreme Court<br/><i>Thomas A. Balmer, Chief Justice</i><br/><i>Oregon Supreme Court</i></p> <p>6. Report of the Board of Governors Budget and Finance Committee<br/><i>Michael E. Haglund, Chair</i><br/><i>BOG Budget and Finance Committee</i></p> |
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### Resolutions

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| <p>7. Increase in Inactive Membership Fee for 2013<br/>(Board of Governors Resolution No. 1)<br/><i>Presenter: Michael Haglund, BOG, Region 5</i></p> <p>8. In Memoriam<br/>(Board of Governors Resolution No. 2)<br/><i>Presenter: Steve Larson, BOG, Region 5</i></p> <p>9. Amendment of Oregon Rule of Professional Conduct 1.8(e)<br/>(Board of Governors Resolution No. 3)<br/><i>Presenter: Helen Hierschbiel</i><br/><i>General Counsel, Oregon State Bar</i></p> <p>10. Amendment of Oregon Rule of Professional Conduct 5.4(a)<br/>(Board of Governors Resolution No. 4)<br/><i>Presenter: Helen Hierschbiel</i><br/><i>General Counsel, Oregon State Bar</i></p> <p>11. Veterans Day Remembrance<br/>(Board of Governors Resolution No. 5)<br/><i>Presenter: Richard Spier, BOG, Region 5</i></p> <p>12. Online Computer Knowledge Base<br/>(Delegate Resolution No. 1)<br/><i>Presenter: James Oberholtzer, HOD, Region 5</i></p> <p>13. Metropolitan Court District<br/>(Delegate Resolution No. 2)<br/><i>Presenter: Timothy HB Farrell, HOD, Region 1</i></p> <p>14. Lawyer Referral Service Policy and Procedure Changes<br/>(Delegate Resolution No. 3)<br/><i>Presenter: Steven McCarthy, HOD, Region 6</i></p> <p>15. Amendment of Oregon Rule of Professional Conduct 1.1<br/>(Delegate Resolution No. 4)<br/><i>Presenter: Steven McCarthy, HOD, Region 6</i></p> | <p>16. Stable Funding for the Court System<br/>(Board of Governors Resolution No. 6)<br/><i>Presenter: Hunter Emerick, BOG, Region 6</i></p> <p>17. Support for Adequate Funding for Legal Services to Low-Income Oregonians<br/>(Delegate Resolution No. 5)<br/><i>Presenters: Kathleen Evans, HOD, Region 6</i><br/><i>Gerry Gaydos, HOD, Region 2</i><br/><i>Ed Harnden, HOD, Region 5</i></p> <p>18. Fairness in PIP Arbitration Proceedings<br/>(Delegate Resolution No. 6)<br/><i>Presenter: Danny Lang, HOD, Region 3</i></p> <p>19. Amend Oregon Rule of Civil Procedure 54E<br/>(Delegate Resolution No. 7)<br/><i>Presenter: Danny Lang, HOD, Region 3</i></p> <p>20. Legal Rate of Interest Upon Non-Contract Obligations<br/>(Delegate Resolution No. 8)<br/><i>Presenter: Danny Lang, HOD, Region 3</i></p> <p>21. Establish Centralized Legal Notice System<br/>(Delegate Resolution No. 9)<br/><i>Presenter: John Gear, HOD, Region 6</i></p> <p>22. Amendment of Oregon Rule of Professional Conduct 3.4<br/>(Delegate Resolution No. 10)<br/><i>Presenter: Steven McCarthy, HOD, Region 6</i></p> <p>23. Amendment of Oregon Rule of Professional Conduct 7.3<br/>(Delegate Resolution No. 11)<br/><i>Presenter: Steven McCarthy, HOD, Region 6</i></p> |
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## Resolutions

### 7. Increase in Inactive Membership Fee for 2013 (Board of Governors Resolution No. 1)

Membership Category	If paid by January 31, 2013	If paid after January 31 but by February 28, 2013	If paid after February 28, 2013
Active members admitted in any jurisdiction before 1/1/11	\$522.00	\$572.00	\$622.00
Active members admitted in any jurisdiction on or after 1/1/11	\$443.00	\$493.00	\$543.00
Inactive members	\$125.00	\$150.00	\$175.00
Active pro bono members	\$170.00	\$170.00	\$170.00

*Whereas*, ORS 9.191(1) directs the Board of Governors to establish the annual membership fees to be paid by members of the Oregon State Bar; and

*Whereas*, Any increase in the annual membership fees over the amount established for the preceding year must be approved by a majority of delegates of the House of Delegates voting thereon at the annual meeting of the HOD; and

*Whereas*, The fee for inactive membership in the bar has been \$110 since 2002 despite the increasing cost of operations; now, therefore, be it

*Resolved*, That the 2013 annual membership fee for inactive and active pro bono\* members of the Oregon State Bar be increased to \$125 if paid by the January 31, 2013 due date, to \$150 if paid after January 31 but by February 28, 2013, and to \$175 if paid after February 28, 2013.

*Presenter: Michael E. Haglund  
Board of Governors, Region 5*

#### Background

The basic annual membership fee for regular active members will remain unchanged in 2013: \$447 for members admitted before January 1, 2011 and \$368 for members admitted after January 1, 2011. The fees quoted above for those members include the \$30 Affirmative Action Program assessment and a \$45 Client Security Fund (CSF) assessment.

Active pro bono members pay the same basic fee as inactive members, but because they are active practicing members they also pay the CSF assessment. They are not, however, subject to fee increases for late payment.

The CSF assessment is set by the BOG and is an increase of \$30 over the assessment for 2010–2012. Since the creation of the Fund in 1967, the assessment has varied considerably. Between 1986 and 2012, it ranged from a high of \$25 to a low of \$5. The increase for 2013 is necessary to rebuild the Fund, which was exhausted by an unprecedented number of high-dollar claims in 2012.

### 8. In Memoriam (Board of Governors Resolution No. 2)

Richard T. Aboussie  
Hon Frank R. Alderson  
C. Robert Altman  
Ronald M. Anderson  
Ronald P. Anderson  
David N. Andrews  
Robert B. Andrich  
Grace Angerman  
Hon. Donald C. Ashmanskas  
Richard E. Au Franc  
Richard Lee Barton  
Elmer Roy Bashaw  
Rex A. Bell  
Averill H. Bolton

Brian G. Booth  
Neil Bregenzer  
William S. Brennan  
Elizabeth W. Browne  
Herbert Carter  
Peter A. Casciato  
Phillip D. Chadsey  
Karl Clinkinbeard  
Robert W. Collins  
John Condon  
Clarence E. Conn  
Mary M. Dahlgren  
Hon James M. Fitzgerald  
George H. Fraser

Walter N. Fuchigami  
Walter P. Gerber  
Myron Joel Gitnes  
Gary D. Gortmaker  
Charles H. Habernigg  
James G. Harlan  
George A. Haslett Jr  
Howard R. Hedrick  
Ronald E. Hergert  
George L. Hibbard  
Thomas Y. Higashi  
Bruce M. Howlett  
James V. Hurley  
Richard A. Kasson

Harvey W. Keller  
Richard V. Kengla  
Olywn E. Kennedy  
Randall B. Kester  
Jim D. Korshoj  
Donald H Landes  
Larry E. Leggett  
David F. Lentz  
James A. Mason  
Derrick E. Mc Gavic  
George Wayne McKallip Jr.  
George M. McLeod  
Robert H. McSweeny  
William N. Mehlhaf

Ronald W. Messerly  
Douglas G. Miller  
Joseph P. Morray  
Howard L. Ollis  
Richard W. Olsen  
Greg A. Perkins  
Lee H. Peterson  
Theodore L. Preg

N. Butch Pribbanow  
Donald P. Reiling  
John R. Rende  
John E. Richard  
Richard T. Rictor  
Kenneth E. Roberts  
Timothy J. Rogers  
Richard N. Roskie

John D. Ryan  
Frank P. Santos  
John L. Schwabe  
Bernard L. Shain  
Nancy A. Smith  
Ronald M. Somers  
David A. Stewart  
Arthur L. Tarlow

Edwin H. Taylor  
Hon. Stephen S. Walker  
G. Robert Warrington  
Ronald A. Watson  
Bill L. Williamson  
Don S. Willner  
Warren A. Woodruff

*Presenter: Steve Larson  
Board of Governors, Region 5*

## 9. Amendment of Oregon Rule of Professional Conduct 1.8(e) (Board of Governors Resolution No. 3)

*Whereas*, The Board of Governors has formulated the following amendment to the Oregon Rules of Professional Conduct pursuant to ORS 9.490(1); and

*Whereas*, The Oregon State Bar House of Delegates must approve any changes in the rules of professional conduct before they are presented to the Oregon Supreme Court for adoption pursuant to ORS 9.490(1); now, therefore, be it

*Resolved*, That the amendment of Oregon Rule of Professional Conduct 1.8(e) as set forth below is approved and shall be submitted to the Oregon Supreme Court for adoption:

### **Rule 1.18(e)**

A lawyer shall not provide financial assistance to [While representing] a client in connection with pending or contemplated [or pending] litigation, [a lawyer shall not advance or guarantee financial assistance to the lawyer's client,] except that:

(1) a lawyer may advance court costs and [the] expenses of litigation, [provided the client remains ultimately liable for such expenses to the extent of the client's ability to pay] 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.

*Presenter: Helen Hierschbiel  
General Counsel, Oregon State Bar*

### **Background**

Currently, Oregon RPC 1.18(e) allows a lawyer to advance costs in contemplated or pending litigation "provided the client remains ultimately liable for such expenses to the extent of the client's ability to pay." It is identical to former DR 5-103(B) which was initially adopted in 1970.

The proposed new language comes from ABA Model Rule 1.8(e) which allows a lawyer to advance the costs of litigation to clients with repayment being

contingent on the outcome of the case, and also to pay the costs of litigation for an indigent client. Comment [10] to Model Rule 1.8 explains that allowing the recovery of advanced costs to be contingent on a successful outcome of the case 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."

The purpose of the rule, in both its current and proposed form, is to prevent a lawyer from acquiring a financial interest that will influence the lawyer's independent judgment in the matter or that will motivate the lawyer to initiate litigation for his or her own financial gain. This restriction is based on long standing prohibitions against barratry, champerty and maintenance.

The phrase "to the extent of the client's ability to pay" was added in 1986. While the records reflect it was adopted without debate by the membership, the added language was clearly an effort to allow lawyers to waive costs when an unsuccessful outcome leaves the client unable to reimburse the costs, while retaining the traditional prohibition against outright payment of litigation costs.

A BOG resolution to adopt the approach of the ABA Model Rule was presented to the HOD in 1997 but was defeated. Since that time, migration to Model Rules-based regulation by all US jurisdictions has been completed. Only Michigan, New Mexico, and Virginia have retained the requirement that clients remain ultimately liable for litigation costs and expenses advanced by the lawyer. All jurisdictions permit the payment of costs when the client is indigent, in recognition that the cost of litigating often discourages clients from pursuing their remedies for civil rights and other violations.

The BOG believes that this proposed change furthers the bar's commitment to access to justice. Lawyers routinely waive costs after an unsuccessful outcome. Under the current rule, lawyers must state in their fee agreements that clients are responsible for costs

and expenses of litigation regardless of the outcome of the case, then wait for the outcome to decide whether to waive the costs. The high cost of litigation can discourage clients from pursuing the legal remedies to which they are entitled.

**10. Amendment of Oregon Rule of Professional Conduct 5.4(a)  
(Board of Governors Resolution No. 4)**

*Whereas*, The Board of Governors has formulated the following amendment to the Oregon Rules of Professional Conduct pursuant to ORS 9.490(1); and

*Whereas*, The Oregon State Bar House of Delegates must approve any changes in the rules of professional conduct before they are presented to the Oregon Supreme Court for adoption pursuant to ORS 9.490(1); now, therefore, be it

*Resolved*, That the amendment of Oregon Rule of Professional Conduct 5.4(a) as set forth below is approved and will be submitted to the Oregon Supreme Court for adoption:

**Rule 5.4**

**Professional Independence of a Lawyer**

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm or firm members may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; *and*

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter; *and*

(5) a lawyer may pay the usual charges of a bar-sponsored or operated not-for-profit lawyer referral service, including fees calculated as a percentage of legal fees received by the lawyer from a referral.

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*Presenter: Helen Hierschbiel  
General Counsel, Oregon State Bar*

**Background**

Before its decision to adopt a percentage fee model for the Lawyer Referral System, the BOG considered carefully whether the new model would conflict with the Rules of Professional Conduct, specifically RPC 5.4(a)'s prohibition against sharing fees with a nonlawyer. The BOG's conclusion was that the rule was never intended to prohibit the payment of a percentage fee to a bar-operated lawyer referral system and should not be read that way. Nevertheless, the rule on its face suggests otherwise and may be confusing to practitioners. The BOG's proposed amendment to RPC 5.4(e) will make it clear that participation in the program is not a violation of the Rules of Professional Conduct.

The ethical propriety of the percentage-fee model was recognized as early as 1956 in ABA Formal Op. No. 291. At the time, both the ABA Canons and the Oregon Rules of Professional Conduct prohibited any division of fees with a nonlawyer. The ABA opinion held, however, that the canons were not violated by a bar association's requirement that members help finance the association's lawyer referral service "either by a flat charge or a percentage of fees collected."

Since then, notwithstanding the restriction on splitting fees with nonlawyers, the practice of paying a nonprofit referral service a percentage fee has met with wide approval in ethics opinions and judicial decisions, which have concluded that percentage fees are a legitimate method of helping such programs generate income to defray operating costs as well as making legal services more available to the public and do not implicate the risks of outside influence that the fee-sharing rule was designed to address.

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**11. Resolution for Veterans Day Remembrance  
(Board of Governors Resolution No. 5)**

*Whereas*, Military service is vital to the perpetuation of freedom and the rule of law; and

*Whereas*, Thousands of Oregonians have served in the military, and many have given their lives; now, therefore, be it

*Resolved*, That the Oregon State Bar hereby extends its gratitude to all those who have served, and are serving, in the military and further offers the most sincere condolences to the families and loved ones of those who have died serving their country.

*Presenter: Richard Spier  
Board of Governors, Region 5*

**Background**

The mission of the bar is to serve justice and promote the rule of law. Active-duty military service members, the guard, and reservists all embody the American tradition of a citizen soldier. We literally would not have our freedom, much less the rule of law, without generations of sacrifice by these citizens. This resolution is simply intended to offer thanks and condolences to all who have sacrificed. This applies to all living veterans, to those who are presently serving, and to the families of those who have lost loved ones.

In honor of Veterans Day, November 12, 2012, the Board of Bar Governors would like to say thank you and pause for a moment in honor of the soldiers and their families.

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**12. Online Computer Knowledge Base  
(Delegate Resolution No. 1)**

*Whereas*, Section 1.2 "Purposes" of the Oregon State Bar Association ("OSB") states in subsection A that "We are a professional organization, promoting high standards of honor, integrity, professional conduct, professional competence, learning and public service among members of the legal profession."; and

*Whereas*, Members and staff of the OSB produce written materials that are useful in the practice of law in Oregon (the "OSB Works"), many of which are not available from any other sources; and

*Whereas*, Large portions of the OSB Works are not readily accessible to the members of the OSB; and

*Whereas*, The cost of dissemination of written materials over the internet is low; now, therefore, be it

*Resolved*, That the Oregon State Bar establish an online computer knowledge base for the use of its members incorporating all of the OSB Materials that are not privileged or otherwise confidential.

*Further Resolved*, That the OSB establish a task force composed of volunteer members of the OSB as well as invited technical advisors to develop and implement the computer knowledge base;

*Presenter: James Oberholtzer  
House of Delegates, Region 5*

**Financial Impact**

Approx. 10 hours of OSB staff time per month to support the task force.

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**13. Metropolitan Court District  
(Delegate Resolution No. 2)**

*Whereas*, the Oregon Judicial Department is experiencing financial difficulties, which may reduce the public's access to justice; and

*Whereas*, The Oregon Judicial Department latest five year plan places improved access to justice as its number one goal; and

*Whereas*, The plan calls for the Judiciary to work with the governor, counties, legislature and bar to develop long term solutions to its problems; and

*Whereas*, Multnomah, Washington and Clackamas counties are the three largest counties (by population) in the state and serve a majority of the state's population; and

*Whereas*, These three counties have already combined their resources to provide transit and other services to the public (Metro); and

*Whereas*, The Oregon Judicial Branch has successfully joined the resources for Hood River, Wasco, Gilliam, Sherman and Wheeler counties to better serve the public by combining these county courts into the Seventh Judicial District; and

*Whereas*, The House of Delegates is authorized to direct the Board of Governors as to future action; now, therefore, be it

*Resolved*, The House of Delegates recommends that the Board of Governors study the feasibility of making a metropolitan court district combining the resources of Multnomah, Washington and Clackamas counties to increase access to justice and make an appropriate recommendation to the Oregon Legislature, the Oregon Judicial Department and the Chief Justice.

**Background**

Members of the bar in Hood River County have a unique perspective on efficient judicial administration and access to justice because our local court is made up of five counties that have been combined. The latest strategic plan put forth

by the Judiciary states that it will work with the Legislature and the Bar to come up with ideas to solve the problems that it is facing. One of the most important is the access to justice. This proposal seeks to combine the largest county courts in the state to improve the access to justice, just as Metro has combined the resources of these same counties to provide other government services.

In this case, I have approached State Senators Thomsen and Monroe, who both support my proposal. However, I do not have the resources to get the kind of information that these senators require to bring the appropriate legislation. I am not aware of any committees that might be interested in the issue. Therefore, the House of Delegates seems like the appropriate forum.

This is not a new idea based on the state's experience with Metro and Hood River's experience in the Seventh Judicial District. But study is needed if a proposal is to be brought to the Judiciary and to the Legislature. Depending on the results of that study, the Board of Governors can then make an appropriate recommendation on behalf of the Bar.

*Presenter: Timothy MB Farrell  
House of Delegates, Region 1*

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**14. Lawyer Referral Service Policy and Procedure Changes  
(Delegate Resolution No. 3)**

*Whereas*, The current Policies and Procedures of the Oregon State Bar Lawyer Referral Services require removal of a member from the Lawyer Referral Program upon the mere filing of disciplinary proceedings and before any adjudication of fault, and as such preclusion (1) is antithetical to the concept of innocence until proven guilty; and (2) operates to chill a member's vigorous defense to disciplinary charges; now, therefore, be it

*Resolved*, That the Policies and Procedures of the Oregon State Bar Lawyer Referral Services be amended as follows:

**"I.D. Eligibility:** Lawyers satisfying the following requirements shall be eligible for participation in the program. The attorney must:

4. not have in effect any final order resulting from any disciplinary proceeding or appeal thereof, directing the lawyer's ineligibility to participate in the program.

**"II.B. Enforcement:**

1. Except as otherwise provided herein, participation in LRS may be terminated or suspended for any length of time by a final order imposing such sanction in any disciplinary proceeding or as upheld by an appellate court."

*Presenter: Steven M. McCarthy  
House of Delegates, Region 6*

**Background**

A new lawyer would expect that an organization of his peers at the bar would pay more than mere lip service to the presumption of innocence, which may have been learned in law school as a fundamental tenet of American jurisprudence. The empirical facts are surprisingly otherwise. The Oregon State Bar as a matter of policy, currently does not honor any such principle insofar as its own membership in its lawyer referral service is concerned; and precludes participation therein once any disciplinary complaint against a member has been made; i.e., the lawyer is guilty until he proves his innocence or the OSB fails

to prove the elements of the complaint by clear and convincing evidence.

As a result of this policy and practice, members who rely on the LRS as a principal means of developing their practices are automatically and immediately precluded from participation in the LRS until the matter is “resolved.” This chills a member's right to fully defend against specious or ill-conceived charges; putting unfair and unnecessary pressure on the member to “plead” to some wrongdoing; and gives the OSB disciplinary officers the same precipitous slope as the playing field as an indigent has in a medical malpractice case. Further, there is no right to a speedy trial in an OSB disciplinary proceeding; and whether coincidental or not, such proceedings take hundreds of hours over several years before a fair and thorough determination of the issue.

An established practitioner might not feel the sting of this sanction at all; and many practitioners believe the LRS referrals consume too much time. But to a

lawyer new to the practice, or seeking to expand clientele into a new area of practice, that preclusion is a continuing and crippling restriction and a sanction imposed both without regard to the final outcome of a disciplinary proceeding; and without recourse for its imposition.

Noteworthy is that no such preclusion from LRS is predicated upon any PLF claims made, thus, the argument that the public is protected by removing a member because of a disciplinary complaint pales against the harm and discredit of malpractice.

#### **Financial Impact**

The fiscal impact is unknown; although the proposed changes obviously inure to the benefit of the substantial percentage of Bar members who have been practicing less than five years, by not unfairly curtailing their ability to develop a client base. The costs to the bar in defense of disciplinary actions may well increase because of the removal of these *ab initio* economic sanctions.

(See Appendix DEL4)

### **15. Amendment to Oregon Rule of Professional Conduct 1.1 (Delegate Resolution No. 4)**

*Whereas*, The current Rules of Professional Conduct, Rule 1.1, requiring competent representation, does not allow for the acceptance by a lawyer of work beyond the lawyer's current level of experience; and that the strict application of the rule precludes the undertaking of such work, the Rule should be expanded to allow such undertakings; and

*Whereas*, ORS 9.490(1) provides: “The board of governors, with the approval of the house of delegates given at any regular or special meeting, shall formulate rules of professional conduct, and when such rules are adopted by the Supreme Court, shall have power to enforce the same. Such rules shall be binding upon all members of the bar.” Now, therefore, be it

*Resolved*: That the Board of Governors recommend and submit for approval by the House of Delegates at a regular or special meeting, that the Supreme Court adopt an amendment to the Rules of Professional Conduct, Rule 1.1 as follows:

Rule 1.1 “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. ***If a lawyer does not have***

***sufficient learning and skill when the legal service is undertaken, the lawyer may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer or expert in the subject matter reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.”*** (addition in italics)

Or in the alternative that ABA Model Rules of Professional Conduct, Rule 1.1, Comments 1-4, be explicitly incorporated by reference in Oregon RPC 1.1.

*Presenter: Steven M. McCarthy  
House of Delegates, Region 6*

#### **Background**

Oregon Rules of Professional Conduct, Rule 1.1, provides that “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

The dilemma presented by the present formulation of the rule is that in a literal construction, a lawyer is

precluded from undertaking legal services without being “competent” in the particular subject matter. The effect is to limit, or in the unfettered discretion of the Bar, to attempt to sanction the effort by a lawyer to obtain experience by undertaking new and difficult challenges. This restricts not only the advancement of the lawyer's competence, but progress in the advancement of the law and the public access to justice by so limiting practitioners. While the Oregon comments to the rule correctly indicate that it is the same as the ABA Model Rule 1.1, the bar is unrestrained from ignoring the relevant ABA Comments:

“[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

“[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

“[3] In an emergency a lawyer

may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

“[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.”

This rule, particularly in its alternative adoption of the comments to the ABA Rule 1.1, merely reflects the parameters as the ABA identifies, and brings Oregon into national standards as to the subject matter. The rulemaking capacity of the Oregon State Bar under ORS 9.490(1) with regard to any changes to the rules of professional conduct, is for the Board of Governors to formulate subject to the approval of the House of Delegates. Where that occurs, and upon adoption by the Supreme Court, such changes then become effective and binding upon OSB members. The Board of Governors, if it is the exclusive proponent of any such rule changes, will by this resolution, recognize its significance and approval by the House of Delegates.”

#### **Financial Impact**

The immediate fiscal impact is unknown; although it inures primarily to the Bar by the saving of undetermined time, energy, and costs in the strict application of the present rule; and secondarily to the benefit of practitioners and the public by the relief and opportunity afforded practitioners by the change. What the effect the proposal may be on any increase in the rate of malpractice complaints is also unknown.



**16. Stable Funding for the Court System  
(Board of Governors Resolution No. 6)**

*Whereas*, The State of Oregon continues to experience severe revenue shortfalls; and

*Whereas*, Courts play an essential constitutional role in society preserving the rule of law, ensuring that government acts within the law, and resolving disputes affecting families in crisis, public safety, and business transactions that support Oregon's economy; and

*Whereas*, Oregonians have a constitutional right to justice administered in state courts "completely and without delay;" and

*Whereas*, In response to revenue shortfalls, the legislature has dramatically reduced the Judicial Department budget, resulting in statewide and local court closures due to staff reductions and mandatory furloughs, delays in case processing and severely reduced public services and access to justice in Oregon; and

*Whereas*, Further reductions to the Judicial Department budget may end full service courts in some areas of the state; and

*Whereas*, Courts are a core function of government, providing services that are not available otherwise through the private sector or non-governmental organizations; and

*Whereas*, Legislators rely on the views of their constituents and public input in setting priorities; and

*Whereas*, effective public input depends upon public awareness of the need for priority funding of the Judicial Department to maintain court operations; now, therefore, be it

*Resolved*, That the Board of Governors

1. Strongly advocate for adequate funding of the Judicial Department;
2. Actively oppose any additional reductions to the Judicial Department budget;
3. Urge members of the bar to contact their legislators in support of adequate funding for the Judicial Department and in opposition to further cuts to the department's budget; and,
4. Urge members of the bar to educate their clients and the public on the critical

need to support adequate funding for state courts to ensure that Oregonians have adequate access to timely justice.

*Presenter: Hunter B. Emerick  
Board of Governors, Region 6*

**Background**

As Oregon's economy tries to climb out of this recession, state services have been reduced to address the budget deficit, and the legislature has implemented cuts to virtually all government sectors.

At some point, however, further cuts threaten the viability of essential government services. Oregon is approaching that point with the judicial branch.

- Since the close of the 2007–2009 biennium, the trial court budget has been reduced by nearly a quarter, from \$243 million to \$183 million in 2011–2013. Trial court full-time equivalent staff positions have been reduced by 21 percent, from 1,594 to 1,258.
- The judicial branch maintained open courts five days a week, eight hours a day in the 2009–2011 biennium. This biennium, however, courts will implement nine furlough days on which courts will be closed.
- Oregon's judges are among the worst paid in the nation, and the legislature has authorized no salary increases since 2007.
- If the state's economy continues to stagnate, the judicial branch may face cuts—as much as 10.5 percent to an already inadequate budget.

Oregon's judicial branch provides a uniquely important government service mandated by Oregon's Constitution.

- As Chief Justice De Muniz pointed out in his State of the Courts Address in January, Oregon courts stand at the intersection of every important social, political and legal issue in the state.
- Courts decide big questions, such as the validity of the land use system, and small cases that are crucial to those directly involved, like child-custody determinations.

- Courts promote public safety and protect vulnerable citizens.
- Viable courts are crucial to the state's business climate: businesses need to know that the courts are available to resolve disputes between businesses, and between businesses and customers.

These are just a few of the reasons why the Oregon Constitution provides that justice is to be administered completely and without delay. (Art. I, § 10).

Given the crucial role of our courts and this constitutional requirement, further decimation of this independent branch of government will lower

the quality of life in Oregon for businesses and citizens alike. Further cuts will require courts to rank cases in order of importance. Constitutionally mandated criminal cases will take precedence. The civil docket, including small claims and probate, will have to take a back seat to cases involving public and individual safety.

A majority of the judicial branch budget is spent on staffing for daily court operations. Cuts in the judicial branch budget directly affect the volume of cases that the courts can handle.

In determining how the state will use its resources, the legislature must recognize that the courts *are* a special case.

**17. Support for Adequate Funding for Legal Services to Low-Income Oregonians (Delegate Resolution No. 5)**

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

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

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

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

*Whereas*, Legal aid programs in Oregon meet far less than 20% of the civil legal needs of Oregon's poor; and

*Whereas*, In the past 2 years Oregon's legal aid programs have had a 25% reduction in funding resulting in a 20% reduction in staffing. Further reductions are anticipated in 2013. Revenues have dropped from most sources: decreased federal funding; low interest rates that have caused a significant reduction in IOLTA revenue (77% drop); loss of state general fund money; and loss of foundation support because of the poor economy; and

*Whereas*, Poverty in Oregon has increased significantly since the beginning of the recession and

more Oregonians are in need of free civil legal assistance; and

*Whereas*, Assistance from the Oregon State Bar and the legal community is critical to maintaining and developing resources that will provide low-income Oregonians meaningful access to the justice system; now, therefore, be it

*Resolved*, That the Oregon State Bar;

(1) Strengthen its commitment and ongoing efforts to improve the availability of a full range of legal services to all citizens of our state, through the development and maintenance of adequate support and funding for civil legal services programs for low-income Oregonians.

(2) Request that Congress and the President of the United States make a genuine commitment to equal justice by adequately funding the Legal Services Corporation.

(3) Actively participate in the efforts of the Campaign for Equal Justice to increase contributions by establishing goals of a 100% participation rate by members of the House of Delegates, 75% of Oregon State Bar Sections, and a 50% contribution rate by all lawyers.

(4) Support the Oregon Law Foundation and its efforts to increase resources through the interest on Lawyers Trust Accounts (IOLTA) program, and encourage Oregon lawyers to bank at OLF Leadership

Banks. These banks pay the highest IOLTA interest rates.

(5) Encourage Oregon lawyers to support civil legal services programs through enhanced pro bono work.

(6) Work to increase funding for legal aid and preserve court filing fee funding for legal aid that was adopted in 1977 and which has been monitored and distributed by the Oregon State Bar Legal Services Program since 1997.

(7) Actively participate in and support the fundraising efforts of those nonprofit low-income legal service providers in Oregon that are not supported by the Campaign for Equal Justice.

*Presenters:*

*Kathleen Evans*

*House of Delegates, Region 6*

*Gerry Gaydos*

*House of Delegates, Region 2*

*Ed Harnden*

*House of Delegates, Region 5*

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**18. Fairness in PIP Arbitration Proceedings  
(Delegate Resolution No. 6)**

*Whereas*, The Oregon Financial Responsibility Law generally provides for mandatory purchase of Automobile Insurance Policies; and

*Whereas*, Within such Oregon Automobile Insurance Policies there is mandatory Personal Injury Protection Coverage providing No-Fault Payments[“PIP Benefits”], including payment of all “reasonable and necessary expenses for medical, hospital, dental, surgical, ambulance and prosthetic services incurred within one year after the date of the person’s injury”; and

*Whereas*, Injured Persons typically undergo a course of treatment by Healthcare Providers [Treating Physicians], who are legally and ethically responsible for restoring the health of the Injured Person by prescribing treatment modalities; prescriptions for medications; prescriptions for surgery or therapy; and, restrictions upon work activities; and

*Whereas*, Insurance Company PIP Payors have the right to have the Insured Person submit to an “Independent Medical Examination” as may be demanded by the PIP Payor Insurance Company; and

*Whereas*, Such PIP insurance companies also have the right to select the so-called “Independent Medical Examiner(s)”; and

*Whereas*, Not infrequently the “IME’s Opinion” recommends summary suspension, interruption, or termination of the Injured Person’s course of medical treatment; with a corresponding cut-off by the PIP Payor Insurance Company of the payment of PIP Medical Expenses and/or reimbursement of PIP Wage Loss Benefits; and

*Whereas*, If the Injured Person disputes such cut-off of PIP Benefits; the common remedy for an

aggrieved Injured Person involves requesting a “PIP Arbitration”, as provided in ORS Chapter 742; and

*Whereas*, ORS 742.521 [CONDITIONS APPLICABLE TO ARBITRATION PROCEEDINGS] does not provide for extension of the one year PIP Coverage term during the period following the cut-off of Benefits when PIP Arbitration has been commenced; and

*Whereas*, Because the commencement of a PIP Arbitration involves the time required for the selection of one or more Arbitrators; time involved for Discovery matters; and, the time required to accommodate the scheduling of an available date for an Arbitration Hearing requiring coordination among the Parties, Counsel, and the Arbitration Panel [NOTE: No guidelines exist for scheduling or expediting the Arbitration Process]; and

*Whereas*, The one year PIP Coverage period continues to run during the pendency of a PIP Arbitration such that a PIP Insured Claimant is left without certainty of payment that likely results in loss of payment for Medical Expenses and in turn loss of access to Healthcare Providers; and

*Whereas*, The present PIP Statues [ORS 742.520-742.528] fail to provide for the extension of the PIP Coverage while awaiting conclusion of the PIP Arbitration Proceedings, with resulting undue hardship to Injured Persons as PIP Insured Claimants; now, therefore, be it

*Resolved*, That the Members of the House of Delegates recommend and encourage the Board of Governors, in the furtherance of the improvement of the Administration of Justice, to study and consider a Legislative Proposal to add the following language to Oregon Revised Statutes, Chapter 742, specifically, amending ORS 742.521 [CONDITIONS APPLICABLE TO

ARBITRATION PROCEEDINGS] by adding the following:  
“(3) The Coverage period for PIP Benefits shall be extended, so as to provide for Extension of the period of PIP Coverage equal to the period of time while such PIP Benefits were suspended, denied, or terminated until rendition of the PIP Arbitration Award.”

*Presenter: Danny Lang  
House of Delegates, Region 3*

#### **Background**

Access to Medical Treatment and Healthcare Providers is essential for Oregonians injured in Motor Vehicle Accidents as evidenced by the Legislature providing mandatory No-Fault Medical Payments known as Personal Injury Protection Benefits [“PIP”] under ORS 742.520-742.528. However, such essential access to treatment of injuries is typically contingent upon confirmation to Healthcare Providers that payment will be made by Insurance Company PIP Payors.

Interruption of such critical access to Healthcare all too frequently occurs when PIP Payments are suspended pending a so-called Independent Medical Examination [“IME”]. Thus, interruption of needed continuing Medical Treatment occurs due to the interruption of PIP Payments in cases where the injured patient has no other source of funds and is forced to await the resolution of what is known as a “PIP Dispute,” for which a “PIP Arbitration” is the usual Forum.

Although a PIP Insured Claimant is allowed to demand a PIP Arbitration, a considerable delay results after the unilateral cut-off of PIP Benefits, which frequently occurs based upon the opinion by the IME that further treatment is no longer “reasonable and necessary.” Worse yet, the PIP Medical Benefits Coverage Period continues to run even during the period of uncertainty facing both the Patient and Healthcare Providers during the Selection of PIP Arbitrator(s); PIP Discovery matters; plus the need to coordinate scheduling of a “PIP Arbitration Hearing” followed by final rendition of the Award.

Wherefore the present procedure results in foreseeable denial of access to Medical Treatment for injuries. In other words, if hypothetically, payment of PIP Benefits were suspended for a period of 180 days, followed by an Arbitration Award in favor of the PIP Claimant; then in that event the PIP Coverage Period should be extended by an additional 180 days beyond the present one year Coverage Period.

Prejudice to Injured Claimants results during the inherent delay until rendition of the PIP Arbitration Award. Therefore, in the interest of fairness and equity, there is a compelling need for amendment to the present PIP Statutes [ORS 742.520-742.528] by providing for the automatic extension of the PIP Coverage Period equal to the corresponding delay while the PIP Arbitration is pending.

#### **19. Amend Oregon Rule of Civil Procedure 54E (Delegate Resolution No. 7)**

*Whereas*, The Oregon Constitution in Article 1, Bill of Rights, Section 20 requires **“Equality of privileges and immunities of citizens.** No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens.”; and

*Whereas*, Settlement of civil cases reduces the demand upon limited Oregon Circuit Court resources; and

*Whereas*, ORCP 54E [DISMISSAL OF ACTIONS; COMPROMISE] currently only empowers Defendants with the privilege of unilaterally tendering an “Offer of Judgment” to Plaintiff(s); and

*Whereas*, The Administration of Justice will be advanced by enabling Plaintiffs to initiate and promote settlement of cases, so as to further promote Settlement disputes and thereby reduce

the litigation burden on Oregon Courts by further Pre-Trial Settlement of cases; and

*Whereas*, Plaintiffs, as Claimants, should have the “Equal Privilege” and Equal Procedural Rights as Defendants; now, therefore, be it

*Resolved*, That the House of Delegates recommend and encourage the Board of Governors, in the furtherance of the improvement of the Administration of Justice, to recommend to the Counsel on Court Procedures an amendment to ORCP 54E so as to provide Equal Access to Justice by Plaintiff(s), as well as Defendant(s), by providing that in addition to Defendant(s), Plaintiff(s) be allowed to file an Offer to Allow Judgment, with the same 10 day response time.

*Presenter: Danny Lang  
House of Delegates, Region 3*

**Background**

Resolution of disputes in Civil Litigation via negotiated settlements, benefit Oregon Circuit Courts by reducing the burdensome back-log of pending cases and generally benefit the Parties by reducing expenses of Litigation. Equal opportunity and mutual fair opportunity to promote Settlements

should be available to both Plaintiffs and Defendants rather than limiting the benefit of Offering to Allow Judgment only to Defendants. Accordingly, the use of an **Offer to Allow Judgment** should be a mutually available remedy rather than at the pleasure and in the sole control Defendants.

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**20. Legal Rate of Interest Upon Non-Contract Obligations (Delegate Resolution No. 8)**

*Whereas*, ORS 82.010 [Legal Rate of Interest...] provides for a legal rate of interest at 9% per annum; and

*Whereas*, The time value of money is generally recognized; and

*Whereas*, Without payment for the time value of money, unjust enrichment accrues to the detriment of Claimants when payment of an obligation is clear; and

*Whereas*, The withholding of payment upon Claims for which such obligation is reasonably clear, such unjust enrichment also acts as a disincentive for the prompt, fair, and equitable payment of such obligations; now, therefore, be it

*Resolved*, That the Members of the House of Delegates recommend and encourage the Board of Governors, in the furtherance of the improvement of the Administration of Justice, to study and consider a Legislative Proposal to add a further provision to

ORS 82.010(1), adding: “(d) Obligation for the payment of money where there is no contract, but the obligation to pay money is reasonably clear.”

*Presenter: Danny Lang  
House of Delegates, Region 3*

**Background**

Non-contract obligations are often the subject of Litigation in Oregon Circuit Courts however under the present ORS 82.010 [Legal Rate of Interest] there is no recovery for the lost time value of money owed upon such non-contract obligations.

Thus, there is no incentive for settlement or payment upon non-contract obligations. Worse yet, loss of the time value of money unjustly rewards foot-dragging even when the obligation is reasonably clear.

Accordingly, in the interest of justice, prejudgment interest should be allowed when a non-contract obligation is reasonably clear.

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**21. Establishment of a Centralized Legal Notice System (Delegate Resolution No. 9)**

*Whereas*, By statute and court rule, Oregon residents and governments at every level are compelled to pay several millions of dollars *monthly* for legal notices published in printed form by private, for-profit newspaper corporations. With a legal monopoly on valid legal notice conveyance, the firms have no competition, resulting in extremely high prices and no incentive to innovate to deliver better service to the public; and

*Whereas*, The monopoly rates charged by the newspapers place an extreme and unjustified burden on local government budgets, as well as on private individuals forced to give such notices; and

*Whereas*, With foreclosures booming, newspapers are enjoying such a windfall from foreclosure notices that the owner of a foreclosure servicing firm is

buying or starting weekly newspapers to capture even more of the profit from the foreclosure crisis; and

*Whereas*, With the collapse in interest rates, interest on lawyer trust account (IOLTA) funding for legal aid services has collapsed, even as the foreclosure crisis creates a tidal wave of demand for civil legal aid; and

*Whereas*, Modern technology can provide Oregonians with a vastly superior system of legal notice that would allow more effective, more complete and useful notices, at a substantially lower cost, while slashing costs for every mandated publisher of legal notices; and

*Whereas*, The requirement to publish legal notices in a “newspaper of general circulation” is a historical artifact from the day when newspapers were the

sole media that reached residents throughout the state: and

*Whereas*, The continuing crisis in legal aid funding and the skyrocketing demand for legal aid services suggests that revenue stream created solely as a result of the legal system should be employed to help fund indigent legal aid, particularly given that the demand for legal aid rises precisely when foreclosures and collections suits and their attendant legal notice rise; now, therefore, be it

*Resolved*, The House of Delegates of the Oregon State Bar instructs the Board of Governors to support and to seek legislative approval for a centralized legal notice system to be operated for the benefit of all Oregonians under the auspices of either the state judicial department or a private nonprofit such as the Oregon Law Foundation.”

*Presenter: John Gear  
House of Delegates, Region 6*

#### **Background**

The public notice system is, first and foremost, a *public* system with a public – indeed, a Constitutional – purpose. Despite this, Oregon’s legal notice system today is not the result of thoughtful design about how to best ensure that those affected by public doings or legal actions are informed about them and enjoy the due process benefit of an effective system.

To the contrary, the sole criterion for most published notices today is cost, where the person obliged to give notice in published form seeks the cheapest paper that satisfies the county publication requirement, with no regard whatsoever to the efficacy of the notice. This system, a holdover from the 19th Century, is obsolete and overpriced.

Like the farrier employed by the City of Detroit Water Bureau long after the last horse was put to pasture, the legal notice system rules have long since outlived their time. It is time for legal notice to be better, smarter, and more efficient and much, much less expensive. This is both possible and necessary, and can happen by creation of a single, publicly owned, centralized system where anyone can publish a legal notice that satisfies the publication requirement.

This change is inevitable, and should be welcomed, although it will disrupt operations for those who profit from the existing system. When the new system arrives – and it will arrive – we will soon enjoy a host of benefits, many of which we cannot yet imagine. We can imagine some obvious

improvements: without the exorbitant cost for publishing notices in newspapers with plummeting readership, we will see notices in many languages, video notices, notices about places with maps as finely detailed as desired, audio notices for the blind, notices with detailed definitions of complex legal terms, notices that *show* people the places being discussed, and on and on.

The only thing holding back a better system is that the legal monopoly created by the newspaper of general circulation requirement – which threatens to outlive most of the newspapers of general circulation – means that no one can create a better system.

There is no doubt that newspaper corporations will fiercely guard their self-interest and struggle against the tide of change, regardless of how much the public would benefit from a better system. Thus, it’s helpful to consider how newspapers generally react when, on public policy questions, groups within society are asked to sacrifice something for the good of the society as a whole. However, newspapers are expert at recognizing special interest pleading, and they often editorialize about the urgent need for public officials to overcome entrenched interests in order to govern for the good of the people.

In fact, when it comes to government operations – and public notice about the public’s legal system is a quintessential government operation – newspapers are reliably heard to cry out for innovation for the sake of efficiency the same way that real estate agents tout location, location, location as the three most important things to think about.

A good example is the August 22, 2012, editorial by the Oregonian Editorial Board, which urged Oregon’s elected officials to act “like Apple,” the company that has repeatedly employed disruptive technology to disrupt and destroy whole industries that formerly supported competitors, such as record labels:

[I]n honor of Apple's milestone this week, we suggest that elected officials start acting like Apple. . . .

While Apple's line of "i" products didn't require new technology per se, they all were innovative in the way they adapted and packaged technology to meet consumers' needs. Local, state and national governments need to view technology through that same lens. . . .

Ultimately, fostering technological innovation will be as important -- probably more so -- to the economy as fixing immediate problems such as the budget deficit and underwater mortgages.

The Oregonian had it exactly right – government must embrace technology and use it to create better ways to do business, even at the expense of the old ways.

All of Oregon’s elected officials are challenged to do more with less, to use technology in new ways, and to replace outmoded ideas with new ones, even when it means taking on private interests who have grown comfortable with the old ways. In the context of the centralized legal notice system, the technology exists today to let governments take over this quintessentially governmental function, at a drastically lower cost, saving the nine-hundred odd special districts and local governments millions of dollars collectively each year.

Likewise, the Salem Statesman-Journal repeatedly calls for governments to undertake radical reforms and to embrace new, disruptive ideas. For example, its editorial of December 22, 2002, when the SJ called on Governor-Elect Kulongoski to “give Oregonians . . . real improvements in government efficiency and accountability” by taking an “unprecedented step” in submitting every single agency in government to a “top-to-bottom review by everyday Oregonians.” The SJ board understood then, as it should now, how important it is to examine old practices with new eyes.

Six years later, on May 24, 2008, the SJ Editorial Board again called for a radical rethink of governmental practices, lauding an effort to rethink those old habits because doing things smarter can free up money for more urgent needs:

Some folks wonder, “Why can’t government operate more like a business?” It’s a good question – especially these days. Business people, including many local taxpayers, **must rethink everything they do to cope with rising fuel costs and increased global competition. They expect government to operate as lean as it can, too.** . . . By finding ways to work more efficiently, [Dr. Bruce] Goldberg hopes to free up money to fill much of that staffing gap. . . . It would also give taxpayers more confidence that the state is spending their money as carefully as they would. **That’s what a successful business**

**does. It’s how Oregonians would like their entire government to work.**

Again from the SJ Editorial Board on January 22, 2004:

So you think state government wastes money? You’re right. Years of turf battles and “**we’ve always done it this way**” thinking have led to **inefficiencies. . . .**

**All the more reason for officials to tackle the institutional waste that afflicts government as a whole.** Here are other efforts in the works: \* \* \*

-- **Doing business online:** Starting this summer, businesspeople will find it far easier to bid for state contracts through the Internet. And though you can get a boat license or buy the Oregon Blue Book online, hundreds of other transactions require customers to download a form, fill it out, and mail it back. That is changing, at last.

**It’s high time state government took common-sense steps like these. Institutional inertia wastes Oregonians money and time.**

And yet again, when the SJ, on February 16, 2003, argued for reforms that “will cut into the income of car dealers, hotels and other establishments that do business with the state” because these reforms “were the right steps to take.” The paper even went so far as to find that

**“If the current recession has a silver lining, it is this: It creates an incentive for government at every level to become more cost-effective and efficient.”**

And the Klamath Falls Herald and News, on July 7, 2012, demanded that the Klamath Falls City Schools district “consider its inventory of schools and buildings and look at what might be the most efficient lineup. . . . Are they still as efficient as they should be?”

That same paper, on January 3, 2012, noted that “People are best served when government live within its means. Doing otherwise, except in emergencies, just pushes back an ugly day of reckoning without solving any underlying issues.” Governments all over Oregon can save millions of dollars annually by replacing the current hodgepodge system of hard-to-find, expensive-to-print legal notices with a single, public system of legal notices operated for the benefit of all

Oregonians, rather than just the publishers of newspapers.

And the Blue Mountain Eagle, on May 22, 2012, noted that reduced hours in rural post offices would be unpopular but were essential anyway, as a concession to “business sense,” because **“A significant number of Americans say government should be operated more like a business.”**

Indeed, the Bend Bulletin supports even very radical proposals that totally reinvent hallowed traditions – when discussing the traditions of others. On June 13, 2012, the Bulletin Editorial Board lauded expansion of the Bend-LaPine Online schooling contract into a program to serve students in all grades with the option to take one, two or even all classes online. Just days earlier, on June 11, 2012, the same board proposed that the Sisters School District employees should take pay cuts because it would benefit the district as a whole and the taxpayers who fund it.

Before suggesting pay cuts for staff, “from janitors through the superintendent,” wouldn’t it be better if the school all across Oregon could slash what they spend on legal notices, even while providing their constituents with much better, more informative notices, with hyperlinked text and graphics instead of tiny blocks of type on paper?

On that same day, the Bulletin’s Editorial Board also noted with satisfaction how the new e-Court system promised to “allow anyone with Internet access to find court schedules, files, and archived records,” which will be “a vast improvement for all who have dealings with the state’s courts.”

The Wallawa County Chieftain, in Enterprise, also wrote about the importance of completely rethinking outmoded systems on May 26, 2011, and of overcoming the entrenched resistance to change that always accompanies such rethinking.

The paper called for an effort against tax breaks for favored industries, demanding a push to **“strip all such politically motivated favors from the federal tax code, while restructuring the nation’s laws to enhance American competitiveness. . . . Once embedded . . . these giveaways are difficult to remove.”** The requirement to publish legal notices in a “newspaper of general circulation” is exactly this sort of embedded giveaway.

Nobody thinks change is easy when it affects the private interests who profit from the status quo. On July 16, 2012, the East Oregonian warned candidates for public office that any changes in the federal

budget will be greeted by the “usual parade of special interests trying to preserve their own spending . . .”

The current publication requirement is protectionist, and, as any economist would predict, has stifled all innovation, giving us a legal notice system essentially unchanged for centuries. Despite the wealth of technologies that could make today’s legal notices much more effective at actually giving notice to the intended audience, newspapers continue to protect a legally established monopoly that they never earned.

Back on May 23, 2012, the (Coos Bay) World Editorial Board opined that local restaurants had no business asking local government to protect them from competition, even when it would cost them their businesses: “Protectionism is rarely a path to prosperity.” The same paper noted, on August 15, 2012, that “As America’s economy has shifted from manufacturing jobs to service jobs, people in service industries have increasingly asked state legislatures to regulate them. The resulting rules may protect the public, but they also squash entrepreneurship.”

Here in Oregon, banks and credit unions are closing frequently, as customers shift to ATMs and online banking. Many of those banks are still housed in buildings where elevator operators and battalions of typists and a cadre of telephone switchboard operators all had jobs before technology changes eliminated them. Indeed, newspapers today relentlessly deploy technology to shed staff, with the SJ having just announced closure of its printing plant entirely. Technological efficiency allows the SJ printing operations to be conducted at a lower cost in Portland.

So newspapers well understand and support using technology to reduce costs. In fact, the Oregonian Editorial Board lauded this trend in its August 15, 2012, editorial, noting the dramatic improvements that technology has made possible for the Portland pioneer cemeteries:

But unseen practices, typically the most rigorous part of a successful business, are making the greatest difference. The records mess is cleaned up, with difficult-to-read agreements and maps and contracts committed to digital form and stored in computers. This makes gravesite sales and contract management legible and accountable, while it accelerates outreach . . .  
**. Trim businesses operate this way, morphing**



***to meet the public's need while conserving resources and maintaining accountability.***

Every worthwhile efficiency improvement hurts someone who benefits from the old, inefficient ways of doing business. For example, when the Eugene Register-Guard, on August 11, 2012, celebrated the new generation of smart meters for utilities, it was also, if you were a meter reader, celebrating the loss of another whole category of jobs to a new technology.

Bottom line:

All these newspapers who demand that public workers innovate and accept new technology should themselves recognize when the shoe is on the other foot.

Oregon government must be willing to radically rethink how it conducts every aspect of its business, and it must be willing to embrace change and to use technology, even if it means disrupting the

comfortable ways of old, and the people who profit from them.

And the legal notice system is the perfect place to start, because a better system will directly benefit each and every single Oregonian, either as a taxpayer, a beneficiary of a more efficient system, a person seeking legal aid, or as a person able to find an enhanced notice quickly and easily at any time of the day or night, without having to constantly guess where a notice might be placed.

Oregonians deserve a publicly owned system that puts effective and efficient legal notice as its first priority and that uses the revenues created from it to benefit the legal aid system.

#### **Financial Impact**

There is no financial impact statement because, when adopted, this will be more than self-supporting.

## **22. Amendment of Oregon Rule of Professional Conduct 3.4 (Delegate Resolution No. 10)**

*Whereas*, Under the presently existing rule, a lawyer may not initiate criminal proceedings against a defendant to gain a civil advantage; and State Bar disciplinary proceedings are "quasi-criminal" adversary proceedings requiring due process; and

*Whereas*, The State of Oregon has a strong interest in preventing improper conduct, extortion, and oppressive and unfair tactics among and between its members, and the enforcement of internally inconsistent rules; and

*Whereas*, ORS 9.490(1) provides: "The board of governors, with the approval of the house of delegates given at any regular or special meeting, shall formulate rules of professional conduct, and when such rules are adopted by the Supreme Court, shall have power to enforce the same. Such rules shall be binding upon all members of the bar; now, therefore, be it

*Resolved*, That the Board of Governors recommend and submit for approval by the House of Delegates at a regular or special meeting, that the Supreme Court adopt an amendment to the Rules of Professional Conduct, Rule 3.4 as follows (changes in italics):

### **RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL**

A lawyer shall not:

- (a) knowingly and unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) falsify evidence; counsel or assist a witness to testify falsely; offer an inducement to a witness that is prohibited by law; or pay, offer to pay, or acquiesce in payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case; except that a lawyer may advance, guarantee or acquiesce in the payment of:
  - (1) expenses reasonably incurred by a witness in attending or testifying;
  - (2) reasonable compensation to a witness for the witness's loss of time in attending or testifying; or
  - (3) a reasonable fee for the professional services of an expert witness.
- (c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;
- (d) in pretrial procedure, knowingly make a frivolous discovery request or fail to make reasonably diligent effort to comply with a

legally proper discovery request by an opposing party;  
(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused;

(f) advise or cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for purposes of making the person unavailable as a witness therein; or

(g) threaten to present criminal **administrative, or disciplinary** charges to obtain an advantage in a civil matter. **[unless the lawyer reasonably believes the charge to be true and if the purpose of the lawyer is to compel or induce the person threatened to take reasonable action to make good the wrong which is the subject of the charge.]**[deleted]

Presenter: Steven M. McCarthy  
House of Delegates, Region 6

#### Background

State Bar disciplinary proceedings are administrative in nature are “quasi-criminal” adversary proceedings invoking the full panoply of due process. *In re*

*Ruffalo* (1968) 390 U.S. 544, 551, 88 S.Ct. 1222, 1226, 20 L.Ed.2d 117; See also *In Re: Steven Kramer*, 193 F.3d 1131 (9th Cir., 1999); 1 Witkin, Cal. Procedure (2d ed. 1970) Attorneys, § 252, p. 260. The purpose of this proposed rule change is make the rule consistent with the prohibition of using criminal prosecution to gain a civil advantage by including the initiation of a bar complaint during the pendency of civil proceeding against a lawyer, thereby precluding any effort to extort a settlement or otherwise gain some other advantage in that proceeding.

The proposed rule change does not prevent an attorney from advising a client of actions which may be taken by the client which constitute either criminal prosecution or the filing of administrative or disciplinary charges, nor does it prevent either a party from pursuing such remedies, even where that action could gain an advantage in a civil action, or a lawyer initiating a bar complaint either independently as an officer of the Court, or where no civil action is pending which would be prejudiced by it.

#### Financial Impact

The immediate fiscal impact upon the OSB and other administrative agencies is unknown; although it inures at least to the Bar by decreasing the costs of the prosecution of lawyer generated ethics complaints, and by avoiding the claims and defense costs for abuse of process or malicious prosecution such as would otherwise be available against the lawyer engaging in the proscribed conduct.

### 23. Amendment of Oregon Rule of Professional Conduct 7.3 (Delegate Resolution No. 11)

*Whereas*, Solicitation of injured or vulnerable clients either in-person or by “running and capping” may exert undue pressure and often demands an immediate response, particularly of unsophisticated, hospitalized, or incapacitated injury victims who were approached at a moment of high stress and vulnerability, without providing an opportunity for comparison or reflection, the potential for overreaching is significant; and

*Whereas*, The State of Oregon has a strong interest in preventing fraud, undue influence, intimidation, overreaching and other forms of vexatious conduct potentially resulting from a lawyer’s in-person solicitation or by “running and capping”; and

*Whereas*, ORS 9.490(1) provides: “The board of governors, with the approval of the house of

delegates given at any regular or special meeting, shall formulate rules of professional conduct, and when such rules are adopted by the Supreme Court, shall have power to enforce the same. Such rules shall be binding upon all members of the bar;” now, therefore, be it

*Resolved*, That the Board of Governors recommend and submit for approval by the House of Delegates at a regular or special meeting, that the Supreme Court adopt an amendment to the Rules of Professional Conduct, Rule 7.3 as follows:

#### **RULE 7.3 CONTACT WITH PROSPECTIVE CLIENTS**

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer’s doing so is the

lawyer's pecuniary gain, unless the person contacted:

- (1) is a lawyer; or
- (2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

- (1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the prospective client is such that the person could not exercise reasonable judgment in employing a lawyer;
- (2) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or
- (3) the solicitation involves coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertisement" in noticeable and clearly readable fashion on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraph (a).

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

***(e) A lawyer shall not, either in an individual capacity or for any firm, corporation, partnership or association, act, employ, or solicit to employ, any runner or capper for any attorneys or to solicit any business for any attorneys in and about the state prisons, county jails, city jails, city prisons, or other places of detention of persons, city receiving hospitals, city and county receiving hospitals, county hospitals, circuit courts, or in any public institution or in any public place or upon any public street or highway or in and about private hospitals, sanitariums or in and about any private institution or upon private property of any character whatsoever.***

***(f) Nothing in this section shall be construed to prevent the recommendation of professional employment where that recommendation is not prohibited by the Rules of Professional Conduct of the Oregon State Bar.***

***(g) Nothing in this section shall be construed to mean that a public defender or assigned counsel may not make known his or her services as a criminal defense attorney to persons unable to afford legal counsel whether those persons are in custody or otherwise.*** (additions in italics)

Presenter: Steven M. McCarthy  
House of Delegates, Region 6

### Background

This proposed rule change study is aimed at the abuses of "ambulance chasing" i.e., where the lawyer does not know or have a prior relationship with the prospective client and the lawyer's solicitation is uninvited. A "runner" or "capper" is any person, firm, association or corporation acting for consideration in any manner or in any capacity as an agent for an attorney at law or law firm, in the solicitation or procurement of business for the attorney at law or law firm; or any person or entity acting for consideration as an agent of a lawyer or law firm. Paying such a person or entity to solicit clients on behalf of the lawyer should be subject to discipline for the reasons stated herein.

Direct in-person, for-profit solicitation by lawyers is not entitled to the same degree of constitutional protection as other forms of "commercial speech" by lawyers and may be prohibited entirely in situations "inherently conducive to overreaching and other forms of misconduct." *Ohralik v. Ohio State Bar Ass'n* (1978) 436 US 447 98 S.Ct. 1912; *Falanga v. State Bar of Georgia* (11th Cir. 1998) 150 F3d 1333, cert.den. (1999) 119 S.Ct. 1496. The state has a strong interest in preventing fraud, undue influence, intimidation, overreaching and other forms of vexatious conduct potentially resulting from a lawyer's in-person solicitation. Running and capping damages the reputation of the bar and the legal profession. *Ohralik v. Ohio State Bar Ass'n* (1978) 436 US 447, 460, 98 S.Ct. 1912, 1921; *Mayer v. State Bar* (1934) 2 C2d 71, 74, 39 P2d 206, 207. States may adopt prophylactic rules against in-person solicitation, running, and capping for profit in order to protect potential clients therefrom. *Ibid.*, 436 US 447 at 462. In California, violations of the running and capping law subject the actor to criminal sanctions. See California Business & Professions Code §§6151-6156.

In-person solicitation is permissible where the potential clients are sophisticated and experienced, particularly if they had previous dealings with lawyers and thus an independent basis for evaluating the claims by a new lawyer. Such persons are not so vulnerable to high-pressure tactics and there is less likelihood that in-person solicitation will be injurious to the person solicited. [See *Edenfield v. Fane* (1993) 507 US 761, 774, 113 S.Ct. 1792, 1802; *Falanga v. State Bar of Georgia*, supra, 150 F3d at 1344.

Because running and capping also presents regulatory difficulties because it is not generally observable, it behooves the Oregon State Bar to take a leadership role in preventing these kinds of abuses by implementing appropriate ethical rules, and sanctions for their breach, before this issue erupts in the Legislature.

Lawyers have multiple other means available for transmitting consumer information to communicate their availability for employment to potential clients, without invading the potential client's right to be left alone. [See *Florida Bar v. Went For It, Inc.* (1995) 515 US 618, 633–634, 115 S.Ct. 2371, 2380; 44 *Liquormart, Inc. v. Rhode Island* (1996) 517 US 484, 502, 116 S.Ct. 1495, 1507; ABA Model Rule 7.3, Comment (2)]. Solicitation of prospective clients by or on behalf of an attorney should remain permissible where (1) there is a preexisting family or professional relationship with the persons involved; (2) the Page 4 solicitation is in discharge of the lawyer's continuing professional duties to such persons; or (3) the solicitation is constitutionally protected by legitimate advertising and commercial speech.

The concern is not with false and misleading communications. Lawyers can be disciplined under Rule 7.1 even if their statements to the solicited person were entirely truthful and not misleading and even though the solicited person was not under stress or subject to undue pressure.

Some examples of the kinds of conduct sought to be prohibited by this rule change:

- Lawyer, without a client, sends agent to solicit injured persons;
- Lawyer hires investigator to gather contact information of injured persons from police radio, at police stations, and hospital emergency rooms and then make personal visits to injured persons at the hospital or their homes to induce them to hire Lawyer.

- Lawyer representing Client in a multiparty accident case contacts or has investigator contact other accident victims at hospital as part to solicit their personal injury cases.

#### **Financial Impact**

The immediate fiscal impact is unknown; although it inures primarily to the Bar by self-regulation and deterrence of conduct that may be criminalized by the legislature; and secondarily to the benefit of the public by the deterring predatory practices. It would likely increase costs to the Bar in the prosecution of ethics complaints.

## Lawyer Referral Service General Information

Oregon State Bar, Lawyer Referral Service, PO Box 231935, Tigard, OR 97281-1935  
Voice: (503) 431-6408 or (800) 452-8260 ext. 408 Fax: (503) 598-6946

Thank you very much for your interest in the Lawyer Referral Service! We look forward to providing you and your future clients with extraordinary service, delivered with the utmost respect and professionalism. Please do not hesitate to contact us if we can be of further assistance and answer any questions you may have.

### Policies and Procedures

All attorneys participating in the Lawyer Referral Service (LRS) program must agree to abide by the Lawyer Referral Service Policies and Procedures that follow this information sheet.

### Program Notes

The LRS operates on a 12-month program year, beginning July 1 and ending June 30. Although registrations are accepted at any time, fees are not prorated for late registrants.

Participating attorneys agree to charge no more than \$35 for an initial consultation. It is up to the attorney to control the length of the consultation. LRS clients are told to expect an in-office consultation. The \$35 consultation fee is a maximum, not a minimum.

Registration for certain Subject Matter Panels requires a separate form and affirmation showing that the panelist meets basic competency standards. The Subject Matter Panels are: 1) felony defense, 2) interstate/independent adoption, and 3) deportation.

Additional information and forms are available online at [www.osbar.org/forms](http://www.osbar.org/forms) and from the RIS staff.

LRS panelists agree to abide by the client service standards contained in the Joint Bench/Bar Statement on Professionalism (reproduced at right) and to use written fee agreements for any services performed on behalf of LRS clients beyond the initial consultation.

The LRS also administers an informal program for adolescents called Problem Solvers. By checking the appropriate box on the LRS registration form, attorneys agree to provide a free half-hour informational conference to people between the ages of 11 and 17.

### Statement of Professionalism:

LRS Panelists agree to abide by the Statement of Professionalism:

1. We will represent you responsibly, and with enthusiasm and dedication. We will vigorously protect your interests, including your right to confidentiality.
2. We will be trustworthy and honest in our dealings with you and others.
3. Your legitimate needs will determine the goals we pursue.
4. We will advise you against and will not pursue a course of conduct which is improper, unreasonable, without merit, or intended only to create delay or harass another.
5. We will conduct your legal affairs as efficiently and inexpensively as possible, and where appropriate, will advise you of alternative ways to resolve disputes. We will discuss available settlement opportunities promptly.
6. We will treat you and all others involved in your legal affairs, including other lawyers, with courtesy, respect and consideration.
7. We will represent you only in matters we can competently handle.
8. We will discuss our fee arrangement with you at the beginning of our relationship.
9. We will keep you informed about your legal affairs. We will provide you with copies of important papers and letters.
10. We will ensure your phone calls are returned promptly. We will be on time for meetings and court proceedings.

# Lawyer Referral Service Policies and Procedures

Oregon State Bar, Lawyer Referral Service, PO Box 231935, Tigard, OR 97281-1935  
Voice: (503) 431-6408 or (800) 452-8260 ext. 408 Fax: (503) 598-6946

## I. Program

### A. Goal

The goal of the Lawyer Referral Service (LRS) is to serve lawyers and the public by referring people who can afford to pay for legal services and need legal assistance to lawyers who have indicated an interest in or willingness to accept such referrals, and by providing ancillary information and alternative referral services.

### B. Program Year

The LRS shall operate on a 12-month program year beginning on July 1 and ending on June 30.

### C. Funding

Lawyers registering as LRS Panelists shall be charged a registration fee. The amount of the registration fee for each program year shall be determined by the Oregon State Bar Board of Governors. Additional funding plans may be implemented upon approval by the Board of Governors.

1. Payment of the registration fee shall entitle the panelist to participation only for the remainder of the program year to which the fee is applicable.
2. Refunds shall be paid only if requested prior to the commencement of the applicable program year.

### D. Eligibility

Lawyers satisfying the following requirements shall be eligible for participation in the program.

The attorney must:

1. be in private practice; and
2. be an active member of the Oregon State Bar who is in good standing; and
3. maintain malpractice coverage with the Professional Liability Fund or American Patent Law Association; and
4. **have no disciplinary proceedings pending.**

Lawyers satisfying the following additional requirements shall be eligible for participation in special subject matter panels. The lawyer must: a) meet standards for eligibility in the LRS; and b) meet the standards set for the specific subject matter panel.

### E. Registration

1. Qualifying lawyers shall be accepted as LRS Panelists upon payment of the registration fee and submission of the signed registration form which includes an agreement to abide by LRS Policies and Procedures.

2. Applications for special subject matter panels shall be reviewed by LRS staff in accordance with eligibility guidelines set by the Board of Governors. Challenges to an LRS staff decision on eligibility shall be reviewed by the Public Service Advisory (PSA) Committee, whose decision is final.

3. The LRS staff shall exercise its discretion in determining whether additional or duplicate registrations will be accepted. Duplicate registrations shall require additional fees. No duplicate registrations shall be made outside of the city where the attorney maintains his or her practice unless: a) the attorney maintains a second physical location where attorney-client meetings may take place; or b) the attorney's office is located within two (2) miles of the border between two locations.

### F. Operation

LRS staff shall develop and revise referral procedures and shall be responsible for the operation of the program. Procedures and rules of operation shall be consistent with the program goal and the following guidelines:

1. LRS staff may not comment on the qualifications of a Panelist and may not guarantee the quality or value of legal services.
2. LRS staff shall not make referrals on the basis of race, sex, age, religion, sexual orientation or national origin.
3. No more than three referrals may be made to a client for the same legal problem.
4. LRS staff may provide legal information and alternative referrals to social service agencies for those callers for whom a referral would not be appropriate, and may develop resource lists to assist in providing such information.

## II. Panelists

### A. Rules for Panelists

In order to remain eligible to receive referrals, each Panelist shall:

1. Continuously be an active member of the Oregon State Bar who is in good standing with malpractice coverage from the Professional Liability Fund or the American Patent Law Association and have no pending disciplinary proceedings.
2. Charge no more than \$35 for the initial consultation with a client referred by the LRS, except that no consultation fee shall be charged where: a) such charge would conflict with a statute or rule regarding attorney's fees in a particular type of case (e.g., workers' compensation cases), or b) the attorney customarily offers or advertises a free consultation to new or potential clients in a particular type of case.
3. Use written fee agreements for all services undertaken on behalf of LRS-referred clients beyond the initial office consultation.
4. Abide by the client service standards contained in the Joint Bench/Bar Statement of Professionalism.
5. Refer back to the LRS any client with whom the Panelist may not personally conduct the initial interview.
6. Participate only on those panels reasonably within the Panelist's competence or where the Panelist has been qualified to join a subject matter panel.
7. Cooperate with LRS staff by responding promptly to requests for information regarding the disposition of referrals.
8. Immediately notify the LRS if the Panelist is unable to accept referrals for a period of time due to vacation, leave of absence, heavy caseload, or any other reason.
9. Fill out and return all LRS Referral Notices within two weeks of the referral date.
10. Submit any fee disputes with clients referred by the LRS to the Oregon State Bar Fee Arbitration program.

### B. Enforcement

1. Panelists against whom disciplinary proceedings have been approved for filing shall be removed from the LRS until those charges have been resolved. Disciplinary proceedings shall include those authorized to be filed pursuant to Rule 3.4 of the Rules of Procedure. 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.

2. 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.

3. A Panelist may be removed from the program or any LRS panel if the Panelist fails to continue to maintain eligibility or otherwise violates the Rules for Panelists. Staff may temporarily remove a Panelist pending review by the PSA Committee at its next regularly scheduled meeting. Decisions of the PSA Committee regarding Panelist eligibility may be reviewed by the OSB Board of Governors, who shall determine whether the Committee's decision was reasonable.

4. Callers complaining about possible ethical violations by Panelists shall be referred to the Oregon State Bar Client Assistance Office.

5. A removed Panelist shall be entitled to a full fee refund if the removal occurred prior to the commencement of the program year to which the fee applies. A removed Panelist shall be entitled to a pro-rated refund if the removal occurs during a program year for which the Panelist has paid a registration fee. The amount of the refund shall be based on the number of full months remaining in the program year.

6. A removed Panelist who again meets all of the eligibility and registration requirements prior to the expiration of the program year during which the removal occurred may be reinstated for the remainder of that program year upon payment of the amount refunded under paragraph 5.