

**Oregon State Bar
Meeting of the Board of Governors
September 27, 2013
Oregon State Bar Center, Tigard, OR
Open Session Agenda**

The Open Session Meeting of the Oregon State Bar Board of Governors will begin at 1:30 p.m. on September 27, 2013. Items on the agenda will not necessarily be discussed in the order as shown.

Friday, September 27, 2013, 1:30 p.m.

1. Call to Order/Finalization of the Agenda

2. Report of Officers & Executive Staff

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| A. | President's Report [Mr. Haglund] | Inform | Exhibit |
| | 1. Announcement of President-Elect Nominee | Inform | |
| | 2. President's Special Award of Appreciation | Inform | |
| B. | President-elect's Report [Mr. Kranovich] | Inform | |
| C. | Executive Director's Report | Inform | Exhibit |
| D. | Director of Regulatory Services Report [Mr. Gleason] | Inform | Exhibit |
| E. | Director of Diversity & Inclusion Report [Ms. Hyland] | Inform | |
| | 1. OLIO Reports [Ms. Matsumonji and Mr. Emerick] | | |
| F. | MBA Liaison Reports [Mr. Ehlers] | Inform | |

3. Professional Liability Fund [Mr. Zarov]

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| A. | Financial statements | Inform | Exhibit |
| B. | Approval of 2014 Budget | Action | Exhibit |

4. OSB Committees, Sections, Councils and Divisions

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| A. | Oregon New Lawyers Division Report [Mr. Eder] | Inform | Exhibit |
| B. | CSF Claims [Ms. Hirschbiel] | | |
| | 1. CSF Workgroup Report & Committee Response | Action | Exhibit |
| | 2. Committee Request to Inform Marion Co. DA re: McBride | Action | Exhibit |
| | 3. Claims Recommended for Payment | Action | Exhibit |
| C. | Sections Presentation on LRS Policy [Ms. Pulju] | Inform | Exhibit |

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

A. Board Development Committee [Mr. Kranovich]

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| 1. | Update on Committee Actions | Inform | <i>PowerPoint</i> |
| 2. | BOG 2014 Public Member Appointment | Action | Handout |

B. Budget and Finance Committee [Mr. Knight]

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| 1. | 2014 Member Fee | Action | Exhibit |
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C. Governance and Strategic Planning Committee [Ms. Hierschbiel]

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| 1. | Section Charitable Contributions | Action | Exhibit |
| 2. | Marriage Equality HOD Resolution | Action | Exhibit |
| 3. | Section bylaw Amendment re: spouse/guest reimbursement | Inform | Exhibit |

D. Public Affairs Committee [Mr. Kehoe]

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| 1. | Legislative Update | Inform | Handout |
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E. Special Projects Committee [Mr. Prestwich]

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| 1. | Update on Completed and Upcoming Projects | Inform | |
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F. International Trade & Legal Services Task Force [Ms. Hierschbiel]

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| | | Inform | |
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6. Other Items

A. Appointments to Various Bar Committees, Boards, Councils

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| | | Action | Exhibit |
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B. CEJ/OLF/OSB Partnership [Mr. Gaydos]

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| | | Inform | Exhibit |
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C. Approve 2013 HOD Agenda [Ms. Hierschbiel]

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| | | Action | Exhibit |
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7. Consent Agenda

A. Approve Minutes of Prior BOG Meetings

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| 1. | Regular Session – July 13 , 2013 | Action | Exhibit |
| 2. | Special Session – July 25, 2013 | Action | Exhibit |
| 3. | Special Session – August 23, 2013 | Action | Exhibit |

8. Default Agenda

A. CSF Claims Financial Report

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| | | | Exhibit |
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B. Claims Approved by CSF Committee

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| | | | Exhibit |
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9. Closed Sessions – [CLOSED](#) Agenda

- A.** Judicial Session (pursuant to ORS 192.690(1)) – Reinstatements
- B.** Executive Session (pursuant to ORS 192.660(1)(f) and (h)) - General Counsel/UPL Report

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

- A.** Correspondence
- B.** Articles of Interest

Functions of the Oregon State Bar

We are a regulatory agency providing protection to the public.

We are a partner with the judicial system.

We are a professional organization.

We are leaders helping lawyers serve a diverse community.

We are advocates for access to justice.

Mission

The mission of the Oregon State Bar is to serve justice by promoting respect for the rule of law, by improving the quality of legal services, and by increasing access to justice.

Values of the Oregon State Bar

Integrity

Integrity is the measure of the bar's values through its actions. The bar adheres to the highest ethical and professional standards in all of its dealings.

Fairness

The bar works to eliminate bias in the justice system and to ensure access to justice for all.

Leadership

The bar actively pursues its mission and promotes and encourages leadership among its members both to the legal profession and the community.

Diversity

The bar is committed to serving and valuing its diverse community, to advancing equality in the justice system, and to removing barriers to that system.

Justice

The bar promotes the rule of law as the best means to achieve justice and resolve conflict in a democratic society.

Accountability

The bar is accountable for its decisions and actions and will be transparent and open in communication with its various constituencies.

Excellence

Excellence is a fundamental goal in the delivery of bar programs and services. Since excellence has no boundary, the bar strives for continuous improvement.

Sustainability

The bar encourages education and dialogue on how law impacts the needs and interests of future generations relative to the advancement of the science of jurisprudence and improvement of the administration of justice.

Report of President Mike Haglund

BOG-related activities, July 1 – September 20, 2013

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| July 10 | Campaign for Equal Justice board meeting |
| July 11-13 | BOG Committee and Board meetings, Astoria |
| August 8-10 | ABA/National Conference of Bar Presidents, San Francisco |
| August 23 | BOG Committee and Board meetings |
| September 5 | Clackamas County Bar Association dinner and speech |
| September 9 | Campaign for Equal Justice board meeting |
| September 11 | Washington County Bar Association dinner and speech |
| September 20 | Speaker, District of Oregon CLE, Innovations in the Law: Science and Technology, OMSI |

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: September 27, 2013
 From: Sylvia E. Stevens, Executive Director
 Re: Operations and Activities Report

OSB Programs and Operations

| Department | Developments |
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| <ul style="list-style-type: none"> ▪ Accounting & Finance/ Facilities/IT (Rod Wegener) | <ul style="list-style-type: none"> ▪ Beginning September 1, rent payments began with the newest tenant, Simpson Properties Group, at the bar center. Currently all but 2,091 s.f is occupied at the bar center, including one tenant which continues to make rent payments even though their office has been closed since February. The lease of Zip Realty expires July 2014, but is expected to renew. ▪ September also is when all bar managers prepare their respective department's line item budget for the next year. ▪ Staff is preparing for changes to member fee deadlines that go into effect January 2014. ▪ Staff is reviewing RFPs received from auditor candidates. ▪ OSB's primary bank, West Coast Bank, has been acquired by Columbia Bank; staff is hopeful that the change in operational software will not affect us. |
| <ul style="list-style-type: none"> ▪ Communications & Public Services (includes RIS and Creative Services) (Kay Pulju) | <p><i>Referral and Information Services</i></p> <ul style="list-style-type: none"> ▪ 423 LRS panelists have renewed and 38 new panelists have registered for the September 1, 2013 – August 31, 2014 Program Year (a total of 461 panelists). The renewing panelists represent a 63% response rate; renewals are expected to continue into October. ▪ Preliminary figures after the 10th reporting month indicate that LRS received \$37,803 in remittance payments for July, surpassing May 2013 as the best month yet. Preliminary data also indicates that October 2012 - July 2013 percentage fee revenue totals \$234,267, meaning LRS generated \$1,952,225 in earned and collected attorneys' fees for LRS panelists during this time period. That said, referral volume remains lower than historical norms, suggesting that LRS receives less percentage fee revenue than it would during a robust economy. ▪ The LRS database software company, Legal Interactive, just upgraded its software at the end of August, which should help bring promised enhancements online more quickly. RIS continues to receive positive feedback from panelists about the new software. ▪ RIS has fully implemented the OSB Legal Opportunities Task Force recommendation to expand income and asset qualification criteria for the Modest Means Program. ▪ RIS continues to distribute its new public outreach poster and business cards promoting RIS programs. Staff will also be implementing a new online marketing initiative in September. ▪ The HR Director is currently conducting first round phone interviews to fill |

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| | <p>two vacant RIS Assistant positions. RIS staff are working additional hours to ensure sufficient coverage for call volume and address panelists’ renewal, registration, and reporting needs.</p> <p><i>Communications & Creative Services</i></p> <ul style="list-style-type: none">▪ Marketing: Our planned integration of the existing CLE seminar site with the OSB website is on track for completion in January. The new site will take advantage of the existing audience of the bar’s main website to increase traffic and reinforce the OSB product brand identity. We will also be moving live event registration and online payment functions to our partner site provided by InReach, which already handles sales of electronically delivered seminars. Making more products available on a single platform will allow customers to search across platforms, e.g., a search for “family law” will bring up all live programs, webinars, streaming video and mp3 options tagged for family law. This move also moves us away from reliance on customized database programming, which is expensive to maintain.▪ Special events: Upcoming projects include a CLE on buying and selling law practices, a second day of tree planting as part of the ABA’s One Million Trees challenge and the annual Awards Luncheon. Staff are also planning and coordinating the annual NABE Communications Conference, which we will be hosting in Portland in late September.▪ Member communications: The August/September issue of the Bulletin included a feature on rural practice, which will be followed by a November feature on buying and selling a law practice – both in response to recommendations of the Legal Opportunities Task Force. Other Bulletin articles focus on ongoing BOG and organizational priorities as well as issues of interest to the membership. The electronic Bar News and BOG Update provide timely updates on board actions as well as bar programs and deadlines.▪ Public education: The now annual review of the bar’s online public education materials is underway, which involves updating all links and recruiting volunteers to edit each topic for accuracy. Legal Links video productions will be coming back on a regular basis in 2014, with some special projects planned for this fall. We will be focusing on web-based delivery rather than community access television but will continue to produce TV programming. |
| <ul style="list-style-type: none">▪ CLE Seminars (Karen Lee) | <ul style="list-style-type: none">▪ CLE Seminars now has a “studio” (the unrented space on the bar’s first floor) for producing webcast seminars without an in-person audience. The studio approach eliminates the need for IT staff to set up and breakdown the webcast equipment for each seminar and frees up the larger meeting space (Columbia and Sandy) for use by the bar and revenue-generating groups. Another advantage of having a webcast studio is the ability to produce a seminar “on the fly.” When the new bankruptcy exemptions went into effect July 1, 2013, the CLE Seminars Department was able to organize and market a studio-only webcast on the topic less than six weeks from the effective date. As the bar’s meeting rooms for in-person events are usually booked several months in advance, a studio-only webcast seminar eliminates the need for an actual meeting room. |

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| | <ul style="list-style-type: none"> ▪ On August 20, the CLE Seminars Department partnered with the Arizona Bar and InReach to offer a free webcast, “Expecting the Unexpected: How to prepare You and Your Staff for Violence in the Workplace.” More than 80 viewers logged into the bar’s InReach website to view the seminar. The department is looking into to offering a free, on-demand video of the presentation available during the month of September for those who missed signing up for the webcast. ▪ The Department reconfigured two staff positions (Customer Service Specialist and CLE Seminars Assistant) and reduced its FTE by .30. |
| <ul style="list-style-type: none"> ▪ Diversity & Inclusion (Mariann Hyland) | <ul style="list-style-type: none"> ▪ The OLIO orientation occurred on August 9th – 11th. 47 students (23 1Ls, 22 THUDS, 2 undergrads), 50 attorneys and 14 Judges attended. Evaluations were very positive. Board members Hunter Emerick and Audrey Matsumonji attended. ▪ D&I exceeded its \$57,100 fundraising goal and raised \$60,570 to fully fund all direct expenses for OLIO programs in the 2013-14 academic year. ▪ D&I published its second quarterly electronic newsletter in August, which featured information concerning the transforming legal profession, the changing job market, and resources to support small firm and solo practitioners. Also, the newsletter featured videos of three small firm and solo practitioners who have developed successful practices serving diverse clients. Here’s a link: http://diversity.osbar.org/. |
| <ul style="list-style-type: none"> ▪ General Counsel (Helen Hierschbiel) | <ul style="list-style-type: none"> ▪ Helen has been providing assistance on prosecutors’ ethical obligations regarding exculpatory evidence to the Brady Workgroup. The workgroup which is comprised of members of the Oregon District Attorneys Association, the Oregon Sheriff’s Association and the Oregon Chiefs of Police and is developing a protocol for prosecutors in Oregon to use to ensure that all exculpatory evidence is identified and made available to the defense as required. ▪ Amber Hollister attended the first ABA UPL School, which was targeted at UPL enforcement bodies throughout the country to strategize on how to address common areas of concern, such as the proliferation of notarios. The information provided and the networking opportunity with her counterparts in other states will be helpful to Amber’s work with the OSB UPL Committee. ▪ The Client Assistance Office has received about 15% fewer complaints in 2013 as compared to last year at this time. It is too early to tell whether this is the beginning of a trend, or an anomaly. ▪ Troy Wood (newest CAO staff attorney) attended his first National Organization of Bar Counsel (NOBC) conference. He reports that learning about other disciplinary systems and how they handle issues of common concern has given him a better perspective for understanding the OSB CAO processes and reasons for those processes. ▪ Chris Mullman, who has been CAO Manager since it was established in 2003, has announced his retirement after nearly 20 years with the OSB. His last day will be September 30, 2013. CAO Staff Attorney Scott Morrill, who has also worked in CAO since its inception in, will be the new department manager. We will be recruiting right away to fill the vacancy created by |

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| <ul style="list-style-type: none"> ▪ Human Resources (Christine Kennedy) | <p>Scott’s promotion.</p> <ul style="list-style-type: none"> ▪ Renewed the workers’ compensation policy with a premium increase of 7.92% due to claims history. ▪ Presented the following seminars for staff: The PERS Update, Much Ado about Roth 457, Mindfulness Based Stress Reduction, Get Heart Healthy One Step at a Time. ▪ Hired replacements for the following positions: Technical Support Specialist and MCLE Program Assistant (part time). ▪ Promoted current staff to fill the following positions: Regulatory Services Coordinator and Public Records Coordinator ▪ Active recruiting to replace the following positions: CLE Seminars Assistant (part time), CLE Customer Service Specialist (part time), two RIS Assistants (part time), Admissions Specialist, Legal Publications Attorney Editor, and Public Affairs Legislative Attorney. |
| <ul style="list-style-type: none"> ▪ Legal Publications (Linda Kruschke) | <ul style="list-style-type: none"> ▪ The following have been posted to BarBooks™ since June: <ul style="list-style-type: none"> ○ Eight revised and 21 reviewed-&-determined-accurate Uniform Civil Jury Instructions. ○ Four chapters of Environmental Law vol. 1: Regulation and Permitting. ○ Seven chapters of Health Law in Oregon. ○ Twelve chapters of Criminal Law, 2013 revision. ▪ Environmental Law vol. 1: Regulation and Permitting, the first in a series of five volumes, is scheduled to go to the printer by Sept. 13. <ul style="list-style-type: none"> ○ 2013 Budget = \$6,000; Actual to date = \$5,640 ○ Because of the relatively small size of the book it will be in a spiral bound with cover format. ▪ Family Law went to the printer by April 19. <ul style="list-style-type: none"> ○ 2013 Budget = \$49,025; Actual to date = \$70,238 ▪ Uniform Civil Jury Instructions and Uniform Criminal Jury Instructions are both currently below budget, but these titles have continued to sell steadily throughout the year and are likely to meet budget by the end of the year. <ul style="list-style-type: none"> ○ Civil – 2013 Budget = \$29,850; Actual to date = \$27,098 ○ Criminal – 2013 Budget = \$22,025; Actual to date = \$20,528 ▪ Work with Tanya Hanson of the PLF to revise their Oregon Statutory Time Limitations book continues. Several chapters have been received and are being reviewed by the editorial board. ▪ The OSB has entered into an agreement with Bloomberg Law to license all our print publications (except for Jury Instruction, which are under a separate agreement) for a fee of \$26,000 per year for three years. This fee will be included in the 2014 budget. ▪ Recruitment for the vacant Attorney Editor position is complete and an offer has been made to the first-choice candidate . |
| <ul style="list-style-type: none"> ▪ Legal Services (Judith Baker) | <ul style="list-style-type: none"> ▪ LSP staff are finalizing the accountability report mandated by the LSP Standards and Guidelines. This document will be reviewed by the LSP Committee in September and submitted to the BOG in November. ▪ LSP staff continue to participate in strategic planning with legal aid programs to address the current funding crisis. |

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| | <ul style="list-style-type: none"> ▪ The number of Certified Pro Bono programs continues to grow, with three new Victims’ Rights Organizations. Also, the Conservation Land Trust Program is working to become certified. ▪ Work continues on the National Pro Bono Celebration Week which will be held October 21 through 25. The Annual Pro Bono Fair and Celebration in Portland will be on Monday, October 21. It will include three CLEs, a reception and an awards ceremony for the ONLD Pro Bono Challenge. There will be Pro Bono Panel at Willamette Law School on Wednesday, October 23. ▪ The Pro Bono Law Student subcommittee will hold lunchtime panels at all three law schools in which panelists will discuss with law students the benefits and challenges of doing pro bono work. |
| <ul style="list-style-type: none"> ▪ Media Relations (Kateri Walsh) | <ul style="list-style-type: none"> ▪ Kateri Walsh made two presentations on managing media issues at the National Conference of Bar Executives Communications Section workshop that was held in Portland September 25. |
| <ul style="list-style-type: none"> ▪ Member Services (Dani Edwards) | <ul style="list-style-type: none"> ▪ The annual volunteer recruitment concluded in early August. As seen in recent years, the number of lawyer volunteers has risen another 30% while the number of public members continues to decrease. ▪ Interviews for BOG public member candidates will be conducted on September 27. ▪ More than 250 lawyer volunteer appointments will be made during the October BOG committee meetings. All board members are encouraged to attend this appointments session. ▪ For the last two months all list serves have been running on the new internal platform. We were able to discontinue our relationship with our old list provider which saves more than \$8,000 each year. The new system provides users with additional features including the ability to manipulate their own list serve account information through the member login area. ▪ In July the bar conducted three judicial preference polls for circuit court appointments in Jackson, Lane and Multnomah Counties. The voter participation for preference polls has been surprisingly high in comparison to the bar’s BOG and HOD elections. The five judicial preference polls conducted this year have resulted in an average of 37% voter return in comparison to the typical 12% to 20% voter participation we see in bar elections. |
| <ul style="list-style-type: none"> ▪ Minimum Continuing Legal Education (Denise Cline) | <ul style="list-style-type: none"> ▪ The MCLE Committee held its quarterly meeting on September 20. ▪ On August 6, the Supreme Court discussed the MCLE Rule amendments that were approved by the BOG at its July meeting. There was some concern about sending notices of noncompliance via email only. At the request of the Court, the proposed amendments were revised to include a requirement that notices of noncompliance be sent via regular mail and email. The revised rule amendment was approved by the Court on September 4. ▪ Processed 4,956 program accreditation applications and 728 applications for other types of CLE credit (teaching, legal research, etc.) since the first of the year. ▪ Claire Cowan, MCLE Program Assistant (.75 FTE), joined the bar staff on July |

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| | <p>22nd. Claire’s work schedule is 20 hours per week from 4/1 through 9/30 and 40 hours per week from 10/1 through 3/31.</p> |
| <ul style="list-style-type: none"> ▪ New Lawyer Mentoring (Kateri Walsh) | <ul style="list-style-type: none"> ▪ There will be a big mentor recruitment push throughout the months of September and October, which will have several different elements. ▪ The NLMP will be hosting a CLE and social for mentoring participants in the fall (tentative date is November 18) that will include a showing of the movie “Adam’s Rib” at the Hollywood Theater and a panel discussion of some of the ethical and professionalism issues raised in the film. |
| <ul style="list-style-type: none"> ▪ Public Affairs (Susan Grabe) | <ul style="list-style-type: none"> ▪ Since the 2013 Legislative Session ended July 8th, the Public Affairs Department has focused on wrapping up the 2013 session, preparing for the short 2014 session, as well as preparing for the longer 2015 session where the bar typically introduces a package of law improvement proposals. ▪ Legislative Wrap up. Public Affairs facilitated the publication of a Bulletin article on the highlights of the 2013 session as well as an update on the Citizens’ Campaign for Court Funding. Public Affairs continues to publish its electronic newsletter, the Capitol Insider on a regular basis. ▪ Legislation Highlights Publication. The Public Affairs Department is currently compiling the 2013 Oregon Legislation Highlights publication with over 18 chapters and authors, and addresses several hundred pieces of legislation in various practice areas including practice tips. ▪ 2013-2014 Legislative Workgroups. Public Affairs is facilitating a number of work groups requested by the legislature. These workgroups will address the use of alternate jurors in criminal cases, withdrawal of attorneys, motions to disqualify a judge in rural counties and eCourt filing fees. The bar will report back to the legislature on these workgroups during the September legislative days. Other workgroups the bar is involved in during the interim include the Elder Abuse Workgroup, the CASA workgroup and the Escrow Agent workgroup. ▪ Interim Legislative Days. Public Affairs will be actively involved in the September interim legislative days providing status updates on the bar workgroups mentioned above as well as monitoring the Capital Construction process for the new Multnomah County Courthouse. We continue to engage in other legislative workgroups in preparation for the February short session. ▪ Liaison activities. The PAD continues to liaison with external stakeholder groups such as the Council on Court Procedures, the various Oregon Law Commission workgroups in particular judicial selection and Probate as well the OSB/OJD eCourt Task Force. ▪ 2015 Law Improvement Process. The Public Affairs staff has started meeting with bar groups about the bar’s process and deadlines for proposing legislation for the 2015 legislative session. The deadline for bar groups to submit proposals for the 2015 legislative session is April 4, 2014. Public Affairs will review the package and make a recommendation to the board of governors which will be forwarded to the legislature by June 1, 2014. |
| <ul style="list-style-type: none"> ▪ Regulatory | <p><i>Discipline & Regulation</i></p> |

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| <p>Services (John Gleason)</p> | <ul style="list-style-type: none"> ▪ The Supreme Court unanimously approved new BR 7.1 which provides for the administrative suspension of lawyers who fail to respond to discipline investigations. The new rule is effective November 1, 2013. The full text is available on the Bar website and will be published in the next Oregon State Bar Bulletin. ▪ Recently we selected a member of the support staff to act as Diversion/Probation Administrator. The centralization of responsibility affords a much greater level of scrutiny to the pending matters. Her primary duty is to ensure that all terms of the probation or diversion are followed and completed. ▪ In early August John attended a conference of international legal regulators from 24 countries, which focused on admission and regulation of lawyers across state and international borders. John and one of his staff attorneys attended the National Conference of Bar Counsel annual meeting in August. <p><i>Admissions</i></p> <ul style="list-style-type: none"> ▪ Admissions Director Charles Schulz and John Gleason attended a recent National Conference of Bar Examiners meeting regarding changes in the area of admissions and character and fitness. It reinforced how quickly changes are happening in the areas of lawyer admissions, law school class numbers, cross-border practice issues and fitness for practice. ▪ Law school numbers are down around the country. The numbers fluctuate depending on the state and number of law schools in the state, but pretty much the numbers everyone talks about are 25-38 percent reduction for 1L’s. The prediction is a close to 50% reduction in bar eligible applicants by 2015 compared to 2010. ▪ The Uniform Bar Exam continues to spread around the country. Latest count is 13 states with several more supreme courts poised to adopt its use. Oregon is not a UBE state. ▪ We continue to work toward a resolution of issues with the BBX. The Chief Justice appointed a committee to address the issues that will meet soon and there will be a progress report for the BOG in November. |
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Executive Director’s Activities July 14 to September 27, 2013

| Date | Event |
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| 7/16 | HOD Out-of-State Region meeting |
| 7/17 | EDs Breakfast Group |
| 7/17 | HOD Region 5 meeting |
| 7/18 | HOD Region 4 meeting |
| 7/20 | Client Security Fund meeting |
| 7/25 | Knowledge Base Task Force meeting |
| 7/25 | BOG Special Meeting Conference Call (Appellate Recommendations) |
| 7/27 | Legal Technicians Task Force meeting |
| 8/1 | OMLA Social & Auction |
| 8/2 | Meeting with Chief Justice |
| 8/6-8/9 | NABE/NCBP meetings (San Francisco) (see accompanying report) |
| 8/21 | Willamette Law School Professionalism Orientation |

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| 8/21 | Professionalism Commission meeting |
| 8/21 | Partners in Diversity Summer "Say Hey" event |
| 8/23 | BOG Committee meetings & Special BOG meeting |
| 8/26 | Lewis & Clark Law School Evening Student Professionalism Orientation |
| 8/29 | PLF Investment Committee |
| 9/4 | Meeting with T. Kranovich and BOG Retreat Facilitator |
| 9/5 | CEJ Board and CEJ Advisory Committee meetings |
| 9/7 | Client Security Fund Committee |
| 9/10 | OAPABA Dinner |
| 9/11 | CLNS Task Force meeting |
| 9/12-10/5 | VACATION!!! |

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: September 27, 2013
From: Sylvia E. Stevens, Executive Director
Re: Report on 2013 NABE/NCBP Annual Meeting

Action Recommended

None, this is for information only.

Discussion

Thank you for the opportunity to attend the 2013 Annual Meeting of the National Association of Bar Executives and National Association of Bar Presidents. The meetings took place back-to-back August 7-9 in San Francisco. A brief overview of the sessions I attended follows:

NABE PROGRAMS

Changing Your Mind About Change

Gerry Riskin of Edge International provided an informative explanation about how traditional “lawyer thinking” can be an obstacle to embracing change. He compared and contrasted the thinking styles of lawyers (independent, critical/analytical, tense, perfectionist, never finished) with those of successful business leaders (visionary, creative, project managers, accepting of error, ready enough) and encouraged audience members to be more willing to take risks and think creatively.

We’re a Lean, Mean Staffing Machine

A panel of bar executives led an audience discussion of best practices for improving staff and organization performance through cross-training, reassignment and motivation.

Where Have All the Volunteers Gone?

An exploration of the changing nature of volunteerism and approaches to reverse the trend.

Keys to Successful Financial Management

A refresher course in understanding financial statements and investment reports, together with audience ideas for managing cash flow, expense reduction and identifying new sources of revenue.

Thinking Outside the Bar Box: Preparing Your Members and Staff for New Trends in Legal Services Delivery

Panelists discussed how changing lawyer demographics, the changing nature and demands of clients, and the impact of technology are raising questions about whether the traditional practice model will meet emerging and evolving legal service needs.

Mastering the Art of Dealing with Difficult Leaders

The panelists reviewed studies on different communication styles and how they can be obstacles to collaborative leadership, as well as tips on how to work within that reality.

NCBP PROGRAMS

A New Age for the Legal Profession Requires a New Age for Bar Associations

Two leading observers of trends in the profession discussed changes in the profession wrought by the economy, globalization, technology, declining law school applications, law school debt and a significant percentage of un- and under-employed young lawyers, and what affect those changes will have on the organized bar and its relevance to members.

Unified State Bar Challenges

Panelists from unified bars that have faced “dis-unification” and other challenges in recent years discussed the source of the underlying problems and the approaches taken in response. The essential questions raised by these challenges is whether the unified bar continue to be a viable model; will consumer demand force a change from the self-regulation model; and how will declining membership impact revenues and programming?

Limited License Legal Technicians-Making Justice More Accessible

Representatives of the Washington State Bar and the Washington Supreme Court explained the rationale for Washington’s new Limited License Legal Technician Program, how it was developed, and it is expected to mean for the organized bar, for lawyers, and for the public.

When the Rubber Hits the Road

Bar presidents crowd-sourced ideas and advice on “what would you do?” situations, tapping into case studies from a variety of jurisdictions.

BOG UPDATE: Disciplinary Counsel/Admissions

Disciplinary Counsel

1. In early August I attended a conference of international legal regulators. Twenty-four countries from Singapore to Northern Ireland, South Africa and Newfoundland sent representatives from their lawyer regulation offices. Essentially every corner of the world participated in the conference. Although the International Legal Regulators is an independent organization it met in conjunction with the ABA and NOBC (Bar Counsel/Supreme Court Counsel) conference in San Francisco.

The conference (and much of the NOBC conference that followed) focused on the admission and regulation of lawyers who cross state and/or international boundaries. Great Britain, Ireland, Australia, New Zealand and many countries in Europe now use non-lawyers to regulate the legal profession. An example of this change to non-lawyer regulation of the practice is the Solicitors Regulation Authority (SRA) of England and Wales. It is an independent regulatory body created by an Act of Parliament responsible for the admission and regulation of all Solicitors. Parliament eliminated self-regulation based in part on a wide spread belief that the legal profession was not responsive to consumers of legal services. Non-lawyer ownership of law firms and multi-discipline practice is now a way of life in much of Europe and Great Britain. Additionally, country barriers (much like state barriers) were to a great extent eliminated by implementation of the SRA and the Council of European Bars and Law Societies.

The movement of lawyers around the world presents a challenge to the United States because of a state-by-state web of admission and regulatory rules. The confusion created by 50+ different sets of standards and rules is a concern and topic of discussion at the National Conference of Chief Justices meetings. In a nutshell, the purpose and goals of lawyer admissions and regulation is changing...quickly.

2. The Supreme Court unanimously approved new rule 7.1 which provides for the administrative suspension of lawyers who fail to respond to discipline investigations. The new rule(s) are effective November 1, 2013. The rules are available on the Bar website and will be published in the next Oregon State Bar Bulletin.
3. In my last update to the BOG, I spoke about the appointment of a staff person to act as the administrator for all diversions and probations. Recently we selected a member of the support staff to act in such capacity. Rather than individual lawyers or multiple staff members administering the active diversions and probation matters, there is now one person responsible for all such matters. The centralization affords a much greater level of scrutiny to the pending matters. Her primary duty is to ensure that all terms of the probation or diversion are followed and completed.
4. At the last BOG meeting I spoke briefly about the creation of a Presiding Disciplinary Judge (PDJ) position. The PDJ would, in part, replace the current use of hearing panels in formal discipline proceedings. In concept, the PDJ position would be a part-time position until and if the case load warranted a full-time PDJ. The PDJ would sit as a presiding judge on all formal discipline matters. The PDJ would rule on all pretrial matters, encourage mediation or settlement when appropriate and preside over the discipline hearing. At the time of hearing, two additional panel members selected from the Disciplinary Board would be appointed to join the PDJ as co-equal fact finders. The PDJ would draft the opinion of the three-person panel.

Several states use a professional judge system in formal discipline matters. Minnesota, Maryland, Colorado, Florida, California, New York and other states use paid judges in discipline matters. Arizona is the most recent state to adopt such a system. The change to judges reduces the time formal discipline matters take from filing to decision, provides for consistent case law and sanctions and creates a greater level of transparency. Additionally, the public perception of lawyer discipline matters is enhanced when a professional judge, rather than a lawyer presides.

I plan to provide the BOG a more detailed review of states using this type of system at the November, 2013 meeting.

Admissions

1. Admissions Director Charles Schulz and I attended a recent National Conference of Bar Examiners meeting regarding changes in the area of admissions and character and fitness. As I discussed earlier, lawyer admissions, law school class numbers, cross-border practice issues and fitness for admission change so fast it is nearly impossible to keep up.
2. Law school numbers are down around the country. The numbers fluctuate depending on the state and number of law schools in the state, but pretty much the numbers everyone talks about are 25-38 percent reduction for 1L's. The prediction is a close to 50% reduction in bar eligible applicants by 2015 compared to 2010. Remember, it takes at least 3 years to matriculate so we are always predicting out that far.
3. The Uniform Bar Exam continues to spread around the country. Latest count is 13 states with several more supreme courts poised to adopt its use. Oregon is not a UBE state.
4. We continue to work toward a resolution of issues with the BBX. The Chief Justice appointed a committee to address the issues and we will meet soon. I will report on progress in November.

Professional Liability Fund

Ira R. Zarov
Chief Executive Officer

September 3, 2013

To: Professional Liability Fund Board of Directors

From: R. Thomas Cave, Chief Financial Officer

Re: June 30, 2013 Financial Statements

I have enclosed June 30, 2013 Financial Statements. These statements assume that the Board of Directors will adopt the estimated liabilities for claims that staff and the actuaries have recommended. The statements show Primary Program net income of \$344,000 million for the first six months of 2013.

Investment returns have been very volatile this year. There were large declines in many investment categories during June. While positive July results more than offset those declines, markets turned significantly downward during August.

If you have any questions, please contact me.

**Oregon State Bar
Professional Liability Fund
Financial Statements
6/30/2013**

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

**Oregon State Bar
Professional Liability Fund
Combined Primary and Excess Programs
Balance Sheet
6/30/2013**

ASSETS

| | <u>THIS YEAR</u> | <u>LAST YEAR</u> |
|-----------------------------------|-------------------------------|-------------------------------|
| Cash | \$1,005,785.75 | \$1,048,633.10 |
| Investments at Fair Value | 44,138,914.58 | 41,658,262.67 |
| Assessment Installment Receivable | 5,120,922.50 | 4,816,827.74 |
| Due from Reinsurers | 45,773.35 | 466,979.33 |
| Other Current Assets | 101,689.60 | 86,622.78 |
| Net Fixed Assets | 922,908.38 | 957,891.19 |
| Claim Receivables | 57,884.84 | 108,939.42 |
| Other Long Term Assets | <u>11,288.71</u> | <u>9,825.00</u> |
| TOTAL ASSETS | <u>\$51,405,167.71</u> | <u>\$49,153,981.23</u> |

LIABILITIES AND FUND EQUITY

| | <u>THIS YEAR</u> | <u>LAST YEAR</u> |
|--|-------------------------------|-------------------------------|
| Liabilities: | | |
| Accounts Payable and Other Current Liabilities | \$127,195.16 | \$151,765.81 |
| Due to Reinsurers | \$959,394.10 | \$816,518.56 |
| Liability for Compensated Absences | 445,620.51 | 430,305.28 |
| Liability for Indemnity | 12,500,000.00 | 13,200,000.00 |
| Liability for Claim Expense | 13,500,000.00 | 12,900,000.00 |
| Liability for Future ERC Claims | 2,700,000.00 | 2,700,000.00 |
| Liability for Suspense Files | 1,400,000.00 | 1,400,000.00 |
| Liability for Future Claims Administration (AOE) | 2,400,000.00 | 2,300,000.00 |
| Excess Ceding Commission Allocated for Rest of Year | 371,738.67 | 360,008.53 |
| Assessment and Installment Service Charge Allocated for Rest of Year | <u>12,674,832.00</u> | <u>12,559,974.83</u> |
| Total Liabilities | <u>\$47,078,780.44</u> | <u>\$46,818,573.01</u> |
| Fund Equity: | | |
| Retained Earnings (Deficit) Beginning of the Year | \$4,047,255.11 | (\$781,169.42) |
| Year to Date Net Income (Loss) | <u>279,132.16</u> | <u>3,116,577.64</u> |
| Total Fund Equity | <u>\$4,326,387.27</u> | <u>\$2,335,408.22</u> |
| TOTAL LIABILITIES AND FUND EQUITY | <u>\$51,405,167.71</u> | <u>\$49,153,981.23</u> |

**Oregon State Bar
Professional Liability Fund
Primary Program
Income Statement
6 Months Ended 6/30/2013**

| | YEAR TO DATE <u>ACTUAL</u> | YEAR TO DATE <u>BUDGET</u> | <u>VARIANCE</u> | YEAR TO DATE <u>LAST YEAR</u> | <u>ANNUAL BUDGET</u> |
|--------------------------------------|----------------------------------|----------------------------------|------------------------------|-------------------------------------|-------------------------------|
| <u>REVENUE</u> | | | | | |
| Assessments | \$12,479,318.50 | \$12,524,500.02 | \$45,181.52 | \$12,362,689.34 | \$25,049,000.00 |
| Installment Service Charge | 195,513.50 | 195,000.00 | (513.50) | 197,285.50 | 390,000.00 |
| Other Income | 24,653.54 | 0.00 | (24,653.54) | 39,501.05 | 0.00 |
| Investment Return | <u>1,032,007.61</u> | <u>1,231,411.50</u> | <u>199,403.89</u> | <u>1,757,768.58</u> | <u>2,462,823.00</u> |
| TOTAL REVENUE | <u>\$13,731,493.15</u> | <u>\$13,950,911.52</u> | <u>\$219,418.37</u> | <u>\$14,357,244.47</u> | <u>\$27,901,823.00</u> |
| <u>EXPENSE</u> | | | | | |
| Provision For Claims: | | | | | |
| New Claims at Average Cost | \$9,480,000.00 | | | \$9,600,000.00 | |
| Actuarial Adjustment to Reserves | 664,997.05 | | | (1,288,663.47) | |
| Coverage Opinions | 85,422.06 | | | 80,955.05 | |
| General Expense | 75,613.66 | | | 35,358.32 | |
| Less Recoveries & Contributions | (3,962.90) | | | (199,641.07) | |
| Budget for Claims Expense | | <u>\$10,362,960.00</u> | | | <u>\$20,725,920.00</u> |
| Total Provision For Claims | <u>\$10,302,069.87</u> | <u>\$10,362,960.00</u> | <u>\$60,890.13</u> | <u>\$8,228,008.83</u> | <u>\$20,725,920.00</u> |
| Expense from Operations: | | | | | |
| Administrative Department | \$1,041,442.73 | \$1,141,600.50 | \$100,157.77 | \$1,033,058.03 | \$2,283,201.00 |
| Accounting Department | 392,164.03 | 393,111.54 | 947.51 | 380,212.94 | 786,223.00 |
| Loss Prevention Department | 888,146.55 | 951,484.62 | 63,338.07 | 875,480.25 | 1,902,969.00 |
| Claims Department | 1,246,433.72 | 1,340,957.04 | 94,523.32 | 1,197,750.02 | 2,681,914.00 |
| Allocated to Excess Program | <u>(552,552.00)</u> | <u>(552,552.00)</u> | <u>0.00</u> | <u>(549,912.96)</u> | <u>(1,105,104.00)</u> |
| Total Expense from Operations | <u>\$3,015,635.03</u> | <u>\$3,274,601.70</u> | <u>\$258,966.67</u> | <u>\$2,936,588.28</u> | <u>\$6,549,203.00</u> |
| Contingency (4% of Operating Exp) | \$0.00 | \$153,085.98 | \$153,085.98 | \$40,587.55 | \$306,172.00 |
| Depreciation and Amortization | \$84,323.11 | \$103,999.98 | \$19,676.87 | \$88,136.46 | \$208,000.00 |
| Allocated Depreciation | <u>(15,028.02)</u> | <u>(15,028.02)</u> | <u>0.00</u> | <u>(17,998.02)</u> | <u>(30,056.00)</u> |
| TOTAL EXPENSE | <u>\$13,386,999.99</u> | <u>\$13,879,619.64</u> | <u>\$492,619.65</u> | <u>\$11,275,323.10</u> | <u>\$27,759,239.00</u> |
| NET INCOME (LOSS) | <u>\$344,493.16</u> | <u>\$71,291.88</u> | <u>(\$273,201.28)</u> | <u>\$3,081,921.37</u> | <u>\$142,584.00</u> |

**Oregon State Bar
Professional Liability Fund
Primary Program
Statement of Operating Expense
6 Months Ended 6/30/2013**

| <u>EXPENSE:</u> | <u>CURRENT</u> <u>MONTH</u> | <u>YEAR</u> <u>TO DATE</u> <u>ACTUAL</u> | <u>YEAR</u> <u>TO DATE</u> <u>BUDGET</u> | <u>VARIANCE</u> | <u>YEAR</u> <u>TO DATE</u> <u>LAST YEAR</u> | <u>ANNUAL</u> <u>BUDGET</u> |
|---------------------------------------|--------------------------------|--|--|----------------------------|---|--------------------------------|
| Salaries | \$333,143.45 | \$2,046,198.26 | \$2,074,087.50 | \$27,889.24 | \$1,973,673.96 | \$4,148,175.00 |
| Benefits and Payroll Taxes | 122,917.40 | 725,507.10 | 788,101.14 | 62,594.04 | 707,615.00 | 1,576,202.00 |
| Investment Services | 7,007.25 | 13,884.00 | 13,999.98 | 115.98 | 13,671.75 | 28,000.00 |
| Legal Services | 180.00 | 4,127.50 | 7,999.98 | 3,872.48 | 6,043.50 | 16,000.00 |
| Financial Audit Services | 0.00 | 22,600.00 | 11,299.98 | (11,300.02) | 21,700.00 | 22,600.00 |
| Actuarial Services | 0.00 | 6,448.75 | 9,499.98 | 3,051.23 | 6,337.50 | 19,000.00 |
| Claims MMSEA Services | 0.00 | 0.00 | 0.00 | 0.00 | 3,850.00 | 0.00 |
| Information Services | 7,422.60 | 48,896.58 | 48,000.00 | (896.58) | 50,370.01 | 96,000.00 |
| Document Scanning Services | 7,968.81 | 9,198.42 | 37,500.00 | 28,301.58 | 12,073.69 | 75,000.00 |
| Other Professional Services | 5,084.16 | 27,130.01 | 28,700.04 | 1,570.03 | 22,121.31 | 57,400.00 |
| Staff Travel | 4,741.50 | 7,316.37 | 6,225.00 | (1,091.37) | 5,404.38 | 12,450.00 |
| Board Travel | 5,308.73 | 9,060.47 | 19,499.94 | 10,439.47 | 12,381.41 | 39,000.00 |
| NABRICO | 700.00 | 800.00 | 5,250.00 | 4,450.00 | 1,174.95 | 10,500.00 |
| Training | 1,376.01 | 13,032.95 | 12,250.02 | (782.93) | 10,871.77 | 24,500.00 |
| Rent | 42,145.08 | 251,936.24 | 260,370.48 | 8,434.24 | 248,213.00 | 520,741.00 |
| Printing and Supplies | 3,989.78 | 21,730.19 | 39,500.04 | 17,769.85 | 32,334.52 | 79,000.00 |
| Postage and Delivery | 3,354.18 | 17,144.72 | 18,375.00 | 1,230.28 | 17,430.26 | 36,750.00 |
| Equipment Rent & Maintenance | 1,723.16 | 20,082.33 | 18,099.96 | (1,982.37) | 14,036.26 | 36,200.00 |
| Telephone | 4,138.24 | 23,712.99 | 21,499.98 | (2,213.01) | 17,048.59 | 43,000.00 |
| L P Programs (less Salary & Benefits) | 20,990.23 | 151,215.61 | 216,780.12 | 65,564.51 | 164,671.67 | 433,560.00 |
| Defense Panel Training | 55.05 | 219.90 | 11,550.06 | 11,330.16 | 0.00 | 23,100.00 |
| Bar Books Grant | 16,666.67 | 100,000.02 | 100,000.02 | 0.00 | 100,000.02 | 200,000.00 |
| Insurance | 0.00 | 8,432.00 | 45,064.50 | 36,632.50 | 8,401.00 | 90,129.00 |
| Library | 2,516.66 | 15,121.44 | 16,500.00 | 1,378.56 | 13,583.42 | 33,000.00 |
| Subscriptions, Memberships & Other | 3,485.36 | 24,391.18 | 16,999.98 | (7,391.20) | 23,493.27 | 34,000.00 |
| Allocated to Excess Program | (92,092.00) | (552,552.00) | (552,552.00) | 0.00 | (549,912.96) | (1,105,104.00) |
| TOTAL EXPENSE | <u>\$502,822.32</u> | <u>\$3,015,635.03</u> | <u>\$3,274,601.70</u> | <u>\$258,966.67</u> | <u>\$2,936,588.28</u> | <u>\$6,549,203.00</u> |

**Oregon State Bar
Professional Liability Fund
Excess Program
Income Statement
6 Months Ended 6/30/2013**

| | YEAR TO DATE <u>ACTUAL</u> | YEAR TO DATE <u>BUDGET</u> | <u>VARIANCE</u> | YEAR TO DATE <u>LAST YEAR</u> | <u>ANNUAL BUDGET</u> |
|---------------------------------|----------------------------------|----------------------------------|-----------------------------|-------------------------------------|------------------------------|
| <u>REVENUE</u> | | | | | |
| Ceding Commission | \$371,738.68 | \$373,375.02 | \$1,636.34 | \$360,008.53 | \$746,750.00 |
| Prior Year Adj. (Net of Reins.) | 3,371.55 | 750.00 | (2,621.55) | 1,369.88 | 1,500.00 |
| Installment Service Charge | 41,433.00 | 19,000.02 | (22,432.98) | 37,180.00 | 38,000.00 |
| Investment Return | <u>135,902.11</u> | <u>92,686.98</u> | <u>(43,215.13)</u> | <u>253,799.69</u> | <u>185,374.00</u> |
| TOTAL REVENUE | <u>\$552,445.34</u> | <u>\$485,812.02</u> | <u>(\$66,633.32)</u> | <u>\$652,358.10</u> | <u>\$971,624.00</u> |
| <u>EXPENSE</u> | | | | | |
| Operating Expenses (See Page 6) | \$602,778.32 | \$611,279.64 | \$8,501.32 | \$599,703.81 | \$1,222,559.00 |
| Allocated Depreciation | <u>\$15,028.02</u> | <u>\$15,028.02</u> | <u>\$0.00</u> | <u>\$17,998.02</u> | <u>\$30,056.00</u> |
| NET INCOME (LOSS) | <u>(\$65,361.00)</u> | <u>(\$140,495.64)</u> | <u>(\$75,134.64)</u> | <u>\$34,656.27</u> | <u>(\$280,991.00)</u> |

**Oregon State Bar
Professional Liability Fund
Excess Program
Statement of Operating Expense
6 Months Ended 6/30/2013**

| | <u>CURRENT MONTH</u> | <u>YEAR TO DATE ACTUAL</u> | <u>YEAR TO DATE BUDGET</u> | <u>VARIANCE</u> | <u>YEAR TO DATE LAST YEAR</u> | <u>ANNUAL BUDGET</u> |
|--------------------------------|----------------------------|------------------------------------|------------------------------------|--------------------------|---------------------------------------|------------------------------|
| <u>EXPENSE:</u> | | | | | | |
| Salaries | \$56,197.34 | \$335,219.74 | \$334,827.00 | (\$392.74) | \$337,690.56 | \$669,654.00 |
| Benefits and Payroll Taxes | 20,929.02 | 125,417.60 | 126,765.54 | 1,347.94 | 119,406.12 | 253,531.00 |
| Investment Services | 492.75 | 1,116.00 | 1,500.00 | 384.00 | 1,328.25 | 3,000.00 |
| Office Expense | 0.00 | 0.00 | 0.00 | 0.00 | 0.00 | 0.00 |
| Allocation of Primary Overhead | 23,239.50 | 139,437.00 | 139,437.00 | 0.00 | 137,817.48 | 278,874.00 |
| Reinsurance Placement & Travel | 44.63 | 189.45 | 2,500.02 | 2,310.57 | 2,316.10 | 5,000.00 |
| Training | 0.00 | 0.00 | 250.02 | 250.02 | 0.00 | 500.00 |
| Printing and Mailing | 0.00 | 92.38 | 2,500.02 | 2,407.64 | 0.00 | 5,000.00 |
| Program Promotion | 0.00 | 1,306.15 | 2,500.02 | 1,193.87 | 1,000.00 | 5,000.00 |
| Other Professional Services | 0.00 | 0.00 | 1,000.02 | 1,000.02 | 145.30 | 2,000.00 |
| Software Development | <u>0.00</u> | <u>0.00</u> | <u>0.00</u> | <u>0.00</u> | <u>0.00</u> | <u>0.00</u> |
| TOTAL EXPENSE | <u>\$100,903.24</u> | <u>\$602,778.32</u> | <u>\$611,279.64</u> | <u>\$8,501.32</u> | <u>\$599,703.81</u> | <u>\$1,222,559.00</u> |

**Oregon State Bar
Professional Liability Fund
Combined Investment Schedule
6 Months Ended 6/30/2013**

| | CURRENT MONTH <u>THIS YEAR</u> | YEAR TO DATE <u>THIS YEAR</u> | CURRENT MONTH <u>LAST YEAR</u> | YEAR TO DATE <u>LAST YEAR</u> |
|--|-----------------------------------|----------------------------------|-----------------------------------|----------------------------------|
| Dividends and Interest: | | | | |
| Short Term Bond Fund | \$8,065.91 | \$112,645.22 | \$16,615.93 | \$153,256.37 |
| Intermediate Term Bond Funds | 21,020.60 | 119,340.26 | 22,115.39 | 132,971.14 |
| Domestic Common Stock Funds | 44,238.77 | 82,719.02 | 0.00 | 7,610.20 |
| International Equity Fund | 0.00 | 0.00 | 0.00 | 0.00 |
| Real Estate | 81,339.95 | 90,808.77 | 45,678.83 | 94,319.52 |
| Hedge Fund of Funds | 0.00 | 0.00 | 0.00 | 0.00 |
| Real Return Strategy | <u>29,601.90</u> | <u>68,496.13</u> | <u>25,576.54</u> | <u>65,280.47</u> |
| Total Dividends and Interest | <u>\$184,267.13</u> | <u>\$474,009.40</u> | <u>\$109,986.69</u> | <u>\$453,437.70</u> |
| Gain (Loss) in Fair Value: | | | | |
| Short Term Bond Fund | (\$82,376.74) | (\$149,823.75) | \$9,335.26 | \$229,637.92 |
| Intermediate Term Bond Funds | (221,753.64) | (335,905.20) | 13,964.35 | 297,268.62 |
| Domestic Common Stock Funds | (164,739.08) | 960,762.84 | 172,784.22 | 433,203.14 |
| International Equity Fund | (261,979.03) | 284,620.37 | 370,725.88 | 304,385.23 |
| Real Estate | 59,323.48 | 134,418.43 | 36,134.86 | 78,332.12 |
| Hedge Fund of Funds | (71,923.44) | 197,619.47 | (51,774.79) | 60,439.27 |
| Real Return Strategy | <u>(269,163.74)</u> | <u>(397,791.84)</u> | <u>79,874.66</u> | <u>154,864.27</u> |
| Total Gain (Loss) in Fair Value | <u>(\$1,012,612.19)</u> | <u>\$693,900.32</u> | <u>\$631,044.44</u> | <u>\$1,558,130.57</u> |
| TOTAL RETURN | <u>(\$828,345.06)</u> | <u>\$1,167,909.72</u> | <u>\$741,031.13</u> | <u>\$2,011,568.27</u> |
| Portions Allocated to Excess Program: | | | | |
| Dividends and Interest | \$12,677.58 | \$41,105.49 | \$7,325.11 | \$45,274.12 |
| Gain (Loss) in Fair Value | <u>(69,667.72)</u> | <u>94,796.62</u> | <u>42,027.56</u> | <u>208,525.57</u> |
| TOTAL ALLOCATED TO EXCESS PROGRAM | <u>(\$56,990.14)</u> | <u>\$135,902.11</u> | <u>\$49,352.67</u> | <u>\$253,799.69</u> |

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: September 27, 2013
Memo Date: September 17, 2013
From: Ira Zarov – CEO PLF
Re: 2014 PLF Assessment and Budget

Action Recommended

Approve the 2014 Budget and Assessment.

Background

On an annual basis, the Board of Governors approves the PLF budget and the assessment for the coming year. The Board of Directors proposes that the assessment remain at \$3500. The attached materials contain the proposed budget and recommendations concerning the assessment.

The highlights of the budget include a 2% salary pool, a \$200,000 contribution to the OSB for BarBooks, a new IT position and an additional Oregon Attorney Assistance Program attorney-counselor position.

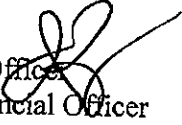
Attachments

Professional Liability Fund

Ira R. Zarov
Chief Executive Officer

September 3, 2013

To: PLF Finance Committee (Tim Martinez, Chair; Teresa Statler, and John Berge) and
PLF Board of Directors

From: Ira Zarov, Chief Executive Officer 
R. Thomas Cave, Chief Financial Officer R.T.C.

Re: 2014 PLF Budget and 2014 PLF Primary Assessment

I. Recommended Action

We recommend that the Finance Committee make the following recommendations to the PLF Board of Directors:

1. Approve the 2014 PLF budget as attached. This budget uses a 2014 salary pool recommendation of 2.0 percent. This recommendation has been made after consultation with Sylvia Stevens.
2. Make a recommendation to the Board of Governors concerning the appropriate 2014 PLF Primary Program assessment. We recommend that the 2014 assessment be \$3,500, which is the same amount as the past three years.

II. Executive Summary

1. Besides the two percent salary pool, this budget includes increased costs for PERS and medical insurance. It includes a \$200,000 PLF contribution for the OSB Bar Books. This budget includes two new staff positions; a computer systems analyst / programmer and an additional OAAP attorney position.
2. The actuarial rate study estimates a cost of \$2,730 per lawyer for new 2014 claims. This budget also includes a margin of \$150 per lawyer for adverse development of pending claims.

III. 2014 PLF Budget

Number of Covered Attorneys

We have provided the number of covered attorneys by period for both the Primary and Excess Programs. (The figures are found on pages 1 and 8 of the budget document.) These statistics illustrate the changes in the number of lawyers covered by each program and facilitate period-to-period comparisons.

For the Primary Program, new attorneys paying reduced primary assessments and lawyers covered for portions of the year have been combined into "full pay" units. We currently project 7,107 full-pay attorneys for 2013. For the past five years, the average annual growth of full-pay attorneys has been 1.3 percent. We have chosen to conservatively assume only 1 percent growth for the 2014 budget which translates to 7,178 full-pay attorneys.

Although the Excess Program covers firms, the budget lists the total number of attorneys covered by the Excess Program. Participation in the Excess Program has declined since 2011 because of competition from commercial insurance companies. After holding steady for one year, participation declined again in 2013. We do not expect further declines in 2014.

Full-time Employee Statistics (Staff Positions)

We have included "full-time equivalent" or FTE statistics to show PLF staffing levels from year to year. FTE statistics are given for each department on their operating expense schedule. The following table shows positions by department:

| | <u>2013 Projections</u> | <u>2014 Budget</u> |
|---------------------------------|-------------------------|--------------------|
| Administration | 8.20 FTE | 10.00 FTE |
| Claims | 19.75 FTE | 20.00 FTE |
| Loss Prevention (includes OAAP) | 12.75 FTE | 13.58 FTE |
| Accounting | 7.04 FTE | 5.95 FTE |
| Excess | <u>1.00 FTE</u> | <u>1.00 FTE</u> |
| Total | 48.74 FTE | 50.53 FTE |

We continue to have some permanent positions staffed at less than full-time levels for both 2013 and 2014. Some staff members work from 30 to 36 hours per week. These part-time arrangements fit the needs of both the employee and the PLF. Part-time and staff changes are the reason for the fractional FTE's.

An existing systems administrator position has been moved from the accounting department to the administration department starting with the 2014 budget.

During the first half 2013, a claims attorney and claims secretary retired and new employees were hired for both positions. The 2013 budget included an additional new claims attorney position which was filled in July. The 2013 budget also included a paralegal position in the claims department. The position was filled at 75 percent of full-time. However, the staff member has done more work in the loss prevention department related to closing law offices. As a result, this position has been moved to the loss prevention department.

There are two new positions proposed to be filled in late 2013. Because of potential retirements and the long learning curve, an additional OAAP attorney position has been added to the budget starting in November, 2013. In addition, the chief financial officer is scheduled to retire November 30, 2013 and some of his duties were in the data processing department. A computer systems analysis / programmer position has been added to the administration department starting in October, 2013. Some of the costs of this new position will be offset by reduced expenses with outside contractors. The replacement Chief Financial Officer is expected start in November. The 2013 budget anticipated some of these "succession planning" expenses and had an increased contingency amount. The additional 2013 expenses have been charged to salary and benefits rather than contingency because it allows for better period to period comparisons.

While no definite plans have been made, we continue to expect that some claims attorneys and other members of the PLF management team to retire in the next few years. The 2014 budget continues to have an increased amount allocated to contingency to cover succession planning and possible expenses relating to replacing these positions.

Allocation of Costs between the Excess and Primary Programs

In 1991, the PLF established an optional underwritten plan to provide excess coverage above the existing mandatory plan. There is separate accounting for Excess Program assets, liabilities, revenues and expenses. The Excess Program reimburses the Primary Program for services so that the Primary Program does not subsidize the cost of the Excess Program. A portion of Primary Program salary, benefits, and other operating costs are allocated to the Excess Program. These allocations are reviewed and adjusted each year. The Excess Program also pays for some direct costs, including printing and reinsurance travel.

Salary and benefit allocations are based on an annual review of the time PLF staff spends on Excess Program activities. The current allocation includes percentages of salaries and benefits for individuals specifically working on the Excess Program.

Besides specific individual allocations, fourteen percent of the costs of the claims attorneys and ten percent of the costs of all loss prevention personnel are allocated to the Excess Program. The total 2014 allocation of salary, benefits and overhead is about 14.35 percent of total administrative operating expense. This is slightly lower than the percentage used in the 2013 budget (14.45 percent).

Primary Program Revenue

Projected assessment revenue for 2013 is based upon the \$3,500 basic assessment paid by an estimated 7,107 attorneys. The budget for assessment revenue for 2014 is based upon a \$3,500 assessment and 7,178 full-pay attorneys. Primary Program revenue for 2013 also includes our forecast for SUA collections of \$215,532. Because of changes in Board of Director policy, there will be no SUA program or collections for 2014.

Investment returns were better than expected for the first seven months of 2013. In doing the 2013 full year projections and 2014 budget, we used the rates of return for the different asset categories recently recommended by R. V. Kuhns & Associates, Inc. These rates are reduced from 2013 levels for several categories (mostly fixed income). While the percentages chosen are significantly lower than historical rates of return, they reflect the current reduced expectations of our investment consultants. Our calculation of investment return projections for the remainder of 2013 and for 2014 began with the July 31, 2013 market value of all current investments. Investment revenue was calculated from July forward using 2.25 percent for the short-term cash flow bond fund, 3.5 percent for intermediate bonds, 7.9 percent for domestic equities, 8.65 percent for foreign equities, 6.75 percent for hedge fund of funds or the GATT funds that are likely to replace the hedge fund of funds, 7 percent for real estate, and 6.75 percent for absolute return. The overall combined expected rate of return for 2014 is about 6.21 percent. (The overall rate combined rate of return used in prepared the 2013 budget was 6.61 percent.)

Primary Program Claims Expense

By far, the largest cost category for the PLF is claim costs for indemnity and defense. Since claims often don't resolve quickly, these costs are paid over several years after the claim is first made. The ongoing calculation of estimated claim costs is the major factor in determining Primary Program profit or loss.

For any given year, financial statement claim expense includes two factors – (1) the cost of new claims and (2) any additional upward (or downward) adjustments to the estimate of costs for claims pending at the beginning of the year. Factor 1 (new claims) is much larger and much more important than factor 2. However, problems would develop if the effects of factor 2 were never considered, particularly if there were consistent patterns of adjustments. The “indicated average claim cost” in the actuarial rate study calculates an amount for factor 1. The report also discusses the possibility of adding a margin to the indicated costs. Adding a margin could cover additional claims costs from adverse development of pending claims (factor 2) or other possible negative economic events such as poor investment returns. We have included margins in the past several years to good effect.

During the second half of 2012, 141 claims were made against a single attorney. There have been 15 additional claims made against the same attorney during 2013. All of these claims from 2012 and 2013 are subject to the same coverage limit of \$350,000. When the actuaries reviewed the estimates for claim liabilities in December 31, 2012 and June 30, 2013, they made an adjustment to

their methodology and removed these claims from their normal analysis. It is also appropriate to adjust claim frequency calculations. After this adjustment, the frequency of new claims dropped for the second half of 2012 and this drop in frequency continued for the first half of 2013. Our 2013 projections of claim costs assume 935 claims made during 2013 at \$21,000 per claim. The \$21,000 cost per claim is higher than our current average claim cost (\$20,500) because early analysis suggests that 2013 claim severity may be a bit higher than expected.

The 2013 budget included \$1,065,600 (approximately \$150 per covered party) for adverse development or actuarial increases to estimates in liabilities for claims pending at the start of the year. The June 30, 2013 actuarial review of claim liabilities recommended an increase of about \$665,000 as a result of adverse development of pending claims. In the past, actuarial adjustments have been both up and down and undoubtedly the December 31, 2013 adjustment will differ from the June adjustment. However, in order to project the 2013 cost of pending claims, we have doubled the amount from June (\$1.33 million).

Primary Program new claims expense for 2014 was calculated using figures from the actuarial rate study. The study assumed a frequency rate of 13 percent, 7,178 covered attorneys and an average claim cost of \$21,000. Multiplying these three numbers together gets a 2014 budget for claims expense of \$19.6 million. This would also translate to about 933 claims at \$21,000 for 2014.

We have added a margin of \$150 per covered lawyer to cover adverse development of claims pending at the start of 2014. If pending claims do not develop adversely, this margin could offset higher 2014 claims frequency, cover other negative economic events, or help the PLF reach the retained earnings goal. The pending claims budget for adverse development is equal to \$1,076,700 (\$150 times the estimated 7,178 covered attorneys). The concept of using a margin will be discussed again in the staff recommendation section regarding the 2014 assessment.

Salary Pool for 2014

The total dollar amount that is available for staff salary increases in a given year is calculated by multiplying the salary pool percentage increase by the current employee salary levels. The salary pool is the only source available for cost of living *and* merit increases. Although there is no policy requiring them, the PLF and OSB historically provide increases to staff that are generally consistent with cost-of-living adjustments.

After consultation with Sylvia Stevens, a two percent salary pool increase is recommended for 2014. The salary pool is used to adjust salaries for inflation, to allow normal changes in classifications, and when appropriate to provide a management tool to reward exceptional work. As a point of reference, one percent in the salary pool represents \$40,689 in PLF salary expense and \$14,504 in PLF benefit costs. The total cost of the two percent salary pool is less than one half of one percent of total expenses (0.4 percent). The projected increase in the CPI index for 2014 is between 2 and 3 percent with the average prediction being 2.1 or 2.2 percent.

Because all salary reclassifications cannot be accomplished within the two percent salary pool allocation, we are also requesting \$30,000 for potential salary reclassification. Salary reclassifications generally occur in two circumstances, when a person hired at a lower salary classification achieves the higher competency required for the new classification, or when there is a necessity to change job requirements. The bulk of the salary reclassification amount reflects either the reclassification of relatively recently hired exempt employees or addresses an historical lack of parity between the salaries of employees in positions with equivalent responsibilities. (Exempt positions are generally professional positions and are not subject to wage and hour requirements.) Salaries for entry level hires of exempt positions are significantly lower than experienced staff. As new staff members become proficient, they are reclassified and their salaries are adjusted appropriately. As the board is aware, several new claims attorneys have been hired in recent years. (The major reclassification usually occurs after approximately three years, although the process of salary adjustment often occurs over a longer time period.)

Benefit Expense

The employer cost of PERS and Medical / Dental insurance are the two major benefit costs for the PLF.

The employer contribution rates for PERS were expected to increase significantly as of July 1, 2013. Because of legislative changes, the new rates were lower than expected. This is the reason that 2013 projections for benefits and payroll taxes are much lower than the 2013 budget figures.

Unlike many state and local employers, the PLF does not "pick up" the employee contribution to PERS. PLF employees have their six percent employee contribution to PERS deducted from their salaries.

The PLF covers the cost of medical and dental insurance for PLF employees. PLF employees pay about fifty percent of the additional cost of providing medical and dental insurance to dependents. Although the rate of increases in medical insurance is slowing somewhat, the cost of medical insurance continues to rise faster than salary levels. We have included about a 5 percent increase for the cost of medical and dental insurance.

Capital Budget Items

The OAAP telephone system was replaced during 2013. There also will be some minor remodeling (leasehold improvements) for new IT personnel during the last quarter of 2013.

There have been ongoing maintenance problems with the PLF boardroom audiovisual equipment. We have included funds in the capital budget to potentially replace the equipment in 2014.

Other Primary Operating Expenses

Insurance expense in the 2013 budget was higher because of a large increase in the cost of 2012 E&O insurance. The cost of this coverage increased because of a significant claim made against the PLF. The proposed cost of the renewal E&O policy was again increased in 2013. Because of significant increase in cost, a decision was made not to purchase this coverage. The 2013 projections and 2014 budget for insurance were reduced accordingly.

The information services account covers the cost of website development. The PLF finished developing a new website for the PLF defense panel during 2013. The PLF also developed a website for the distribution of material for BOD and BOD committee meetings during 2013. In addition, the main PLF website will be revised and rewritten during 2013 and early 2014.

The PLF has traditionally had defense panel meetings every other year. The 2013 budget included estimates of costs for the scheduled 2013 meeting. Defense panel members pay for their own lodging and meal expenses and some facility and supply costs. The PLF pays for the cost of staff and Board of Director lodging and meals and a portion of supplies and speakers. There is a small 2014 budget amount for a potential small program for newer panel members.

PLF Policies require an outside claims department audit at least every five years. (The PLF has a financial audit every year.) A claims audit was performed in 2011 and we do not expect to have another claims audit for several years.

The 2014 budget includes a \$200,000 contribution to the OSB Bar Books. The PLF Board of Directors believes there is substantial loss prevention value in free access to Bar Books via the internet which had the potential to reduce future claims.

For many years, the PLF Primary Program has included a contingency budget item. The contingency amount has usually been set between two and four percentage of operating costs. In the past, the contingency items was been used for items such as CEO recruitment expense, the costs of a focus group on SUA, and the Medicare reporting litigation expense. In 2013, the contingency budget was raised to 4 percent of operating costs to cover potential succession costs. The 2014 contingency budget also uses 4 percent of operating expenses (\$314,701).

Total Operating Expenses and the Assessment Contribution to Operating Expenses

Page one of the budget shows projected 2013 Primary Program operating costs to be about 3.2 percent lower than the budget amount.

The 2014 Primary Program operating budget is 2.8 percent higher than the 2013 budget and 6.3 percent greater than the 2013 projections. The main reasons for the increases are the new IT and OAAP positions, the 2 percent salary increase, and related higher benefit costs.

Excess Program Budget

The major focus of this process is on the Primary Program and the effects of the budget on the 2014 Primary Program assessment. We do include a budget for the Excess Program (page 8). Participation in the Excess Program has declined since 2011 because of competition from commercial insurance companies. After holding steady for one year, participation declined again in 2013. We do not expect further declines in 2014 because of reported increases in premium costs from competing insurers.

The major revenue item for the Excess Program is ceding commissions. These commissions represent the portion of the excess assessment that the PLF gets to keep and are based upon a percentage of the assessment (premium) charged. Most of the excess assessment is turned over to reinsurers who cover the costs of resolving excess claims. We currently project ceding commission of \$745,000 for 2013. The 2014 budget estimates ceding commissions to increase slightly because of changes in the excess agreement relating to data loss coverage.

After three or four years from the start of a given plan year, the two reinsurance treaties covering the first \$5 million provide for profit commissions if excess claim payments are low. If there are subsequent adverse developments, prior profit commissions are returned to the reinsurance companies. In recent years, excess claims have increased and it is quite difficult to predict profit commissions in advance. Actual profit commissions have proven to be rather small. As a result, no profit commissions have been included in the 2013 projections or 2014 budget.

Excess investment earnings were calculated using the same method described in the Primary Program revenue section.

The major expenses for the Excess Program are salary, benefits, and allocations from the Primary Program that were discussed in an earlier section.

IV. Actuarial Rate Study for 2014

The actuaries review claims liabilities twice a year, at the end of June and December. They also prepare an annual rate study to assist the Board of Directors in setting the assessment. The attached rate study focuses on the estimate of the cost of 2014 claims. It relies heavily on the analysis contained in the actuaries' claim liability study as of June 30, 2013. The methodology used in that study is discussed by separate memorandum. The rate study only calculates the cost of new 2014 claims. It does not consider adjustments to pending claims, investment results, or administrative operating costs.

The actuaries estimate the 2014 claim cost per attorney using two different methods. The first method (shown on Exhibit 1) uses regression analysis to determine the trends in the cost of claims. Regression analysis is a statistical technique used to fit a straight line to number of points on a graph. It is very difficult to choose an appropriate trend. Because of the small amount and volatility of data, different ranges of PLF claim years produce very different trend numbers. The selection of

the starting and ending points is very significant. For the PLF, including a low starting point such as 1987 or a very high point such as 2000 skews the straight line significantly up or down. Because of these problems, the actuaries do not favor using this technique to predict future claim costs.

The second method (Exhibit 2) involves selection of expected claim frequency and claim severity (average cost). Claims frequency is defined as the number of claims divided by the number of covered attorneys. For the indicated amount, the actuaries have used a 2014 claims frequency rate of 13 percent and \$21,000 as the average cost per claim (severity). The average cost figure has increase by \$500 from last years' study. We feel the \$21,000 severity factor is appropriate given the increases in claim expense severity since 2008. The actuaries' chosen frequency rate is a half of one percent lower from last years' figure of 13.5 percent. We feel that this rate is appropriate given the reduction in claim frequency over the past twelve months. The actuaries prefer the result found with this second method. Their indicated average claim cost is \$2,730 per attorney. This amount would only cover the estimated funds needed for 2014 new claims.

It is necessary to calculate a provision for operating expenses not covered by non-assessment revenue. As can be seen in the budget, the estimate of non-assessment revenue does not cover the budget for operating expenses. The 2014 shortfall is about \$575 per lawyer assuming 7,178 full-pay lawyers.

The actuaries discuss the possibility of having a margin (additional amount) in the calculated assessment. On pages 8 and 9 of their report, the actuaries list pros and cons for having a margin in the assessment.

V. Staff Recommendations

If you add the operating expense portion of \$575 per lawyer to the actuaries' indicated claim cost of \$2,730, you would have an assessment of \$3,305. We feel that it is appropriate to include a margin of \$150 per attorney for adverse development of pending claims. This allows for a budget of about \$1.1 million for adverse development of pending claims. An assessment of \$3,500 would allow a projected budget profit of about \$326,000.

Because of good financial results for 2012 and the first six months of 2013, the PLF currently has positive combined Primary and Excess retained earnings of about \$4.3 million. The Board of Directors has a long-term goal of \$12 million positive retained earnings. A 2014 assessment with some margin makes it more likely that some small progress will be made toward that retained earnings goal.

Given the factors discussed above, the PLF staff feels that the current Primary Program assessment should be maintained for 2014. Accordingly, we recommend setting the 2014 Primary Program assessment at \$3,500.

The Finance Committee will discuss the actuarial report during its telephone conference meeting at 3:00 p.m. on September 10, 2013 and prepare recommendations for the Board of Directors. The full Board of Directors will then act upon the committee's recommendations at their board meeting on September 13, 2013.

**OREGON STATE BAR
PROFESSIONAL LIABILITY FUND
2014 PRIMARY PROGRAM BUDGET
Presented to PLF Board of Directors on September 13, 2013**

| | 2011 <u>ACTUAL</u> | 2012 <u>ACTUAL</u> | 2013 <u>BUDGET</u> | 2013 <u>PROJECTIONS</u> | 2014 <u>BUDGET</u> |
|------------------------------|-----------------------|-----------------------|-----------------------|----------------------------|-----------------------|
| <u>Revenue</u> | | | | | |
| Assessments including SUA | \$24,465,415 | \$24,803,326 | \$25,049,000 | \$25,090,978 | \$25,123,000 |
| Installment Service Charge | 385,593 | 394,631 | 390,000 | 391,000 | 390,000 |
| Investments and Other | (544,650) | 4,364,988 | 2,462,823 | 3,115,627 | 2,692,264 |
| Total Revenue | <u>\$24,306,358</u> | <u>\$29,562,945</u> | <u>\$27,901,823</u> | <u>\$28,597,605</u> | <u>\$28,205,264</u> |
| <u>Expenses</u> | | | | | |
| Provision for Claims | | | | | |
| New Claims | \$18,538,608 | \$20,908,307 | \$19,660,320 | \$19,635,000 | \$19,595,940 |
| Pending Claims | \$2,398,105 | (\$2,435,227) | \$1,065,600 | \$1,330,000 | \$1,076,700 |
| Total Provision for Claims | <u>\$20,936,713</u> | <u>\$18,473,080</u> | <u>\$20,725,920</u> | <u>\$20,965,000</u> | <u>\$20,672,640</u> |
| Expense from Operations | | | | | |
| Administration | \$2,234,384 | \$2,200,578 | \$2,283,201 | \$2,260,078 | \$2,482,372 |
| Accounting | 635,730 | 748,742 | 786,223 | 815,137 | 637,662 |
| Loss Prevention | 1,700,518 | 1,824,653 | 1,902,969 | 1,866,918 | 2,081,023 |
| Claims | <u>2,305,033</u> | <u>2,398,157</u> | <u>2,681,914</u> | <u>2,462,053</u> | <u>2,666,466</u> |
| Total Operating Expense | \$6,875,665 | \$7,172,130 | \$7,654,307 | \$7,404,186 | \$7,867,523 |
| Contingency | 53,523 | 23,693 | 306,172 | 25,000 | 314,701 |
| Depreciation | 209,326 | 175,500 | 208,000 | 168,527 | 169,800 |
| Allocated to Excess Program | (1,393,740) | (1,135,822) | (1,135,160) | (1,135,160) | (1,145,155) |
| Total Expenses | <u>\$26,681,487</u> | <u>\$24,708,581</u> | <u>\$27,759,239</u> | <u>\$27,427,553</u> | <u>\$27,879,509</u> |
| Net Income (Loss) | <u>(\$2,375,129)</u> | <u>\$4,854,364</u> | <u>\$142,584</u> | <u>\$1,170,052</u> | <u>\$325,755</u> |
| Number of Full Pay Attorneys | 6,937 | 7,030 | 7,104 | 7,107 | 7,178 |

CHANGE IN OPERATING EXPENSES:

| | |
|--------------------------------|-------|
| Increase from 2013 Budget | 2.79% |
| Increase from 2013 Projections | 6.26% |

**OREGON STATE BAR
PROFESSIONAL LIABILITY FUND
2014 PRIMARY PROGRAM BUDGET
CONDENSED STATEMENT OF OPERATING EXPENSE
Presented to PLF Board of Directors on September 13, 2013**

| | <u>2011 ACTUAL</u> | <u>2012 ACTUAL</u> | <u>2013 BUDGET</u> | <u>2013 PROJECTIONS</u> | <u>2014 BUDGET</u> |
|--|--------------------------|--------------------------|--------------------------|-----------------------------|--------------------------|
| <u>Expenses</u> | | | | | |
| Salaries | \$3,858,800 | \$3,984,100 | \$4,148,175 | \$4,101,924 | \$4,333,390 |
| Benefits and Payroll Taxes | 1,194,430 | 1,395,115 | 1,576,202 | 1,473,542 | 1,613,525 |
| Professional Services | 270,489 | 289,644 | 314,000 | 337,261 | 319,630 |
| Auto, Travel & Training | 76,029 | 95,137 | 94,450 | 99,350 | 122,650 |
| Office Rent | 491,884 | 511,782 | 520,741 | 521,137 | 530,879 |
| Office Expense | 153,163 | 136,526 | 151,950 | 134,250 | 136,250 |
| Telephone (Administration) | 34,329 | 36,564 | 43,000 | 49,872 | 57,960 |
| L P Programs | 359,385 | 389,839 | 433,560 | 358,268 | 444,794 |
| OSB Bar Books | 300,000 | 200,000 | 200,000 | 200,000 | 200,000 |
| Defense Panel Program | 20,706 | 0 | 23,100 | 23,100 | 1,500 |
| Insurance | 60,081 | 70,793 | 90,129 | 38,878 | 39,145 |
| Library | 32,928 | 31,047 | 33,000 | 33,000 | 33,000 |
| Memberships & Subscriptions | 18,244 | 20,512 | 19,800 | 21,000 | 22,200 |
| Interest & Bank Charges | 5,197 | 11,071 | 6,200 | 12,604 | 12,600 |
| Other | <u>0</u> | <u>0</u> | <u>0</u> | <u>0</u> | <u>0</u> |
| Total Operating Expenses | <u>\$6,875,665</u> | <u>\$7,172,130</u> | <u>\$7,654,307</u> | <u>\$7,404,186</u> | <u>\$7,867,523</u> |
| Allocated to Excess Program | <u>(\$1,350,104)</u> | <u>(\$1,099,826)</u> | <u>(\$1,105,104)</u> | <u>(\$1,105,104)</u> | <u>(\$1,120,789)</u> |
| Full Time Employees (See Explanation) | 44.56 | 44.83 | 47.06 | 47.74 | 49.53 |
| Number of Full Pay Attorneys | 6,937 | 7,030 | 7,104 | 7,107 | 7,178 |
| Non-personnel Expenses | \$1,822,435 | \$1,792,915 | \$1,929,930 | \$1,828,720 | \$1,920,608 |
| Allocated to Excess Program | (\$388,938) | (\$275,635) | (\$278,874) | (\$278,874) | (\$270,406) |
| Total Non-personnel Expenses | <u>1,433,497</u> | <u>1,517,280</u> | <u>1,651,056</u> | <u>1,549,846</u> | <u>1,650,202</u> |

CHANGE IN OPERATING EXPENSES:

| | |
|--------------------------------|-------|
| Increase from 2013 Budget | 2.79% |
| Increase from 2013 Projections | 6.26% |

**OREGON STATE BAR
PROFESSIONAL LIABILITY FUND
2014 PRIMARY PROGRAM BUDGET
ADMINISTRATION**

Presented to PLF Board of Directors on September 13, 2013

| | 2011 <u>ACTUAL</u> | 2012 <u>ACTUAL</u> | 2013 <u>BUDGET</u> | 2013 <u>PROJECTIONS</u> | 2014 <u>BUDGET</u> |
|--|-----------------------|-----------------------|-----------------------|----------------------------|-----------------------|
| <u>Expenses</u> | | | | | |
| Salaries | \$647,912 | \$632,504 | \$642,627 | \$656,351 | \$807,152 |
| Benefits and Payroll Taxes | 209,493 | 231,342 | 242,304 | 230,476 | 296,206 |
| Staff Travel | 13,759 | 23,832 | 17,550 | 19,250 | 19,550 |
| Board of Directors Travel | 29,994 | 38,011 | 39,000 | 39,000 | 39,000 |
| Training | 843 | 9,701 | 8,000 | 12,000 | 15,000 |
| Investment Services | 27,304 | 27,719 | 28,000 | 28,000 | 28,000 |
| Legal Services | 7,931 | 13,251 | 16,000 | 12,000 | 13,000 |
| Actuarial Services | 18,564 | 18,900 | 19,000 | 19,000 | 22,000 |
| Information Services | 82,863 | 86,814 | 96,000 | 134,705 | 97,600 |
| Offsite System Backup | 1,138 | 0 | 0 | 0 | 0 |
| Electronic Record Scanning | 21,879 | 52,035 | 75,000 | 60,000 | 65,000 |
| Other Professional Services | 73,601 | 65,375 | 57,400 | 60,956 | 70,230 |
| Pro Services - Medicare Reporting | 11,400 | 3,850 | 0 | 0 | 0 |
| OSB Bar Books | 300,000 | 200,000 | 200,000 | 200,000 | 200,000 |
| Office Rent | 491,884 | 511,782 | 520,741 | 521,137 | 530,879 |
| Equipment Rent & Maint. | 42,345 | 36,000 | 35,200 | 39,000 | 39,000 |
| Dues and Memberships | 18,244 | 20,512 | 19,800 | 21,000 | 22,200 |
| Office Supplies | 64,615 | 51,613 | 68,000 | 50,000 | 52,000 |
| Insurance | 60,081 | 70,793 | 90,129 | 38,878 | 39,145 |
| Telephone | 34,329 | 36,564 | 43,000 | 49,872 | 57,960 |
| Printing | 10,966 | 8,573 | 11,000 | 9,000 | 9,000 |
| Postage & Delivery | 34,350 | 37,715 | 36,750 | 34,750 | 34,750 |
| NABRICO - Assoc. of Bar Co.s | 24,805 | 9,996 | 10,500 | 10,600 | 10,600 |
| Bank Charges & Interest | 5,197 | 11,071 | 6,200 | 12,604 | 12,600 |
| Repairs | 887 | 2,625 | 1,000 | 1,500 | 1,500 |
| Miscellaneous | <u>0</u> | <u>0</u> | <u>0</u> | <u>0</u> | <u>0</u> |
| Total Operating Expenses | <u>\$2,234,384</u> | <u>\$2,200,578</u> | <u>\$2,283,201</u> | <u>\$2,260,078</u> | <u>\$2,482,372</u> |
| Allocated to Excess Program | <u>(\$559,903)</u> | <u>(\$430,118)</u> | <u>(\$430,857)</u> | <u>(\$430,857)</u> | <u>(\$461,595)</u> |
| Administration Full Time Employees | 8.75 | 8.00 | 8.00 | 8.20 | 10.00 |
| CHANGE IN OPERATING EXPENSES: | | | | | |
| Increase from 2013 Budget | 8.72% | | | | |
| Increase from 2013 Projections | 9.84% | | | | |

OREGON STATE BAR
PROFESSIONAL LIABILITY FUND
2014 PRIMARY PROGRAM BUDGET
ACCOUNTING

Presented to PLF Board of Directors on September 13, 2013

| | 2011 <u>ACTUAL</u> | 2012 <u>ACTUAL</u> | 2013 <u>BUDGET</u> | 2013 <u>PROJECTIONS</u> | 2014 <u>BUDGET</u> |
|--------------------------------|-----------------------|-----------------------|-----------------------|----------------------------|-----------------------|
| <u>Expenses</u> | | | | | |
| Salaries | \$473,136 | \$542,180 | \$548,750 | \$581,693 | \$445,453 |
| Benefits and Payroll Taxes | 141,635 | 183,646 | 210,973 | 208,344 | 162,909 |
| Travel | 207 | 178 | 400 | 500 | 1,500 |
| Financial Audit | 20,200 | 21,700 | 22,600 | 22,600 | 23,800 |
| Training | <u>552</u> | <u>1,038</u> | <u>3,500</u> | <u>2,000</u> | <u>4,000</u> |
| Total Operating Expenses | <u>\$635,730</u> | <u>\$748,742</u> | <u>\$786,223</u> | <u>\$815,137</u> | <u>\$637,662</u> |
| Allocated to Excess Program | <u>(\$144,052)</u> | <u>(\$128,721)</u> | <u>(\$111,674)</u> | <u>(\$111,674)</u> | <u>(\$90,264)</u> |
| Accounting Full Time Employees | 6.10 | 6.90 | 6.90 | 7.04 | 5.95 |

CHANGE IN OPERATING EXPENSES:

| | |
|--------------------------------|---------|
| Decrease from 2013 Budget | -18.90% |
| Decrease from 2013 Projections | -21.77% |

**OREGON STATE BAR
PROFESSIONAL LIABILITY FUND
2014 PRIMARY PROGRAM BUDGET
LOSS PREVENTION (Includes OAAP)
Presented to PLF Board of Directors on September 13, 2013**

| | <u>2011 ACTUAL</u> | <u>2012 ACTUAL</u> | <u>2013 BUDGET</u> | <u>2013 PROJECTIONS</u> | <u>2014 BUDGET</u> |
|---|------------------------|------------------------|------------------------|-----------------------------|------------------------|
| <u>Expenses</u> | | | | | |
| Salaries | \$1,015,169 | \$1,053,974 | \$1,059,579 | \$1,100,271 | \$1,189,806 |
| Benefits and Payroll Taxes | 325,964 | 380,840 | 409,830 | 408,379 | 446,423 |
| In Brief | 54,370 | 44,854 | 62,000 | 45,000 | 62,000 |
| PLF Handbooks | 7,320 | 5,872 | 6,000 | 1,000 | 6,000 |
| Library | 102 | 436 | 150 | 500 | 500 |
| Video and Audio Tapes | 42,485 | 35,454 | 42,200 | 35,000 | 35,000 |
| Mail Distribution of Video and Audiotape | 12,871 | 11,949 | 12,000 | 12,000 | 12,000 |
| Web Distribution of Programs | 9,165 | 24,180 | 18,000 | 15,000 | 18,000 |
| Program Promotion | 20,596 | 28,664 | 30,000 | 15,000 | 20,000 |
| Expense of Closing Offices | 4,800 | 15,861 | 14,500 | 4,000 | 10,500 |
| Facilities | 33,591 | 47,282 | 45,000 | 47,000 | 47,000 |
| Speaker Expense | 1,018 | (1,311) | 5,000 | 7,000 | 5,000 |
| Accreditation Fees | 1,071 | 1,632 | 1,400 | 1,600 | 1,600 |
| Beepers & Confidential Phone | 3,377 | 4,107 | 4,000 | 5,000 | 5,000 |
| Expert Assistance | 6,414 | 300 | 5,000 | 0 | 5,000 |
| Bad Debts from Loans | 0 | 0 | 0 | 0 | 0 |
| Memberships & Subscriptions | 10,832 | 11,053 | 11,000 | 11,000 | 12,900 |
| Travel | 31,708 | 36,171 | 36,950 | 23,075 | 36,750 |
| Training | 22,883 | 25,038 | 40,250 | 29,325 | 47,800 |
| Downtown Office | 96,782 | 98,297 | 100,110 | 106,768 | 119,744 |
| Miscellaneous | <u>0</u> | <u>0</u> | <u>0</u> | <u>0</u> | <u>0</u> |
| | | | | | |
| Total Operating Expenses | <u>\$1,700,518</u> | <u>\$1,824,653</u> | <u>\$1,902,969</u> | <u>\$1,866,918</u> | <u>\$2,081,023</u> |
| | | | | | |
| Allocated to Excess Program | <u>(\$246,921)</u> | <u>(\$202,122)</u> | <u>(\$209,540)</u> | <u>(\$209,540)</u> | <u>(\$225,930)</u> |
| | | | | | |
| L P Depart Full Time Employees (Includes OAAP) | 11.83 | 11.83 | 11.83 | 12.75 | 13.58 |
| | | | | | |
| CHANGE IN OPERATING EXPENSES: | | | | | |
| Increase from 2013 Budget | | 9.36% | | | |
| Increase from 2013 Projections | | 11.47% | | | |

OREGON STATE BAR
PROFESSIONAL LIABILITY FUND
2014 PRIMARY PROGRAM BUDGET
CLAIMS DEPARTMENT

Presented to PLF Board of Directors on September 13, 2013

| | 2011 <u>ACTUAL</u> | 2012 <u>ACTUAL</u> | 2013 <u>BUDGET</u> | 2013 <u>PROJECTIONS</u> | 2014 <u>BUDGET</u> |
|--------------------------------------|-----------------------|-----------------------|-----------------------|----------------------------|-----------------------|
| <u>Expenses</u> | | | | | |
| Salaries | \$1,722,583 | \$1,755,442 | \$1,897,219 | \$1,763,609 | \$1,890,979 |
| Benefits and Payroll Taxes | 517,338 | 599,287 | 713,095 | 626,343 | 707,987 |
| Claims Audit | 5,609 | 0 | 0 | 0 | 0 |
| Training | 4,335 | 9,758 | 13,000 | 12,000 | 29,000 |
| Travel | 1,534 | 2,623 | 2,500 | 4,000 | 4,000 |
| Library & Information Systems | 32,928 | 31,047 | 33,000 | 33,000 | 33,000 |
| Defense Panel Program | <u>20,706</u> | <u>0</u> | <u>23,100</u> | <u>23,100</u> | <u>1,500</u> |
| | | | | | |
| Total Operating Expenses | <u>\$2,305,033</u> | <u>\$2,398,157</u> | <u>\$2,681,914</u> | <u>\$2,462,053</u> | <u>\$2,666,466</u> |
| | | | | | |
| Allocated to Excess Program | <u>(\$399,228)</u> | <u>(\$338,865)</u> | <u>(\$353,033)</u> | <u>(\$353,033)</u> | <u>(\$343,000)</u> |
| | | | | | |
| Claims Depart Full Time Employees | 17.88 | 18.10 | 20.33 | 19.75 | 20.00 |
| | | | | | |
| CHANGE IN OPERATING EXPENSES: | | | | | |
| Decrease from 2013 Budget | | -0.58% | | | |
| Increase from 2013 Projections | | 8.30% | | | |

OREGON STATE BAR
PROFESSIONAL LIABILITY FUND
2014 PRIMARY PROGRAM BUDGET
CAPITAL BUDGET

Presented to PLF Board of Directors on September 13, 2013

| | 2011 <u>ACTUAL</u> | 2012 <u>ACTUAL</u> | 2013 <u>BUDGET</u> | 2013 <u>PROJECTIONS</u> | 2014 <u>BUDGET</u> |
|-----------------------------|-----------------------|-----------------------|-----------------------|----------------------------|-----------------------|
| <u>Capital Items</u> | | | | | |
| Furniture and Equipment | \$19,595 | \$21,188 | \$10,000 | \$8,000 | \$10,000 |
| Telephone | 0 | 0 | 1,000 | 11,500 | 5,000 |
| Copiers / Scanners | 0 | 71,253 | 10,000 | 2,500 | 8,500 |
| Audiovisual Equipment | 0 | 0 | 0 | 0 | 25,000 |
| Data Processing | | | | | |
| Hardware | 22,832 | 9,434 | 13,000 | 12,000 | 12,000 |
| Software | 22,179 | 5,574 | 10,000 | 4,000 | 6,000 |
| PCs, Ipads and Printers | 57,751 | 27,077 | 13,500 | 7,500 | 7,500 |
| Leasehold Improvements | <u>1,783</u> | <u>1,700</u> | <u>3,000</u> | <u>15,000</u> | <u>5,000</u> |
| Total Capital Budget | <u>\$124,140</u> | <u>\$136,226</u> | <u>\$60,500</u> | <u>\$60,500</u> | <u>\$79,000</u> |

Increase from 2013 Budget 30.58%

Increase from 2013 Projections 30.58%

**OREGON STATE BAR
PROFESSIONAL LIABILITY FUND
2014 EXCESS PROGRAM BUDGET
Presented to PLF Board of Directors on September 13, 2013**

| | <u>2011 ACTUAL</u> | <u>2012 ACTUAL</u> | <u>2013 BUDGET</u> | <u>2013 PROJECTIONS</u> | <u>2014 BUDGET</u> |
|--------------------------------------|------------------------|------------------------|------------------------|-----------------------------|------------------------|
| Revenue | | | | | |
| Ceding Commission | 720,039 | 733,700 | 746,750 | 745,000 | 760,000 |
| Profit Commission | 21,684 | 32,599 | 0 | 0 | 0 |
| Installment Service Charge | 37,322 | 37,180 | 38,000 | 41,500 | 42,000 |
| Other | 703 | 1,478 | 1,500 | 3,375 | 1,500 |
| Investment Earnings | <u>22,315</u> | <u>429,191</u> | <u>185,374</u> | <u>292,734</u> | <u>202,643</u> |
| Total Revenue | <u>\$802,063</u> | <u>\$1,234,148</u> | <u>\$971,624</u> | <u>\$1,082,609</u> | <u>\$1,006,143</u> |
| Expenses | | | | | |
| Allocated Salaries | \$732,877 | \$608,431 | \$599,356 | \$599,356 | \$621,781 |
| Direct Salaries | 65,615 | 66,984 | 70,298 | 73,048 | 76,512 |
| Allocated Benefits | 228,289 | 215,760 | 226,874 | 226,874 | 228,602 |
| Direct Benefits | 15,938 | 23,050 | 26,657 | 26,434 | 28,400 |
| Program Promotion | 1,596 | 6,070 | 5,000 | 7,500 | 7,500 |
| Investment Services | 2,696 | 2,282 | 3,000 | 2,500 | 2,500 |
| Allocation of Primary Overhead | 388,938 | 275,635 | 278,874 | 278,874 | 270,406 |
| Reinsurance Placement Travel | 5,733 | 3,933 | 5,000 | 500 | 5,000 |
| Training | 0 | 0 | 500 | 500 | 500 |
| Printing and Mailing | 4,283 | 5,301 | 5,000 | 5,500 | 5,500 |
| Other Professional Services | 6,290 | 1,345 | 2,000 | 2,000 | 2,000 |
| Software Development | <u>0</u> | <u>0</u> | <u>0</u> | <u>0</u> | <u>0</u> |
| Total Expense | <u>\$1,452,255</u> | <u>\$1,208,791</u> | <u>\$1,222,559</u> | <u>\$1,223,086</u> | <u>\$1,248,701</u> |
| Allocated Depreciation | <u>\$43,636</u> | <u>\$35,996</u> | <u>\$30,056</u> | <u>\$30,056</u> | <u>\$24,366</u> |
| Net Income | <u>(\$693,828)</u> | <u>(\$10,639)</u> | <u>(\$280,991)</u> | <u>(\$170,533)</u> | <u>(\$266,924)</u> |
| Full Time Employees | 1.00 | 1.00 | 1.00 | 1.00 | 1.00 |
| Number of Covered Attorneys | 2,317 | 2,313 | 2,395 | 2,175 | 2,175 |
| CHANGE IN OPERATING EXPENSES: | | | | | |
| Increase from 2013 Budget | | 2.14% | | | |
| Increase from 2013 Projections | | | 2.09% | | |

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: September 27, 2013
Memo Date: September 10, 2013
From: David Eder, Oregon New Lawyers Division Chair
Re: ONLD Report

The following is a list of ONLD activities since the July BOG meeting:

- The ONLD Executive Committee met at Hood River Inn in August in conjunction with the OLIO Orientation. During the trip the ONLD participated in a networking panel with other specialty bar leaders and conducted a speed networking session with OLIO participants.
- On September 6 the ONLD held a dual-track CLE program in Salem for local attorneys and law students. The afternoon program was followed by an evening presentation on civility in the legal profession with Justice De Muniz in conjunction with a social event.
- Held five one-hour noontime CLE programs in Multnomah County. Topics included professionalism, estate planning, and transitioning from private practice to in-house counsel. The CLE Subcommittee will also conduct Super Saturday, an annual full day multi-track CLE program, at the OSB Center on September 21.
- Sent three ONLD representatives to San Francisco to participate in the ABA Young Lawyers Division annual meeting and assembly.
- Sponsored two informal social events in Portland.
- Two appointments to the executive committee were made to replace outgoing members. The new appointees are Kaori Tanabe and Colin Andries.
- Approved the 2014 Executive Committee slate:

| | |
|------------------------------|--------------------------------|
| <u>Officers:</u> | <u>Positions to be filled:</u> |
| Chair: Ben Eder | Region 5: Jason Hirshon |
| Chair-Elect: Karen Clevering | Region 6: Karen Clevering |
| Past Chair: David Eder | At Large 11: Colin Andries |
| Secretary: Kaori Tanabe | |
| Treasurer: Colin Andries | |

Upcoming events include:

- In October the ONLD will launch its fourth round of open enrolment for the award-winning Practical Skills through Public Service Program. Volunteer positions are available in Clackamas, Lane, Linn, Marion, Multnomah, and Washington Counties as well.
- Select and announce this year's ONLD Member Service, Public Service, Volunteer of the Year, and Project of the Year award recipients.
- The ONLD annual meeting and social is scheduled for November 1 at the Governor Hotel beginning at 5:30 p.m. All BOG members are invited to attend.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: September 27, 2013
From: Hunter Emerick, Chair, BOG Client Security Fund Workgroup
Re: Report of the BOG Client Security Fund Workgroup

Action Recommended

Consider and adopt the recommendations of the CSF Workgroup as set forth in this report.

Discussion

Creation of the Workgroup

The unprecedented experience of the Client Security Fund in 2012¹ caused the Board of Governors to devote considerable time discussing the Fund including its purpose, how it is funded, what types and amount of awards it should make, and how to avoid a similar situation where eligible claims far exceed the Fund reserve.

In mid-2012, the BOG asked the CSF Committee to review Fund rules and policies and suggest any changes that would help assure Fund stability in future years. The Committee had many discussions about the impact of the Gruetter and McBride claims as they worked through them.² The Committee also had a special meeting to respond to the BOG's request for an analysis of the Fund. Ultimately, the Committee recommended a minor clarification in the *per claim limit*, but nothing else.

When the Committee's recommendation was submitted to the BOG in May, several members continued to be concerned that rule changes might be necessary to limit the CSF's exposure to significant claims. President Haglund suggested further consideration be given to the issues, and appointed a workgroup comprised of Hunter Emerick, Matt Kehoe, Ethan Knight, Theresa Kohlhoff and Caitlin Mitchel-Markley.

The Workgroup's First Meeting

The workgroup had its first meeting on June 7 and invited CSF Chair Steven Bennett to participate. The committee began by reiterating its goal of assuring stability of the Fund and avoiding exhaustion of the reserves that requires an increase in the assessment. Ms. Stevens

¹ Thirty-nine Clients of Bend lawyer Bryan Gruetter submitted claims alleging losses of more than \$1.2 million and eligible claims paid to date exceed \$800,000 (with one remaining to be resolved). The CSF also received more than 70 claims from clients of Salem attorney Jason McBride; the total amount of those claims, approximately \$300,000, constitute the second largest Fund payout in its history, after Gruetter.

² It is worth noting that the CSF Committee had several meetings of 4+ hours as they analyzed and made decisions about the claims.

provided a brief history of the OSB Client Security Fund and explained that magnitude of the Gruetter/McBride claims together was unique in the history of the Fund. The only similar situation occurred in the early years of the Fund before there was a reserve, when the funds on hand were insufficient to cover all the eligible claims. In addition to raising the assessment for the following year, the BOG in that instance authorized partial payments followed by final payments the following year.

The workgroup then discussed the respective merits of various policies in place in other funds:

- Per-claim and per-lawyer caps;
- Once-per-year awards limited to a specified percentage of the fund balance, prorated as necessary;
- A look-back period of two or three years to supplement partial payments in the claim year.

Eliminating “earned on receipt” fees and having random trust account audits were also discussed as possibly effective ways to minimize claims of misappropriation, although admittedly more difficult to implement.

Mr. Bennett was then asked for his perspective. He pointed out that Oregon’s fund is very much in the mainstream with a long history of stable funding through member assessment and maintenance of a suitable reserve. Mr. Bennett echoed the CSF Committee’s view that none of the possible changes would appear to improve the existing program. He suggested that making awards only once a year would exacerbate the claimant’s hardship and that “justice delayed is justice denied.” He also expressed his opinion that the \$30 assessment increase in 2013 is “background noise” and not meaningful to most members, who to his knowledge are universally proud of the bar’s ability to at least partially repair the damage done by dishonest lawyers.

At the conclusion of the meeting, there was a general consensus that the CSF reserve should be increased to \$1 million and the rules revised to clarify that the maximum award of \$50,000 per claim applied regardless of the number of legal matters the lawyer was handling for the client at the time. Staff was requested to gather information about insurance for the fund, and also about random audit programs for consideration at the next meeting.

The Workgroup’s Second Meeting

The workgroup met again on August 23. Ms. Stevens reported that none of the insurers to whom she was referred was interested in covering the Fund. Reasons given were that the Fund was too small to be of interest; the premiums were likely to be larger than the current per-member assessment; and in the event of a significant claim, the policy would be cancelled or the premium increased to an even greater amount.

The group then reviewed its prior consideration about options. The group reiterated its desire to raise the reserve and clarify the rules regarding per-claim limits. There was also a

consensus for making awards at the end of the year and limiting the amount that would be paid out of the fund at any time. To alleviate the hardship of annual payments, it was agreed that the first \$5000 of any claim could be paid as approved, with the remainder held to the end of the year, with a look-back to allow the balance of the approved award to be paid in subsequent years.

Recommendations of the Workgroup

1. Increase the CSF reserve to \$1 million, even though achieving that goal will mean retaining the \$45 assessment for more years than originally anticipated.
2. CSF Committee and BOG will continue to review and approve claims throughout the year and the first \$5,000 of approved awards will be paid on approval.
3. The remaining balance of approved award in excess of \$5,000 will be held and paid at the end of the year.³
4. The Fund reserve balance will never be less than \$500,000 and the year-end awards will be pro-rated as necessary.
5. Any approved award that is not fully paid at the end of the year will be eligible for additional payment over the following two years if the fund balance is sufficient.
6. Revise CSF Rule 6.2 as follows:

~~No reimbursement from the Fund on any one claim shall exceed claimant shall be entitled to an award in excess of \$50,000 for any claim or claims arising out of claimant's representation by a lawyer or law firm, regardless of the number of matters handled or the length of the representation.~~
7. Request Legal Ethics Committee to consider the implications of eliminating the permission for “earned on receipt” fees.

³ This may require a special BOG meeting in December.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: September 27, 2013
From: Sylvia E. Stevens, Executive Director
Re: Referral to Marion County DA re: Jason McBride

Action Recommended

Consider the request of the CSF Committee that the Marion County DA be informed of Jason McBride's activities.

Discussion

As the board is well aware, former Salem attorney Jason McBride has been the source of 81 claims to the Client Security Fund in 2012 and 2013. To date, the Committee and the BOG have approved awards totaling \$122,250. The September 27 BOG agenda includes awards for BOG approval totaling another \$20,000, and there are five pending claims seeking awards of \$18,000.

In the course of investigating the claims, the CSF Committee has concluded that in many of the cases, McBride's conduct appears criminal. They have not (and cannot) determine whether McBride acted knowingly when he signed up new clients and promised them results not available under the law. His conduct is more clearly theft when he took fees for new matters at or after the time he stipulated to a suspension from practice while the Bar completed its investigation into numerous charges of misconduct. Based on those conclusions, the Committee would like to submit information¹ on the most egregious claim to the Marion County DA.

Accordingly, the Committee hereby recommends that the BOG authorize the submission of information to the Marion County DA pursuant to CSF Rule 4.14:

The Committee may recommend to the Board of Governors that information obtained by the Committee about a lawyer's conduct be provided to the appropriate District Attorney or to the Oregon Department of Justice when, in the Committee's opinion, a single serious act or a series of acts by the lawyer might constitute a violation of criminal law or of a civil fraud or consumer protection statute.

¹ One of the committee members has volunteered to review and compile the information.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: September 27, 2013
From: Sylvia E. Stevens, Executive Director
Re: CSF Claims Recommended for Awards

Action Recommended

Consider the recommendation of the CSF Committee that awards be made On the following claims:

| | |
|--|--------------------------|
| No. 2013-33 McBRIDE (J. Garibay)..... | \$5,000.00 |
| No. 2012-68 McBRIDE (Romero) & No. 2012-90 McBRIDE (Vega de Garibay)..... | \$10,000.00 ¹ |
| No. 2013-38 GRUETTER (Bullwinkel) | \$48,950.15 |
| No. 2013-26 GRUETTER (M. Farrar)..... | \$28,984.53 |
| No. 2013-27 GRUETTER (B. Farrar) | \$14,995.01 |
| No. 2013-07 McBRIDE (Olvera)..... | \$5,000.00 |
| TOTAL | \$112,929.69 |

Discussion

No. 2013-33 McBRIDE (J. Garibay) \$5,000.00

Jose Garibay came to the US with his family at age four in 1987, entering without permission. In about 2005, Jose was able to acquire a work authorization based on his mother's status as a domestic violence victim. In March 2009, Jose pleaded guilty to two felony charges (including rape in the third degree) and was sentenced to 19 months in prison. In August 2009, the government initiated removal proceedings and in January 2010 Jose was transported to Tacoma to await deportation.

Jose's sister Maria paid \$100 and consulted with McBride in on February 24, 2010 on Jose's behalf. McBride "guaranteed" that Jose would be able to stay in the US and persuaded Maria that he could also help get Jose's conviction overturned. Maria signed a retainer agreement with McBride on Jose's behalf on July 14, 2010; Jose's mother paid a retainer of \$4900. In late July 2010, McBride filed a notice of appearance on Jose's behalf and in late August filed a motion to appear by phone at the removal hearing. At the hearing it was determined that Jose did not qualify for a "reasonable fear" delay in removal, and he was deported on October 2, 2010.

¹ See note 2.

Maria contends that she called McBride two or three times a month to inquire about Jose's case and was always told that he was working on appeals. In March 2011, McBride sent Jose's mother some papers to complete, indicating that he would use her status to seek an adjustment in Jose's status. McBride's file contains no evidence that he filed such application or that he did any work on a criminal or removal appeal. Virtually nothing seems to have been done following Jose's removal.

McBride never told Jose's sister or mother that Jose's felony convictions would permanently bar him from an adjustment of status, or that the chances of a convicted sex offender gaining legal permanent resident status are essentially non-existent.

The CSF Committee recommends an award to Jose (to be paid to his mother) of the entire \$5000 paid to McBride. The Committee concluded that McBride was dishonest in taking a fee from Jose's family and promising an outcome that was legally impossible. McBride had been handling immigration cases for several years and held himself out as an expert, so he had to have known that there was nothing he could do for Jose and should have declined the representation. No judgment is required because the OSB has obtained a judgment against McBride that encompasses all claims.

**No. 2012-68 McBRIDE (Romero) &
No. 2012-90 McBRIDE (Vega de Garibay) \$10,000.00**

Oscar Romero and Maria Vega de Garibay entered the US illegally from Mexico in 1995 and 1997, respectively. They left in 2000 and returned, again illegally, in 2002. They were married in the US in 2006. That same year they filed applications for permanent residency or status adjustment for themselves and their children.

In September 2009, Oscar and Maria's applications were denied due to their multiple illegal entries and ineligibility for an exception. Orders for removal of the family soon followed. Later that month, Oscar and Maria retained McBride to seek cancellation of the removal orders and for work authorizations. McBride assured them that, despite the removal orders and denial or previous applications, he could accomplish their objectives for a fee of \$10,000.² In June 2010, McBride filed a Notice of Appearance with the Immigration Court, two days before a master hearing on Maria's removal hearing. Claimants indicate that McBride attended two removal hearings and was able to have the proceedings continued.

Oscar and Maria also paid \$1155 in fees for filing their applications. McBride asked for the fee (\$385) on three occasions, blamed the immigration authorities. The investigator determined that McBride made at least one erroneous filing that had to be re-done with a new fee. Curiously, however, although he always asked his clients to deliver filing fees in money

² Oscar and Maria each filed CSF Applications for Reimbursement. Oscar sought only the \$5000 attributed to his case, while Maria requested \$10,000 for both of them. It was not clear from either application that they were related and that fact was discovered only through the investigations. The Committee decided to treat their two applications as one.

orders payable to the government, McBride instructed Maria to leave the payee line blank on at least two of the money orders she provided.

Communication with McBride was difficult; when asked about the status he assured the clients that he was looking into things. He never returned their calls and cancelled appointments. At one point he told Maria he was waiting to file their work visa applications until “after the election.” They learned of McBride’s suspension and subsequent resignation when they contacted the OSB for help.

McBride’s files do not contain evidence of any substantive action concerning the clients’ matter. There is a note that the deportation hearings were administratively closed on June 22, 2012 but nothing official that gives a reason. The claimants were unaware of the status of their deportation case until informed by the investigator. There are no copies of completed work applications in McBride’s file. Oscar and Maria have no valid work visas and have not been able to adjust their status.

The CSF Committee concluded that any work done by McBride was *de minimis* and of little value to the claimants. Some members suggested McBride be credited with 2 hours of work at \$200/hour, and refunding \$9600 to the claimants. They also believed that the claimants should recover 2 of the \$385 filing fees, for a total of \$770. Ultimately, the committee voted unanimously to recommend an award of \$10,000.

No. 2013-38 GRUETTER (Bullwinkel) \$48,950.15

David Bullwinkel hired Bryan Gruetter to pursue claims for serious injuries sustained in an automobile accident in 2007. Bullwinkel gave Gruetter \$5000 for expenses, but Gruetter otherwise agreed to handle the case on a *pro bono* basis because of the extensive medical bills and limited insurance available from the driver. Gruetter settled the claim for \$100,00 in July 2008. Gruetter deposited the settlement funds into trust, explaining to Bullwinkel that his strategy was to hold the funds, wait for the medical providers to refer the bills to collections, and then settle cheaply with the collection agencies.

Gruetter paid some of the medical bills in May and June 2010 and distributed \$10,000 to Bullwinkel. He said the balance of \$43,950.15 would be available in November after the statute of limitations passed on the remaining medical claims. Bullwinkel learned of the loss in July 2011 when medical providers began to contact him and he was unable to get an explanation from Gruetter. Gruetter also never accounted for the \$5000 cost advance.

The Committee recommends an award to Bullwinkel of \$48,950.15. His claim is included in the restitution judgment being negotiation by the US Attorney’s Office that will be assigned to the OSB.

No. 2013-26 GRUETTER (B. Farrar) \$14,995.01

No. 2013-27 GRUETTER (M. Farrar) \$28,984.53

Bryan and Maureen Farrar were injured in a car accident and hired Bryan Gruetter to pursue their injury claims. He settled the two claims for \$100,00 each in January 2008. He reported to the clients with a preliminary accounting, indicating that he had successfully negotiated a waiver of the PIP liens and a significant reduction in some of the medical claims, which were paid directly from State Farm.

With his initial accounting Gruetter distributed \$66,572.77 to the claimants and reported that he was withholding \$44,679.23 for outstanding medical bills (\$28,984.53 for Maureen and \$15,694.70 for Bryan). Gruetter promised to continue negotiating with the providers, and assured the clients they would receive a substantial portion of the money he was holding. They heard nothing more from Gruetter and the balance of their medical bills were never paid. Their attorney explains the long delay in presenting a claim to the Farrar's lack of sophistication and trust in Gruetter's continuing assurances that he was taking care of things for them.

The CSF investigation identified an additional \$699.69 in expenses paid on Mr. Farrar's behalf. The CSF Committee recommends unanimously that the Farrars be awarded a total of \$43,979.54.

McBRIDE (Olvera) \$5,000.00

Jose Olvera entered the US illegally in 2002. Shortly thereafter, he was detained and returned to Mexico, but he again entered the US illegally. Jose married a US citizen in 2008 and they have a child who was born in the US.

In February 2011, Olvera hired McBride about getting permanent legal residency. During the interview, Olvera disclosed his two illegal entries into the US. McBride did not inform Olvera that his two illegal entries subjected him to a 10-year bar; rather, he assured Olvera that he could accomplish Olvera's objectives and Olvera paid the quoted fee of \$5,000.

In the summer of 2011, after Olvera had paid 1/2 of the fee, McBride's office filed the petition for permanent residency. The petition disclosed one illegal entry. (McBride apparently typically told clients not to disclose a second illegal entry; he also told clients that the 10-year bar could be waived in certain circumstances.) Olvera continued making payments toward McBride's fee through December 2011. By that time, McBride knew he was being investigated by the Bar on complaints of 10 former clients. In February 2012, the Bar filed a petition seeking immediate suspension, which McBride stipulated to in May 2012. He did not inform clients of his situation and Olvera learned of it only when he unsuccessfully tried to contact McBride's office in the summer of 2012.

The committee concluded that McBride took Olvera's money under false pretenses, since his two illegal entries were a complete bar to Olvera's objective of obtaining permanent legal status, and recommends a refund of the entire \$5000.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: September 27, 2013
Memo Date: September 16, 2013
From: Kay Pulju
Re: Section leader comments on LRS percentage fee implementation

Action Recommended

Information only; related action items will appear on the November board agenda.

Background

When the board voted in February of 2012 to implement percentage-fee funding for the Lawyer Referral Service (LRS), it acknowledged concerns about the impact of percentage fees on certain case types. The board endorsed the recommendation of the OSB Public Service Advisory Committee (PSAC) and staff to further explore those concerns, including through discussions with bar sections.

PSAC committee members and staff have since met with the executive committees of the following sections: Disability Law, Military & Veterans, and Workers Compensation. Representatives of those sections have been invited to address the board directly in advance of the board's consideration of a package of proposed LRS policy changes in November.

Dear Board of Governors,

The Disability Section of the Oregon Bar Association would like to share its thoughts with the Board of Governors with regard to the current 12% referral fee and its applicability to social security disability benefits cases. For the reasons we lay out below, we believe that social security disability benefits cases should be exempt from the fee.

As you know, the Social Security system includes two¹ types of disability benefits available to claimants who have become unable to participate in fulltime competitive employment by virtue of a physical or mental disability, or both. Title II, known as Social Security Disability Insurance (SSDI) is a program for adults who have a significant work history. Title XVI, known as Supplemental Security Insurance (SSI) is a program for children and adults who have not had a significant work history and who meet strict income and resource limits. As a result, Title XVI benefits are available only for very low-income individuals.

The law provides specifically for when and the amount attorneys may be paid for their work on behalf of disability claimants. Attorneys receive payment for their legal services:

1. Only if the attorney is successful in winning approval of a claimant's claim; and
2. Only out of back benefits owing to the claimant for that period of time between onset of disability and a favorable decision; and
3. Only 25% of back benefits; and
4. Regardless of the amount of back benefits won for the claimant, with a cap of \$6000 on the fee paid to the attorney.

As a result, this work is among the lowest-paid legal work. An average concurrent or Title XVI case will result in a \$2000 fee not including costs². The length of time that an attorney works on such a case may exceed two or three years. Many legal services offices no longer offer representation for disability benefits. The Disability Rights Organization (DRO), which provides legal services to disabled individuals for many kinds of legal issues, does not offer representation for disability benefits.

¹ In some cases, claimants file for both Title II and Title XVI benefits. This is known as an application for concurrent benefits. It occurs when an individual's potential Title II benefits are so low, due to his or her past earnings work, that he or she would otherwise receive less than the federally-set monthly payment provided by Title XVI.

² Most fee retainer agreements provide for client payment of costs but in our experience, nearly 50% of clients in this area of law fail to repay costs. Not only must a disability attorney acquire and submit all of a claimant's medical records, but best practices dictate that an attorney should acquire a treating physician opinion as well, at an average cost of \$225. Costs per client range from \$300-\$1200.

Approval of social security disability benefits is at an all-time low. Applications are up. Claimants need representation to thread their way through a complex and confusing administrative maze. Yet many disability attorneys are leaving the practice of social security disability law because of the difficulty of making a living in this area of law. It is critical that attorneys, both new to the practice of law and those devoted to disability benefits regardless of the limited size of fees, not be driven out of this practice.

Unfortunately, the recent 12% fee may be having exactly that effect. Many social security disability attorneys no longer participate in the lawyer referral program since the new fee was imposed, according to comments on our local listserve. Younger attorneys have a disincentive to enter this area of law, with its federally limited legal fees further reduced by the lawyer referral percentage fee.

We understand that there has been discussion of including this category of cases in the Modest Means program as a way of addressing this problem. As we understand the Modest Means program, participating attorneys limit their charge for an initial consultation. But federal law already prohibits charging any fee for an initial consultation for a disability benefits case. Indeed, there is no hourly fee at all in this area of law. What is noteworthy, however, is that the income/resource limitation for clients in the Modest Means program³ is similar to those of clients who qualify for SSI or SSD/SSI concurrent benefits, if not more lenient.

We believe that social security disability cases should be exempt from the 12% fee to encourage access to justice for disabled individuals and to enable new attorneys to enter this field of practice. We appreciate the time that OSB staff has spent with us, listening to our concerns and helping us to understand the history, rationale and process related to the 12% referral fee. We had the opportunity to discuss with staff options should the Board of Governors decide to exempt social security disability cases, either through a modification of the Modest Means program or through an LRS exemption for these cases from the referral fee. Based on these discussions, our preferred option is an LRS exemption.

Thank you for your consideration of our views on this important matter.

Sincerely,

Heidi von Ravensberg, President, Disability Bar Section

On behalf of the Disability Section and its members.

cc: Kay Pulju, George Wolff, Audrey, Mariann Hyland, Toni Kelich

³ Clients for the MMP qualify if their income does not exceed 225% of the federal poverty guidelines. Restrictions on client assets also apply.

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Dear Board of Governors:

The Executive Committee of the Workers' Compensation Section of the Oregon Bar Association sincerely thank you for the opportunity to provide the Board with our Sections' perspective and concerns with regard to the current 12% referral fee and its impact on Injured Workers and their ability to "ACCESS JUSTICE". That is simply put, the ability of an Injured Worker to :

Obtain competent and experienced counsel to represent their interests.

For the reasons outlined below, which have significant impact upon "Access to Justice" issues, we believe that Workers' Compensation cases should be exempt from the fee.

We believe an Exemption would further the Mission of the Oregon State Bar which is :

'(T)o serve justice by promoting respect for the rule of law, by improving the quality of legal services, and **by increasing access to justice.**

(Emphasis added)

A. Evolution and Background of Claimant's Workers' Compensation Practice over the last Decade and a half

A number of changes, over the past 15+ years have dramatically impacted Oregonians who have sustained injuries in the course and scope and arising out of their employment.

1. First, the Oregon Workers' Compensation law, over the past 10 to 15 years, has become increasingly complicated, both substantively and procedurally. This has come about, in large part, due to a series of legislative changes.

2. Second, the Oregon economy and workforce has, of course, undergone substantial changes as well. Gone are the physically demanding (and dangerous) logging and mill jobs of the past. Our State's labor force is comprised, more and more, of organic technological entrepreneurs who work in relatively safe environments. These innovative individuals work at a local health food restaurant, or food cart, or winery, or athletic apparel store. Generally, when such workers sustain an industrial injury, they are often back to work quickly with little or no permanent disability and minimal, if any, need for future medical care and treatment.

3. Third, the transformation of our labor force, of course, has also transformed the cases that Claimant's attorneys handle. Twenty five years ago when a 40-something year old logger was struck by a falling limb the traumatic injury was devastating and not seriously called into question. Now, when a 40 year old secretary for the Oregon State

Bar, develops Carpal Tunnel Syndrome (CTS), which his/her Family doctor attributes to computer keyboarding/ 6 ½ hours a day, 5 days a week, over the past 12 years working at the Bar, the Workers' Comp insurer for OSB will hire an "IME" (Independent Medical Examiner) who might very well conclude that the CTS has developed from a number of non-work related causes ranging from off-the-job hobbies to obesity to pregnancy to idiopathic (i.e., unknown) factors. In those cases, a time-consuming and expensive medical-legal tug-of-war and battle of experts most often ensues.

4. Fourth, as Comp cases have become more complicated, it now takes more time to get a case to a hearing as Attorneys spend more time in Depositions : Pitting Expert vs. Expert. While Depositions are obtained, of course, the Hearing record must be left open, often for a month or two. Thereafter, the ALJ has to convene closing arguments or require the parties to submit written closing arguments (14 days for Claimant's submission followed by 14 days for the Defense Argument and 7 days for Claimant's rebuttal).

5. Fifth, it has become more expensive to prepare for a hearing as the Fees which Medical Experts charge have steadily increased.

Taking the immediate example above of the CTS Claim, once faced with an IME report, the Claimant's attorney usually schedules a Phone Conference with the Treating Doctor as well as the Hand Surgeon that the Treater has referred the Claimant to. A decade ago, a doctor would usually charge \$50.00 for a routine phone conference. Now that charge is anywhere from \$100.00 to \$500.00. Assuming that the Attorney wants the doctor to write a report or respond to a series of questions in a simple "YES" and "NO" format, a separate bill is often generated (once again in a range of \$100.00 or more - - - sometimes up to \$250.00). Then similar medical-legal costs are incurred when the Surgeon is approached for an opinion. These costs are paid up-front by the Claimant's attorney (although they are recoverable when the case concludes **IF THE CLAIMANT ULTIMATELY PREVAILS ON A DENIED CLAIM**). If the Claimant ultimately loses, the Attorney can only hope that his client will be able to afford to reimburse these costs (which can amount to \$1,000.00 or more in many cases). It is fair to say that in the majority of losing cases, a Claimant's lawyer DOES NOT get reimbursed for costs advanced.

As a result of the changes in our practice, it is rare for new Oregon Bar admittees to venture into the complicated world of Claimant's Workers' Comp.

At the same time, experienced Claimant's lawyers are leaving the practice : some as a result of retirement, some have passed away and some find it no longer worth the substantial investment of time (as well as money for costs advanced) given the small

likelihood of ever obtaining a "decent" or "living wage" from a Claimant's Workers' Comp practice in Oregon.

B. Attorney Fees :

1. How does a Claimant's Lawyer get paid?

The law provides specifically **for when** and **in what amount** Claimant attorneys get paid for their work on behalf of their clients. Attorneys receive payment for their legal services:

- a. Only if the attorney is successful in winning approval of a claimant's DENIED claim (either at hearing or on appeal) - in which case, the Attorney fee is paid by the employer's insurer or the self-insured employer.
- b. Only out a client's benefits (but ONLY on some occasions) ; ranging from 10% to 25% of benefits and, then again, with a cap on the Attorney Fee award. Normally, for instance, the Claimant's Attorney DOES NOT GET PAID ANY FEE from a Client's initial Award of Permanent Disability. An Attorney can represent a Client for a year or two. The Attorney can provide important services and counsel as an Injured Worker proceeds with attempts to obtain surgery, time loss benefits, vocational benefits, etc. When the Worker's Medical Condition becomes MEDICALLY STATIONARY, the Worker will almost always obtain a NOTICE OF CLOSURE (as long as the Worker has missed time from work by reason of his/her Claim or has some degree or permanent impairment/disability). If the Worker receives an AWARD OF PERMANENT DISABILITY (no matter how big or small), the Worker's Attorney DOES NOT, in the VAST MAJORITY OF CASES, RECEIVE ANY ATTORNEY FEE WHATSOEVER. Only if the Injured Worker appeals the initial AWARD and successfully obtain additional Disability does the Attorney received a Fee (even then the fee is initially 10%, of the increased compensation obtained for the Client and only, in certain cases, is the Attorney Fee 25% of the increased compensation obtained for the Client.
- c. Out of a settlement, in which case the fee is normally 25% of the first \$17,500.00 and 10% of any sum in excess of \$17,500.00.

2. When does a Claimant's Lawyer get paid?

There are two components to Attorney Fees. First, there is the **amount** that is paid as a Fee. Secondly, there is the **time at which an Attorney Fee is actually paid.** (For instance, a Claimant may retain counsel on September 1, 2013. After all Appeals have been exhausted, the Attorney Fee awarded may not be paid

until the Spring or Summer of 2015.) As a result, each new Client that is retained is initially a drain on one's time and money for, usually, a substantial period of time before any fee is ever (IF EVER) obtained.

- a. Because of the increasing complexity of the Comp law, litigated cases often can take a year to two years to move from Claim Filing to the Hearing Stage, before an Administrative Law Judge, to an initial appeal before the Workers' Compensation Board, and occasionally to an Appeal to the Court of Appeals. Until litigation is concluded in a Claimant's favor, an Attorney fee award is not payable to Counsel.

The 2012 Report on THE OREGON WORKERS' COMPENSATION SECTION (published by the Dept. of Consumer and Business Services) (12th Edition) (Published September 2012) states :

"In 2011 there were 7,681 Requests for Hearing before an ALJ. The Median lag time from RFH to Opinion and Order was 127 days (Page 65). In 2011, there were 517 Requests for Board Review and the Median lag time from Request to Order on Review was 189 days (Page 67)." (these two figures amount to more than 10 months). .

Additionally, in 2011, there were 77 Appeals to the Court of Appeals. The Median time to Decision was 586 days. (Id. at 68).(More than a year and a half).

C. Access to Justice Issues:

Due to the ever increasing medical-legal complexity of the Oregon Workers' Compensation system, and the ever shrinking numbers of Claimant's Attorneys, injured workers have an increasingly difficult time finding competent and experienced attorneys to represent them. Factors which have been identified to account for this problem are as follows:

1. Due to the contingency nature of this area of the law, the risk of never getting paid is SUBSTANTIAL as it has become increasingly likely that an Attorney's efforts will be unsuccessful in a large number of cases (and, therefore, no attorney fee will be paid),
2. Even when an Attorney is successful in obtaining a recovery for his client, the fee will not be commensurate with the time, risk and effort expended and the fee will be paid long after the representation of the Claimant began.

3. There is a high probability that a Claimant's lawyer will have to make a SUBSTANTIAL INVESTMENT of TIME AND MONEY :

Time for case preparation, depositions of treating doctors and Independent Medical Examiners (IMEs) (which usually involves travel time to a particular doctor's office), and

Money (to advance costs for medical-legal reports, conferences with doctors, etc.) ,

4. Long after a fee is obtained, a Claimant's attorney often will be called upon to assist a client with ongoing issues that arise when a person has an accepted Comp claim (i.e., issues involving palliative care, reimbursement for travel and medications, payment of medical providers, etc.) Most of the Claimant's Bar have historically performed these services on what amounts to simply a PRO BONO and GOOD WILL basis. It is a reality of Claimant's practice, that a fair number cases simply "Go on and On and On". Once a claim is concluded, of course, an Attorney has the option of telling the client that they are on their own. Most practitioners, however, continue to offer a Claimant their time, advice and counsel, knowing that their efforts will usually be compensated for by a heartfelt "Thank you", if nothing else.

D. The Changes in the LRS Program have caused a fair number of experienced Claimant's Attorneys to withdraw from the Program which has had a negative impact on Access to Justice Issues:

It is the understanding of the Executive Committee that there has been a decrease in the number of Work Comp Panelists since the imposition of the 12% Fee Program. In fact, two of the current members of the Executive Committee decided to withdraw from the program after being panelists for, in one case over 25 years, and in another case, over 13 years.

From our Sections' perspective, there are a number of issues and problems with the current LRS Program that adversely impact the Claimant's Bar, in particular, as well as that class of Oregonians who are seeking legal representation for work injuries. These concerns include :

1. Payment of a 12% Referral fee when the Attorney fees obtained on many cases are NOTHING/ZERO, small or otherwise inadequate (given the time and effort expended). Even, then, in cases where a fee is obtained, often the fee is ACTUALLY PAID LONG AFTER a Claimant retains counsel.

2. The administrative burden to report case status to LRS on a monthly basis.

3. The prohibition against referrals to competent experienced attorneys if those lawyers are NOT LRS members (although we understand that this rule is going to be eliminated).

4. The payment of a 12% Referral fee when the original LRS Client has another claim in the future and retains Counsel again or, otherwise, has another issue arise on the same claim months or years down the road in the future (once again, we understand that this rule may be slated for elimination as well).

Given the difficulties Claimant's attorneys face, simply trying to maintain a Workers' Comp practice in Oregon that is profitable, the changes to the LRS program simply DO NOT WORK and DO NOT MAKE SENSE for most experienced Claimant attorneys in the State.

E. In the past, LRS Work Comp Panelists performed a true and substantial Public Service even when they were NOT retained by the individual who was referred by LRS. LRS Panelists would act as sounding boards and would also serve to educate and moderate the expectations of many PRO SE Claimants. In those case, the Panelist essentially provided PRO BONO services and advice to an Injured Worker which was timely and beneficial.

The Executive Committee of the Workers' Comp Section wishes to convey to the Board of Bar Governors the fact that many members of our Section, like Members of the Disability Section of the Bar, practice in this area of the law for reasons beyond financial gain. Many of the members of our Section, from the Claimant's side and Defense side as well, believe that we have an obligation to maintain a Workers' Compensation system, in Oregon, that is viable whereby all litigants **can have access to competent representation.**

In the past, LRS participants in the Work Comp Panel, most often, would be presented with the following scenario/typical call:

1. Injured Worker phones Panelist Attorney in a frustrated/agitated state. IW has contacted 5, 6, 7 or more Attorneys. IW Cannot find anyone to take his/her case. IW has appeared at a scheduled hearing, at least, once PRO SE. ALJ indicated that Claimant really should consider retaining counsel given the issues and what is at stake. (On some occasions, Claimant has appeared more than once PRO SE and hearing has

been postponed on more than one occasion).

2. LRS Attorney explains to Claimant why it is that no attorney would likely be willing to handle the case (insufficiency of medical evidence, costs associated with obtaining medical evidence, likelihood of drawn out litigation through depositions, appeals, etc.). LRS Attorney informs Claimant that he/she will not handle case under the circumstances.

3. IW informs attorney that insurer has made a small offer. Attorney indicates that the Claimant might want to seriously consider accepting the offer if the Claimant cannot find legal counsel, etc.

Now that many former LRS Panelists have decided to forego participation in LRS, Claimant's attorneys, who are constantly being contacted by frustrated IWs, often refer the Claimant back to LRS. Of course, LRS (as we understand) only gives a person 3 names at one time and then will only give a person another 3 names after a certain period of time has elapsed. As such, Claimants get frustrated, to the point of verbalizing their anger at the ALJ and Defense Counsel the next time the case is convened for hearing. While this anger is misplaced, the average Oregonian, simply cannot understand why it is so difficult to find an attorney to handle their case. Oftentimes, a PRO SE Claimant will call an ALJ's secretary (on numerous occasions) seeking help, advice, guidance, etc. As the Board can imagine, some of those calls are from Claimants who express their frustrations in a less than a polite and calm manner.

F. GOING FORWARD

The Work Comp Executive Committee has a Sub-Committee called "*Going Forward*".

On October 20, 2011, this Going Forward Subcommittee and our Section, together with the Bar's CLE department, co-sponsored a beginner's seminar entitled "*How to Try a Workers' Compensation Case.*" A mock hearing was scripted and performed by section members. The intent of the seminar was to try entice, lure, and spark some interest in Oregon Work Comp and attract fresh blood and bodies into this area of the law (primarily to the Claimant's Bar as, anecdotally, it appears that the only newbies in the Comp practice are on the Defense side of the street).

Amongst attorneys, in the Comp world, it has long been said that we all sit on a 3 legged stool :

Claimant's Attorneys.

Defense Counsel.
Administrative Law Judges/Member of the Workers' Comp Board.

Take away one of those supportive structures and the whole stool collapses.

The Implementation of the LRS changes have caused the most fragile and vulnerable of those "legs" to further crack.

At its best, Oregon's Workers' Comp system is healthiest when claimants' attorneys can depend on a profitable volume practice that provides services for the majority of Injured Workers. Not surprisingly, such a scenario meets the Bar's objective of Access to Justice.

When WC attorneys become more selective in how they spend their time and money, "Access to Justice" suffers. While substantive changes to the law that affect profitability will change only with legislative amendments, things that affect profitability outside of the legislature can be implemented more easily.

Three of those things are:

1. Increasing the amount of fees earned;
2. Increasing public awareness of the availability of competent attorneys to handle their complex cases; and.
3. Decreasing the costs of doing business.

As an adjudicative body, the Workers' Compensation Board and its Administrative Law Judges, will determine the amount of fees in most cases.

As a Professional Association, as well as a business organization, the Board of Bar Governors, should not hinder profitability in practice areas, such as ours, that attempt to serve, in a real sense, as many Oregonians as possible (especially when a practice area is already shrinking in numbers because of the reasons outlined above).

LRS and LRS Advertising provides a service to the public and its policies should also serve to encourage and promote Access to Justice in those areas of the law where it is difficult to find experienced and competent professional legal representation.

Hopefully, the Bar, and Injured Oregon Workers, would be well served by an Exemption for our Section as Claimant Attorneys already suffer from slim to nonexistent profit margins.

Our Section appreciates the fact that the Board of Bar Governors is seriously considering if the LRS Referral Fee, as applied to Work Comp Panelists, so adversely impacts an Injured Workers' Access to Justice that this area of practice should be exempt from the Fee Referral Rules.

G. GOING FURTHER TO SERVE OREGON'S INJURED WORKERS

The Oregon State Bar was founded in 1935 by the Oregon Legislature.

As an organization the **Oregon State Bar Mission** is 'to serve justice by promoting respect for the rule of law, by improving the quality of legal services, and by increasing access to justice. (Emphasis added)

The OSB Functions to "serve a diverse community" and to serve as "**advocates for access to justice**". (Emphasis added)

The OSB's Values include :

"Fairness (as the) bar works to eliminate bias in the justice system and **to ensure access to justice for all.**"

"Diversity (as the) bar is committed to serving and valuing its diverse community, to advancing equality in the justice system, and to removing barriers to that system."

"Excellence (which) is a fundamental goal in the delivery of bar programs and services. Since excellence has no boundary, **the bar strives for continuous improvement.**"

(Emphasis added)

* Quoting from the OSB Website at <http://www.osbar.org/osbinfo.htm>

H. IN KEEPING WITH THE MISSION AND VALUES OF THE OREGON BAR, THE WORKERS' COMPENSATION SECTION REQUESTS EXEMPTION FROM THE LRS 12% FEE

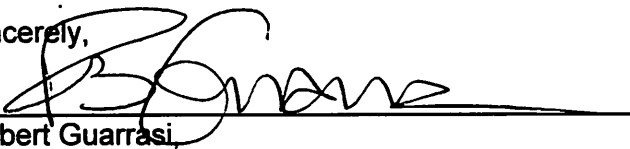
Finally, just like the Disability Section, we understand that there has been discussion of including this category of cases in the Modest Means program as a way of addressing this problem. The Modest Means program limit charges for an initial

appropriate for our Section.

In conclusion, we thank you for considering our request that Workers' Compensation cases be exempt from the 12% fee. Such an exemption would encourage access to justice for injured and disabled individuals and might even serve to encourage and enable new attorneys to enter this field of practice.

We appreciate your concern and consideration of our views on a matter of utmost importance to working Oregonians.

Sincerely,



Robert Guarrasi

9/20/13
Date

Executive Committee Member, Workers' Compensation Section
On behalf of the Workers' Compensation Section and its members.

cc: Kay Pulju, George Wolff
Norm Cole, Chairman (Workers' Compensation Executive Committee);
Jackie Jacobson, ALJ (Chair-Elect)
Dale Johnson (Immediate Past Chair)
Holly Somers (Presiding ALJ, Workers' Compensation Hearings Division)

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: September 27, 2013
Memo Date: September 12, 2013
From: Rod Wegener, CFO
Re: 2014 Active Membership Fee

Action Recommended

Establish the Active Membership Fee for 2014.

Background

The last increase in the Active Membership Fee was in 2006 when the fee was raised from \$397.00 to \$447.00. (This fee does not include the Diversity & Inclusion and Client Security Fund assessments.) The current general active fee for the over-two year member is \$447.00 and \$383.00 for the under-two year member.

The preliminary projections for the 2014 budget indicate the budget can be balanced without a fee increase in the general membership in 2014. Although there have been increases to the other fees and assessments over this nine-year period, the general active member fee for has not changed. (The year of any increase is bolded in red.)

| Year | General | D&I | CSF | Total | Inactive |
|------|----------|----------------|----------------|-----------------|-----------------|
| 2006 | \$447.00 | \$30.00 | \$ 5.00 | \$482.00 | \$110.00 |
| 2007 | \$447.00 | \$30.00 | \$ 5.00 | \$482.00 | \$110.00 |
| 2008 | \$447.00 | \$30.00 | \$ 5.00 | \$482.00 | \$110.00 |
| 2009 | \$447.00 | \$30.00 | \$ 5.00 | \$482.00 | \$110.00 |
| 2010 | \$447.00 | \$30.00 | \$15.00 | \$492.00 | \$110.00 |
| 2011 | \$447.00 | \$30.00 | \$15.00 | \$492.00 | \$110.00 |
| 2012 | \$447.00 | \$30.00 | \$15.00 | \$492.00 | \$110.00 |
| 2013 | \$447.00 | \$30.00 | \$45.00 | \$522.00 | \$125.00 |
| 2014 | \$447.00 | \$45.00 | \$45.00 | \$537.00 | \$125.00 |

At the August 23 meeting, the Budget & Finance Committee recommended to the board that the assessment for the Diversity & Inclusion program be increased from \$30.00 to \$45.00 in 2014. This increase adds approximately \$229,000 to that program's budget for 2014.

The line item budget for 2014 currently is being developed by bar managers and the detail budget will be presented to the Budget & Finance Committee at its October 25 meeting with final approval of the 2014 budget at the November BOG meeting.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: September 27, 2103
From: David Wade, Chair, Governance & Strategic Planning Committee
Re: Encouraging Section Charitable Contributions to CEJ

Action Recommended

Approve the GSP Committee's recommendations for encouraging section contributions to the Campaign for Equal Justice, based on the HOD resolution requiring the OSB to assist in achieving a 75% contribution rate among sections.

Background

The Executive Director of the Campaign for Equal Justice has inquired whether the OSB's liberal policy regarding section charitable contributions is inconsistent or incompatible with the HOD resolution requiring the OSB to support the CEJ by establishing a 75% contribution rate among sections.

Section 15.401 of the OSB Bylaws governs section donations to charities:

Sections may make donations to charitable causes or organizations only with prior approval of the Executive Director. The Executive Director will allow such donations on a showing by the section that the donation is germane to the Bar's purposes as set forth in Section 12.1 of these Bylaws. The Executive Director will maintain a list of approved recipients.

Bylaw 12.1, in turn, provides:

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

Section charitable contributions are a relatively new phenomenon, and sections were initially allowed to make donations only to the CEJ and the Classroom Law Project, organizations to which the OSB makes an annual contribution. However, with the BOG's approval, the list of approved charities has expanded over the years as sections identified additional desired recipients.

The CEJ's current concern is twofold: not only are section contributions not reaching the 75% participation goal, but the aggregate amount contributed has also declined in the recent

years.¹ The CEJ would like the BOG to take a more active role in encouraging sections to contribute and has suggested including information on the “approved” list that references the HOD resolution as well as the OSB’s long-standing partnership with and support for the CEJ. This focus might encourage sections to select the CEJ over other approved charities.

After discussion at the July meeting, the consensus of the Governance & Strategic Planning Committee was that language supporting contributions to the CEJ should be incorporated in to the “approved charities” list. (See attached.) The Committee also believes that every BOG contact to a section should attend at least one section executive committee meeting to (1) emphasize that sections are part of the bar and that the bar’s mission to promote access to justice is also the mission of each section, and (2) remind the section of the HOD goal of have 75% of sections contribute to the CEJ each year.

The committee seeks the BOG’s approval before implementing either of these recommendations.

¹ Specific data will be available at the meeting on August 23.

OSB APPROVED RECIPIENTS OF SECTION CHARITABLE CONTRIBUTIONS

The OSB's mission includes promoting the rule of law and the fair administration of justice, and increasing access to justice. OSB Bylaw 1.2. For several years, the OSB House of Delegates has passed resolutions supporting adequate funding for legal services for low-income Oregonians. In furtherance of that goal, the HOD has called for 75% of OSB Sections to contribute to the Campaign for Equal Justice.

The Campaign for Equal Justice is the support arm for Oregon's legal aid programs, which consist of four non-profits: Legal Aid Services of Oregon and the Oregon Law Center (statewide programs); and the Center for Non-Profit Legal Services (Medford) and Lane County Legal Aid and Advocacy. Oregon's legal aid programs also support numerous pro bono programs including the Statewide Low-Income Taxpayer Clinic, the Domestic Violence Project, the Senior Law Project, the Family Law Pro Se Facilitation Clinic, and the Bankruptcy Clinic.

Sections are strongly encouraged to contribute to the Campaign for Equal Justice in furtherance of the Bar's mission to promote the rule of law and the fair administration of justice. Sections may also contribute to any charitable cause that is related to the purposes for which the section exists and that has been approved by the Executive Director. OSB Bylaw 15.401.

The following charities has been approved for section contributions:

- Campaign for Equal Justice¹
- Catholic Charities
- Classroom Law Project
- Chemawa Student Association
- Lewis and Clark Small Business Clinic
- Multnomah County Probate Advisory Committee
- National Bar Association
- National Council on Juvenile and Family Court Judges
- Native American Youth Association
- Oregon Minority Lawyers Association
- Opportunity for Lawyers in Oregon
- Oregon Lawyers Against Hunger
- Oregon Lawyer Assistance Foundation
- Oregon Native American Chapter
- Peacemakers
- Special Advocates for Vulnerable Oregonians, Inc.

¹ Donations to the individual organizations supported by the CEJ are not allowed, although donors may designate the use of their contributions.

Scholarships or Educational Activities:

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

Carlton Snow scholarship fund

Federal Circuit Bar Associations Charitable and Educational Fund

Harry Chandler scholarship fund

Juvenile Law Training Academy

Section scholarships law school students earning the highest grade on the final exam in the section's area of substantive law.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: September 27, 2013
From: David Wade, Chair, Governance & Strategic Planning Committee
Re: Proposed HOD Resolution Supporting Marriage Equality

Action Recommended

Consider the GSP Committee's recommendation that the BOG submit the attached resolution to the HOD in November 2013 and support its passage.

Background

At its meeting in July, the Governance & Strategic Planning Committee had a lengthy conversation about whether the BOG and the bar could take a public stand in favor of marriage equality.

The Committee considered carefully whether the issue is germane to the purposes for which the OSB exists so as not to implicate the *Keller* limitations. Viewed as an issue of civil rights and equal access to justice, the Committee concluded supporting marriage equality fits very well within the bar's mission to advance the science of jurisprudence and improve the administration of justice. It is also consistent with the bar's commitment to serving a diverse community and advancing equality in the legal system. In other words, marriage equality is not merely a political or ideological cause unrelated to the quality of justice available to all persons.

Having concluded that marriage equality is an appropriate issue for the BOG and the bar to consider, the Committee determined that the best approach for showing support would be through a resolution adopted by the HOD.

After additional conversation in August, the Committee voted unanimously to recommend that the BOG submit the attached resolution to the HOD and support its adoption.

BOG Resolution No. XXX

Whereas, The Oregon Legislative Assembly has directed the BOG to “at all times direct its power to the advancement of the science of jurisprudence and the improvement of the administration of justice,” and

Whereas, The Functions of the Oregon State Bar as stated in OSB Bylaw 1.2 include that “We are leaders helping lawyers serve a diverse community,” and

Whereas, Consistent with and supportive of this Function, one of the Values of the Oregon State Bar is that “The Bar is committed to serving and valuing its diverse community, to advancing equality in the legal system, and to removing barriers to the system,” and

Whereas, the movement for Marriage Equality is the civil rights challenge of this decade, much as the struggle for racial and ethnic equality was an important part of the 1950s and 1960s, which struggle resulted in improved ability of racial minorities to enjoy the same civil rights afforded to others, such as in public accommodations, education, voting rights, -- and marriage (*Loving v. Virginia*, 388 US 1 (1967)), and

Whereas, As the organization of Oregon lawyers who are called upon to “serve a diverse community,” we of the OSB should go on record in support of the civil right to marry a person of either sex and

Whereas, Members of the OSB help Oregonians every day with issues that turn on the status of the marriage relationship, including marriage and dissolution and attendant issues of support, property division, and child custody; adoption; estate planning, estate/gift and income taxation; healthcare and medical insurance; criminal law; education; and the rights and obligations of debtors and creditors, and

Whereas, It is reasonable to support uniformity of application of the law in these areas, as between same-sex and different sex couples who wish to be married, and to contend for the benefits of federal law only recently made available to same-sex couples whose marriages are recognized under state law, and.

Whereas, the United States Supreme Court recently held the federal Defense of Marriage Act unconstitutional as respects its prohibition of the federal government’s recognition of same sex marriages that are valid under state law(*United States v. Windsor*, 570 US ____ (2013)), and
Whereas, in holding that the central government cannot discriminate against same-sex spouses whose marriages are valid under applicable state law, the Court stated:

. . . The differentiation [between different-sex and same-sex marriage] demeans the couple, whose moral and sexual choices the Constitution protects, see *Lawrence [v. Texas]*, 539 U. S. 558 [2003], and whose relationship the State has sought to

dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives, and

Whereas, We must be respectful of Bar members and members of the public whose personal religious or moral beliefs may be strongly opposed to same-sex marriage, but as an organization charged with protecting equality in the legal profession, and “advancing the science of jurisprudence and the improvement of the administration of justice,” , the OSB should publicly support a legal environment in Oregon in which the relationship between same-sex couples who wish to marry is deemed “dignified,” in which the moral and sexual choices of same sex couples are not “demeaned,” and in which their children are not “humiliated,” Now therefore,

BE IT RESOLVED, that the Oregon State Bar supports the right of every Oregonian to marry a person of any sex, subject to applicable law regarding age, residence, and other prevailing statutory requirements.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: September 27, 2013
Memo Date: September 13, 2013
From: Amber Hollister, Deputy General Counsel
Re: Amendments to Standard Section Bylaws

Action Recommended

Review the attached proposed amendments to the Standard Section Bylaws, which would prohibit reimbursement of section executive committee's guest expenses. These proposed amendments will be circulated to section leadership and Board members may receive feedback from members. This issue will be on November 2013 BOG Agenda for action.

Background

The attached proposed Standard Section Bylaw amendments would clarify that sections are prohibited from reimbursing expenses incurred by a section executive committee member's guest or relative. The reason for the amendment is threefold.

First, this amendment is consistent with OSB Bylaws Section 7.500, which provides "Expenses of spouses or guests will not be reimbursed except as specifically approved by the Board of Governors."

Second, the amendment proactively prevents violations of the Oregon Government Ethics Laws and prevents a perception of unfairness. Not all reimbursements of section executive committee members' guest expenses would be permitted under the Oregon Government Ethics Law, ORS Chapter 244, *et seq.* The Oregon Government Ethics Law generally prohibits public officials, including volunteers such as section executive committee members, from using or attempting to use their position to obtain a financial benefit, if the opportunity for the financial benefit would not otherwise be available "but for" their position as a public official. ORS 244.040(1). For this reason, members are generally prohibited from using their positions with the bar to financially benefit themselves, their relatives, or businesses with which they are associated.

There are exceptions to the Oregon Government Ethics Law's general "but for" prohibition. One exception allows reimbursement of the expenses of a public official's relative or a member of a public official's household, who is accompanying a public official to an official event. ORS 244.020(6)(b)(H). That exception, however, *does not* extend to mere friends or significant others who do not reside with the public official (e.g. girlfriends/boyfriends). If the Bar were to allow sections to routinely reimburse guest expenses, the Bar would have to evaluate each request and deny requests if they did not fall under an Oregon Government Ethics Law exception. This would likely lead to a perception of unfairness. If the Bar did not

evaluate reimbursement requests, there is a risk that it would reimburse expenses prohibited by the Government Ethics Law.

Third, the change eliminates any administrative cost associated with tracking reimbursements to guests of section members. If reimbursements are allowed, the Bar would need to track reimbursements and collect member W-9s so that it could issue a 1099 whenever reimbursements exceeded six hundred dollars. The Bar would be required to issue tax documentation because reimbursement of guest expenses is not a business expense.

Conclusion

For all of the reasons, staff supports amending the Standard Section Bylaws to prohibit reimbursement of section guest expenses, after notice has been given to section leadership.

Proposed Amended Standard Section Bylaws

Article IX Receipts and Expenditures

Section 1. Membership dues shall be collected by the Oregon State Bar and any other receipts of this Section shall be remitted promptly to the Oregon State Bar.

Section 2. The Oregon State Bar shall regularly assess the Section an amount to cover both direct and indirect costs of the Section's activities performed by the Oregon State Bar staff.

Section 3. Expenditure of the balance of Section funds, after such assessment, shall be as determined by the Executive Committee. Section funds shall be disbursed by the Oregon State Bar as authorized in writing by the Section's Treasurer using forms and following procedures established by the Bar. If the Treasurer is unavailable for authorization, the Section Chair may authorize disbursement of Section funds followed by written notice to the Treasurer of the action taken. Reimbursement of expenses incurred by the Treasurer or by the Treasurer's firm must be authorized in writing by the Section chair. Expenditures of Section funds shall not exceed the available Section fund balance, nor shall expenditures be in violation of laws or policies generally applicable to the Oregon State Bar. **Expenses of spouses or guests will not be reimbursed except as specifically approved by the Board of Governors.**

Section 4. Contracts for Section newsletter editors or other providers of personal services must be reviewed and signed by the Oregon State Bar Executive Director or the Director's designee.

Section 5.

(A) The Section serves as an education, communication and networking forum in the areas of law or other law related activity for which the Board of Governors approved its establishment. If the Section receives support from the Bar on other than a fee for service basis, it shall comply with the expenditure restrictions applicable to the Bar as set forth in *Keller v. State Bar of California*, 496 US 1 (1990) and related board policies.

(B) If the Section wishes to spend Section funds free from the restrictions imposed by *Keller* and related board policies it may do so if it pays the full cost of administration and other support provided by the Bar, so that the Section is entirely self-supported by voluntary dues of its members. The Section must obtain approval of its members to such election by mail or electronic vote or at a regular or special meeting. Upon exercising its right under this policy, the Section shall be provided administrative and other services by the bar on a fee for service basis only. The election shall be effective until rescinded by a vote of the Section membership.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: September 27, 2013
Memo Date: September 11, 2013
From: Danielle Edwards, Director of Member Services
Re: Volunteer Appointments

Action Recommended

Review and approve the following appointment recommendations.

Background

State Lawyers Assistance Committee

Due to a resignation and the chair moving out of state, the committee requires the appointment of a chair and one member. Staff and the committee officers recommend the appointment of **Robert "Kim" Lusk** (782911) as chair. Mr. Lusk has been a member of the committee since 2005 and is currently serving in the secretary position. Staff also recommends the appointment of **Michael W. Seidel** (871466). In addition to his experience with SLAC business from his previous service, he also provides geographic diversity as a practicing attorney from central Oregon.

Recommendation: Robert "Kim" Lusk, chair, term expires 12/31/2014

Recommendation: Michael W. Seidel, member, term expires 12/31/2014

House of Delegates

HOD Regions 1 and 2 have public member vacancies. Staff recommends the appointment of **James B. Horan** of Baker City for the region 1 position. Mr. Horan is the government affairs and communications manager at Oregon Trail Electric Consumer's Cooperative and currently serves on the Public Service Advisory Committee. **Nathaline Frener**, recommended by staff for the region 2 position, is the program supervisor for the Lane County Family Mediation Program.

Region 1: James B. Horan, term expires 4/19/2016

Region 2: Nathaline Frener, term expires 4/19/2016

CASA Workgroup

During the 2013 legislative cycle, HB 3363 called for creation of a workgroup to study and make recommendations to remove obstacles in the juvenile court dependency system. The BOG was asked to appoint two members to the workgroup with expertise representing parents and children in juvenile court dependency proceedings. On September 9 Mike Haglund appointed **Angela Sherbo** (824472), who worked closely with CASA and the Judicial Department to reach a compromise on HB3363 to create this workgroup, and **Nancy Cozine** (972432), Executive Director of the Office of Public Defense Services.

Oregon Elder Abuse Workgroup

During the 2013 legislative cycle, HB 2205 created the Oregon Elder Abuse Workgroup, consisting of 22 members. The group is to study and make recommendations on defining "abuse of vulnerable persons". The definition will be relevant to lawyers, who will become mandatory elder abuse reporters effective January 1, 2015. The workgroup is to recommend legislation to the 2014 legislature. The Board of Governors has two appointments to the workgroup: a lawyer whose practice is concentrated on elder law and a criminal defense lawyer. In July the BOG appointed **Lara C Johnson** (933230) to the workgroup. **John Lamborn** (951389) was appointed to the remaining OSB seat by Mike Haglund on September 9.

What's new?

You already know that legal aid is providing critical help to low income Oregonians all across Oregon, but did you know that legal aid is also educating and reaching out, collaborating with other community groups and engaging people like you in pro bono clinics to fight for justice? Check out these recent innovative legal aid programs.

In 2013, Oregon legal aid has a new...

...statewide grant to expand elder

services. Four legal aid programs working in cooperation with the State Unit on Aging at DHS received a national grant to improve services for senior clients in Oregon. The first part of the grant involves reaching out to partners across the community to identify the most important services. The goal is to expand legal aid's ability to assist the most vulnerable seniors who are unable to connect to legal help currently, such as immigrants, those in rural areas, shut-ins, and those with no internet, family, or very few community connections.

...clinic to remove barriers to work and housing.

Eight years ago, Joe got a little rowdy in a Portland bar after watching a Timbers game that came down to the last seconds, with the Timbers winning. In his excited state, Joe left without paying his bar tab. The subsequent conviction has held him back from housing, and getting a good job, even though he has never committed any other offenses. Legal aid has received a new United Way grant in Hillsboro to expand pro bono services to help with the paperwork and court filings that will clean up a record in order to gain employment in this type of scenario.

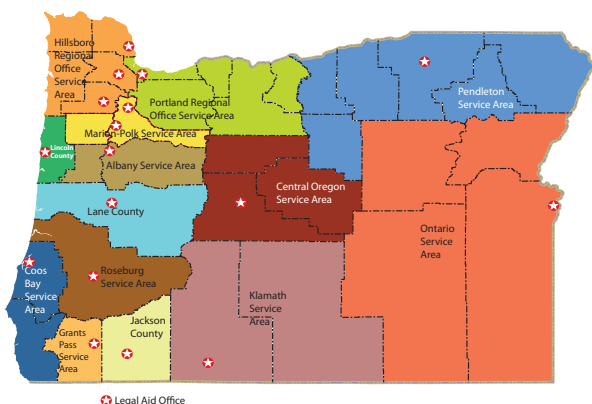
...partnership with OAPABA. Once a month IRCO (Immigrant & Refugee Community Organization) and legal aid pair up and go onsite to community centers to answer questions and meet legal needs for a very diverse group of people. Recently, OAPABA (Oregon Asian Pacific American Bar Association) has joined in the fight! They are providing additional support for issues that are a focus for Asian and Pacific Islanders. The lawyers at the clinic answers questions about housing and employment cases. Often a simple bit of advice goes very far towards empowering a person to get the help they need.

...grant for justice work with the Warm Springs tribe.

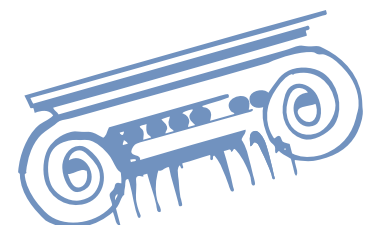
Since March 2013, a highly experienced attorney, Barbara Creels, has been available full time to provide representation to indigent clients in the tribal court. She also is working with the tribe to strengthen the justice system. Examples of her work include assisting a family in getting a birth certificate for their grandmother so that they can prove eligibility for services, such as tribal housing and access to health services. She is also working with lay advocates and others in the tribal court to create forms and documents that will make the filings and court procedure more efficient.

...director at the statewide Tax

Clinic. Legal aid welcomes Matt Erdman to the head of the Tax Clinic, which is sponsored by a matching grant from the IRS. Matt is clearly a numbers guy, stating how busy this clinic has been statewide in the first half of the year in definite terms: with 72 cases, 26 presentations, 8 outreach events and over 6,500 contacts, they are taking their place in the fight for justice. In addition, Matt has been focusing on making contacts and connections throughout the state to get every office ready to help low income Oregonians navigate tax season. Here is an example of a great case the tax clinic resolved: a family came to legal aid after not receiving their full refund. They were worried they had done something wrong. Legal aid discovered that their unlicensed tax preparer had spelled their daughter's name wrong and reversed the last two digits of her social security number. This was easily resolved with the IRS.



These are just a few of the great new programs happening now in the Oregon legal aid fight for justice!



Legal Aid Funding Overview

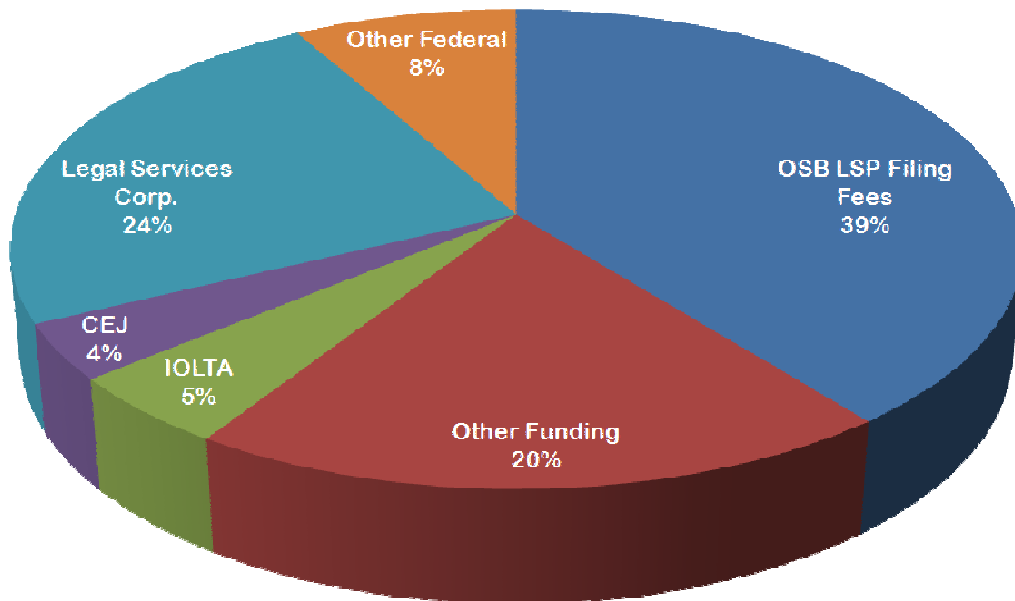
Legal aid is a state, federal, and private partnership. Oregon lawyers working through the Campaign for Equal Justice, the Oregon State Bar, the Oregon Law Foundation and other bar groups send a clear message: the Oregon legal community believes that civil access to justice is a priority.

THE LAWYERS' CAMPAIGN FOR EQUAL JUSTICE

Funding Sources

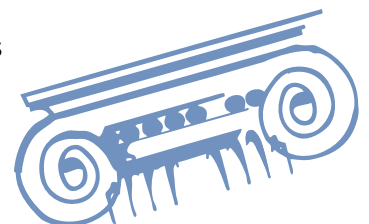
*Fighting for Justice.
Together.*

- Legal aid programs balance 80 different sources of funding.
- Over the past three years, due to a perfect storm of funding cuts, legal aid has reduced staffing by 20% and closed two offices.
- There is now funding to serve about 15% of the civil legal needs of low income Oregonians.
- Funding sources for legal aid looks like this:



Thank you for your generous support!

- CEJ leverages your donation to stabilize federal, state, and foundation funding—and to seek new funding—for legal aid.
- Adding your name to the list of donors shows other legal aid funders how much Oregon's legal community cares about access to justice.
- Your donation and your volunteer work encouraging others to donate is a critical part of keeping Oregon's legal aid programs intact!



Oregon State Bar
2013 House of Delegates Meeting

Holiday Inn Portland South - Wilsonville
25425 SW 95th Avenue
Wilsonville, Oregon 97070
503.682.2211
Friday, November 1, 2013
9:00 a.m.

Oregon State Bar

Dear Oregon State Bar Member:

I am pleased to invite you to the 2013 OSB House of Delegates meeting, which will begin at **9:00 a.m.** on **Friday, November 1, 2013**, at the Holiday Inn Portland South Hotel & Convention Center – Wilsonville. Use the code “Oregon State Bar” to receive a rate of \$99 if you want to book a room at the hotel. Call 503.682.2211 or visit them online at www.hiportlandsouth.com.

I am pleased to report that the Board of Governors is not requesting an increase in the annual membership fee for 2014. The BOG is proposing, however, an increase in the Diversity & Inclusion (*formerly* Affirmative Action) assessment. The preliminary agenda for the meeting also includes several proposed amendments to the Oregon Rules of Professional Conduct and a resolution supporting marriage equality.

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 website at 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, 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 HOD Meeting on November 1, and I thank you in advance for your thoughtful consideration and debate of these items.



Michael E. Haglund, OSB President

OREGON STATE BAR

2013 House of Delegates Meeting AGENDA

Holiday Inn Portland South – Wilsonville, 25425 SW 95th Avenue, Wilsonville, Oregon 97070

9:00 a.m., Friday, November 1, 2013

Presiding Officer: Michael E. Haglund, OSB President

Reports

- | | |
|---|--|
| 1. Call to Order <i>Michael E. Haglund OSB President</i> | 5. Report of the Board of Governors Budget and Finance Committee <i>Ethan D. Knight, Chair BOG Budget and Finance Committee</i> |
| 2. Adoption of Final Meeting Agenda <i>Michael E. Haglund OSB President</i> | 6. Report on CLNS Task Force Resolution <i>Travis Prestwich and Patrick Ehlers CLNS Task Force Co-Chairs</i> |
| 3. Report of the President <i>Michael E. Haglund OSB President</i> | 7. Overview of Parliamentary Procedure <i>Alice M. Bartelt</i> |
| 4. Comments from the Chief Justice of the Oregon Supreme Court <i>Thomas A. Balmer, Chief Justice Oregon Supreme Court</i> | |

Resolutions

- | | |
|--|---|
| 8. In Memoriam (Board of Governors Resolution No. 1) <i>Presenter: David Wade, BOG, Region 2</i> | 15. Online Directory Section Listings (Delegate Resolution No. 2) <i>Presenter: John Gear, HOD, Region 6</i> |
| 9. Diversity & Inclusion Assessment Increase (Board of Governors Resolution No. 2) <i>Presenters: Ethan Knight, BOG, Region 5 David F. Bartz, Jr., ACDI Committee Member</i> | 16. Support for Adequate Funding for Legal Services to Low-Income Oregonians (Delegate Resolution No. 3) <i>Presenters: Kathleen Evans, HOD, Region 6 Gerry Gaydos, HOD, Region 2 Ed Harnden, HOD, Region 5</i> |
| 10. Amendment of Oregon Rule of Professional Conduct 8.4 (Board of Governors Resolution No. 3) <i>Presenter: Ethan Knight, BOG, Region 5</i> | 17. Enhance Public Safety on Oregon Public Waterways (Delegate Resolution No. 4) <i>Presenter: Danny Lang, HOD, Region 3</i> |
| 11. Amendment of Oregon Rules of Professional Conduct 7.1-7.5 (Board of Governors Resolution No. 4) <i>Presenter: Kurt Hansen Chair, Legal Ethics Committee</i> | 18. Scope of House of Delegates Authority (Delegate Resolution No. 5) <i>Presenter: Danny Lang, HOD, Region 3</i> |
| 12. Amendment of Oregon Rules of Professional Conduct (Board of Governors Resolution No. 5) <i>Presenter: Helen Hierschbiel General Counsel, Oregon State Bar</i> | 19. Marriage Equality Resolution (Board of Governors Resolution No. 7) <i>Presenters: Patrick Ehlers, BOG, Region 5 Richard Spier, BOG, Region 5</i> |
| 13. Veterans Day Remembrance (Board of Governors Resolution No. 6) <i>Presenter: Richard Spier, BOG, Region 5</i> | 20. Admission to Bar after Two Years of Law School (Delegate Resolution No. 6) <i>Presenter: Timothy MB Farrell President, Mid-Columbia Bar Association</i> |
| 14. Member Support of Judicial Branch (Delegate Resolution No. 1) <i>Presenter: Danny Lang, HOD, Region 3</i> | 21. Centralized Legal Notice System (Delegate Resolution No. 7) <i>Presenter: John Gear, HOD, Region 6</i> |
| | 22. Admission Rule for Military Spouse Attorneys (Delegate Resolution No. 8) <i>Presenter: Gabriel Bradley, HOD, Out-of-State</i> |

Resolutions

8. In Memoriam

(Board of Governors Resolution No. 1)

Philip T. Abraham
Gail L. Achterman
Duane A. Bartsch
Milton E. Bernhard
Thomas L. Black
Stuart M. Brown
Richard W. Butler
Jesse R. Calvert
Janis M. Cote
Joyce C. Dahl
Dianne K. Dailey
Cameron J. Dardis
C. Douglas De Freytas
Lynn Deffebach
Robert L. Dressler
Neil J. Driscoll

William B. Duncan
Royce Deryl Edwards
John B. Fenner
Steve D. Gann
Arnold L. Gray
Reese Patrick Hastings
Rodger M. Hepburn
John W. Hill
H. Kent Holman
Ralph M. Holman
Theodore B. Jensen
Raymond Alan Janski
Rees C. Johnson
Krista I. Koehl
Sanford Kowitt
Richard T. Kropp

Ryan Lawrence
Herbert W. Lombard
Gregg A. Lowe
Jim L. Lucas
Merrill C. McCarthy
Hon. Michael J.
McElligott
Peter L. Powers
Patrick A. Randolph
William P. Ray
Don H. Sanders
Kenneth W. Saxon
Lester Edward Seto
Thomas A. Sherwood
Hon. Otto R. Skopil
Loretta Skurdahl

Frederick T. Smith
Guy O. Smith
Douglas R. Spencer
Mary L. Stasack
Marvin S.W. Swire
Joseph J. Thalhofer
William R. Thomas
Larry Voth
Wendy Weinberg Waplinger
Mark LB Wheeler
Arthur L. Whinston
Kathryn A. Wood
Joseph P. Wright

*Presenter: David Wade
Board of Governors, Region 2*

9. Diversity and Inclusion Assessment Increase (Board of Governors Resolution No. 2)

Whereas, the 1974 Oregon State Bar Annual Meeting approved the creation of an Oregon State Bar Affirmative Action Program (AAP) due to the low numbers of racial and ethnic minority bar members (.5% of the membership); and

Whereas, in 2006 the House of Delegates (HOD) approved a resolution reauthorizing the AAP through December 31, 2021 at the same funding level established for the AAP in 1989 (\$30 per active member per year and \$15 per active member for less than two years); and

Whereas, since the mid-1970's, the number of bar members who identify as racial and ethnic minorities has increased to 6.6%, while the population of racial and ethnic minorities in Oregon has increased to 16.4%; and

Whereas, the demographics in Oregon and America are rapidly changing, and there is a compelling need for the bar to serve an increasingly diverse population and to reflect the community we serve; and

Whereas, a diverse and inclusive bar is necessary to solve the challenges faced by the legal profession; and

Whereas, the name of the AAP was changed to the Diversity & Inclusion Department and Programs (D&I) in 2011; and

Whereas, the assessment to fund the Diversity & Inclusion Department has not increased in 23 years; and

Whereas, an increase in the Diversity & Inclusion Assessment is necessary to retain staff, and continue programs and outreach; now, therefore, be it

Resolved, that effective in 2014, the Diversity & Inclusion Assessment be set at \$45 for active members admitted in any jurisdiction before January 1, 2012, and at \$25 for active members admitted in any jurisdiction on or after January 1, 2012.

*Presenters: Ethan Knight, BOG, Region 5
David F. Bartz, Jr., ACDI Committee Member*

Proponent's Statement

The Board of Governors recommends passage of the resolution increasing the assessment to fund the bar's Diversity & Inclusion Department and Programs (D&I), formerly known as the Affirmative Action Program (AAP). The assessment to fund D&I was last raised 23 years ago in 1990, so funding for D&I has not kept pace with inflation. Additional funding is

needed to retain staff and fund important programs and outreach.

The OSB established the AAP, which is now called the Diversity & Inclusion Department and Programs, in 1974. At that time only 0.5% (27 out of 5,450) bar members identified as racial and ethnic minorities. Initially, D&I was funded by a \$10 per bar member "Affirmative Action" assessment. The assessment was increased from \$10 to \$15 in 1980, and from \$15 to \$30 in 1990. In 2006, the House of Delegates authorized the \$30 assessment through 2021.

The mission of the Diversity & Inclusion Department of the Oregon State Bar is to support the mission of the Oregon State Bar: by promoting respect for the rule of law, by improving the quality of legal services, and by increasing access to justice. The Program serves this mission by striving to increase the diversity of the Oregon bench and bar to reflect the diversity of the people of Oregon, by educating attorneys about the cultural richness and diversity of the clients they serve, and by removing barriers to justice.

With its dedicated resources, and a long history of committed advisory committee volunteers, D&I has made significant progress toward increasing the diversity of the OSB, which is one of its primary missions. This work is evidenced by the increase in the number of attorneys licensed in Oregon who identify as racial and ethnic minorities from .5% in 1974 to 6.6% today. That said, there is much more work that needs to be done, especially given the rapidly changing demographics in Oregon and the United States, the rise in the number of Americans who are unable to afford legal services, declining law school enrollment, and the legal jobs crisis.

The board believes that a diverse and inclusive bar is necessary to solve the challenges facing the legal profession. In particular, a diverse and inclusive bar is necessary to attract and retain talented employees and leaders; effectively serve diverse clients with diverse needs; understand and adapt to increasingly diverse local and global markets; devise creative solutions to complex problems; and improve access to justice, respect for the rule of law, and the credibility of the legal profession. Until a diverse set of lawyers is present at every level of the profession

-- partners in firms, government agencies, nonprofits and businesses, judges both state and federal, etc.-- there is still work to be done.

Race and ethnicity is one important aspect of diversity that requires deliberate attention, but the concept is much broader than that. In 2012 the board defined diversity and inclusion as acknowledging, embracing and valuing the unique contributions our individual backgrounds make to strengthen our legal community, increase access to justice, and promote laws and creative solutions that better serve clients and communities. Diversity includes, but is not limited to: age; culture; disability; ethnicity; gender and gender identity; geographic location; national origin; race; religion; sexual orientation; and socio-economic status.

D&I's signature program, Opportunities for Law in Oregon (OLIO), was created in 1998 as a racial and ethnic minority law student recruitment and retention strategy. Direct program expenses for OLIO are paid entirely with non-member resources (donations, grants, etc.). Beginning in 2005, the eligibility requirement for OLIO was opened to allow any law student who supported the program's mission to attend the OLIO Orientation as an upper division student as well as all the other OLIO program components. Today, all of D&I's programs and outreach extend beyond programs for students and include all bar members and the community at large.

The OSB has had a long-standing tradition of supporting the advancement of diversity and inclusion within the bar. The challenges faced by the legal profession nationally and in Oregon demand that we increase our effort to support diversity as key to the bar achieving its mission. While we recognize the difficulty in asking our bar members to pay more in a time of less, we on the Board of Governors encourage the members of the House of Delegates to support this increase as a modest investment in a future bar that is more inclusive and promotes access to justice for all Oregonians.

**10. Amendment of Oregon Rule of Professional Conduct 8.4
(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 8.4 as set forth below is approved and will be submitted to the Oregon Supreme Court for adoption:

**RULE 8.4
MISCONDUCT**

- (a) It is professional misconduct for a lawyer to:
- (1) violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
 - (2) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
 - (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law;
 - (4) engage in conduct that is prejudicial to the administration of justice;
 - (5) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules or other law; [or]
 - (6) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law[.]; or
 - (7) in the course of representing a client, knowingly engage in conduct that manifests bias or prejudice based upon race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation, marital status, disability or socioeconomic status.**
- (b) Notwithstanding paragraphs (a)(1), (3) and (4) and Rule 3.3(a)(1), it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or

constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct. "Covert activity," as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.

(c) Notwithstanding paragraph (a)(7), a lawyer shall not be prohibited from engaging in legitimate advocacy with respect to the bases set forth therein, or from declining, accepting, or withdrawing from representation of a client in accordance with Rule 1.16

*Presenter: Ethan Knight
BOG, Region 5*

Background

At its April 2011 meeting, in response to a request from the Oregon Women Lawyers, the Board of Governors directed the Legal Ethics Committee ("LEC") to establish a special subcommittee, including representatives from OWLS, specialty bars and other stakeholders (collectively "stakeholders"), to evaluate whether discrimination, intimidation and harassment are adequately addressed in the Oregon Rules of Professional Conduct. The LEC established the group and designated it Task Force on Discipline for Harassment, Discrimination and Intimidation ("HDI Task Force").

At the September 2011 BOG meeting, the HDI Task Force submitted a recommendation and a proposed amendment to RPC 8.4 to the BOG. The Board voted unanimously to accept the task force conclusion that the RPCs should prohibit discrimination, intimidation and harassment in the practice of law. However, because the LEC itself had not had an opportunity to fully study the proposed rule, and in a preliminary vote was evenly divided on the issues of whether a rule change was appropriate and on the language of the proposed rule, the Board decided to send the matter back to the LEC for further study.

After another year of consideration including efforts to draft a formal ethics opinion, and meeting with

stakeholders, the LEC ultimately concurred with the HDI Task Force conclusion that a rule change is necessary and appropriate. Oregon is one of a minority of states that does not have either a rule or commentary that specifically prohibits lawyers from engaging in harassment, discrimination or intimidation in the practice of law. The LEC believes the time has come for Oregon to join the majority in expressly prohibiting harassment, discrimination and intimidation by lawyers in the practice of law.

In deciding what form an amendment to the rules should take, the LEC reviewed the HDI Task Force report and the rules and commentary from other jurisdictions. Using the amendment to RPC 8.4 proposed by the HDI Task Force as its starting point, the LEC's primary points of discussion were: what protected classes of individuals should be included in the new rule; what level of intent should be required (knowing or negligent); and whether the new rule should reach a lawyer's conduct only in the course of representing a client or include conduct when representing the lawyer's own interests.

On the question of what protected classes should be included in the rule, the LEC adopted the recommendations made by stakeholders, adding color, sex, gender identity, gender expression, and socioeconomic status to the list proposed by the HDI Task Force.¹

There was significant debate around the issue of whether the level of intent required to violate the rule should be "knowing" or "negligent." The amendment proposed by the HDI Task Force included a "knowing" element; however, several LEC members expressed concern about the difficulty of proving that a lawyer "knowingly manifested" bias or prejudice. Moreover, civil rights laws do not require a showing of intent to prove discrimination. The LEC settled on what it believes is a fair compromise: the rule requires evidence that a lawyer *knowingly engaged in conduct* that manifests bias or prejudice, as opposed to evidence that the lawyer *knowingly manifested bias or prejudice*. Accordingly, a violation would occur, when a lawyer knowingly makes a racial slur, regardless of whether the lawyer intended to manifest bias or prejudice by such conduct.

¹ The addition of sex, gender identity and gender expression was based on the U.S. Department of Education Office for Civil Rights guidance relating to Title IX.

The LEC also spent considerable time discussing whether the new rule should reach conduct "in the course of representing a client or the lawyer's own interests" or only conduct "in the course of representing a client." Some felt strongly that the rules of professional conduct should not be used to dictate a lawyer's personal conduct or to enforce laws that prohibit employment discrimination, and expressed concern that including "the lawyer's own interests" would open those doors. While mindful of those issues, others were concerned that omitting "the lawyer's own interests" would allow a lawyer to engage in offensive conduct in the course of pursuing his or her own personal legal matters. The proposed rule applies only "in the course of representing a client." Overriding all discussions was the desire to ensure that some form of an amendment to RPC 8.4 be approved by the House of Delegates. Thus, while the proposed new language may not be the preferred version for everyone, compromises were made by many in order to create a rule that would demonstrate the bar's intolerance for conduct that manifests bias or prejudice, be enforceable, and be acceptable to the majority of the membership. The BOG acknowledges and is grateful for the stakeholders' contributions to the work of the LEC in developing this proposed amendment.

**11. Amendment of Oregon Rules of Professional Conduct 7.1-7.5
(Board of Governors Resolution No. 4)**

Whereas, The Board of Governors has formulated the following amendments 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 following Oregon Rules of Professional Conduct 7.1 – 7.5 be substituted for the current Oregon RPC 7.1 – 7.5 and submitted to the Oregon Supreme Court for adoption:

**RULE 7.1 COMMUNICATIONS CONCERNING A
LAWYER'S SERVICES**

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

RULE 7.2 ADVERTISING

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

- (1) pay the reasonable costs of advertisements or communications permitted by this Rule;**
- (2) pay the usual charges of a legal service plan or a not-for-profit lawyer referral service; and**
- (3) pay for a law practice in accordance with Rule 1.17.**

(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

**RULE 7.3 DIRECT 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 "Advertising Material" 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 paragraphs (a)(1) or (a)(2).

(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.

RULE 7.4 (RESERVED)

RULE 7.5 FIRM NAMES AND LETTERHEADS

(a) A lawyer shall not use a firm name, letterhead or other professional designation

that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is a fact.

(e) A lawyer may be designated "Of Counsel" on a letterhead if the lawyer has a continuing professional relationship with a lawyer or law firm, other than as a partner or associate. A lawyer may be designated as "General Counsel" or by a similar professional reference on stationery of a client if the lawyer or the lawyer's firm devotes a substantial amount of professional time in the representation of the client.

*Presenter: Kurt Hansen
Chair, Legal Ethics Committee*

Background

The 2010 HOD agenda included a resolution to conform Oregon's advertising rules to Washington's. Although the resolution failed, several delegates suggested that the BOG should study the idea. The BOG, in turn, asked the Legal Ethics Committee (LEC) to study the rules and make a recommendation. This resolution is the product of nearly two years' study by the LEC.

The LEC review included Washington's rules, the ABA Model Rules, and the report and recommendations of a 2009 Advertising Task Force. The 2009 Task Force, concluding that many of Oregon's rules would not withstand scrutiny under the Oregon Constitution, recommended sweeping changes that included eliminating the prohibition on in-person

solicitation. In the face of strong opposition to such extensive changes, the BOG tabled the 2009 recommendations.

As did the 2009 Task Force, the LEC operated on the assumption that the principal objective of the rules on advertising and solicitation is to assure that those communications are truthful and not misleading. The desire to protect lawyers from competition, regulate "good taste" or keep the public ignorant of their potential rights, are not proper bases for professional regulation.

Nevertheless, the LEC recommendations take a more measured approach than the 2009 Task Force proposals. The LEC concluded that adoption of the ABA Model Rules 7.1-7.5 with some variations will retain important existing provisions while providing practitioners with guidance that is clear, simple and more consistent with other jurisdictions. The LEC will, if the proposed rules are adopted, draft one or more formal ethics opinions that will offer interpretive guidance.

A brief summary of the changes follows. The full text of the proposed amendments, with a comparison to the current rules and explanatory notes can be found at the end of this agenda.

RPC 7.1: This is the rule with the most significant change. The rule prohibits false or misleading communications, and currently lists nine different types of statements that are prohibited because they are deemed to be misleading. Because both the 2009 Task Force and the LEC believe the itemized list is both under-inclusive and overbroad, the recommendation is to adopt the ABA Model Rule language that simply prohibits false or misleading communications, and defines false or misleading to include a misrepresentation of fact or law, or the omission of facts necessary to make a statement not materially misleading. This change will, of course, require lawyer to evaluate proposed communications on a case-by-case basis, focusing the analysis on the harm the rules is intended to prevent.

RPC 7.2: The first part of this rule is a simple statement authorizing advertisements in written, recorded or electronic communication. The current prohibition on allowing another to promote the lawyer's service through means involving false or misleading communications is eliminated, as it is covered in the overarching prohibition of Rule 7.1. The prohibition against paying others for referrals is

retained, with limited exceptions including paying the charges of a not-for-profit referral service. The current detailed provisions of 7.2(c) relating to legal service plans are eliminated, as they are already covered in other rules.

RPC 7.3: The proposed new rule is nearly identical to current Rule 7.3, retaining the prohibitions against in-person, live telephone or real-time electronic solicitation of professional employment. The requirement to identify unsolicited advertisements as such is modified to substitute the phrase "Advertising Material" for "Advertisement" and deletes the requirement that the words be "in noticeable and clearly readable fashion" on the ground that it does not give clear guidance with regard to the many kinds of communications that may be used and because a notification that isn't readily apparent constitutes no notification and would violate the rule. Recommendations of the ABA Ethics 20/20 Commission have also been incorporated into the proposed rule for clarity sake.

RPC 7.4: Neither the Legal Ethics Committee nor the BOG favors adoption of the ABA rule governing communicating fields of practice and specialization.

Both conclude that it is duplicative of the existing prohibition against false or misleading communications.

RPC 7.5: The proposed new rule contains the essential elements of the current rule, but in different order and using slightly different language. The only substantive change is in regard to including a lawyer's name in a firm name if the lawyer is temporarily not actively practicing with the firm. The new rule applies that prohibition only when the lawyer is holding public office.

12. Miscellaneous Amendments to Oregon Rules of Professional Conduct (Board of Governors Resolution No. 5)

Whereas, The Board of Governors has formulated the following amendments 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 Oregon Rules of Professional Conduct be amended as follows and submitted to the Oregon Supreme Court for adoption:

RULE 1.0 TERMINOLOGY

(q) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and [e-mail] **electronic communications**. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

RULE 1.6 CONFIDENTIALITY

* * *

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

* * *

(6) in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm. In those circumstances, a lawyer may disclose [provide the following information in discussions preliminary to the sale of a law practice under Rule 1.17] with respect to each affected client [potentially subject to the transfer:] the client's identity[;], the identities of any adverse parties[;], the nature and extent of the legal services involved[;], and fee and payment information, but only if the information revealed would not compromise the attorney-client privilege or otherwise prejudice any of the clients. [A potential

purchasing] **The lawyer or lawyers receiving the information** shall have the same responsibilities as the [*selling*] **disclosing lawyer** to preserve **the information** [*relating to the representation of such clients whether or not the sale of the practice closes or the client ultimately consents to representation by the purchasing lawyer*] **regardless of the outcome of the contemplated transaction;**

* * *

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

RULE 1.10 IMPUTATION OF CONFLICTS OF INTEREST; SCREENING

* * *

(c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9, unless the personally disqualified lawyer is **promptly** screened from any form of participation or representation in the matter **and written notice of the screening procedures employed is promptly given to any affected former client.** [*For purposes of this rule, screening requires that:*

(1) the personally disqualified lawyer shall serve on the lawyer's former law firm an affidavit attesting that during the period of the lawyer's disqualification the personally disqualified lawyer will not participate in any manner in the matter or the representation and will not discuss the matter or the representation with any other firm member; and the personally disqualified lawyer shall serve, if requested by the former law firm, a further affidavit describing the lawyer's actual compliance with these undertakings promptly upon final disposition of the matter or representation;

(2) at least one firm member shall serve on the former law firm an affidavit attesting that all firm members are aware of the requirement that the personally disqualified lawyer be screened from participating in or discussing the matter or the representation and describing the procedures being followed to screen the personally disqualified lawyer; and at least one firm member shall serve, if requested by the former law firm, a further affidavit describing the actual compliance by the firm members with the procedures for screening the

personally disqualified lawyer promptly upon final disposition of the matter or representation; and (3) no violation of this Rule shall be deemed to have occurred if the personally disqualified lawyer does not know that the lawyer's firm members have accepted employment with respect to a matter which would require the making and service of such affidavits and if all firm members having knowledge of the accepted employment do not know of the disqualification.]

RULE 1.15-2 IOLTA ACCOUNTS AND TRUST ACCOUNT OVERDRAFT NOTIFICATION

(a) A lawyer trust account for client funds that cannot earn interest in excess of the costs of generating such interest ("net interest") shall be referred to as an IOLTA (Interest on Lawyer Trust Accounts) account. IOLTA accounts shall be operated in accordance with this rule and with operating regulations and procedures as may be established by the Oregon State Bar with the approval of the Oregon Supreme Court.

* * *

(f) If a lawyer or law firm determines that a particular client's funds in an IOLTA account either did or can earn net interest, the lawyer shall transfer the funds into an account specified in paragraph (c) of this rule and request a refund for **the lesser of either:** [*of*] any interest earned by the client's funds **and** [*that may have been*] remitted to the Oregon Law Foundation; **or the interest the client's funds would have earned had those funds been placed in an interest bearing account for the benefit of the client at the same bank.**

(1) The request shall be made in writing to the Oregon Law Foundation within a reasonable period of time after the interest was remitted to the Foundation and shall be accompanied by written verification from the financial institution of the interest amount.

(2) The Oregon Law Foundation will not refund more than the amount of interest it received from the client's funds in question. The refund shall be remitted to the financial institution for transmittal to the lawyer or law firm, after appropriate accounting and reporting.

* * *

RULE 1.18 DUTIES TO PROSPECTIVE CLIENT

(a) A person who [discusses] **consults** with a lawyer **about** the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has [had discussions with] **learned information from** a prospective client shall not use or reveal **that** information [learned in the consultation], except as Rule 1.9 would permit with respect to information of a former client.

RULE 2.4 LAWYER SERVING AS MEDIATOR

(a) A lawyer serving as a mediator:

- (1) shall not act as a lawyer for any party against another party in the matter in mediation or in any related proceeding; and
- (2) must clearly inform the parties of and obtain the parties' consent to the lawyer's role as mediator.

(b) A lawyer serving as a mediator:

- (1) may prepare documents that memorialize and implement the agreement reached in mediation;
- (2) shall recommend that each party seek independent legal advice before executing the documents; and
- (3) with the consent of all parties, may record or may file the documents in court.

(c) [Notwithstanding Rule 1.10, when a lawyer is serving or has served as a mediator in a matter, a member of the lawyer's firm may accept or continue the representation of a party in the matter in mediation or in a related matter if all parties to the mediation give informed consent, confirmed in writing.]

[[d c]]The requirements of Rule 2.4(a)(2) and (b)(2) shall not apply to mediation programs established by operation of law or court order.

RULE 1.12 FORMER JUDGE, ARBITRATOR, MEDIATOR OR OTHER THIRD-PARTY NEUTRAL

(a) Except as stated in **paragraph (d)** and in Rule 2.4(b) [and in paragraph (d)], a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all

parties to the proceeding give informed consent, confirmed in writing.

* * *

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

RULE 4.4 RESPECT FOR THE RIGHTS OF THIRD PERSONS; INADVERTENTLY SENT DOCUMENTS

* * *

(b) A lawyer who receives a document **or electronically stored information** relating to the representation of the lawyer's client and knows or reasonably should know that the document **or electronically stored information** was inadvertently sent shall promptly notify the sender.

RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER [ASSISTANTS] ASSISTANCE

With respect to a nonlawyer employed or retained, supervised or directed by a lawyer:

- (a) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (b) except as provided by Rule 8.4(b), a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Background

Most of the following amendments are based largely on changes made to the ABA Model Rules of Professional Conduct based on the recommendations of the ABA Ethics 20/20 Commission. Others were suggested as helpful clarifications of the Oregon RPCs.

Rule 1.0 Terminology

Adding “electronic communications” to the definition of “writing” or “written” in subsection (q) recognizes that email is not the only (or even most widely used) form of electronic communication. Making the language more general will make it clear that all such communications fall within the meaning of “writing.”

Rule 1.6 Confidentiality

The new language in paragraph (b)(6) expands on the disclosures currently permitted in connection with the sale of a law practice. It recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest when a lawyer is considering an association with another firm or two firms are considering a merger.

New paragraph (c) requires lawyers to act competently to safeguard client information against unauthorized access by third parties and against inadvertent disclosure by the lawyer or other persons who are participating in the representation who are subject to the lawyer’s supervision. The “new” language is nearly identical to *former* DR 4-101(D), which had no counterpart in the ABA Model Rules until recently.

Rule 1.10 Imputation of Conflicts of Interest; Screening

The detailed process in subparagraphs (1)-(3) of the current rule retained the language in *former* DR 5-105(I), which was adopted in Oregon in 1983. For many years, Oregon was one of only two jurisdictions that permitted such screening. When Oregon adopted the Oregon Rules of Professional Conduct (based largely on the ABA Model Rules) in 2005, the long-standing screening process was retained in part because there was no analogous ABA Model Rule. At the same time, we adopted a definition of “screened” in Rule 1.0(n):

“Screened” denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

One unforeseen consequence of retaining the language of the old screening rule is its assumption that the personally disqualified lawyer’s former law

firm continues to represent the former client. Accordingly, RPC 1.10(c) provides no guidance when a lawyer wants to invoke screening to avoid disqualification of the new firm, but the lawyer’s former client is no longer represented by the lawyer’s former firm.

If amended as proposed, the rule will direct the notice of the screening that is being employed to the affected former client (through the client’s lawyer if the client is represented, pursuant to RPC 4.2). The screening procedures employed are at the discretion of the firm, so long as they are sufficient to meet the standard in Rule 1.0(n). This will align screening in Rule 1.10 to the screening permitted under Rule 1.18 (Prospective Client).

Rule 1.15-2 IOLTA Accounts and Trust Account Overdraft Notification

If client funds held by a lawyer are so minimal in amount or will be held for such a short period that they *cannot* earn net interest, RPC 1.15-2 requires they be held in an IOLTA (Interest on Lawyer Trust Accounts). Interest earned on funds held in IOLTA accounts is paid to the Oregon Law Foundation (“OLF”), a charitable, tax-exempt entity, which uses the money for grants to legal services programs for low-income individuals and to other programs that either promote diversity in the legal profession or educate the public about the law.

Client funds that *can* earn net interest must *not* be deposited in an IOLTA account. Instead, RPC 1.15-2(c) directs that such funds must be deposited in an interest bearing Lawyer Trust Account in which interest earned on the funds accrues to the benefit of the client.

Should a lawyer deposit into an IOLTA account funds that are later determined to have been able to earn net interest for the client, RPC 1.15-2(f) requires the lawyer to transfer the funds into an interest bearing trust account for the client’s benefit and “request a refund for any interest earned by the client’s funds that may have been remitted to the Oregon Law Foundation.” The OLF is then to issue a refund of the interest earned on the client funds. Unfortunately, the RPC does not make it clear how much interest should be refunded.

Interest rates available to the general public at most financial institutions are at an all-time low and currently range between about .01 and .25 percent. By contrast, because of Oregon’s unique Leadership Bank Program, interest rates on Oregon IOLTA

accounts can be as high as 1%. As a result, a client's funds could earn much more interest in an IOLTA account than they could earn if deposited in a separate interest bearing account for the client's benefit.

The trust account rules, particularly the IOLTA requirements, were not designed to provide a windfall for a client whose lawyer mistakenly deposits the funds in the wrong account. This change will allow the client to have a refund only of the amount of interest that the client's funds would have earned if properly placed in a non-IOLTA account.

Rule 1.18 Duties to Prospective Client

The change from "discusses" to "consults" is intended to make it clear that a person may become a prospective client within the meaning of the rule regardless of whether the "consultation" is written, oral or electronic. Circumstances will dictate whether the communication constitutes a consultation. For example, a consultation is likely to have occurred if a lawyer, in person or through advertising in any medium, invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. By contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's qualifications or provides legal information of general interest. Similarly, a mechanism for submitting information will not result in consultations if the lawyer clearly indicates no intention of establishing client relationships in that manner and warns against submitting confidential information. The amendment in paragraph (b) complements the change in paragraph (a) by eliminating the term "discussions" and puts the focus on the information that is learned.

Rule 2.4 Lawyer Serving as Mediator and Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third Party Neutral

The proposed amendments to Oregon RPC 2.4 and RPC 1.12 will clarify their relationship to one another and resolve their inconsistent mandates. Rule 2.4(c) allows one lawyer in a firm to represent a party to a mediation even if another member of the firm is serving or has served as a mediator in the matter, provided all parties to the mediation give their

informed consent to the representation. By contrast, RPC 1.12(c) prohibits any other lawyer in the firm from undertaking or continuing representation in the matter without the parties' consent unless the lawyer in the firm who mediated the matter is screened and the parties and tribunal are given prompt written notice.

The inconsistency between RPC 2.4 and 1.12 was unintentional and only recently discovered when a practitioner inquired about which rule to apply. Oregon RPC 2.4 is identical to *former* DR 5-106, which was initially adopted in 1986 and was unique to Oregon. The language was retained in RPC 2.4 with only minor changes. Oregon RPC 1.12, on the other hand, was adopted verbatim from the Model Rules; prior to 2005, Oregon had no rule like it.

While unintended, the discord between RPC 2.4(c) and 1.12(c) creates uncertainty for practitioners. At the very least, the written notice provision of RPC 1.12(c) is redundant, given the informed consent requirement of RPC 2.4. Additionally, the informed consent requirement of RPC 2.4 is unnecessarily burdensome and elevates the rights of mediating parties to those of clients. If a firm has previously represented a client, there is an obvious justification for requiring (under RPC 1.9) the former client's informed consent if the firm undertakes to represent a new client with adverse interests in a related matter. There is, however, no similar rationale for giving a mediating party the same level of veto power over the mediator's or the mediator's firm's subsequent representation of clients.

Rule 4.4 Respect for the Rights of Third Persons; Inadvertently Sent Documents

The addition of "electronically stored information" to paragraph (b) recognizes modern methods of communications. OSB Formal Op. No. 2011-187 assumes the applicability of the rule to electronically stored information and discusses the duties of a lawyer who receives inadvertently sent metadata in an electronic document. Amending the rule provides a sounder underpinning for the conclusion in the opinion and clarifies the scope of the rule.

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

This simple change in the title to the rule will clarify the obligations of lawyers who outsource legal work, both domestically and offshore. Specifically, the change will make it clear that existing principles apply to the use of nonlawyers both within and

outside the firm. The term “assistants” generally connotes nonlawyer staff within a lawyer’s office; “assistance” is a broader term than can encompass a

variety of individuals and types of work that may be sourced outside a firm.

**13. Resolution for Veterans Day Remembrance
(Board of Governors Resolution No. 6)**

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 11, 2013, the Board of Bar Governors would like to say thank you and pause for a moment in honor of the soldiers and their families.

**14. Member Support of Judicial Branch
(Delegate Resolution No. 1)**

Whereas, Oregon State Bar Members depend on the availability of an adequately staffed and funded Judicial Branch; and

Whereas, the Constitution of Oregon, Article VII, providing for the Judicial power of the State sets forth the independent function of the Judicial Branch; and

Whereas, an independent Judicial Branch must receive stable and certain funding to provide for needed infrastructure, adequate staffing, and Judicial compensation commensurate with the level of responsibility of Circuit Court Judges; Judges of the Court of Appeals; and Oregon Supreme Court Justices; and

Whereas, individual Members of the Oregon State Bar are uniquely qualified to communicate to the Public, the Media, and Members of the Oregon Legislature the need for essential funding of the Judicial Branch as an independent function of State Government in providing access to Justice; now, therefore, be it

Resolved, that the House of Delegates recommend the Board of Governors actively encourage Members to Publicly and Legislatively support funding of the Judicial Branch needs for infrastructure improvements; staffing without Court closures; and recognition that the responsibility upon the Oregon Judiciary for full Access to Justice requires commensurate compensation.

Presenter: Danny Lang, HOD, Region 3

**15. Online Directory Section Listings
(Delegate Resolution No. 2)**

Whereas, The bar maintains complete records of bar section membership and leadership roles; and

Whereas, The bar has an online member directory available for the public and provides attorney

contact and disciplinary information to the public through that directory; and

Whereas, Attorneys should be encouraged to become active participants and leaders in bar

sections, both for the good of the bar and the public; and

Whereas, Listing each member's section membership history and leadership position history will encourage bar members to join sections of interest to them and to seek leadership positions in those sections, helping the sections and the bar financially; and

Whereas, The cost of this enhancement is trivially small; and

Whereas, The public would benefit from having information about attorney section membership and leadership history when using the directory; now, therefore, be it

Resolved, That the House of Delegates of the Oregon State Bar directs the Board of Governors to take prompt action to enhance the online membership directory listing by adding each listed member's section membership and leadership history to the online display for each consenting member

Presenter: John Gear, HOD Region 6

**16. Support for Adequate Funding for Legal Services to Low-Income Oregonians
(Delegate Resolution No. 3)**

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 is 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 more than one third of legal aid's overall funding and is critical in providing equal access to justice; and

Whereas, Poverty in Oregon has increased 61% between 2000 and 2011, the 8th largest increase in the nation and most of Oregon's poor have nowhere to turn for free legal assistance; and

Whereas, In the past 3 years, because of a perfect storm of funding cuts, Oregon's legal aid programs have had to reduce staffing and close offices, at a time when the need for civil legal services is at a record high; and

Whereas, It is estimated that legal aid programs in Oregon meet about 15% of the civil legal needs of Oregon's poor creating the largest "justice gap" for low-income and vulnerable Oregonians in recent history; 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 Oregon's legal aid programs and through support for the Campaign for Equal Justice.

(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) Work with Oregon's legal aid programs and the Campaign for Equal Justice to preserve and increase state funding for legal aid and explore other sources of new funding.

(4) 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 contributing \$50,000, and a 50% contribution rate by all lawyers.

(5) 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 that pay the highest IOLTA rates.

(6) Support the Campaign for Equal Justice in efforts to educate lawyers and the community about the legal needs of the poor, legal services delivery and access to justice for low-income and vulnerable Oregonians.

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

(8) Support the fundraising efforts of those nonprofit organizations that provide civil legal services to low-income Oregonians that do not receive funding from the Campaign for Equal Justice

Presenters:

Kathleen Evans, HOD, Region 6

Gerry Gaydos, HOD, Region 2

Ed Harnden, HOD, Region 5

Background

“The mission of the Oregon State Bar is to serve justice by promoting respect for the rule of law, by improving the quality of legal services and by increasing access to justice.” OSB Bylaw 1.2. One of the four main functions of the bar is to be “a provider of assistance to the public. As such, the bar seeks to ensure the fair administration of justice for all.” [\[d.\]\[HH1\]](#)

The Board of Governors and the House of Delegates have adopted a series of resolutions supporting adequate funding for civil legal services in Oregon (Delegate Resolutions in 1996, 1997, 2002, 2005–2012). This resolution is similar to the resolution passed in 2012, but specifically updates the increase in poverty, and resolves to work with Oregon’s legal aid programs and the Campaign for Equal Justice in helping to address “the justice gap.”

The legal services organizations in Oregon were established by the state and local bar associations to increase access for low-income clients. The majority of the boards of the legal aid programs are appointed by state and local bar associations. The Oregon State Bar operates the Legal Services Program pursuant to ORS 9.572 to distribute filing fees for civil legal services and provide methods for evaluating the legal services programs. The Campaign works collaboratively with the Oregon

Law Foundation and the Oregon State Bar to support Oregon’s legal aid programs. The Bar and the Oregon Law Foundation each appoint a member to serve on the board of the Campaign for Equal Justice.

In a comprehensive study assessing legal needs, which was commissioned by the Oregon State Bar, the Office of the Governor and the Oregon Judicial Department found that equal access to justice plays an important role in the perception of fairness of the justice system. *The State of Access to Justice in Oregon* (2000). Providing access to justice and high quality legal representation to all Oregonians is a central and important mission of the Oregon State Bar. The study also concluded that individuals who have access to a legal aid lawyer have a much improved view of the legal system compared with those who do not have such access. Studies in 2005 and 2009 by the national Legal Services Corporation confirm that in Oregon we are continuing to meet less than 20% of the legal needs of low-income Oregonians. Legal Services Corporation, *Documenting the Justice Gap in America: The Unmet Civil Legal Needs of the Low-Income Americans* (Fall 2005). Today, legal aid programs estimate that about 85% of the civil legal needs of the poor in Oregon go unmet. Although we have made strides toward increasing lawyer contributions to legal aid, there remains a significant deficit in providing access to justice to low-income Oregonians.

Currently, about 20% of lawyers contribute to the Campaign for Equal Justice. The Campaign supports statewide legal aid programs in Oregon which have offices in 17 different Oregon communities, and provide representation to income eligible clients in all 36 Oregon counties. The offices focus on the most critical areas of need for low income clients. About 40% of legal aid’s cases involve family law issues relating to domestic violence.

17. Enhance Public Safety on Oregon Public Waterways (Delegate Resolution No. 4)

Whereas, recognized need for Public Safety upon Oregon Highways have been addressed by the Seat Belt Law as set forth in **ORS 811.210** [Failure to Properly use Safety Belts]; and

Whereas, recognized need for the protection of Children while seated as passengers in motor vehicles has been addressed by the Child Safety

System Standards as set forth in **ORS 815.080** [Providing Safety Belt, Harness or Child Safety System that Does Not Comply with Standards]; and

Whereas, recognized need for Public Safety of Bicyclists has been addressed by the Child Protective Headgear Law as set forth in **ORS 814.485** [Failure to Wear Protective Headgear]; and

Whereas, generally, Oregon reservoirs, lakes, and rivers are Public Waterways; and

Whereas, Users of both Oregon Public Highways and Oregon Public Waterways are subject to risks of serious injury or death, which can be mitigated by appropriate safety requirements when persons use Public Waterways; and

Whereas, the occurrence of reported drownings that frequently occur upon Oregon Public Waterways evidences needless, preventable drownings; and

Whereas, the victims of such preventable drownings also include would-be rescuers [“danger invites rescue”] adding to the consequences of repeated occurrences of such tragic drownings; and

Whereas, substantial consequences include major expenses associated with rescue and recovery efforts [i.e., Law Enforcement, EMT’s, or Coast Guard]; and

Whereas, additional major consequences include the loss of a parent, family unit, and financial support of children left dependent by loss of a parent; and

Whereas, there is a readily available means for the prevention of drownings via the use of Coast Guard approved Floatation Devices [generally available for less than \$10.00]; now, therefore, be it

Resolved, that the House of Delegates recommend and encourage the Board of Governors to recommend to the Oregon Legislature the enactment of Public Safety Legislation designed to address preventable drownings by requiring that Users of Oregon Public Waterways wear appropriate Coast Guard approved Floatation Devices when in water greater than a depth of three feet.

Presenter: Danny Lang, HOD, Region 3

**18. Scope of House of Delegates Authority
(Delegate Resolution No. 5)**

Whereas, Delegates to the House of Delegates have demonstrated their interest, competence, and dedication to promoting high standards of honor, integrity, professional conduct, professional competence, learning and public service among the members of the legal profession; and

Whereas, the House of Delegates has been delegated/recognized as a provider of assistance to the public seeking to ensure the fair administration of justice for all and the advancement of the science of jurisprudence, and promoting respect for the law among the general public; and

Whereas, the type of matters historically presented to the House of Delegates (and to the Membership prior to the creation of the HOD) have included: 1) Disciplinary Rule Changes; 2) Bar positions on major legislative and policy issues; 3) Member resolutions on a variety of topics; 4) fee increases; and

Whereas, the annual meeting of the House of Delegates offers a forum, open to the public, wherein Agenda Items and matters of public interest and benefit are within the scope of the Oregon State Bar ByLaws, including the aforementioned purpose(s) of the Bar; and

Whereas, Agenda Items/Proposed Resolutions are submitted by Elected Delegates or Ex-Officio

Delegates within the purpose of ensuring fair administration of justice for all and the advancement of the science of jurisprudence; and

Whereas, to date, the concept of “advancement of the science of jurisprudence” remains susceptible to differing subjective interpretations; and

Whereas, better guidance will be provided to HOD Delegates and Members of the Board of Governors by the establishment of appropriate criteria; and

Whereas, enhanced visibility of the Oregon State Bar in general and the various Sections; Committees; Local Bar Associations; and other sponsors of public interest matters will be better served by establishment of appropriate definitions and categories for proposed Agenda Items; now, therefore, be it

Resolved, that the House of Delegates recommend and encourage the Board of Governors to appoint a Committee to undertake development of such refinements of the science of jurisprudence in the context of the functioning of the House of Delegates.

Presenter: Danny Lang, HOD, Region 3

**19. Marriage Equality Resolution
(Board of Governors Resolution No. 7)**

Whereas, The Oregon Legislative Assembly has directed the BOG to “at all times direct its power to the advancement of the science of jurisprudence and the improvement of the administration of justice;” and

Whereas, The Functions of the Oregon State Bar as stated in OSB Bylaw 1.2 include that “We are leaders helping lawyers serve a diverse community;” and

Whereas, Consistent with and supportive of this Function, one of the Values of the Oregon State Bar is that “The Bar is committed to serving and valuing its diverse community, to advancing equality in the legal system, and to removing barriers to the system;” and

Whereas, The movement for Marriage Equality is the civil rights challenge of this decade, much as the struggle for racial and ethnic equality was an important part of the 1950s and 1960s, which struggle resulted in improved ability of racial minorities to enjoy the same civil rights afforded to others, such as in public accommodations, education, voting rights, -- and marriage (*Loving v. Virginia*, 388 US 1 (1967)); and

Whereas, As the organization of Oregon lawyers who are called upon to “serve a diverse community,” we of the OSB should go on record in support of the civil right to marry a person of either sex; and

Whereas, Members of the OSB help Oregonians every day with issues that turn on the status of the marriage relationship, including marriage and dissolution and attendant issues of support, property division, and child custody; adoption; estate planning, estate/gift and income taxation; healthcare and medical insurance; criminal law; education; and the rights and obligations of debtors and creditors; and

Whereas, the United States Supreme Court recently held the federal Defense of Marriage Act unconstitutional as respects its prohibition of the

federal government’s recognition of same sex marriages that are valid under state law(*United States v. Windsor*, 570 US ____ (2013)); and

Whereas, In holding that the central government cannot discriminate against same-sex spouses whose marriages are valid under applicable state law, the Court stated:

. . . The differentiation [between different-sex and same-sex marriage] demeans the couple, whose moral and sexual choices the Constitution protects, see *Lawrence [v. Texas]*, 539 U. S. 558 [2003], and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives; and

Whereas, We must be respectful of Bar members and members of the public whose personal religious or moral beliefs may be strongly opposed to same-sex marriage, but as an organization charged with protecting equality in the legal profession, and “advancing the science of jurisprudence and the improvement of the administration of justice,” the OSB should publicly support a legal environment in Oregon in which the relationship between same-sex couples who wish to marry is deemed “dignified,” in which the moral and sexual choices of same sex couples are not “demeaned,” and in which their children are not “humiliated;” now, therefore, be it

Resolved, that the Oregon State Bar supports the right of every Oregonian to marry a person of any sex, subject to applicable law regarding age, residence, and other prevailing statutory requirements.

*Presenters: Patrick Ehlers, BOG, Region 5
Richard Spier, BOG, Region 5*

**20. Admission to Bar after Two Years of Law School
(Delegate Resolution No. 6)**

Whereas, some of America's greatest lawyers like Abraham Lincoln never attended law school; and

Whereas, President Obama endorses scrapping the third year of law school (*Economist*, August 31, 2013, p. 24); and

Whereas, the basic principles of legal analysis are taught to all first year law students; and

Whereas, law schools provide little practical training; and

Whereas, most students fill their third year of law school with obscure courses; and

Whereas, in the past decade law school fees have soared with the average graduate owing \$140,000.00; and

Whereas, law firms are not hiring untrained law school graduates at the rate they used to, leaving graduates unemployed and unable to either pay or discharge their law school debt; and

Whereas, states like Arizona do not require a law degree to take a bar exam (Rule of Supreme Court 34, as amended 12/12/12); and

Whereas, states like California do not require law schools to be ABA accredited; now, therefore, be it

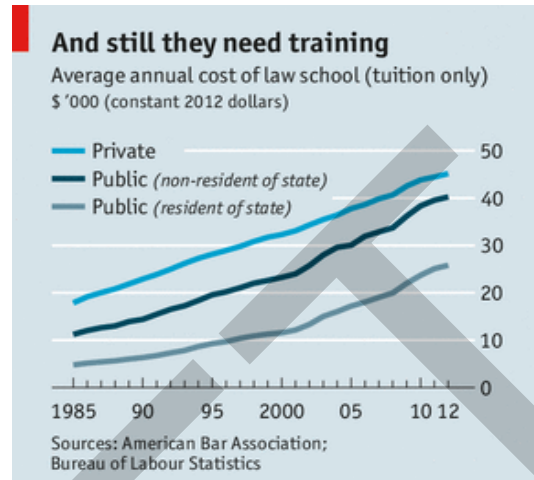
Resolved, that the board of bar examiners and Oregon Supreme Court consider the issue of admission to the bar after two years of law school.

*Presenter: Timothy MB Farrell
President, Mid-Columbia Bar Association*

Background

For many, two years is plenty. The president suggests scrapping the last year of law school. From the print edition of the *Economist*, August 31, 2013:

“THIS is probably controversial to say, but what the heck,” said Barack Obama on August 23rd. “[L]aw schools would probably be wise to think about being two years instead of three.” Mr Obama once taught constitutional law; his idea could put many of his former colleagues out of work. Yet he has a point.



For most of the 1800s, would-be lawyers (such as Abraham Lincoln) learned the trade as apprentices. Law schools sprouted up late in the century, in two main flavours. Elite universities set up legal departments for posh students; night schools catered to the sons of immigrants. To stop the proles from sullyng the image of the bar—ahem, to provide sufficient instruction in the intricacies of the law—the snootier institutions convinced the American Bar Association (ABA) to accredit only schools that required a costly three years’ worth of courses for a degree. It still does.

Most of the basic principles of legal analysis can be learned in a year, and law schools have made little effort to teach practical skills, since firms have historically trained new attorneys themselves. So students tend to fill their final year with classes on curious or obscure topics.

Over the past decade, however, fees have soared, requiring students to borrow ever-greater sums: the average 2013 graduate will be \$140,000 in hock, by one estimate. Meanwhile, firms have cut back on hiring, leaving many debt-laden young lawyers unemployed. That has led critics—now including Mr Obama—to suggest that law schools pare their coursework down to two years, letting students save money and start earning sooner. Cutting costs would also allow more graduates to take lower-paying jobs in public-interest law.

That would benefit students, but not law schools. Already suffering from declining enrolment, they would have to tighten their belts if they lost a third of their tuition revenue. So some schools are trying to reinvent the final year: New York University is placing students in foreign universities or in government, while Stanford has emphasized interdisciplinary classes and clinical courses. Since first-year lawyers at big firms now earn \$160,000 a year, their time has become too valuable to squander on training. “We can use that time to prepare them for practice better and cheaper than firms can,” says Larry Kramer, the former dean of Stanford Law.

But despite Mr Obama’s words, even schools that make no such effort are still shielded by the three-year requirement. The ABA has set up a task force on legal education, and its commission on accreditation standards is

now conducting a quinquennial review. Ten of the council’s 21 members come from the legal academy, which wants to maintain the status quo. James Silkenat, the ABA’s president, says he supports “innovation” to reduce costs—but still believes schools yield “a better product with the full three years”.

Many advocates for reform are turning to the judiciary, which sets the rules for bar admission. Last year Arizona began allowing students to take the test while still in law school. If more states follow its lead—and if firms will hire lawyers without an ABA-approved degree—then adventurous law schools might offer a two-year option. Or perhaps Mr Obama could tell the Department of Education to strip the ABA of its role as the federally sanctioned accreditor if it does not give schools the “flexibility” Mr. Silkenat says he favours.

21. Instruct Board of Governor to Prioritize Design of a Centralized Legal Notice System to Provide Stable Funding for Legal Aid Services in Oregon (Delegate Resolution No. 7)

Whereas, The costs of legal notices place a significant burden on local government budgets, as well as on private individuals forced to give such notice; and

Whereas, With the collapse in interest rates, interest on lawyer trust account (IOLTA) funding for legal aid services has collapsed, even as the economic circumstances in Oregon have led to a surge in demand for civil legal aid; and

Whereas, Readily available technology would allow a centralized legal notice provider to do a better job, at substantially lower cost, while providing individuals and governments giving notice with options for notices that are substantially richer in content and far more effective at helping Oregonians be aware of, understand, and participate in the proceedings that that notices describe; and

Whereas, Today’s telecommunications capabilities mean that a centralized legal notices system can be developed and implemented that provides all Oregon residents with instantaneous notice of any legal notice from any county in Oregon at a fraction

of the cost of newsprint publication, with substantial excess revenue available to be directed to fund civil legal aid; and

Whereas, The Board of Governors’ Centralized Legal Notice System Task Force, formed after passage of the 2012 House of Delegates Resolution on this subject, has studied this subject and is expected to recommend to the BOG that design and development of a centralized legal notice system be a bar priority; now, therefore, be it

Resolved, The House of Delegates of the Oregon State Bar instructs the Board of Governors to undertake, as a Board priority, design and development of a centralized legal notice system to be operated for the benefit of all Oregonians under the auspices of the bar or other appropriate nonprofit entity, with the goal of providing a reduction in the costs of legal notices and directing the net proceeds from such a system to funding legal aid services.

Presenter: John Gear, HOD, Region 6

22. Admission Rule for Military Spouse Attorneys (Delegate Resolution No. 8)

Whereas, the Department of Defense has recognized that military spouses face unique licensing and employment challenges as they move frequently in support of the nation's defense; and

Whereas, the American Bar Association House of Delegates and the Conference of Chief Justices have encouraged state bar-admission authorities to enact "admission by endorsement" for military spouses; and

Whereas, this House desires that the burden of licensing requirements should be eased for military spouses to the maximum extent possible while also maintaining rigorous standards for learning, ability, character, and fitness among lawyers admitted to practice in Oregon; and

Whereas, the Military Spouse J.D. Network has promulgated a Model Rule for Admission of Military Spouse Attorneys that allows for admission without examination for military spouses who are members in good standing of another bar and who meet character and fitness requirements; now, therefore, be it

Resolved, The Board of Governors recommend to the Oregon Supreme Court that it adopt a rule allowing admission without examination for attorneys holding an active license to practice law in at least one state, territory, or the District of Columbia for as long as those attorneys are present in Oregon due to a spouse's military service and those attorneys meet the education, character, and fitness requirements for admission.

Presenter: Gabriel Bradley, HOD, Out-of-State

Background

Military members typically move every two or three years. For an attorney married to a military member, the frequent state-to-state moves present a huge obstacle to a legal career. In addition to the normal hassle of moving, military spouse attorneys have to become re-licensed in their new jurisdictions.

In June 2011, the Department of Defense's State Liaison and Educational Opportunity office announced that sixteen states have laws that make licensing easier for professionals (not just attorneys) who move to a new jurisdiction because of their spouses' military service. Oregon was not one of those states.

On February 6, 2012, the ABA House of Delegates adopted a resolution that urged state bar-admission authorities to adopt rules that "accommodate the unique needs of military spouse attorneys who move frequently in support of the nation's defense." This resolution specifically encouraged:

- Admission without examination for military spouses who are present in a state due to their spouses' military service.
- Reviewing bar application procedures to ensure they are not unduly burdensome to military spouses.
- Encouraging mentorship programs for military spouses who are new to a jurisdiction.
- Offering reduced bar application and membership fees to military spouses who are new to a jurisdiction or wish to retain bar jurisdiction after moving out of the jurisdiction.

On July 25, 2012, the Conference of Chief Justices passed a resolution encouraging state bar-admission authorities to "consider the development and implementation of rules permitting admission without examination for attorneys who are dependents of service members of the United States Uniformed Services and who have graduated from ABA accredited law schools and who are already admitted to practice in another state or territory."

Oregon allows for attorney admission by reciprocity with thirty-seven states and the District of Columbia. But some military spouse attorneys will come to Oregon from states that do not have reciprocity with Oregon. Others may be starting out in their careers or may have taken time off and will therefore not meet the time-in-practice requirements of the general reciprocity rule. A more flexible admissions rule for military spouse attorneys would alleviate the burden of frequent moves.

The Military Spouse J.D. Network (www.msjdn.org) is a group of attorneys who are married to military members. They have drafted a Model Rule for Admission of Military Spouse Attorneys. MSJDN reports that rule accommodations for military spouse attorneys have been passed in Arizona, Idaho, Illinois, North Carolina, South Dakota, and Texas. A copy of the Model Rule is attached.

DRAFT Model Rule for Admission of Military Spouse Attorneys

Rule __. Admission of Military Spouse Attorneys.

1. Due to the unique mobility requirements of military families who support the defense of our nation, an attorney who is a spouse or a registered domestic partner of a member of the United States Uniformed Services (“service member”), stationed within this jurisdiction, may obtain a license to practice law pursuant to the terms of this rule.
2. An applicant under this rule must:
 - (a) have been admitted to practice law in another U.S. state, territory, or the District of Columbia;
 - (b) hold a J.D. or LL.B. degree from a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association at the time the applicant matriculated or graduated;
 - (c) establish that the applicant is currently a member in good standing in all jurisdictions where admitted;
 - (d) establish that the applicant is not currently subject to attorney discipline or the subject of a pending disciplinary matter in any jurisdiction;
 - (e) establish that the applicant possesses the character and fitness to practice law in this jurisdiction;
 - (f) demonstrate presence in this jurisdiction as a spouse of a member of the United States Uniformed Services;
 - (g) certify that the applicant has read and is familiar with this jurisdiction’s Rules of Professional Conduct;
 - (h) pay the prescribed application fee;
 - (i) within [60 days] of being licensed to practice law, complete a course on this jurisdiction’s law, the content and method of delivery of which shall be approved by this jurisdiction’s highest Court; and
 - (j) comply with all other ethical, legal, and continuing legal education obligations generally applicable to attorneys licensed in this jurisdiction.
3. The Court may require such information from an applicant under this rule as is authorized for any applicant for admission to practice law—except any information specifically excluded by this rule—and may make such investigations, conduct such hearings, and otherwise process applications under this rule as if made pursuant to this jurisdiction’s rules governing application for admission without examination. Upon a showing that strict compliance with the provisions of this section would cause the applicant unnecessary hardship, the Court may in its discretion waive or vary the application of such provisions and permit the applicant to furnish other evidence in lieu thereof.
4. If after such investigation as the Court may deem appropriate, it concludes that the applicant possesses the qualifications required of all other applicants for admission to practice law in this jurisdiction, the applicant shall be licensed to practice law and enrolled as a member of the bar of this jurisdiction. The Court shall promptly act upon any application filed under this rule.
5. Except as provided in this rule, attorneys licensed under this rule shall be entitled to all privileges, rights, and benefits and subject to all duties, obligations, and responsibilities of active members of bar of this jurisdiction, and shall be subject to the jurisdiction of the courts and agencies of this jurisdiction with respect to the laws and rules of this jurisdiction governing the conduct and discipline of attorneys, to the same extent as members of the bar of this jurisdiction.

6. The license to practice law under this rule shall terminate in the event that:

- (a) the service member is no longer a member of the United States Uniformed Services;
- (b) the military spouse attorney is no longer married to the service member; or
- (c) the service member receives a permanent transfer outside the jurisdiction, except that if the service member has been assigned to an unaccompanied or remote assignment with no dependents authorized, the military spouse attorney may continue to practice pursuant to the provisions of this rule until the service member is assigned to a location with dependents authorized.

In the event that any of the events listed in this paragraph occur, the attorney licensed under this rule shall notify the Court of the event in writing within thirty (30) days of the date upon which the event occurs. If the event occurs because the service member is deceased or disabled, the attorney shall notify the Court within one hundred eight (180) days of the date upon which the event occurs.

7. Each attorney admitted to practice under this rule shall report to the Court, within thirty (30) days:

- (a) any change in bar membership status in any jurisdiction of the United States or in any foreign jurisdiction where the attorney has been admitted to the practice of law; or
- (b) the imposition of any permanent or temporary professional disciplinary sanction by any federal or state court or agency.

8. An attorney's authority to practice under this rule shall be suspended when the attorney is suspended or disbarred in any jurisdiction of the United States, or by any federal court or agency, or by any foreign nation before which the attorney has been admitted to practice.

Oregon State Bar
Meeting of the Board of Governors
July 13, 2013
Open Session Minutes

The meeting was called to order by President Michael Haglund at 9:00 a.m. on July 13, 2013. The meeting adjourned at 1:25 p.m. Members present from the Board of Governors were Jenifer Billman, Patrick Ehlers, Hunter Emerick, R. Ray Heysell, Matthew Kehoe, Ethan Knight, Theresa Kohlhoff, Tom Kranovich, Audrey Matsumonji, Caitlin Mitchel-Markley, Maureen O'Connor, Travis Prestwich, Joshua Ross, Richard Spier, David Wade and Timothy L. Williams. Staff present were Sylvia Stevens, Helen Hirschbiel, Rod Wegener, John Gleason, Kay Pulju, Susan Grabe, Mariann Hyland, Kateri Walsh and Camille Greene. Also present were Ira Zarov, PLF CEO, Guy Greco, Vice-Chair PLF Board of Directors, David Eder, ONLD Chair, Robert Burt, Chair, Harassment Discrimination Intimidation (HDI) Task Force and Legal Ethics Committee Member, Bonnie Richardson, HDI Task Force, Kim Sugawa-Fujinaga, President, Oregon Asian Pacific American Bar Association (OAPABA), Simon Whang, Past-President, OAPABA, Ramon Pagan, President, Oregon Hispanic Bar Association, and Kathleen Rastetter, President, Oregon Women Lawyers.

1. Report of Officers & Executive Staff

A. Report of the President

As written.

B. Report of the President-elect

As written. Mr. Kranovich asked the board to submit what they see as crucial issues facing the OSB for the 2013 retreat/planning session.

C. Report of the Executive Director

ED Operations Report as written. Ms. Stevens presented the request for a study of the effect of CLEs on malpractice claims. The board took no action.

Ms. Stevens informed the board of the PLF's position on BOG member disqualification. Mr. Zarov reported that the PLF Board of Directors requested that no change be made.

Ms. Stevens gave an update on the Modest Means Program and OSB Legal Opportunities Task Force recommendations designed to increase employment opportunities for bar members. One immediate change will be to expand the income limits for MMP client eligibility from 200% to 225% of the federal poverty level. This will go into effect August 1, 2013. Still under consideration is whether to add a fourth tier to the fee structure (currently \$60/\$80/\$80 depending on the client's income). Areas of law identified as priorities for possible expansion are: Elder Law, Estate Planning, Disability Law, Workers Comp and Immigration. The PSAC is advising on a proposed implementation strategy and timeline.

Legal Publications would like to provide authors and editors with more public recognition of their efforts, and at the same time provide the board of governors with an opportunity to meet and personally thank our volunteers for their contributions and our volunteers with an opportunity to meet the board of governors at a reception after the October board meeting.

The board was unanimously supportive of having a reception following the October 25 committee meetings.

D. Director of Diversity & Inclusion

Ms. Hyland asked the board for support when the board discusses the 2014 budget. She also encouraged support for the OLIO program.

E. MBA Liaison Reports

Ms. Hirschbiel announced that the MBA's plan for 2014 will include support of diversity and inclusion.

2. Professional Liability Fund [Mr. Zarov]

Mr. Zarov provided a general update and financial report. The PLF is hiring two new claims attorneys and expects two claims attorneys to retire. Three new employees will be hired to cover Tom Cave's position when he retires at the end of 2013. A reinsurer will audit the PLF next week. Mr. Zarov has seen an increased trend in construction defect claims as well as real estate claims.

3. Rules and Ethics Opinions

Mr. Robert Burt presented the LEC's proposed amendment to RPC 8.4. Representatives from OMLA, OAPABA, OHBA and OWLS offered their comments and fielded questions from the board about the proposed rule.

Motion: Mr. Knight moved, Mr. Spier seconded, and the board voted to present the amendment to RPC 8.4 to the HOD in November. Ms. Mitchel-Markley was opposed. **[Exhibit A]**

Ms. Hirschbiel presented the LEC's proposal to adopt minor changes to RPCs 1.0(q), 1.18, 4.4(b) and 5.3 as recommended by the ABA Ethics 20/20 Commission. The proposal regarding RPC 1.6 differs slightly from the ABA recommendations to conform to existing language in the rule relating to disclosures in connection with the sale of a law practice.

Motion: Ms. Billman moved, Ms. Matsumonji seconded, and the board voted unanimously to present the RPC changes to the HOD in November. **[Exhibit B]**

Ms. Hirschbiel presented the LEC's proposal to amend RPC 1.12(c) & 2.4(c) to conform the requirements for avoiding disqualification of a mediator's firm members.

Motion: Mr. Spier moved, Mr. Emerick seconded, and the board voted unanimously to present the amendments to RPC 1.12(c) and 2.4(c) to the HOD in November. **[Exhibit C]**

Mr. Gleason proposed amendments to Bar Rules of Procedure 1, 2, 7, 8 and 12 to create an administrative suspension process for lawyers who fail to respond to disciplinary inquiries.

Motion: Mr. Knight moved, Mr. Matsumonji seconded, and the board voted to submit the amendments to Bar Rules of Procedure 1, 2, 7, 8 and 12 to the court, subject to replacing the word "comply" to "respond" with regard to subpoenas. Mr. Kehoe was opposed. **[Exhibit D]**

4. ABA House of Delegates

Mr. Haglund presented the ABA HOD delegates' request for direction on ABA HOD Resolution 117 regarding Right to Housing.

The board took no position. **[Exhibit E]**

Mr. Haglund presented the ABA HOD delegates' request for direction on ABA HOD Resolution 113A regarding "gay panic."

The board took no position **[Exhibit F]**

Mr. Haglund presented the King County Bar Association's request that the board publicly support the ABA HOD Resolution 10A, which encourages disciplinary authorities not to take action against lawyers for counseling client to comply with state and local law legalizing the possession and use of marijuana.

Motion: Ms. Kohlhoff moved, Mr. Spier seconded, and the board voted unanimously to support the ABA HOD resolution. Mr. Knight abstained. Mr. Emerick, Mr. Prestwich, Mr. Kranovich and Ms. Mitchel-Markley were opposed. **[Exhibit G]**

5. OSB Committees, Sections, Councils and Divisions

A. Minimum Continuing Legal Education Committee

Ms. Hirschbiel asked the board to consider amending Rules 7.4(b), 7.5(a) and (b) and 8.1(c), and Regulations 1.115(a) and (b), 7.200(a) and (b) in an effort to 1) align the delinquency dates for MCLE noncompliance with the delinquency dates for payment of fees and IOLTA compliance, and 2) allow the bar to send notices of noncompliance by e-mail rather than by certified mail.

Motion: Mr. Wade moved, Mr. Knight seconded, and the board voted to amend the regulations and to present the rule changes to the Supreme Court. Mr. Emerick was opposed. **[Exhibit H]**

Ms. Hirschbiel asked the board to consider amending Rule 7.5 to clarify that compliance reports may be audited after noncompliance has been cured.

Motion: Mr. Wade moved, Ms. O'Connor seconded, and the board voted unanimously to present amended rule 7.5 to the Supreme Court. **[Exhibit I]**

B. Oregon New Lawyers Division

Mr. Eder reported on a variety of ONLD projects and events described in his written report including an apology for some technical difficulties during the Diversity & Inclusion CLE. He thanked Mr. Spier for speaking at their CLE on how to become an arbitrator. They are focusing on programs at the law schools to help the law students prepare for actual practice.

C. CSF Claims

Ms. Stevens presented the CSF claims recommended for payment. **[Exhibit J]**

Motion: Mr. Wade moved, Ms. Matsumonji seconded, and the board voted unanimously to approve payments totaling \$55,682.03.

Ms. Stevens presented the claimants request for review of the CSF Committee's denial of the CONNALL (Roelle) claim for reimbursement.

Motion: Mr. Wade moved, Mr. Emerick seconded, and the board voted unanimously to affirm the committee's decision.

Ms. Stevens presented the claimant's request for review of the CSF Committee's denial of the GATTI (New) claim for reimbursement.

Motion: Mr. Kehoe moved, Mr. Emerick seconded, and the board voted to affirm the committee's decision.

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

A. Board Development Committee

Mr. Kranovich presented the committee's appointment recommendation for the Board on Public Safety Standards and Training.

Motion: The board voted unanimously to approve the appointment of Ronald J. Miller to the Board on Public Safety Standards and Training.

Mr. Kranovich presented the committee's appointment recommendations for Council on Court Procedures.

Motion: The board voted unanimously to approve the committee's appointments to the Council on Court Procedures. **[Exhibit K]**

B. Budget and Finance Committee

Mr. Knight presented the 2014 Executive Summary budget report to the board. Mr. Wegener further explained the budget summary and projected increased income. **[Exhibit L]**

Mr. Knight presented a proposed revision to the current investment policy. Mr. Spier clarified the need to revise the investment policy.

Motion: The board voted unanimously to approve the committee recommendation to revise bylaw 7.402 as presented by Mr. Spier. **[Exhibit M]**

C. Governance and Strategic Planning Committee

Motion: The board voted unanimously to approve the committee recommendation to amend OSB Bylaw 2.400-2.404 as presented by Ms. Hierschbiel. **[Exhibit N]**

Motion: The board voted to approve the committee recommendation to amend RPC 4.4(b) to reverse the prior board amendment, return to the existing rule, and not submit an amendment to the House of Delegates in November. Mr. Wade, Mr. Ross, Mr. Emerick and Mr. Prestwich were opposed. **[Exhibit O]**

Motion: Mr. Wade presented the Committee's recommendation to reverse its earlier decision to present the HOD with an amendment to RPC 4.4(b) that would require the recipient of an

inadvertently sent document to follow the sender's instructions with regard to the document. The board voted unanimously in favor of the committee motion.

Mr. Wade then moved, Mr. Prestwich seconded, and the board voted on whether to amend RPC 4.4(b) to allow the recipient of an inadvertently sent document to either follow the sender's instructions or preserve the status quo for a reasonable period to allow the sender to take protective action. Mr. Emerick, Mr. Ross, Mr. Williams and Mr. Wade voted in favor. Ms. Matsumonji, Ms. O'Connor, Ms. Billman, Mr. Heysell, Mr. Kranovich, Ms. Kohlhoff, Mr. Spier, Mr. Ehlers and Mr. Prestwich were opposed. The motion failed.

D. Public Affairs Committee

Ms. Grabe presented a wrap-up on the legislative session and successful court funding.

E. Special Projects Committee

Mr. Prestwich reported on the progress of current board projects for 2013 and support for the upcoming CEJ Laf-Off fundraiser. Implementation of the Legal Job Opportunities Task Force objectives include CLEs on closing and transferring law practices, focus on needs for lawyers in rural counties, and development of a legal-practice management CLE in conjunction with the mentoring program.

F. Centralized Legal Notice System Task Force

Mr. Ehlers updated the board on the progress of the task force and the prevailing view of making a recommendation to the board to move forward with this project.

G. Knowledge Base Task Force

Ms. Stevens updated the board on the task force's discussions to date.

7. Other Action Items

A. Mr. Haglund presented the recommendations for various interim committee appointments. **[Exhibit P]**

Motion: Mr. Kranovich moved, Mr. Emerick seconded, and the board unanimously approved the appointments as presented.

B. Ms. Hirschbiel presented the recommended appointment of Mr. William Close as the V. Archer Scholarship Trustee. There was some discussion about whether this was an appropriate role for the BOG.

Motion: Mr. Wade moved, Mr. Knight seconded, and the board approved the appointment as presented. Mr. Spier was opposed.

C. Ms. Pulju presented the recommendations for the 2013 president's awards.

Motion: Mr. Haglund, Ms. Kohlhoff, and Mr. Knight volunteered to form a subcommittee to review the candidates and present their recommendations to the board in August.

8. Consent Agenda

Motion: Ms. O'Connor moved, Ms. Matsumonji seconded, and the board voted unanimously to approve the consent agenda of past meeting minutes.

9. Closed Sessions – see CLOSED Minutes

- A.** Judicial Session (pursuant to ORS 192.690(1)) – Reinstatements
- B.** Executive Session (pursuant to ORS 192.660(1)(f) and (h)) - General Counsel/UPL Report

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

None.

**Oregon State Bar
Board of Governors Meeting
July 13, 2013
Judicial Proceedings Minutes**

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

A. Disciplinary Counsel's Report

As written.

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**Oregon State Bar
Board of Governors Meeting
July 13, 2013
Executive Session Minutes**

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

A. Unlawful Practice of Law Litigation

The BOG received status reports on the non-action items.

B. Pending or Threatened Non-Disciplinary Litigation

The BOG received status reports on the non-action items.

C. Other Matters

Bulletin Advertising by Disbarred Attorneys

Ms. Hierschbiel asked the board to determine whether to prohibit advertising of law-related services by disbarred lawyers.

Motion: Mr. Heysell moved and Ms. Billman seconded to prohibit advertising of law-related services by disbarred lawyers. Mr. Ehlers and Ms. Kohlhoff were opposed. The motion passed.

OLF Proposed Amendment to RPC 1.15-2

Ms. Hierschbiel asked the board to consider the recommendation of the Oregon Law Foundation to submit the amendment of Oregon RPC 1.15-2 to the House of Delegates for approval and to the Oregon Supreme Court for adoption thereafter.

Motion: Mr. Wade moved and Mr. Ehlers seconded to accept the recommendation of the OLF to submit the amendment ORPC 1.15-2 to the HOD for approval and to the Oregon Supreme Court for adoption thereafter. The board unanimously approved the motion. **[Exhibit Q]**

Legal Ethics Committee Proposed Amendment to Oregon RPC 8.4

RULE 8.4 MISCONDUCT

(a) It is professional misconduct for a lawyer to:

(1) violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(2) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law;

(4) engage in conduct that is prejudicial to the administration of justice;

(5) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules or other law;

(6) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(7) in the course of representing a client, knowingly engage in conduct that manifests bias or prejudice based upon race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation, marital status, disability or socioeconomic status.

(b) Notwithstanding paragraphs (a)(1), (3) and (4) and Rule 3.3(a)(1), it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct. "Covert activity," as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.

(c) Notwithstanding paragraph (a)(7), a lawyer shall not be prohibited from engaging in legitimate advocacy with respect to the bases set forth therein, or from declining, accepting, or withdrawing from representation of a client in accordance with Rule 1.16.

RULE 1.0 TERMINOLOGY

* * *

(q) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and [*e-mail*] **electronic communications**. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

RULE 1.6 CONFIDENTIALITY

* * *

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

* * *

(7) **to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client; or**

* * *

(c) **A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.**

RULE 1.18 DUTIES TO PROSPECTIVE CLIENT

(a) A person who [*discusses*] **consults** with a lawyer **about** the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has [*had discussions with*] **learned information from** a prospective client shall not use or reveal **that** information [*learned in the consultation*], except as Rule 1.9 would permit with respect to information of a former client.

Rule 4.4 Respect for the Rights of Third Persons; INADVERTENTLY SENT DOCUMENTS

* * *

(b) A lawyer who receives a document **or electronically stored information** relating to the representation of the lawyer's client and knows or reasonably should know that the document **or electronically stored information** was inadvertently sent shall promptly notify the sender.

RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER [ASSISTANTS] ASSISTANCE

RULE 7.3 [DIRECT CONTACT WITH PROSPECTIVE] SOLICITATION OF 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] target of the solicitation is such that the person could not exercise reasonable judgment in employing a lawyer;
- (2) the [prospective client] target of the solicitation 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] anyone 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).

Supplement to BOG Agenda Item 4.A.2

RULE 1.6 CONFIDENTIALITY

* * *

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

* * *

(6) in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm. In those circumstances, a lawyer may disclose *[provide the following information in discussions preliminary to the sale of a law practice under Rule 1.17]* with respect to each **affected client** *[potentially subject to the transfer:]* the client's identity^[:], the identities of any adverse parties^[:], the nature and extent of the legal services involved^[:], and fee and payment information, **but only if the information revealed would not compromise the attorney-client privilege or otherwise prejudice any of the clients.** *[A potential purchasing]* **The lawyer or lawyers receiving the information** shall have the same responsibilities as the *[selling]* **disclosing lawyer** to preserve the information *[relating to the representation of such clients whether or not the sale of the practice closes or the client ultimately consents to representation by the purchasing lawyer]* **regardless of the outcome of the contemplated transaction;**

(7) to comply with the terms of a diversion agreement, probation, conditional reinstatement or conditional admission pursuant to BR 2.10, BR 6.2, BR 8.7 or Rule for Admission Rule 6.15. A lawyer serving as a monitor of another lawyer on diversion, probation, conditional reinstatement or conditional admission shall have the same responsibilities as the monitored lawyer to preserve information relating to the representation of the monitored lawyer's clients, except to the extent reasonably necessary to carry out the monitoring lawyer's responsibilities under the terms of the diversion, probation, conditional reinstatement or conditional admission and in any proceeding relating thereto.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

RULE 1.12 FORMER JUDGE, ARBITRATOR, MEDIATOR OR OTHER THIRD-PARTY NEUTRAL

(a) Except as stated in paragraph (d) and in Rule 2.4(b) ~~and in paragraph (d)~~, a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk or staff lawyer to or otherwise assisting in the official duties of a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

- (1) the disqualified lawyer is timely screened from any participation in the matter substantially in accordance with the procedures set forth in Rule 1.10(c); and
- (2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

RULE 2.4 LAWYER SERVING AS MEDIATOR

(a) A lawyer serving as a mediator:

(1) shall not act as a lawyer for any party against another party in the matter in mediation or in any related proceeding; and

(2) must clearly inform the parties of and obtain the parties' consent to the lawyer's role as mediator.

(b) A lawyer serving as a mediator:

(1) may prepare documents that memorialize and implement the agreement reached in mediation;

(2) shall recommend that each party seek independent legal advice before executing the documents; and

(3) with the consent of all parties, may record or may file the documents in court.

~~(c) Notwithstanding Rule 1.10, when a lawyer is serving or has served as a mediator in a matter, a member of the lawyer's firm may accept or continue the representation of a party in the matter in mediation or in a related matter if all parties to the mediation give informed consent, confirmed in writing.~~

~~(c)~~ The requirements of Rule 2.4(a)(2) and (b)(2) shall not apply to mediation programs established by operation of law or court order.

Rule 1.8 Service Methods.

(a) Except as provided in Rule 4.2 and Rule 8.9, any pleading or document required under these rules to be served on an accused, ~~or applicant, or attorney~~ shall be

(1) sent to the accused, ~~or applicant, or attorney~~ or his or her attorney if the accused, ~~or applicant, or attorney~~ is represented, by first class mail addressed to the intended recipient at the recipient's last designated business or residence address on file with the Bar, or

(2) served on the accused, ~~or applicant, or attorney~~ by personal or office service as provided in ORCP 7D(2)(a)-(c).

(b) Any pleading or document required under these rules to be served on the Bar shall be sent by first class mail addressed to Disciplinary Counsel at the Bar's business address or served by personal or office service as provided in ORCP 7D(2)(a)-(c).

(c) A copy of any pleading or document served on Bar Disciplinary Counsel shall also be provided to Bar Counsel, if one has been appointed, by first class mail addressed to his or her last designated business address on file with the Bar or by personal or office service as provided in ORCP 7D(2)(a)-(c).

(d) Service by mail shall be complete on deposit in the mail except as provided in BR 1.12.

(Rule 1.8 amended by Order dated June 30, 1987.)

(Rule 1.8(a) amended by Order dated February 23, 1988.)

(Rule 1.8(a), (b) and (c) amended by Order dated June 17, 2003, effective July 1, 2003.)

(Rule 1.8(d) amended by Order dated April 26, 2007.)

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Rule 2.4 Disciplinary Board.

(a) Composition. A disciplinary board shall be appointed by the Supreme Court. The Disciplinary Board shall consist of a state chairperson, 7 regional chairpersons, and 6 additional members for each Board region except for Region 1 which shall have 9 additional members, Region 5 which shall have 23 additional members, and Region 6 which shall have 11 additional members. Each regional panel shall contain 2 members who are not attorneys, except for Region 1 which shall have appointed to it 3 members who are not attorneys, Region 5 which shall have appointed to it 8 members who are not attorneys, and Region 6 which shall have appointed to it 4 members who are not attorneys. The remaining members of the Disciplinary Board shall be resident attorneys admitted to practice in Oregon at least 3 years. Except for the state chairperson who shall be an at-large appointee, members of each regional panel shall either maintain their principal office within their respective region or maintain their residence therein. The members of each region shall constitute a regional panel. Trial panels shall consist of 2 attorneys and 1 public member, except as provided in BR 2.4(f)(3). The state chairperson, regional chairpersons and trial panel chairpersons shall be attorneys.

(b) Term.

(1) Disciplinary Board members shall serve terms of 3 years and may be reappointed. State and regional chairpersons shall serve in that capacity for terms of 1 year, subject to reappointment by the Supreme Court.

(2) Notwithstanding BR 2.4(a), the powers, jurisdiction and authority of Disciplinary Board members shall continue beyond the expiration of their appointment or after their relocation to another region for the time required to complete the cases assigned to them during their term of appointment or prior to their relocation, and until a replacement appointment has been made by the Supreme Court. The state chairperson and the regional chairpersons shall serve until a replacement appointment has been made by the Supreme Court.

(c) Resignation and Replacement. The court may remove, at its discretion, or accept the resignation of, any member of the Disciplinary Board and appoint a successor who shall serve the unexpired term of the member who is replaced.

(d) Disqualifications and Suspension of Service.

(1) The disqualifications contained in the Code of Judicial Conduct shall apply to members of the Disciplinary Board.

(2) The following individuals shall not serve on the Disciplinary Board:

(A) A member of the Board, the SPRB, or an LPRC shall not serve on the Disciplinary Board during the member's term of office. This disqualification shall also preclude an attorney or public member from serving on the Disciplinary Board while any member of his or her firm is serving on the Board, the SPRB or an LPRC.

(B) No member of the Disciplinary Board shall sit on a trial panel with regard to subject matter considered by the Board, the SPRB or an LPRC while a member thereof or with regard to subject matter considered by any member of his or her firm while a member of the Board, the SPRB or an LPRC.

(3) A member of the Disciplinary Board against whom charges of misconduct have been approved for filing by the SPRB is suspended from service on the Disciplinary Board until the charges filed against the member have been resolved by final decision or order. If a Disciplinary Board member is suspended from the practice of law as a result of a final decision or order in a disciplinary proceeding, the member may not resume service on the Disciplinary Board until the member is once again authorized to practice law. For the purposes of this rule, charges of misconduct include authorization by the SPRB to file a formal complaint pursuant to BR 4.1, the determination by the SPRB to admonish an attorney pursuant to BR 2.6(c)(1)(B) or BR 2.6(d)(1)(B) which admonition is thereafter refused by the attorney, authorization by the SPRB to notify the Supreme Court of a criminal conviction pursuant to BR 3.4(a), and authorization by the SPRB to notify the Supreme Court of an attorney's discipline in another jurisdiction pursuant to BR 3.5(a).

(e) Duties of State Chairperson.

- (1) The state chairperson shall coordinate and supervise the activities of the Disciplinary Board, including the monitoring of timely preparation and filing of trial panel opinions.
- (2) The state chairperson shall not be required to, but may, serve on trial panels during his or her term of office.
- (3) The state chairperson shall resolve all challenges to the qualifications of regional chairpersons under BR 2.4(g) and all challenges to the qualifications of trial panels appointed in contested reinstatement proceedings.
- (4) Upon receipt of written notice from Disciplinary Counsel of service of a statement of objections, the state chairperson shall appoint a trial panel and trial panel chairperson from an appropriate region. The state chairperson shall give written notice to Disciplinary Counsel, Bar Counsel and the applicant of such appointments and a copy of the notice shall be filed with the Disciplinary Board Clerk.
- (5) The state chairperson shall appoint a member of the Disciplinary Board to conduct pre-hearing conferences as provided in BR 4.6.
- (6) The state chairperson may appoint Disciplinary Board members from any region to serve on trial panels or to conduct pre-hearing conferences as may be necessary to resolve the matters submitted to the Disciplinary Board for consideration.
- (7) In matters involving final decisions of the Disciplinary Board under BR 10.1, the state chairperson shall review statements of costs and disbursements and objections thereto and shall fix the amount of actual and necessary costs and disbursements to be recovered by the prevailing party.
- (8) In matters involving the filing of a petition for suspension pursuant to BR 7.1, the state chairperson shall promptly review the petition for immediate suspension, the attorney's response, if any, and any reply from Disciplinary Counsel. Upon such review the state chairperson shall promptly issue an order pursuant to BR 7.1(d).

(f) Duties of Regional Chairperson.

- (1) Upon receipt of written notice from Disciplinary Counsel of service of a formal complaint, the regional chairperson shall appoint a trial panel from the members of the regional panel and a chairperson thereof. The regional chairperson shall give written notice to Disciplinary Counsel, Bar Counsel and the accused of such appointments and a copy of the notice shall be filed with the Disciplinary Board Clerk.
- (2) Except as provided in BR 2.4(e)(3), the regional chairperson shall rule on all challenges to the qualifications of members of the trial panels in his or her region under BR 2.4(g).
- (3) Upon the stipulation of the Bar and an accused, the regional chairperson shall appoint one attorney member from the regional panel to serve as the sole adjudicator in a disciplinary proceeding. In such case, the member appointed shall have the same duties and authority under these rules as a three member trial panel.
- (4) The regional chairperson may serve on trial panels during his or her term of office.
- (5) The regional chairperson shall rule on all questions of procedure and discovery that arise prior to the appointment of a trial panel and trial panel chairperson.

(g) Challenges. The Bar and an accused or applicant shall be entitled to one peremptory challenge and an unlimited number of challenges for cause as may arise under the Code of Judicial Conduct or these rules. Any such challenges shall be filed in writing within seven days of written notice of an appointment of a trial panel with the Disciplinary Board Clerk, with copies to the regional chairperson for disciplinary proceedings or to the state chairperson for contested reinstatement proceedings or for challenges to a regional chairperson. Challenges for cause shall state the reason for the challenge. The written ruling on a challenge shall be filed with the Disciplinary Board Clerk, and the regional chairperson or the state chairperson, as the case may be, shall serve copies of the ruling on all parties. These provisions shall apply to all substitute appointments, except that neither the Bar nor an accused or applicant shall

have more than 1 peremptory challenge. The Bar and an accused or applicant may waive a disqualification of a member in the same manner as in the case of a judge under the Code of Judicial Conduct.

(h) Duties of Trial Panel Chairperson. The Disciplinary Board Clerk shall mail to the trial panel finally selected a copy of the formal complaint or statement of objections and, if one has been filed, the answer of the accused or applicant. Upon receipt of the pleadings from Disciplinary Board Clerk, the trial panel chairperson shall promptly establish the date and place of hearing pursuant to BR 5.4 and notify in writing the Disciplinary Board Clerk and the parties of the date and place of hearing. The trial panel chairperson shall rule on all pre-hearing matters, except for challenges under BR 2.4(e)(3). The trial panel chairperson may convene the parties or their counsel prior to the hearing to discuss the parties' respective estimates of time necessary to present evidence, the availability and scheduling of witnesses, the preparation of trial exhibits, and other issues that may facilitate an efficient hearing. The trial panel chairperson may thereafter issue an order regarding agreements or rulings made at such pre-hearing meeting. The trial panel chairperson shall convene the hearing, oversee the orderly conduct of the same, and timely file with the Disciplinary Board Clerk the written opinion of the trial panel.

(i) Duties of Trial Panel.

(1) Trial. It shall be the duty of a trial panel to which a disciplinary or contested reinstatement proceeding has been referred, promptly to try the issues. The trial panel shall pass on all questions of procedure and admission of evidence.

(2)

(A) Opinions. The trial panel shall render a written opinion signed by the concurring members of the trial panel. A dissenting member shall note the dissent and may file a dissenting opinion attached to the majority opinion of the trial panel. The majority opinion shall include specific findings of fact, conclusions and a disposition. The trial panel chairperson shall file the original opinion with the Disciplinary Board Clerk, and serve copies on the parties and the State Court Administrator. It shall be filed within 28 days after the conclusion of the hearing, the settlement of the transcript if required under BR 5.3(e), or the filing of briefs if requested by the trial panel chairperson pursuant to BR 4.8, whichever is later.

(B) Extensions of Time to File Opinions. If additional time is required by the trial panel to render its opinion, the trial panel chairperson may file a request for an extension of time with the Disciplinary Board Clerk and serve a copy on the state chairperson prior to the expiration of the applicable 28 day period. Disciplinary Counsel, Bar Counsel, and the accused or applicant shall be given written notice of such request. The state chairperson shall file a written decision on the extension request with the Disciplinary Board Clerk and shall serve copies on all parties.

(3) Record. The trial panel shall keep a record of all proceedings before it, including a transcript of the evidence and exhibits offered and received, and shall promptly file such record with the Disciplinary Board Clerk.

(4) Notice. The Disciplinary Board Clerk shall promptly notify the parties of receipt of the opinion from the trial panel.

(j) Publications.

(1) Disciplinary Counsel shall cause to be prepared, on a periodic basis, a reporter service containing the full text of all Disciplinary Board decisions not reviewed by the Supreme Court. The reporter service shall be distributed to all state and county law libraries and members of the Disciplinary Board.

(2) Disciplinary Counsel shall have printed in the Bar Bulletin, on a periodic basis, summaries of Supreme Court contested admission, contested reinstatement and disciplinary decisions and summaries of all Disciplinary Board decisions not reviewed by the Supreme Court.

(Rule 2.4(a) amended by Order dated January 2, 1986, further amended by Order dated January 24, 1986 effective January 2, 1986, nun pro tunc.)

(Rule 2.4(d)(2) amended by Order dated September 10, 1986, effective September 10, 1986.)

(Rules 2.1, 2.6, 2.7 and 2.8 amended by Order dated June 30, 1987.)

(Rule 2.4(j) amended by Order dated October 1, 1987, effective October 1, 1987.)

(Rule 2.4(f)(1) amended by Order dated February 22, 1988.)

(Rule 2.4(d), (h) and (i) amended by Order dated February 23, 1988.)
(Rule 2.4(e) amended by Order dated March 13, 1989, effective April 1, 1989, corrected June 1, 1989.)
(Rule 2.4(i)(3) amended by Order dated March 20, 1990, effective April 2, 1990.)
(Rule 2.4(a) amended by Order dated January 10, 1991.)
(Rule 2.4(d), (e) and (i) amended by Order dated July 22, 1991.)
(Rule 2.4(b) amended by Order dated December 22, 1992.)
(Rule 2.4(a), (e) and (f) amended by Order dated December 13, 1993.)
(Rule 2.4(i)(3) amended by Order dated June 5, 1997, effective July 1, 1997.)
(Rule 2.4 (a) amended by Order dated July 10, 1998.)
(Rule 2.4(e), (f), (g), (h), (i) and (j) amended by Order dated February 5, 2001.)
(Rule 2.4(b)(2) and (i)(2)(a) and (b) amended by Order dated June 28, 2001.)
(Rule 2.4(b)(1) and (2);(e)(4); (f)(1); (g); (h); and (i)(2)(a) and (b), (3) and (4) amended by Order dated June 17, 2003, effective July 1, 2003.)
(Rule 2.4(d)(3) added by Order dated January 21, 2005.)
(Rule 2.4(b)(2) amended by Order dated April 26, 2007.)
(Rule 2.4(g) and 2.4(h) amended by Order dated October 19, 2009.)
(Rule 2.4(a) amended by Order dated August 23, 2010, effective January 1, 2011.)

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Rule 2.6 Investigations

(a) Review by Disciplinary Counsel.

(1) For disciplinary complaints referred to Disciplinary Counsel by the client assistance office pursuant to BR 2.5(a)(2), Disciplinary Counsel shall, within 14 days after receipt of the complaint, mail a copy of said complaint to the attorney, if the client assistance office has not already done so, and notify the attorney that he or she must respond to the complaint in writing to Disciplinary Counsel within 21 days of the date Disciplinary Counsel requests such a response. Disciplinary Counsel may grant an extension of time to respond for good cause shown upon the written request of the attorney. An attorney need not respond to the complaint if he or she provided a response to the client assistance office and is notified by Disciplinary Counsel that further information from the attorney is not necessary.

(2) If the attorney fails to respond to Disciplinary Counsel or to provide records requested by Disciplinary Counsel within the time allowed, or fails to comply with a subpoena issued pursuant to BR 2.3(b)(3)(C) or BR 2.3(b)(3)(E), Disciplinary Counsel may file a petition with the Disciplinary Board to suspend the attorney from the practice of law, pursuant to the procedure set forth in BR 7.1. Notwithstanding the filing of a petition under this rule, Disciplinary Counsel may investigate the complaint or refer the complaint to an appropriate LPRC within 14 days of the time set for the response. The procedure set forth in BR 2.3(a) shall be followed. Disciplinary Counsel shall inform the complainant and the attorney in writing of this action.

* * * *

(Rule 2.6 amended and 2.6(g)(3) added by Order dated July 9, 2003, effective August 1, 2003.)

(Rule 2.6 amended by Order dated December 8, 2003, effective January 1, 2004.)

(Rule 2.6(g)(1) amended by Order dated March 20, 2008.)

(Rule 2.6(f)(2) amended by Order dated October 19, 2009.)

Title 7 — [Reserved for expansion] Suspension for Failure to Respond in a Disciplinary Investigation

Rule 7.1 Suspension for Failure to Respond or to Comply with Subpoena.

- (a) **Petition for Suspension.** When an attorney fails without good cause to timely respond to a request from Disciplinary Counsel or the LPRC for information or records, or fails to comply with a subpoena issued pursuant to BR 2.3(a)(3), BR 2.3(b)(3)(C), or BR 2.3(b)(3)(E), Disciplinary Counsel may petition the Disciplinary Board for an order immediately suspending the attorney until such time as the attorney responds to the request or complies with the subpoena. A petition under this rule shall allege that the attorney has not responded to requests for information or records or has not complied with a subpoena, and has not asserted a good faith objection to responding or complying. The petition shall be supported by a declaration setting forth the efforts undertaken by Disciplinary Counsel or the LPRC to obtain the attorney's response or compliance.
- (b) **Procedure.** Disciplinary Counsel shall file a petition under this rule with the Disciplinary Board Clerk, with proof of service on the state chairperson, who shall have the authority to act on the matter for the Disciplinary Board. A copy of the petition and declaration shall be served on the attorney as set forth in BR 1.8(a).
- (c) **Response.** Within 7 business days after service of the petition, the attorney may file a response setting forth facts showing that the attorney has responded to the requests or complied with the subpoena or the reasons why the attorney has not responded or complied. The attorney shall serve a copy of the answer upon Disciplinary Counsel pursuant to BR 1.8(b). Disciplinary Counsel may file a reply to any response within 2 business days after being served with a copy of the attorney's response. The response and reply shall be filed with the Disciplinary Board Clerk, with proof of service on the state chairperson.
- (d) **Review by the Disciplinary Board.** Upon review, the Disciplinary Board state chairperson shall: issue an order: immediately suspending the attorney from the practice of law for an indefinite period; or denying the petition. The state chairperson shall file the order with the Disciplinary Board Clerk, who shall promptly send a copy to Disciplinary Counsel and the attorney.
- (e) **Duties upon Suspension.** An attorney suspended from practice under this rule shall comply with the requirements of BR 6.3(a) and (b).
- (f) **Independent Charges.** Suspension of an attorney under this rule is not discipline. Suspension or reinstatement under this rule shall not bar the SPRB from causing disciplinary charges to be filed against an attorney for violation of RPC 8.1(a)(2) arising

from the failure to respond or comply as alleged in the petition for suspension filed under this rule.

(g) Reinstatement. Subject to the provisions of BR 8.1(a)(viii) and BR 8.2(a)(v), any person who has been a member of the Bar but suspended under Rule 7.1 solely for failure to respond to requests for information or records or to comply with a subpoena shall be reinstated by the Executive Director to the membership status from which the person was suspended upon the filing of a Compliance Affidavit with Disciplinary Counsel as set forth in BR 12.10.

*-(Rule 7.1 amended by Order dated November 1, 1984, effective December 1, 1984. Amended by Order dated September 24, 1987, effective October 1, 1987. Rule 7.1 amended by Order dated October 1, 1990. Title 7 amended by Order dated July 22, 1991.)
(Rule 7.1 deleted by Order dated October 19, 2009.)*

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Rule 8.2 Reinstatement — Informal Application Required.

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

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

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

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

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

(v) been suspended under BR 7.1 and has remained in that status more than six months but not in excess of five years prior to the date of application for reinstatement.

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

* * * *

(Rule 8.2(b) amended by Order dated May 31, 1984, effective July 1, 1984.)

(Rule 8.2 amended by Order dated March 13, 1989, effective April 1, 1989.)

(Rule 8.2 (a) and (b) amended by Order dated March 20, 1990, effective April 2, 1990.)

(Rule 8.2(a) amended by Order dated December 28, 1993.)

(Rule 8.2(a) amended by Order dated December 14, 1995.)

(Rule 8.2 amended by Order dated December 9, 2004, effective January 1, 2005.)

(Rule 8.2(d)(iii) amended by Order dated April 26, 2007.)

(Rule 8.2(c) and 8.2(d) amended by Order dated October 19, 2009.)

(Rule 8.2(a)(iv) added by Order dated June 6, 2012.)

Rule 12.10 Compliance Affidavit.

A compliance affidavit filed under BR 7.1(g) shall be in substantially the following form:

COMPLIANCE AFFIDAVIT

In re: Reinstatement of

(Name of Attorney) (Bar Number)

For reinstatement as an active/inactive (circle one) member of the OSB.

1. Full name _____ Date of Birth _____

2. Residence address _____ Telephone _____

3. I hereby attest that during my period of suspension from the practice of law from _____ to _____, (insert dates),

I did not at any time engage in the practice of law except where authorized to do so.

or

I engaged in the practice of law under the circumstances described on the attached [attach an explanation of activities relating to the practice of law during suspension].

4. I hereby attest that I have responded to the requests for information or records by Disciplinary Counsel or the Local Professional Responsibility Committee and have complied with any subpoenas issued by Disciplinary Counsel or the Local Professional Responsibility Committee, or provided good cause for not complying to the request.

I, _____, the undersigned, being first duly sworn, depose and say that the above answers are true and correct as I verily believe.

(Name)

Subscribed and sworn to before me this _____ day of _____, 20____.

Notary Public in and for
the State of Oregon

My Commission Expires: _____

AMERICAN BAR ASSOCIATION

**COMMISSION ON HOMELESSNESS & POVERTY
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES**

CENTER FOR HUMAN RIGHTS

COMMISSION ON DISABILITY RIGHTS

COMMISSION ON SEXUAL ORIENTATION AND GENDER IDENTITY

COMMISSION ON YOUTH AT RISK

SOLO, SMALL FIRM AND GENERAL PRACTICE DIVISION

STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS

FORUM ON AFFORDABLE HOUSING & COMMUNITY DEVELOPMENT LAW

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

- 1 RESOLVED, That the American Bar Association urges governments to promote the human right
- 2 to adequate housing for all through increased funding, development and implementation of
- 3 affordable housing strategies and to prevent infringement of that right.

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REPORT

One of the four goals listed alongside the ABA’s mission statement is to Advance the Rule of Law, which includes objectives to hold governments accountable and work for just laws and human rights.¹ The Universal Declaration of Human Rights lists the right to adequate housing as a necessary component of the right to a standard of living that supports one’s health and well-being.²

Coming out of the Depression, and heading into World War II, President Franklin Roosevelt set out four freedoms essential for world peace in his 1941 State of the Union address: freedom of speech, freedom of religion, freedom from want, and freedom from fear.³ In his 1944 State of the Union address, President Roosevelt took another bold step, declaring that the United States had accepted a “second Bill of Rights,” including the right of every American to a decent home.⁴ The U.S. then led the U.N. in drafting and adopting the Universal Declaration on Human Rights, placing civil, political, economic, social, and cultural rights, including the right to adequate housing, on equal footing.⁵ The U.S. signed the International Covenant on Economic, Social & Cultural Rights in 1977, which codifies the right to housing. Indeed, the ABA endorsed its ratification in 1979, making the human right to housing part of ABA policy for the past 34 years.⁶

In responding to a U.N. report on the right to housing in the U.S., the State Department in 2010 emphasized that the U.S., has made a “political commitment to a human right related to housing in the Universal Declaration on Human Rights.”⁷

The Right to Housing Should be Progressively Realized

Despite recognition of the human right to housing, implementation has not yet occurred. This resolution, as a whole, provides a framework for progressive realization of that right. As such, implementing the human right to housing would not require the government to immediately build a home for each person in America or to provide housing for all free of charge overnight. However, it does require more than some provision for emergency shelter, piecemeal implementation of housing affordability programs, and intermittent enforcement of non-discrimination laws, all of which exist in some form in all local U.S. communities and have failed as a whole to eliminate homelessness or poverty. It requires an affirmative commitment to progressively realize the right to fully adequate housing,

¹ American Bar Association, *ABA Mission and Goals* (last visited Nov. 1, 2012), http://www.americanbar.org/utility/about_the_aba/aba-mission-goals.html.

² Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., pt. 1, art. 25(1), U.N. Doc. A/810 (1948).

³ Franklin D. Roosevelt, State of the Union Message to Congress (January 6, 1941).

⁴ Franklin D. Roosevelt, State of the Union Message to Congress (January 11, 1944).

⁵ See National Law Center on Homelessness & Poverty, *Simply Unacceptable: Homelessness & the Human Right to Housing in the United States 2011*, 16 (2011) [hereinafter “*Simply Unacceptable*”].

⁶ See International Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 16, 1966, art. 11(1), 993 U.N.T.S. 3, 5 (entered into force Jan. 3, 1976); ABA House Report 690 MY 1979.

⁷ Interactive Dialogue following the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, A/HRC/13/20/Add 4 and A/HRC/13/20.

whether through public funding, market regulation, private enforcement, or a combination of all of the above.⁸

This resolution calls on the U.S. government at all levels to more fully implement the right to housing as a legal commitment. Asserting housing as a human right will create a common goal and a clear framework to:

- a. Help government agencies set priorities to implement the right to housing
- b. Provide support for advocacy groups
- c. Create pressure to end policies which fail to guarantee human rights
- d. Allow us to focus on *how* to solve the problem rather than worrying about whether the U.S. government has a *duty* to solve the problem

U.S. Policy Supports the Implementation of the Human Right to Housing Domestically

Our nation was founded on the principles of the self-evident, unalienable rights to life, liberty and the pursuit of happiness.⁹ Yet today, lack of shelter and affordable housing has forced members of our society to live their daily lives in ways that threaten their dignity and sense of worth as a human being as well as their health and safety, contrary those founding principles.

The U.S. commitment to the human right to housing was reaffirmed in its signature to the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1977. The ICESCR was submitted to the Senate for ratification in late 1978, with an ABA resolution endorsing ratification in early 1979.¹⁰ The ICESCR codifies the right to housing in Article 11, which states, “[t]he States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing... The States Parties will take appropriate steps to ensure the realization of this right.”¹¹ Although the Senate has yet to ratify the treaty, law professor David Weissbrodt notes signing a covenant indicates that “the United States accepts the responsibility to refrain from acts calculated to frustrate the objects of the treaty.”¹² The U.S. has also already ratified the International Covenant on Civil and Political Rights and the International Covenant on the Elimination of All Forms of Racial Discrimination (both with endorsement from the ABA), both of which recognize the right to be free from discrimination, including in housing.¹³

⁸ *Simply Unacceptable*, *supra* note 5, at 8.

⁹ The Declaration of Independence, para. 1 (U.S. 1776).

¹⁰ ABA House Report 690 MY 1979.

¹¹ *See* International Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 16, 1966, art. 11(1), 993 U.N.T.S. 3, 5 (entered into force Jan. 3, 1976).

¹² David Weissbrodt, "United States Ratification of the Human Rights Covenants," *Minn. L. Rev.* 63:35 at n. 63, 43, (November 1978), citing Vienna Convention on the Law of Treaties, art. 18, UN Doc. A/Conf. 39/27 (1969).

¹³ U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992); International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 (Article 2(1)); U.S. reservations, declarations, and understandings, International Convention on the Elimination of All Forms of Racial Discrimination, 140 Cong. Rec. S7634-

On the 70th Anniversary of President Roosevelt’s “Four Freedoms” speech, in a presentation to the American Society of International Law, Assistant Secretary of State for Democracy, Human Rights, and Labor Michael Posner stated, “there are many ways to think about what should or should not count as a human right. Perhaps the simplest and most compelling is that human rights reflect what a person needs in order to live a meaningful and dignified existence.”¹⁴

Posner’s speech reflects the increasing importance the Obama Administration has placed on economic and social human rights such as the right to adequate housing. In March 2011, the U.S. acknowledged for the first time that rising homelessness implicates its human rights obligations, and made commitments to the United Nations (U.N.) Human Rights Council to “reduce homelessness,” “reinforce safeguards to protect the rights” of homeless people, and to continue efforts to ensure access to affordable housing for all.¹⁵ In May 2012, the Department of Justice and U.S. Interagency Council on Homelessness issued a joint report recognizing that criminalization of homelessness may not only violate our Constitution, but also the U.S.’s treaty obligations under the International Covenant on Civil & Political Rights, and the Convention Against Torture.¹⁶ The Administration has frequently welcomed both the international community’s input and its obligation to lead by example. The U.S. seems more willing than ever to hold itself to high international standards, and even acknowledge that it may sometimes fall short.

Moreover, the international community has increasingly taken note of America’s failure to uphold the right to housing. In 2006, the UN Human Rights Committee expressed concern about the disparate racial impact of homelessness in the U.S. and called for “adequate and adequately implemented policies, to ensure the cessation of this form of racial discrimination.”¹⁷ In 2008, the UN Committee on the Elimination of Racial Discrimination again recognized racial disparities in housing and ongoing segregation in the U.S.¹⁸ Since then, numerous U.N. experts, on official missions to the U.S., have addressed U.S. violations of the human right to housing and related rights.¹⁹

02 (daily ed., June 24, 1994); International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, entered into force Jan. 4, 1969 (Article 5(e)(i)). *See also*, ABA House Report 700 MY 1979; ABA House Report 921 AM 1978.

¹⁴ The Four Freedoms turn 70, Michael H. Posner, Assistant Secretary, Bureau of Democracy, Human Rights, and Labor, Address to the American Society of International Law, March 24, 2011.

¹⁵ Report of the Working Group on the Universal Periodic Review, United States of America, *Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review*, A/HRC/16/11/Add.1, ¶ 19 (Mar. 8, 2011).

¹⁶ Interagency Council on Homelessness, *Searching out Solutions: Constructive Alternatives to the Criminalization of Homelessness* 8 (2012) (USICH and the Access to Justice Initiative of the U.S. Dep’t of Justice, with support from the Department of Housing and Urban Development, convened a summit to gather information for this report).

¹⁷ Concluding Observations of the Human Rights Committee on the Second and Third U.S. Reports to the Committee, CCPR/C/USA/CO/3 (2006), at para. 22.

¹⁸ Committee on the Elimination of Racial Discrimination, Consideration of Reports Submitted by State Parties Under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America, CERD/C/USA/CO/6 (2008), at para. 9.

¹⁹ *See Simply Unacceptable*, *supra* note 5, at 24-5.

The Legal Community has an Important Role to Play in Implementing the Human Right to Housing

Despite the nation's commitment to human rights ideals, its practices have often fallen short. Families continue to face foreclosures, many as a result of predatory lending practices, but even as homes without families multiply, families without homes cannot access them. Many tenants pay more than 50% of their income toward rent, putting them one paycheck away from homelessness. Without a right to counsel in housing cases, renters must often choose between pushing for basic repairs or facing unjust eviction. When widespread poverty goes unattended, despite the sufficiency of a country's resources, "respect for legal institutions will ultimately be undermined."²⁰ The legal community has a duty to provide these families with justice, yet we can only do so much in the nation's current legal environment. In this instance, access to justice requires us to advocate for change. That advocacy comes in the form of this resolution, calling upon our government at all levels to implement the human right to housing as a necessary component of ensuring the basic human dignity of every individual.

Implementing the human right to adequate housing

In implementing the human right to adequate housing, the American Bar Association calls upon federal, state, local, tribal, and territorial governments to

- (1) Implement policies promoting the human right to adequate housing for all including veterans, people with disabilities, older persons, families, single individuals, and unaccompanied youth, which, at minimum, includes:**
 - a. Affordability, habitability, and accessibility;**
 - b. Provision of security of tenure, access to services, materials, facilities, and infrastructure;**
 - c. Location proximate to employment, health care, schools, and other social facilities;**
 - d. Provision of housing in areas that do not threaten occupants' health; and**
 - e. Protection of cultural identity or diversity**

The Committee on Economic, Social and Cultural Rights (CESCR), which oversees implementation of the ICESCR, lists seven elements required for housing to be considered adequate including legal security of tenure; availability of services, materials, facilities, and infrastructure; affordability; habitability; accessibility; location near employment options, healthcare facilities, schools, child care centers, and other social facilities; and cultural adequacy in housing design.²¹ This framework recognizes that each of these elements is interdependent with each other. Adequate housing requires more than four walls and a roof; it requires adequate community resources, supportive

²⁰ ABA Annual meeting, 1986 at 789.

²¹ General Comment 4, The right to adequate housing (Sixth session, 1991), U.N. Doc. E/1992/23, annex III at 114 (1991), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 18 (2003).

legal and policy frameworks, effective access to justice, and a participatory and transparent democratic system to maintain all aspects of the right. It also recognizes that enjoyment of the right to housing is a standard relative to the availability of resources in a given country; here in the U.S., in what remains the wealthiest country in the world, we can and must do more.²²

In 2010, there were over 10 million very low-income renters and only 4.5 million affordable rental units, 40% of which were occupied by higher-income renters.²³ This lack of availability forced approximately 22 percent of the 36.9 million rental household in the United States to spend more than half of their income on housing.²⁴ Not only is affordable housing in short supply, but affordable units are often inadequate in other ways based on the CESC definition. Underfunding for public housing leaves many affordable units in disrepair and lack of meaningful enforcement – including lack of access to legal counsel – has rendered housing codes ineffective, making these units uninhabitable.²⁵ In urban areas, poor, minority areas have poorer access to basic services, including hospitals.²⁶ In rural, impoverished areas, access to infrastructure allowing for basic water and sanitation is limited or unavailable.²⁷ In suburbs and ex-urban communities, zoning restrictions have prevented construction of (and in some cases, removed) affordable housing.²⁸ In all areas, the high cost of housing often forces individuals to endure these housing inadequacies, live in overcrowded spaces, and live in areas with failing schools, high crime rates, and increased exposure to environmental pollutants.²⁹

Even where needy applicants are able to obtain housing assistance or access affordable housing, they face discrimination in the private housing market on the basis of race, disability, gender, sexual orientation, source of income, criminal background, or other status. Despite some strong de jure protections: over 27,000 complaints were registered in 2011 with housing protection agencies, and many more go unreported.³⁰ Although this number has decreased slightly since 2009, more work needs to be done to ensure equal access to housing resources. This includes ensuring availability of various types of home and community based support services that enable individuals and families to live independently as long as possible. Additionally, as was seen following Hurricanes Katrina and Sandy, many traditionally marginalized groups feel a disparate impact during

²² See National Law Center on Homelessness & Poverty, *Human Right to Housing Report Card* (2012).

²³ John Griffith, Julia Gordon & David Sanchez, Center for American Progress, *It's Time to Talk About Housing 7* (August 15, 2012).

²⁴ *Id.*

²⁵ *Simply Unacceptable*, *supra* note 5, at 9, 74-79.

²⁶ *Id.*

²⁷ *Id.*

²⁸ See, e.g. Benjamin Harney, *The Economics of Exclusionary Zoning and Affordable Housing*, 38 *Stetson L.Rev.* 459 (2009); John Hasse, John Reiser & Alexander Pichacz, *Evidence of Persistent Exclusionary Effects of Land Use Policy within Historic and Projected Development Patterns in New Jersey: A Case Study of Monmouth and Somerset Counties*, Rowan University (2011).

²⁹ *Simply Unacceptable*, *supra* note 5, 51-61

³⁰ National Fair Housing Alliance, *Fair Housing in a Changing Nation – 2012 Fair Housing Trends Report* (April 30, 2012).

natural disasters, and the right to adequate housing must be ensured appropriately in the post-disaster context as well.³¹

The U.S. has a strong tradition of promoting affordable, accessible housing, but programs have been under-funded and under-implemented. Moreover, while the human rights framework demands progressive implementation of the right to housing, and prohibits retrogressive policies, over the past 30 years there has been a significant disinvestment in public and subsidized housing at the federal level.³² Recent years have seen innovations such as the Rental Assistance Demonstration and Choice Neighborhoods Initiative, which attempt to “do more with less” while preserving important rights and protections for low-income residents, but these programs still fail to meet the need in communities.³³ Furthermore, many long-term contracts for affordable housing built under the Section 8 program during the 1960’s are now coming to term, threatening a further loss of affordable units.³⁴

The contours of the human right to adequate housing continue to be developed at the international level by the CESCR and other U.N. experts, and at the regional level by regional human rights bodies, in response to ever-changing conditions. The U.S. should always seek to be a leader in applying these developing standards to its policies.

(2) Take immediate steps to respect, protect, and fulfill the right to adequate housing and other human rights through measures guaranteeing the availability of affordable, accessible housing to all who require it;

Progressively realizing the right to adequate housing requires resolutions, recognition, and legislation, but also requires action. In our federal system, states and local communities are often best situated to act quickly to remedy human rights violations in a way that is effective for their area. State and local governments should not wait for the United States to act on the right to adequate housing but should immediately take steps to create local solutions to housing rights violations. Recent positive steps include resolutions recognizing and pledging to implement the human right to housing in Madison and Dane County, WI, and the introduction of a homeless bill of rights referencing human rights standards in California.³⁵

³¹ See, e.g. Advisory Group on Forced Evictions, Mission Report to New Orleans, (2010).

³² Western Regional Advocacy Project, *Without Housing 2010 update* (2010), http://www.wraphome.org/pages/index.php?option=com_content&id=376; National Low Income Housing Coalition, *Changing Priorities: The Federal Budget and Housing Assistance 1976-2007* (2002), <http://nlihc.org/sites/default/files/changingpriorities.pdf>.

³³ See Peter W. Salsich, Jr., *Does America Need Public Housing?*, 19 Geo. Mason L. Rev. 689 (2012); Emily Turner, *A Suspect Shift: Public Housing’s Transition to Mixed-Income Housing, A National Analysis- Lessons from Denver* (2010).

³⁴ See, e.g. National Low Income Housing Coalition, *Project-Based Housing* (2013), <http://nlihc.org/issues/project-based>; Rachel Bratt, *A Withering Commitment*, National Housing Institute (1997), <http://www.nhi.org/online/issues/94/bratt.html>.

³⁵ City of Madison Res. 28925 (Dec. 2011), <http://madison.legistar.com/View.ashx?M=F&ID=1775433&GUID=B82C4409-BF96-4361-A1A1-587ED424E4D6>; Dane County Res. 292, 11-12 (July 2012); R.I. S. 2052 (2012); AB 5 2013-14 Reg. Sess. (Ca. 2012).

(3) Recognize that homelessness is a prima facie violation of the right to housing, and to examine the fiscal benefits of implementation of the right to housing as compared to the costly perpetuation of homelessness;

Homelessness is an ongoing and increasingly prevalent violation of the most basic essence of the human right to housing in the United States and requires an immediate remedy. In 2011, cities across the country noted an average 16% increase in the number of homeless families.³⁶ From the 2009-10 school year to the 2010-11 school year, the number of homeless school children increased by 13% to over one million children.³⁷ Among other factors contributing to this growth, recent studies have shown that: one out of four homeless women is homeless as a result of domestic violence;³⁸ 1 in 11 released prisoners end up homeless³⁹ - with a disparate impact on racial minorities and those who have been criminalized because of their homeless status;⁴⁰ and over 1.6 million unaccompanied homeless youth are forced out of home due to physical or sexual abuse, aging out of foster care, or as a result of disagreements with parents or caretakers over sexual orientation.⁴¹ Temporary shelter should only be seen as an interim, emergency response to homelessness. The right to housing demands permanent housing arrangements, with whatever supports are needed to maintain stability, in as short a time as possible.

In a 2007 resolution, equally applicable today, the ABA opposed the enactment of laws criminalizing individuals for “carrying out otherwise non-criminal life-sustaining practices or acts in public spaces, such as eating, sitting, sleeping, or camping, when no alternative private spaces are available.”⁴² Instead of providing adequate alternatives, more communities are increasingly turning to these criminalization policies.⁴³ Criminalization of homelessness, and homelessness itself, injures the dignity and self-worth of the individual, as well as potentially interfering with their health and safety, where individuals are forced into unsafe situations or must face the elements without shelter. Lack of proper identification or generation of a criminal record caused by homelessness may also prevent homeless persons from accessing government support or

³⁶ The United States Conference of Mayors, *Hunger and Homelessness Survey: A Status Report on Hunger and*

Homelessness in America's Cities 21 (2011).

³⁷ National Center for Homeless Education, *Education for Homeless Children and Youths Program 4* (2012).

³⁸ National Law Center on Homelessness and Poverty, *Lost Housing, Lost Safety: Survivors of Domestic Violence Experience Housing Denials and Evictions Across the Country*, 5 (Feb. 2007).

³⁹ Bureau of Justice Statistics, 2009. “Prisoners In 2008”, available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1763> (last visited Jan. 21, 2011).

⁴⁰ *Simply Unacceptable*, supra note 5, at 61-73.

⁴¹ James Swift, National Network for Youth, *Experts Address the Legal Problems Surrounding Homeless Youth Services* (Sept. 10, 2012), available at <http://www.nn4youth.org/news/network-news/2012/09/10/experts-address-legal-problems-surrounding-homeless-youth-services>.

⁴² ABA House Report 106 MY 2007.

⁴³ National Law Center on Homelessness and Poverty, *Criminalizing Crisis: The Criminalization of Homelessness*

in U.S. Cities 9-10 (2011) (among the 188 cities reviewed between 2009 and 2011, the report identifies a 7 percent increase in prohibitions on begging or panhandling; a 7 percent increase in prohibitions on camping in particular public places; and a 10 percent increase in prohibitions on loitering in particular public places).

finding a job.⁴⁴ Low-income youth facing inadequate housing conditions or lack of housing have poorer educational outcomes due to high mobility, hunger, and health problems, creating a cycle of poverty and homelessness.⁴⁵

Housing is a critical component of overall health, and homeless persons have an average life span of 42-52 years, compared to 78 years for the general population.⁴⁶ Indeed, New York City has established a right to housing for those suffering from AIDS, recognizing their “acute needs for safe, clean housing to keep them healthy.”⁴⁷

In 2010, 113 attacks, 24 of which led to the death of the victim, were deemed acts of “bias motivated violence” against homeless individuals.⁴⁸ The National Coalition for the Homeless documented hate crimes against homeless persons for twelve years (1999-2010) and noted that fatal attacks on homeless individuals were twice as high each year as fatal attacks on all currently protected classes combined.⁴⁹ Although low-income families in affordable housing do not face the “bias motivated violence” perpetrated against those living on the streets, low-income neighborhoods tend to have higher rates of violence than other areas. Students in poor neighborhoods reported fighting in school or the presence of weapons at school twice as often as their wealthier counterparts.⁵⁰

In addition to viewing housing expenditures as obligatory, legislators must also consider the fiscal *benefits* of adequately meeting low-income housing needs. In a 2004 study by the Lewin Group on the costs of serving homeless individuals in nine cities across the U.S., several cities found supportive housing to be cheaper than housing homeless individuals in shelters.⁵¹ That same year, the Congressional Budget Office estimated the cost of a Section 8 Housing Certificate to be \$7,028, approximately \$8,000 less than the cost of an emergency shelter bed funded by HUD’s Emergency Shelter Grants program.⁵² A collaborative effort of service and medical providers in San Diego, Project 25, has documented a \$7 million dollar savings to tax payers through reduced emergency care and jail costs by providing permanent housing to 35 homeless individuals, a 70% reduction.⁵³

⁴⁴ *Simply Unacceptable*, *supra* note 5, at 61-73.

⁴⁵ New Housing Normal; *Simply Unacceptable*, *supra* note 5, at 74-79.

⁴⁶ Nat’l Coalition for the Homeless, Health Care and Homelessness (July 2009), <http://www.nationalhomeless.org/factsheets/health.html>.

⁴⁷ New York City Local Law 50 of 2005, Council Int. No. 535-A, (2005).

⁴⁸ National Coalition for the Homeless, *Hate Crimes Against the Homeless, Violence Hidden in Plain View* 9 (January 2012), available at <http://www.nationalhomeless.org/publications/hatecrimes/hatecrimes2010.pdf>.

⁴⁹ National Coalition for the Homeless, *Hate Crimes Against the Homeless, Violence Hidden in Plain View* 12 (January 2012), available at <http://www.nationalhomeless.org/publications/hatecrimes/hatecrimes2010.pdf>.

⁵⁰ *Id.*

⁵¹ National Law Center on Homelessness and Poverty, *Criminalizing Crisis: The Criminalization of Homelessness in U.S. Cities* 9-10 (2011).

⁵² *Ibid.*

⁵³ Gary Warth, *San Diego: Homeless program reportedly saved taxpayers \$7M*, North County Times, Apr. 10, 2012, http://www.nctimes.com/news/local/sdcounty/san-diego-homeless-program-reportedly-saved-taxpayers-m/article_85fded-46a4-5e6d-9d0d-83b068acdd1e.html.

Scotland, France, and South Africa all show that the progressive implementation of the right to housing through legislation and case law is possible where the political will exists. Scotland's Homeless Act of 2003 progressively expanded the right to be immediately housed and the right to long-term, supportive housing for as long as it is needed, starting with target populations, but available to all in need as of 2012. The law also includes a private right of action and requires jurisdictions to plan for development of adequate affordable housing supplies.⁵⁴ France created similar legislation in 2007 in response to public pressure and a decision of the European Committee on Social Rights under the European Social Charter.⁵⁵ South Africa's constitutional right to housing protects even those squatting in informal settlements, requiring the provision of adequate alternative housing before families and individuals can be evicted.⁵⁶ This law has been enforced in local communities to even require rebuilding housing that has been torn down.⁵⁷ While not yet perfect, these countries are proving that progressively implementing the right to housing is both economically feasible and judicially manageable.

Further, the American Bar Association urges the federal government to lead by example through increased efforts to support and develop the right to housing domestically and at the international level. These efforts include:

- a. Prioritizing funding for housing when making federal budgetary decisions;**
- b. Assessing the impact new federal legislation and regulatory decisions will have on the right to housing;**
- c. Urging every state, locality, and territory to develop comprehensive affordable housing strategies;**
- d. Developing mandates or incentives for housing developers and financial institutions to ensure the right to housing as a priority;**
- e. Prohibiting state and local governments, territories, government-owned entities, and substantially government-related entities from violating the right to adequate housing;**
- f. Requiring governments and organizations to prevent or mitigate any infringement upon the right to adequate housing;**

⁵⁴ See, e.g. Eric S. Tars and Caitlin Egleson, *Great Scot! The Scottish Plan to End Homelessness and Lessons for the Housing Rights Movement in the U.S.*, 16 GEORGETOWN J. POV. LAW & POLICY 187 (2009).

⁵⁵ See, e.g. Eric S. Tars, Julia Lum & E. Kieran Paul, *The Champagne of Housing Rights: France's Enforceable Right to Housing and Lessons for U.S. Advocates*, 4 NE. U. L.J. 429 (2012).

⁵⁶ See, e.g. Kate Tissington, [A Review of Housing Policy and Development in South Africa since 1994](#), Social & Economic Rights Institute (2010).

⁵⁷ See *Tswelopele Non-Profit Organisation v. City of Tshwane metropolitan Municipality* [2007] SCA 70 (RSA), stating "to be hounded unheralded from the privacy and shelter of one's home, even in the most reduced circumstances, is a painful and humiliating indignity... Placing them on the list for emergency [housing] assistance will not attain the simultaneously constitutional and individual objectives that reconstruction of their shelters will achieve. The respondents should, jointly and severally, be ordered to reconstruct them. And, since the materials belonging to the occupiers have been destroyed, they should be replaced with materials that afford habitable shelters."

- g. **Leading a shift in discussion of housing services from providing charity to supporting victims of human rights violations;**
- h. **Reviewing policies that govern the cost of housing to ensure costs do not interfere with a person's ability to enjoy other human rights such as the right to adequate food or health; and**
- i. **Supporting the adoption of resolutions, treaties, and other international principles further establishing and promoting the right to housing at the international and regional level and committing to their implementation domestically.**

Federal housing assistance provides several million units of housing nationwide but continues to fall far short of adequately addressing the country's low-income housing needs.⁵⁸ Under current funding levels, federal assistance is only available for approximately one out of every four eligible low-income families.⁵⁹ Framing these expenditures as part of our government's basic obligations to its citizens, the same as its duty to ensure constitutional rights, allows us to establish a new baseline in budgetary debates and planning.⁶⁰

To take some of the burden to support the homeless and low-income populations off the government, the government must include the right to adequate housing in its policy decisions. At the start of the economic downturn in 2007 and 2008, for example, the government provided bailout money to failing banks without requiring protections to help those facing foreclosure remain in their homes.⁶¹ Had protections been included, the government and banks could have worked to keep homeowners in their homes to prevent a massive influx in the number of families requiring affordable housing or homelessness services.⁶²

As a leader in the international community, the United States should be on the forefront of the realization of a right to adequate housing.⁶³ This requires acknowledging housing

⁵⁸ See *Simply Unacceptable*, *supra* note 5, at 51-61.

⁵⁹ *Id.*, at 26.

⁶⁰ *Id.*, at 11.

⁶¹ See Emergency Economic Stabilization Act of 2008 (Division A of [Pub.L. 110-343](#), 122 *Stat.* 3765, enacted October 3, 2008). See also Paul Kiel, *Banks Getting TARP Money Lending Less Than Other Banks*, ProPublica, Feb. 3, 2009, <http://www.propublica.org/article/banks-getting-tarp-money-lending-less-than-other-banks-090203>; Mary Snow, *Where's the bailout money?*, CNN, Dec. 22, 2008, <http://www.cnn.com/2008/US/12/22/bailout.accountability/index.html>.

⁶² Preventing foreclosure is far more cost-effective for all stakeholders- banks, individuals, and governments - than incurring losses and government having to provide additional services once a family becomes homeless. See, e.g. Diana Savino, *NYS Foreclosure Prevention Services Campaign*, Feb. 1, 2012, <http://www.nysenate.gov/press-release/nys-foreclosure-prevention-services-program-campaign-0> (estimating \$1 of investment in foreclosure prevention generates a \$68 return); see also, Roberto G. Quercia, Spencer M. Cowan & Ana Moreno, *The Cost-Effectiveness of Community-Based Foreclosure Prevention*, 2005; Ana Moreno, *Cost Effectiveness of Mortgage Foreclosure Prevention*, 1995.

⁶³ See Susan Randolph, Sakiko Fukada-Parr & Terra Lawson-Remer, Working Paper Version of Economic and Social Rights Fulfillment Index: Country Scores and Rankings 4, 18 (2010) (working paper) (on file with the Economic & Social Rights Empowerment Initiative), available at <http://www.serfindex.org/research/>, (The Economic and Social Rights Fulfillment Index, an assessment that

as a priority in terms of funding, regulation, and enforcement. This also requires a paradigm shift in our society. Provision of housing can no longer be seen as an optional government entitlement program but must be seen as an essential protection of human rights. Overall, we must realize as a country that protecting human rights is not optional and that the violation of one individual's human rights weakens an entire community.

Conclusion

The U.S. is in the midst of the worst housing crisis since the Great Depression. We need a new framework in which to discuss issues of housing and homelessness; a framework that says everyone has a right to adequate housing. While adopting an explicit human rights framework in the U.S, would represent a shift, the U.S. has a proud history to which it can point, starting from the days of President Roosevelt that demonstrate the human right to housing is not a foreign, but a domestic value.⁶⁴ Our current struggle with budget deficits is not a reason to defer actions to improve Americans' access to adequate housing; rather, it is precisely in this time of economic crisis that the need to do so is most acute. Given that the U.S. is still the wealthiest nation in the world, with a well-developed democratic and judicial system, the ABA calls upon all levels of government to hold itself to a high standard, one that recognizes the full dignity of every human being cannot be guaranteed without enjoying, among all other rights, the human right to adequate housing.

Respectfully submitted,

Antonia Fasanelli, Chair
Commission on Homelessness & Poverty

August 2013

determines how well countries perform in meeting economic and social rights, such as the right to housing, in light of their available resources, places the U.S. 24th out of 24 high-income countries analyzed.); See The Constitution of the Republic of South Africa, Act 100 of 1996, §§ 26-28, (The Constitution of the Republic of South Africa includes the right of all to access of affordable housing.)

⁶⁴ See *Simply Unacceptable*, *supra* note 5, at 93.

GENERAL INFORMATION FORM

Submitting Entity: Commission on Homelessness & Poverty

Submitted By: Antonia Fasanelli, Chair, Commission on Homelessness & Poverty

1. Summary of Resolution(s).

This resolution calls upon local, state, tribal, and federal government to progressively implement policies promoting the human right to adequate housing for all including veterans, people with disabilities, older persons, families, single individuals, and unaccompanied youth, and urges the federal government to lead by example through increased efforts to support and develop the right to housing domestically and at the international level.

This resolution, as a whole, provides a framework for *progressive realization* of that right. As such, implementing the human right to housing would not require the government to immediately build a home for each person in America or to provide housing for all free of charge overnight. However, it does require more than some provision for emergency shelter, piecemeal implementation of housing affordability programs, and intermittent enforcement of non-discrimination laws, all of which exist in some form in all local U.S. communities and have failed as a whole to eliminate homelessness or poverty. It requires an affirmative commitment to progressively realize the right to fully adequate housing, whether through public funding, market regulation, private enforcement, or a combination of all of the above.

2. Approval by Submitting Entity.

The Commission approved this policy resolution on May 4, 2013.

3. Has this or a similar resolution been submitted to the House or Board previously?

No. Please see response to #4 below.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

In 1979, the ABA endorsed the U.S. ratification of the International Covenant on Economic, Social & Cultural Rights which codifies the right to housing. (See ABA House Report 690 MY 1979.) Adoption of this policy would build on the ABA's 34 year history of advocacy in the human rights arena.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

N/A

6. Status of Legislation. (If applicable)

None at this time.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The United States government has supported the human right to housing in a number of international treaties and other documents, and is increasingly discussing housing and homelessness in terms of human rights. Lawyers across the country are using human rights framing at the federal, state, and local levels as an additional tool in litigation and legislative advocacy to end homelessness and promote the right to adequate housing for all.

8. Cost to the Association. (Both direct and indirect costs)

None. Existing Commission and Governmental Affairs staff will undertake the Association's advocacy on behalf of these recommendations, as is the case with other Association policies.

9. Disclosure of Interest. (If applicable)

There are no known conflicts of interest with this resolution.

10. Referrals.

Administrative Law
 Business Law
 Criminal Law
 Government and Public Sector Lawyers
 Individual Rights and Responsibilities
 International Law
 Law Student Division
 Litigation
 Real Property
 Senior Lawyers
 Solo, Small Firm and General Practice
 State and Local Government
 Young Lawyers Division
 Forum on Affordable Housing and Community Development
 Delivery of Legal Services
 Disaster Response and Preparedness
 Legal Aid and Indigent Defendants
 Pro Bono and Public Service
 Center for Human Rights

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Commission on Disability Rights
Commission on Domestic Violence
Commission on Immigration
Commission on Law and Aging
Commission on Sexual Orientation and Gender Identity
Commission on Youth at Risk

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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Homeless Persons Representation Project
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Baltimore, MD 21201
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Amy Horton-Newell, Staff Director
ABA Commission on Homelessness & Poverty
(202) 662-1693
Amy.Hortonnewell@americanbar.org

12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

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AFasanelli@hprplaw.org

EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution calls upon federal, state, local, territorial, and tribal governments to progressively implement policies promoting the human right to adequate housing for all including veterans, people with disabilities, older persons, families, single individuals, and unaccompanied youth, and urges the federal government to lead by example through increased efforts to support and develop the right to housing domestically and at the international level.

This resolution, as a whole, provides a framework for progressive realization of that right. As such, implementing the human right to housing would not require the government to immediately build a home for each person in America or to provide housing for all free of charge overnight. However, it does require more than some provision for emergency shelter, piecemeal implementation of housing affordability programs, and intermittent enforcement of non-discrimination laws, all of which exist in some form in all local U.S. communities and have failed as a whole to eliminate homelessness or poverty. It requires an affirmative commitment to progressively realize the right to fully adequate housing, whether through public funding, market regulation, private enforcement, or a combination of all of the above.

2. Summary of the Issue that the Resolution Addresses

Despite the nation's commitment to human rights ideals, its practices have often fallen short. The U.S. has a strong tradition of promoting affordable, accessible housing, but programs have been under-funded and under-implemented. Furthermore, over the past 30 years there has been a significant disinvestment in public and subsidized housing at the federal level. Families continue to face foreclosures, many as a result of predatory lending practices, but even as homes without families multiply, families without homes cannot access them. Many tenants pay more than 50% of their income toward rent, putting them one paycheck away from homelessness. Homelessness is an ongoing and increasingly prevalent violation of the most basic essence of the human right to housing in the United States and requires an immediate remedy. In 2011, cities across the country noted an average 16% increase in the number of homeless families. From the 2009-10 school year to the 2010-11 school year, the number of homeless school children increased by 13% to over one million children.

3. Please Explain How the Proposed Policy Position will address the issue

This resolution calls on the U.S. government at all levels to more fully implement the right to housing as a legal commitment. Asserting housing as a human right will create a common goal and a clear framework to:

- a. Help government agencies set priorities to implement the right to housing
 - b. Provide support for advocacy groups
 - c. Create pressure to end policies which fail to guarantee human rights
 - d. Allow us to focus on how to solve the problem rather than worrying about whether the U.S. government has a duty to solve the problem
4. Summary of Minority Views
- None to date.

DRAFT

AMERICAN BAR ASSOCIATION
CRIMINAL JUSTICE SECTION
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES
COMMISSION ON SEXUAL ORIENTATION AND GENDER IDENTITY
COMMISSION ON YOUTH AT RISK
CENTER FOR HUMAN RIGHTS

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

- 1 RESOLVED, That the American Bar Association urges federal, state, local and territorial
2 governments to take legislative action to curtail the availability and effectiveness of the
3 “gay panic” and “trans panic” defenses, which seek to partially or completely excuse crimes such
4 as murder and assault on the grounds that the victim’s sexual orientation or gender identity is to
5 blame for the defendant’s violent reaction. Such legislative action should include:
- 6 (a) Requiring courts in any criminal trial or proceeding, upon the request of a party, to
7 instruct the jury not to let bias, sympathy, prejudice, or public opinion influence its
8 decision about the victims, witnesses, or defendants based upon sexual orientation or
9 gender identity; and
 - 10 (b) Specifying that neither a non-violent sexual advance, nor the discovery of a person’s sex
11 or gender identity, constitutes legally adequate provocation to mitigate the severity of any
12 non-capital crime.

DRAFT

REPORT

Executive Summary

Jorge Steven Lopez-Mercado, age 19, was decapitated, dismembered and burned for being openly gay, but according to the police investigator on the case, “people who live this lifestyle need to be aware that this will happen.” When Matthew Shepard, age 21, made a pass at two men in a gay bar, he should have expected to be beaten, pistol-whipped, tied to a fence, and left to die. When Emile Bernard was stabbed, beaten and blinded after coming on to a hitchhiker, his assailant claimed he could not be guilty since the victim “was asking for trouble” by making sexual advances. If Angie Zapata, age 18, hadn’t initially “hidden” that she had male anatomy, her attacker would never have bludgeoned her to death with a fire extinguisher. And when a fellow student shot Larry King, age 15, execution-style in front of their teacher and classmates, his actions were understandable because Larry wore dresses and heels, and said “Love you, baby!” to him the day before. These are actual defenses, offered by real defendants, in United States courts of law that have succeeded in mitigating or excusing real crimes, even today.

The “gay panic” and “trans panic” legal defenses are surprisingly long-lived historical artifacts, remnants of a time when widespread public antipathy was the norm for lesbian, gay, bisexual, and transgender (‘LGBT’) individuals. These defenses ask the jury to find that the victim’s sexual orientation or gender identity is to blame for the defendant’s violent reaction. They characterize sexual orientation and gender identity as objectively reasonable excuses for loss of self-control, and thereby mitigate a perpetrator’s culpability for harm done to LGBT individuals. By fully or partially excusing the perpetrators of crimes against LGBT victims, these defenses enshrine in the law the notion that LGBT lives are worth less than others.

Historically, the gay and trans panic defenses have been used in three ways to mitigate a charge of murder to manslaughter or justified homicide. First, the defendant uses gay panic as a reason to claim insanity or diminished capacity. The defendant alleges that a sexual proposition by the victim triggered a nervous breakdown in the defendant, and then claims to have been afflicted with “homosexual panic disorder.” This insanity defense has been discredited since 1973, when the American Psychiatric Association removed the diagnosis of homosexual panic disorder from its *Diagnostic and Statistical Manual of Mental Disorders*. However, the legal field has yet to catch up with medical progress, and variations on the defense are still being raised in court.

Second, defendants make a gay panic argument to bolster a defense of provocation by arguing that the victim’s sexual advance, although entirely non-violent, was sufficiently provocative to induce the defendant to kill. Similarly, defendants make a trans panic argument for provocation by pointing to the discovery of the victim’s biological sex, usually after the defendant and victim have engaged in consensual sexual relations, as the sufficiently provocative act that drove the defendant to kill.

Third, defendants use gay/trans panic arguments to strengthen their case for self-defense. In these cases, defendants contend that they reasonably believed the victim was about to cause them serious bodily harm because of the victim’s sexual orientation or gender identity. Although the

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threat of danger would otherwise fall short of the standard for self-defense, the defendant asserts that the threat was heightened solely due to the victim's sexual orientation or gender identity.

Successful gay and trans panic defenses constitute a miscarriage of justice. One form of injustice is obvious: the perpetrator kills or injures the victim, and then blames the victim at trial based on sexual orientation or gender identity. In addition, the successful use of these defenses sends a message to the LGBT community that the suffering of a gay or trans person is not equal to the suffering of other victims, and will not be punished in the same manner. By the same token, in excusing violent behavior towards LGBT individuals, courts teach those who hold anti-LGBT bias that the law does not take bias attacks seriously. For those looking to hurt LGBT individuals, nothing can do more harm than the notion that violence, even homicide, is a reasonable response to a life lived openly.

Some courts and legislatures have begun to curtail the use of gay and trans panic defenses. But in other jurisdictions gay and trans panic defenses remain a valid defense option, and are successful in too many courts across the country. This report makes three recommendations to combat the discriminatory effects of gay and trans panic defenses. First, at the request of any party, courts should provide jury instructions advising juries to make their decisions without improper bias or prejudice. Second, legislatures should specify that neither non-violent sexual advances nor the discovery of a person's gender identity can be adequate provocation for murder. Third, state and local governments should proactively educate courts, prosecutors, defense counsel, and the public about gay and trans panic defenses and the concrete harms they perpetuate against the LGBT community.

Continued use of these anachronistic defenses marks an egregious lapse in our nation's march toward a more just criminal system. As long as the gay and trans panic strategies remain available and effective, it halts the forward momentum initiated by criminal law reforms such as rape shield rules and federal hate-crime laws. To reflect our modern understanding of LGBT individuals as equal citizens under law, gay and trans panic defenses must end.

Introduction

Lawrence "Larry" King, 15, was open about being gay. He was teased and bullied incessantly from the age of ten, but he was proud of his identity and openly expressed it through make-up, accessories, and high heels.¹ He had the support of some of his school's administration, who stood up for him when students and teachers expressed concern about his appearance.² Despite this support, one day after saying "Love you, baby!" to another male student, Larry was shot to death in a classroom in front of his classmates.³

¹ Ramin Setoodeh, *Young, Gay and Murdered*, Newsweek, Jul. 28, 2008, at 40.

² *Id.*

³ Jens Erik Gould, *The Lawrence King Case: In Court, Has the Bullied Become the Bully?*, TIME, Aug. 25, 2011, <http://www.time.com/time/nation/article/0,8599,2090287,00.html>.

Larry did not touch Brandon McInerney, 14.⁴ He never threatened Brandon, did not make any advances toward him, and did not put him in any kind of danger.⁵ The day before he was murdered, Larry, wearing make-up and high heels, simply asked Brandon to be his valentine.⁶

Brandon's defense at trial was that Larry was sexually harassing Brandon and that Larry's words and wardrobe were responsible for his death.⁷ His attorney argued that Brandon was just responding to Larry, whom he described as an aggressor and a bully who was known to make inappropriate remarks and sexual advances to males.⁸ Brandon's attorney did not claim that Larry assaulted Brandon or threatened his safety; he didn't have to.⁹ Following this strategy of shaming and demonizing the victim for his sexual orientation, the jury hung when trying to decide if Brandon was deliberate, and wholly blameworthy, in killing Larry.¹⁰

Sadly, Larry's story of murder and subsequent vilification is not unique. Intentional violence against LGBT people is an increasingly common hate crime in the United States.¹¹ Approximately three-quarters of LGBT persons have been targets of verbal abuse and one-third have been targets of physical violence.¹² Data collected under the Hate Crimes Statistics Act indicate that, "gay people report the greatest number of hate crimes at greater per capita rates than all other groups."¹³ Unfortunately, attacks on LGBT persons motivated by their sexual orientation or gender identity have had fatal consequences.¹⁴

⁴ Zeke Barlow, *Emotional Day as Students Testify in Brandon McInerney Murder Trial*, VENTURA COUNTY STAR, July 6, 2011, <http://www.vcstar.com/news/2011/jul/06/first-student-testifies-in-brandon-mcinerney/> [hereinafter *Emotional Day*]; Setoodeh, *supra* note 1.

⁵ *Emotional Day*, *supra* note 5.

⁶ Catherine Saillant, *Oxnard School's Handling of Gay Student's Behavior Comes Under Scrutiny*, LOS ANGELES TIMES, Aug. 11, 2011, at A1; Setoodeh, *supra* note 1.

⁷ Zeke Barlow, *Attorneys Argue over Who Was the Aggressor in Brandon McInerney Trial*, VENTURA COUNTY STAR, July 5, 2011, <http://www.vcstar.com/news/2011/jul/05/lawyers-give-opening-statements-in-brandon-case/> [hereinafter *Attorneys Argue*].

⁸ *Attorneys Argue*, *supra* note 8 ("[Brandon's attorney] said of his client, 'He [Brandon] was pushed there [to kill Larry] by a young man who repeatedly targeted him with unwanted sexual advances.'").

⁹ *See Attorneys Argue*, *supra* note 8.

¹⁰ *Mistrial Declared in CA Gay Student Killing Trial*, VENTURA COUNTY STAR, Sept. 1, 2011, <http://www.vcstar.com/news/2011/sep/01/jury-stuck-in-calif-gay-student-killing-trial/>.

¹¹ In 2010, 1,277 of the 6,628 hate crimes reported to the FBI were based on the victim's sexual orientation. Fed. Bureau of Investigation, U.S. Dep't of Justice, FBI — Table 1 (2011), <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2010/index> (follow "Incidents and Offenses" hyperlink; then follow "Table 1" hyperlink). Of all hate crimes, the percentage of crimes linked to sexual orientation has steadily increased over the last five years from 14.2% in 2005 to 19.3% in 2010. *Id.*; Fed. Bureau of Investigation, U.S. Dep't of Justice, Table 1 — Hate Crime Statistics 2005 (2006), <http://www2.fbi.gov/ucr/hc2005/table1.htm>.

¹² Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 474-75 (2008).

¹³ William B. Rubenstein, *The Real Story of U.S. Hate Crimes Statistics: An Empirical Analysis*, 78 TUL. L. REV., 1213, 1215. (2004).

¹⁴ In 2010, at least two people were killed, motivated by anti-gay bias. Fed. Bureau of Investigation, U.S. Dep't of Justice, FBI — Table 4 (2011), <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2010/index> (follow "Incidents and Offenses" hyperlink; then follow "Table 4" hyperlink).

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Many defendants charged with violence against LGBT people have claimed “gay panic,” a theory in which the defendant argues that the victim’s sexual orientation excuses, mitigates, or justifies violence.¹⁵ For example, a heterosexual male defendant charged with murdering a gay male may claim that he panicked when the victim made a sexual advance. The defendant thus blames the victim, insisting that it was the victim’s identity and actions that resulted in “an understandable and excusable loss of self-control.”¹⁶ Although gay panic is not a freestanding defense to criminal liability, gay panic arguments are used as grounds for traditional defenses of provocation, self-defense, insanity, or diminished capacity.¹⁷

“Trans panic” is a related defense wherein defendants argue that the victim’s gender identity excuses, mitigates, or justifies violence.¹⁸ A defendant charged with murdering a male-to-female transgender victim, for example, may claim that he panicked when he learned after sexual relations that the victim was biologically male.¹⁹ Like the gay panic defense, the defendant uses trans panic arguments to shift blame to the victim for “deceiving” the defendant.²⁰

The use of gay or trans panic defenses subjects victims to secondary victimization²¹ by asking the jury to find the victim’s sexual orientation or gender identity blameworthy for the defendant’s actions.²² The use of a gay or trans panic defense deprives victims, their family, and their friends of dignity and justice.²³ More broadly, it is designed to stir up and reinforce the anti-gay or anti-transgender emotions and stereotypes that led to the assault in the first place.²⁴ It also suggests that violence against LGBT individuals is excusable.²⁵ Finally, gay and trans panic

¹⁵ Victoria L. Steinberg, *A Heat of Passion Offense: Emotions and Bias in “Trans Panic” Mitigation Claims*, 25 B.C. THIRD WORLD L.J. 1, 3 (2005). Gay panic, trans panic, and similar terms are sometimes used in a more general way to describe when a defendant seeks mitigation of a crime or sympathy from the jury by claiming that the defendant held some negative (but understandable) emotions toward the victim’s sexual orientation that motivated the defendant’s actions. This report focuses only on the use of gay panic and trans panic in defense of a murder charge.

¹⁶ *Maier v. People*, 10 Mich. 212, 220 (1862).

¹⁷ *Lee*, *supra* note 15, at 490.

¹⁸ Victoria L. Steinberg, *A Heat of Passion Offense: Emotions and Bias in “Trans Panic” Mitigation Claims*, 25 B.C. THIRD WORLD L.J. 1, 3 (2005).

¹⁹ *See* Steinberg, *supra* note 21, at 3.

²⁰ *See* Robert B. Mison, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133, 171 (1992); *Lee*, *supra* note 15, at 515 (noting that the defendant argued that it was the transgender victim’s “deception and betrayal” that caused the killing).

²¹ Kevin T. Berrill & Gregory M. Herek, *Primary and Secondary Victimization in Anti-Gay Hate Crimes: Official Response and Public Policy*, J. INTERPERSONAL VIOLENCE, 401, 404 (1990).

²² *Lee*, *supra* note 15, at 471 & 475.

²³ *See* Berrill & Herek, *supra* note 25, at 404-05.

²⁴ Robert G. Bagnall, Patrick C. Gallagher & Joni L. Goldstein, Comment: *Burdens on Gay Litigants and Bias in the Judicial System: Homosexual Panic, Child Custody, and Anonymous Parties*, 19 HARV. C.R.-C.L.L. REV. 497, 501 (1984).

²⁵ *Id.*

defenses are irreconcilable with state and federal laws that treat bias crimes against LGBT people as aggravated offenses.²⁶

For almost three decades, the ABA has taken a leading role in urging the elimination of discrimination against the LGBT community, keeping pace with our evolving understanding that LGBT persons are healthy, functioning contributors to our society.²⁷ The proposed resolution is consistent with and builds upon the existing ABA policy of supporting equality under the law for LGBT persons.

I. Gay Panic and Trans Panic Defenses

A. Origins of “Gay Panic”

Edward J. Kempf, a clinical psychiatrist, first coined the term “homosexual panic” in the 1920s to describe a psychological disorder.²⁸ It referred to a panic that resulted from the internal struggle of a patient’s “societal fear of homosexuality and the delusional fantasy of homoeroticism.”²⁹ Kempf observed that when these patients found people of the same sex attractive, they felt helpless, passive, and anxious.³⁰ However, Kempf’s studies did not find that patients afflicted with such panic became violent towards others.³¹ Instead, he observed that patients became suicidal or self-inflicted punishment.³² Later studies confirmed that homosexual panic disorder rendered patients incapable of aggression.³³

²⁶ See Berrill & Herek, *supra* note 28, at 401-04 (explaining that tactics like gay panic defenses undercut hate crime laws, because victims would rather choose not to claim the protections of the hate crime laws instead of enduring — or because victims anticipate — the anti-gay consequences, such as panic defenses, that come with accepting the laws’ protections).

²⁷ In 1986, the American Bar Association adopted Goal IX supporting “full and equal participation in the legal profession by minorities, women, persons with disabilities, and persons of different sexual orientations and gender identities.” Since then, the ABA has adopted a host of resolutions aimed at combatting discrimination against LGBT individuals, on issues including housing and employment (1989), child custody (1995), adoption (1999), domestic violence (2006), foster care (2007), immigration (2009), and same-sex marriage (2010). See generally ABA Policy Document Library, available at <http://www.americanbar.org/directories/policy.html>.

²⁸ Gary David Comstock, *Dismantling the Homosexual Panic Defense*, 2 LAW & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES 81, 82 (1992).

²⁹ Christina Pei-Lin Chen, Note: *Provocation’s Privileged Desire: The “Homosexual Panic,” and the Non-Violent Unwanted Sexual Advance Defense*, 10 CORNELL J.L. & PUB. POL’Y 195, 199 (2000).

³⁰ Lee, *supra* note 15, at 482; Comstock, *supra* note 33, at 87-88.

³¹ Comstock, *supra* note 33, at 86.

³² *Id.*

³³ Kara S. Suffrendini, *Pride and Prejudice: The Homosexual Panic Defense*, 21 B.C. THIRD WORLD L.J. 279, 289 (2001) (citing Burton S. Glick, *Homosexual Panic: Clinical and Theoretical Considerations*, 129 J. NERVOUS & MENTAL DISEASE 20, 21 (1959)); Comstock, *supra* note 33, at 85 (quoting Henry Harper Hart, *Fear of Homosexuality in College Students*, in PSYCHOSOCIAL PROBLEMS OF COLLEGE MEN BY THE STAFF OF THE DIVISION OF STUDENT MENTAL HYGIENE 200, 204 (Bryant M. Wedge ed., Department of University Health, Yale University 1973). Rather than become violent, however, the patients blamed themselves with contempt for their homosexual cravings. Suffrendini, *supra* note 38, at 289; Comstock, *supra* note 28, at 85.

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Homosexual panic disorder was briefly recognized in the American Psychiatric Association (“APA”) *Diagnostic and Statistical Manual of Mental Disorders* (“DSM”), appearing in the 1952 edition.³⁴ Homosexual panic depended on a condition of latent homosexuality or “repressed sexual perversion” as the underlying disorder.³⁵ After the APA formally removed homosexuality from the DSM in 1973, homosexual panic disorder was also stripped of recognition.³⁶

B. Gay and Trans Panic in the Courts

Gay panic and trans panic defenses are not officially recognized, freestanding defenses. Instead, these terms describe theories used to establish the elements of traditional criminal defenses including insanity and diminished capacity, provocation leading to heat of passion, and self-defense.

1. Insanity and Diminished Capacity

Gay panic was first raised as an insanity or diminished capacity defense.³⁷ To invoke an insanity defense, the defendant attempts to show that he suffered from a mental defect — in this case, homosexual panic disorder — at the time of his act.³⁸ The defendant then tries to prove that the victim’s sexual orientation and actions triggered in him a violent psychotic reaction, and because of the disorder he did not understand the nature and quality of his act or appreciate that that what he was doing was wrong.³⁹ A defendant arguing diminished capacity must show that the defendant’s homosexual panic disorder affected his capacity to premeditate and deliberate or to form the requisite intent to kill.⁴⁰

The use of gay panic to make a case for either insanity or diminished capacity is inappropriate. The defense has no medical or psychological basis. Under the insanity or diminished capacity frameworks, the gay panic defense relies on the medical and psychological validity of homosexual panic disorder.⁴¹ However, with the removal of homosexuality from the DSM, defendants can no longer claim to suffer from homosexual panic disorder.⁴² Even if homosexual panic disorder were still medically recognized, the use of homosexual panic disorder in this manner would be inappropriate because according to the early research, those suffering from homosexual panic did not have the ability to react violently to another person.⁴³ Defendants who

³⁴ Comstock, *supra* note 33, at 83.

³⁵ Chen, *supra* note 34, at 202.

³⁶ *Id.*

³⁷ Chen, *supra* note 34, at 201. The first reported use of the gay panic defense was in 1967 in *People v. Rodriguez*, 64 Cal. Rptr. 253 (Cal. Ct. App. 1967). According to the defendant, when the victim grabbed him from behind the defendant became temporarily insane due to an acute homosexual panic, which resulted in a violent, uncontrollable psychotic reaction. *Rodriguez*, 64 Cal. Rptr. at 255; Chen, *supra* note 34, at 201. The jury ultimately rejected the defendant’s homosexual panic defense and convicted him of murder. *Rodriguez*, 64 Cal. Rptr. at 254.

³⁸ Bagnall, Gallagher & Goldstein, *supra* note 28, at 499.

³⁹ *Id.*

⁴⁰ Lee, *supra* note 15, at 494.

⁴¹ Chen, *supra* note 34, at 202.

⁴² See *supra* text accompanying notes 39-41.

⁴³ Comstock, *supra* note 33, at 86.

have assaulted or killed another person thus exhibit violence inconsistent with the once-recognized psychiatric disorder.⁴⁴ Moreover, the gay panic defense relies on the notion that same-sex attraction is objectionable and that anti-gay violence is culturally understandable, or even permissible.⁴⁵

As homosexual panic disorder has been delegitimized, defendants' arguments that a mental disease was to blame for their actions are increasingly less successful.⁴⁶ Unfortunately, the decline of the gay panic defense then gave way to the defense that a non-violent homosexual advance could constitute provocation to murder.

2. Provocation

The partial defense of provocation is one of the most common forms of gay and trans panic defenses. The provocation defense allows a defendant to mitigate the crime of murder to lesser crime of voluntary manslaughter.⁴⁷

A defendant using a gay panic provocation defense points to the actions of the LGBT victim, usually a non-violent sexual advance toward the defendant, as provocation.⁴⁸ While the use of this provocation defense has become popularly known as "gay panic," it is sometimes described as the "non-violent homosexual advance" defense.⁴⁹

A defendant employing a trans panic defense uses similar strategy.⁵⁰ In a typical trans panic case, a male defendant engages in consensual sexual activity with a victim who is biologically male but presents as female.⁵¹ After the sexual act concludes, the defendant discovers the victim's biological sex, becomes violently angry, and kills the victim in the heat of passion.⁵² At trial the defendant claims that the victim deceived the defendant, and that the discovery of her sex and gender identity should partially excuse the killing.⁵³

⁴⁴ *Id.* at 88.

⁴⁵ Lee, *supra* note 15, at 496-7 (citing Karen Franklin & Gregory M Herek, *Homosexuals, Violence Toward*, in 2 ENCYCLOPEDIA OF VIOLENCE, PEACE, CONFLICT 139, 148 (Lester Kurtz & Jennifer Turpin eds. 1999).

⁴⁶ Chen, *supra* note 34, at 199; Lee, *supra* note 15, at 497.

⁴⁷ WAYNE R. LAFAVE, CRIMINAL LAW FIFTH EDITION § 15.2 (West 2010).

⁴⁸ Lee, *supra* note 15, at 500. The non-violence of the sexual advance is essential. Any violence used in the solicitation allows the defendant to claim self-defense as justification for the killing. Chen, *supra* note 34, at 202.

⁴⁹ Chen, *supra* note 34, at 202. Many of the cases where gay panic is used to support a provocation defense involve a defendant that has been the subject of a homosexual advance. Scott D. McCoy, Note: *The Homosexual-Advance Defense and Hate Crimes Statutes: Their Interaction and Conflict*, 22 CARDOZO L. REV. 629, 641 (2001). However, there is at least one case where the defendant employed a provocation defense when he was not the subject of a solicitation. In *Commonwealth v. Carr*, a man shot two lesbian women, killing one of them, after he found them naked and in the act of lovemaking. 580 A.2d 1362, 1363 (Pa. 1990). The defendant argued that his rage against homosexuality provoked him to shoot. *Id.* This use of the provocation defense corresponds more to a homosexual panic defense rather than a homosexual advance defense. McCoy, *supra*, at 641 n. 73.

⁵⁰ See Steinberg, *supra* note 21, at 3.

⁵¹ See *id.*

⁵² Lee, *supra* note 15, at 513.

⁵³ *Id.* at 516.

Both of those defense strategies seek to exploit jurors' bias and prejudice. By arguing that the victim's sexual orientation or gender identity are partially to blame for the killing, the defendant appeals to deeply rooted negative feelings about homosexuality and transgender people.⁵⁴ The defense implicitly urges the jury to conclude that bias against gay or transgender individuals is reasonable, and that a violent reaction is therefore an understandable outcome of that bias.⁵⁵ Where the sole basis for the claim of provocation is a non-violent sexual advance or the discovery of the victim's sex or gender identity, the defense should not be available.

3. Self-Defense

Defendants also have enjoyed some success using gay and trans panic arguments when raising the defense of self-defense.⁵⁶ Self-defense is a complete defense to criminal liability that justifies a non-aggressor who uses reasonable force against another, provided that he reasonably believes that he is in immediate danger of serious bodily harm and reasonably believes that the use of force is necessary to avoid the danger.⁵⁷

Under the self-defense framework, the defendant who pursues a gay panic strategy attempts to show that the victim made some advance or overture, and that the defendant reasonably believed defensive force was necessary to prevent imminent danger of serious bodily harm through sexual assault.⁵⁸ The defendant typically focuses on the victim's sexual orientation to convince the jury that his perception of danger was reasonable and that his violent response was necessary.⁵⁹ Self-defense used in this manner is inappropriate because the threat coming from the victim usually falls short of the serious bodily harm standard, and the force used to thwart any perceived attack far outweighs any threat supplied by the victim.⁶⁰

To assert the defense, the defendant points to the victim's sexual orientation as a reason why the defendant reasonably perceived a threat of serious bodily harm, over and above the danger posed by the victim's actions alone.⁶¹ This tactic attempts to call up negative stereotypes that cast LGBT individuals as sexual predators.⁶² The defendant then suggests that because the victim was

⁵⁴ See Bagnall, Gallagher & Goldstein, *supra* note 28, at 501; Lee, *supra* note 15, at 504; Steinberg, *supra* note 21, at 4.

⁵⁵ See Steinberg, *supra* note 21, at 10; Lee, *supra* note 15, at 517.

⁵⁶ Bagnall, Gallagher & Goldstein, *supra* note 28, at 498 & n. 3; Lee, *supra* note 15, at 517.

⁵⁷ LAFAVE, *supra* note 58, § 10.4.

⁵⁸ Comstock, *supra* note 33, at 82.

⁵⁹ See *id.* at 89; Suffredini, *supra* note 38, at 300.

⁶⁰ Comstock, *supra* note 33, at 95-96.

⁶¹ McCoy, *supra* note 60, at 640 n. 67 (providing two example cases, *People v. Rowland*, 69 Cal. Rptr. 269 (Cal. Ct. App. 1968), and *Walden v. State*, 307 S.E.2d 474 (Ga. 1983), where the defendant pointed to the victim's sexual orientation as evidence that a sexual advance was more menacing or violent in order to assert the defense of self-defense).

⁶² Mison, *supra* note 24, at 157 (describing common negative stereotypes surrounding the term "homosexual," which include: "homosexuals are loathsome sex addicts who spread AIDS and other venereal diseases; homosexuals are unable to reproduce and therefore must recruit straight males to perpetuate their ranks;

homosexual, the victim's advance must have been more aggressive than his actions would have otherwise indicated.⁶³

Equally troubling, defendants sometimes use gay panic arguments to explain their use of greater force than is reasonably necessary to avoid the danger.⁶⁴ Gary David Comstock has surveyed a number of cases where excessive force was used, including when defendants attacked the victim in groups;⁶⁵ used weapons against unarmed victims;⁶⁶ and acted in a manner that suggested premeditation rather than response to an unexpected sexual assault.⁶⁷ In these cases, the use of excessive force should disqualify the defendant from the defense of self-defense; however juries have permitted excessive force when the sexual orientation of the victim is at issue.⁶⁸

The use of gay panic to bolster a claim of self-defense relies on and propagates negative stereotypes about gay people.⁶⁹ It attempts to appeal to jurors' biases and invites them to mischaracterize both the advance as seriously threatening and the defendant's violent reaction as reasonable, simply because of the victim's sexual orientation.

II. Courts and Legislatures Have Begun to Curtail Gay Panic and Trans Panic Defenses

As gay and trans panic defenses have become less credible and more obviously driven by discriminatory intent, some courts have refused to recognize their validity and some legislatures have acted to limit their success.

A. Categorical Limits on Gay Panic and Trans Panic Defenses

1. Judicial Restraints on Gay Panic Defenses

Courts have increasingly been skeptical of gay panic arguments to support defense claims of insanity or provocation. Trial courts have refused to provide juries with applicable defense

homosexuals are unproductive and untrustworthy members of society; homosexuals are insane and dangerous because homosexuality is a mental illness").

⁶³ Comstock, *supra* note 33, at 97. Another way for a defendant to improperly use a victim's sexual orientation is to claim that he suffered from homosexual panic disorder, which heightened his perception of danger. The defendant attempts to convince the jury to consider his weakened mental condition when deciding if his perception of danger was objectively reasonable. *See* Suffredini, *supra* note 38, at 299; Lee, *supra* note 15, at 518-19; Comstock, *supra* note 33, at 95 (citing Bagnall, Gallagher & Goldstein, *supra* note 28, at 508 (quoting *Parisie v. Greer*, 671 F.2d 1011, 1016 (7th Cir. 1982))). As explained above, the use of the no-longer-recognized homosexual panic disorder in this manner is inappropriate.

⁶⁴ Comstock, *supra* note 33, at 95.

⁶⁵ *Id.* at 96 & n. 105.

⁶⁶ *Id.* at 96 & nn. 106-12.

⁶⁷ *Id.* at 96-97 & nn. 113-18.

⁶⁸ Lee, *supra* note 15, at 518-20. For example, a jury found that when the defendant, a 30-year-old, muscular, stocky, construction worker, claimed that he was sexually assaulted by an overweight and weak 58-year-old, deadly force was appropriate despite the likelihood that the defendant probably could have avoided the assault without killing the victim. *Id.* at 520.

⁶⁹ Lee, *supra* note 15, at 518.

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instructions, while appellate courts have made strong statements about why gay panic arguments are inadequate. Unfortunately, in many jurisdictions gay panic arguments remain viable and continue to do harm.

a. Restrictions on the Defense of Insanity

Several courts have explicitly rejected gay panic as a basis for the insanity defense. For example, the Massachusetts Supreme Judicial Court rejected a defendant's argument that he was entitled to invoke an insanity defense against a charge of murder because he suffered from gay panic.⁷⁰ The defendant, William Doucette Jr., drove to a motel with Ronald Landry.⁷¹ Doucette and Landry engaged in sexual activity after which Doucette stabbed Landry in the heart, chest, neck, and back and then left Landry to die.⁷² Doucette later claimed that he killed Landry due to an attempted homosexual attack.⁷³ The jury convicted Doucette of first-degree murder, but Doucette appealed on the ground that his attorney should have raised an insanity defense based on "homosexual panic."⁷⁴ The court disagreed, holding that homosexual panic was merely the defendant's characterization of the events, and not a mental disorder which would compel the interposition of an insanity defense.⁷⁵

b. Restrictions on the Defense of Provocation

Similarly, several courts have curtailed the use of gay panic arguments as a basis for provocation. In one high-profile Pennsylvania case, Claudia Brenner and Rebecca Wight were hiking along the Appalachian Trail.⁷⁶ Having stopped to rest for the night, the two were engaged in lovemaking when suddenly Brenner was shot five times in her right arm, face, and neck. Wight ran for cover but was also shot in the head and back. Brenner attempted to assist Wight, but when she was unable to revive her, left for help. By the time help arrived, Wight had died. Stephen Roy Carr was arrested for the shooting and found guilty of first-degree murder by a bench trial. Carr attempted to argue that he shot Brenner and Wight in a heat of passion caused by the provocation of observing their homosexual lovemaking. To support his argument, Carr offered to show a history of constant rejection by women, including his mother, who may have been a lesbian.⁷⁷ The trial court refused to consider Carr's evidence of his psychosexual history, finding it irrelevant.

On appeal, the Superior Court of Pennsylvania agreed with the trial court that Carr's evidence of his psychosexual history was irrelevant to prove the defense of provocation.

The sight of naked women engaged in lesbian lovemaking is not adequate provocation to reduce an unlawful killing from murder to voluntary manslaughter. It is not an event which is sufficient to cause a reasonable person to become so

⁷⁰ See *Commonwealth v. Doucette*, 462 N.E.2d 1084, 1097 (Mass. 1984).

⁷¹ *Id.* at 1089.

⁷² *Id.* at 1089-90.

⁷³ *Id.* at 1089.

⁷⁴ *Id.* at 1097.

⁷⁵ *Id.*

⁷⁶ *Commonwealth v. Carr*, 580 A.2d 1362, 1363 (Pa. Super. Ct. 1990).

⁷⁷ *Id.* at 1363-64.

impassioned as to be incapable of cool reflection. . . . [T]he law does not condone or excuse the killing of homosexuals any more than it condones the killing of heterosexuals. Similarly, it does not recognize homosexual activity between two persons as legal provocation sufficient to reduce an unlawful killing of one or both of the actors by a third person from murder to voluntary manslaughter.⁷⁸

The court thus limited the gay panic defense by categorically eliminating the sight of same-sex sexual activity from what may constitute legally adequate provocation.⁷⁹

Similarly, in a pair of cases, the Massachusetts Supreme Judicial Court rejected the argument that verbal solicitations coupled with a touch on the leg or genitals could constitute provocation. On September 29, 1988, Joshua Halbert and Kevin Pierce telephoned David McLane to “go party” at McLane’s apartment.⁸⁰ McLane treated Halbert and Pierce to beer, whiskey, and rum, and they watched pornographic films.⁸¹ When Halbert left the apartment to purchase cigarettes, McLane grabbed Pierce’s genitals and said, “You know you want it.”⁸² Pierce rejected McLane, pushing him away.⁸³ Once Halbert returned, Pierce said that McLane and Halbert were gay.⁸⁴ McLane responded by placing his hand on Halbert’s knee and asking, “What do you want to do?”⁸⁵ Pierce and Halbert then attacked McLane. Pierce came from behind and locked his arm around McLane’s neck, choking him.⁸⁶ Halbert kicked and punched McLane in the groin, slashed McLane’s neck with a razor blade, and smashed a whiskey bottle over McLane’s head.⁸⁷ Finally, Pierce released his hold over McLane, and stabbed McLane twice through his temple with steak knives.⁸⁸

At Halbert’s trial, the judge refused to instruct the jury on voluntary manslaughter due to provocation, and the jury found Halbert guilty of first-degree murder.⁸⁹ Halbert argued on appeal that the trial court erred when it did not provide the manslaughter instruction.⁹⁰ He argued that McLane provoked him when McLane put his hand on Halbert’s knee and asked, “What do you want to do?”⁹¹ The court rejected Halbert’s assertion that McLane’s question to Halbert, along with the touch of the knee, was sufficient provocation, reasoning that neither was enough to produce a heat of passion in an ordinary person.⁹²

⁷⁸ *Id.* at 1364-65.

⁷⁹ *Id.* at 1364.

⁸⁰ *Commonwealth v. Pierce*, 642 N.E.2d 579, 581 (Mass. 1994); *Commonwealth v. Halbert*, 573 N.E.2d 975, 977 (Mass. 1991).

⁸¹ *Pierce*, 642 N.E.2d at 581.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Halbert*, 573 N.E.2d at 977.

⁸⁵ *Id.* at 979.

⁸⁶ *Pierce*, 642 N.E.2d at 581; *Halbert*, 573 N.E.2d at 977.

⁸⁷ *Pierce*, 642 N.E.2d at 581; *Halbert*, 573 N.E.2d at 977.

⁸⁸ *Halbert*, 573 N.E.2d at 977.

⁸⁹ *Id.* at 976.

⁹⁰ *Id.*

⁹¹ *Id.* at 979.

⁹² *Id.*

Having been convicted of first-degree murder, Pierce also argued on appeal that the trial judge erred by not providing the manslaughter instruction.⁹³ He asserted that McLane's statement, "You know you want it," and McLane's grabbing of Pierce's genitals were provocative enough to incite a heat of passion.⁹⁴ As in *Halbert*, the court disagreed, holding that a sexual invitation and the grabbing of genitals were insufficient to provoke a reasonable person into a homicidal response.⁹⁵

Other state courts have similarly limited the use of gay panic to support a provocation defense.⁹⁶ Internationally, in several jurisdictions the legislature has responded to the gay panic defense by amending the criminal code to exclude non-violent sexual advances as a legally adequate basis for provocation.⁹⁷

B. Jury Instructions to Eliminate Bias

State legislatures are also becoming concerned about the use of gay or trans panic strategies, and have implemented or considered a number of laws aimed at reducing their impact in the courtroom.

For example, in the wake of the murder of Gwen Araujo and the uncertainty that her killers would be held accountable,⁹⁸ in 2006 the California legislature passed, and Governor Arnold Schwarzenegger signed into law, the Gwen Araujo Justice for Victims Act aimed at limiting the success of gay panic defenses.⁹⁹

The Act made legislative findings and declarations that the use of panic strategies that appeal to societal bias against a person's sexual orientation or gender identity conflicted with California's

⁹³ *Pierce*, 642 N.E.2d at 581.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *E.g.*, *People v. Page*, 737 N.E.2d 264, 273-74 (Ill. 2000) (attempting to "make out" with the defendant is not a category of provocation); *Commonwealth v. Troila*, 571 N.E.2d 391, 394-95 (Mass. 1991) ("making a pass" at the defendant is not evidence that provocation existed); *State v. Volk*, 421 N.W.2d 360, 365 (Minn. Ct. App. 1988) (revulsion by the defendant to a homosexual advance is not a provocation sufficient to elicit a heat of passion response); *State v. Latiolais*, 453 So. 2d 1266 (La. App. 3d Cir. 1984) (touching defendant's leg in a manner which was not rough but just "meaningful," indicating that the victim was determined to have sexual relations with the defendant, was not provocation sufficient to justify vicious attacks).

⁹⁷ Crimes Act 1900, AUSTL. CAP. TERR. LAWS § 13(3) (2012) ("[C]onduct of the deceased consisting of a non-violent sexual advance (or advances) towards the accused — (a) is taken not to be sufficient, by itself, to be conduct to which [the defense of provocation] applies; . . .") (Central Territory of Australia); Criminal Code Act, N. TERR. AUSTL. LAWS § 158(5) (2012) ("[C]onduct of the deceased consisting of a non-violent sexual advance or advances towards the defendant: (a) is not, by itself, a sufficient basis for a defence of provocation; . . .") (Northern Territory of Australia).

⁹⁸ *Prosecutors Examine Ways to Counter 'Gay Panic' Defense*, USA TODAY, July 21, 2006, http://www.usatoday.com/news/nation/2006-07-21-gaypanic-trials_x.htm; *see supra* text accompanying notes 98-110.

⁹⁹ 2006 Cal. Legis. Serv. ch 550 (West); *see also News in Brief*, S. VOICE (Atlanta), October 6, 2006, at 16.

public policy.¹⁰⁰ The Act further provided that in a criminal trial, either party may request that the jury be instructed not to let bias, prejudice, or public opinion influence its decision about the defendant's culpability.¹⁰¹

III. Proposed Responses to Gay Panic and Trans Panic Defenses

To combat the discriminatory effects of gay and trans panic defenses, lawmakers or courts should take the following actions: (1) ensure that any party during a criminal trial may ask that the court instruct the jury to make its decision free from bias or prejudice and to disregard any appeals to societal bias or prejudice; (2) eliminate non-violent sexual advances or the discovery of a person's gender identity as sufficient for adequate provocation; and (3) provide for the training of judges, prosecutors, and defense attorneys regarding gay and trans panic defenses and best practices for dealing with them.

A. Anti-bias Jury Instructions

To reduce the risk of improper bias, legislatures should provide jury instructions that advise jurors of their duty to apply the law without improper bias or prejudice.

Model Language

In any criminal trial or proceeding, upon the request of a party, the court shall instruct the jury substantially as follows: "Do not let bias, sympathy, prejudice, or public opinion influence your decision. Bias includes bias against the victim or victims, witnesses, or defendant based upon his or her disability, gender, nationality, race or ethnicity, religion, gender identity, or sexual orientation."¹⁰²

B. Eliminate Gay Panic and Trans Panic as Adequate Provocation

In addition, legislatures should specify that neither a non-violent sexual advance, nor the discovery of a person's sex or gender identity, constitutes legally adequate provocation to mitigate the severity of any non-capital crime.¹⁰³ Such an exception would be consistent with the holdings of state supreme courts that have expressly rejected non-sexual advances as a basis for provocation,¹⁰⁴ and with similar categorical exceptions adopted by other state legislatures.¹⁰⁵

¹⁰⁰ 2006 Cal. Legis. Serv. ch 550 § 2(d) (West).

¹⁰¹ *Id.* § 3.

¹⁰² Modeled from section 1127h of the California Penal Code. CAL. PENAL CODE § 1127h (West 2009).

¹⁰³ Although the Constitution guarantees a criminal defendant the right to present a full defense, *Rock v. Arkansas*, 483 U.S. 44, 52 (1987), courts and legislatures are free to eliminate or narrow criminal defenses. 6 WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE §24.4(a) (3d ed. 2007).

¹⁰⁴ *See supra* Part II.A.1.b.

¹⁰⁵ *See, e.g.,* LAFAYE, *supra* note 58, § 15.2(b)(6) (noting that in many states, as a matter of common law, "mere words" are never adequate provocation); MD. CODE ANN., CRIM. LAW § 2-207(b) (LexisNexis 2002) ("[t]he discovery of one's spouse engaged in sexual intercourse with another does not constitute legally adequate provocation for the purpose of mitigating a killing from the crime of murder to voluntary manslaughter even though

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Model Language

Version 1

(1) A non-violent sexual advance does not constitute legally adequate provocation for the purpose of mitigating a killing from the crime of murder to the crime of manslaughter even though the killing was provoked by that advance.

(2) The discovery of a person's sex or gender identity does not constitute legally adequate provocation for the purposes of mitigating a killing from the crime of murder to the crime of manslaughter even though the killing was provoked by that discovery.¹⁰⁶

Version 2

(1) Sufficient provocation to support "sudden quarrel" or "heat of passion" does not exist if the defendant's actions are related to discovery of, knowledge about, or the potential disclosure of one or more of the following characteristics or perceived characteristics: disability, gender nationality, race or ethnicity, religion, or sexual orientation, regardless of whether the characteristic belongs to the victim or the defendant. This limitation applies even if the defendant dated, romantically pursued, or participated in sexual relations with the victim.

(2) Sufficient provocation to support "sudden quarrel" or "heat of passion" does not exist if the defendant's actions are related to discovery of, knowledge about, or the potential disclosure of the victim's association with a person or group with one or more of the characteristics, or perceived characteristics, in paragraph (1).

(3) For the purposes of this section, "gender" means sex, and includes a person's gender identity and gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.¹⁰⁷

IV. Conclusion

An individual's sexual orientation or gender identity does not trigger in another person a medical or psychological panic, does not constitute legally adequate provocation, and does not make a person more threatening. LGBT people should be able to live without fear that being honest about their sexual orientation or gender identity would provide a socially sanctioned excuse or justification for violence.

Accordingly, courts and legislatures should affirmatively act (1) to ensure that juries are aware of the possibility that subconscious or overt bias or prejudice may cloud their judgment and (2) to limit the use of gay or trans panic arguments as a basis for provocation in non-capital cases.

the killing was provoked by that discovery"); MINN. STAT. ANN. § 609.20(1) (West 2011) ("[T]he crying of a child does not constitute provocation.").

¹⁰⁶ Modeled from section 2-207 of the Criminal Law Code of Maryland. MD. CODE ANN., CRIM. LAW § 2-207 (LexisNexis 2002).

¹⁰⁷ Modeled from the California Assembly Bill 1160, as introduced. Assem. 1160, 2006 Reg. Sess. (Cal. 2005).

Respectfully submitted,

William Shepherd, Chair
Criminal Justice Section
August 2013

DRAFT

GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section

Submitted By: William Shepherd, Chair

1. Summary of Resolution(s).

This resolution urges legislative action to curtail the availability and effectiveness of the “gay panic” and “trans panic” defenses – including requiring courts instruct the jury not to let the sexual orientation or gender identity of the victims, witnesses, or defendants, bias the jury’s decision, specifying that neither a non-violent sexual advance, nor the discovery of a person’s sex or gender identity, constitutes legally adequate provocation to mitigate the severity of any non-capital case.

2. Approval by Submitting Entity.

The proposed resolution was approved by the Criminal Justice Section Council at its Spring Meeting on May 12, 2013.

3. Has this or a similar resolution been submitted to the House or Board previously?

The ABA has passed numerous resolutions on LGBT issues, this resolution is most similar to and builds upon resolution 10A passed at the Annual Meeting in 1996 (urging bar associations to research bias against LGBT within the legal community).

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

This resolution is unique in addressing the “gay panic” and “trans panic” defenses.

5. What urgency exists which requires action at this meeting of the House?

The use of gay or trans panic defenses subjects victims to secondary victimization by asking the jury to find the victim’s sexual orientation or gender identity blameworthy for the defendant’s actions. The use of a gay or trans panic defense deprives victims, their family, and their friends of dignity and justice. More broadly, it is designed to stir up and reinforce the anti-gay or anti-transgender emotions and stereotypes that led to the assault in the first place. It also suggests that violence against LGBT individuals is excusable. Finally, gay and trans panic defenses are irreconcilable with state and federal laws that treat bias crimes against LGBT people as aggravated offenses.

6. Status of Legislation. (If applicable)

Not Applicable

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The policy will be distributed to various criminal justice stakeholders in order to encourage the necessary legislative action to curtail the availability and effectiveness of the “gay panic” and “trans panic” defenses. The policy will also be featured on the Criminal Justice Section website and in Section publications.

8. Cost to the Association. (Both direct and indirect costs)

No cost to the Association is anticipated.

9. Disclosure of Interest. (If applicable)

None

10. Referrals.

At the same time this policy resolution is submitted to the ABA Policy Office for inclusion in the 2013 Annual Agenda Book for the House of Delegates, it is being circulated to the chairs and staff directors of the following ABA entities:

Standing Committees

Governmental Affairs

Gun Violence

Pro Bono and Public Service

Legal Aid and Indigent Defendants

Professionalism

Ethics and Professional Responsibility

Special Committees and Commissions

Commission on Civic Education in the Nation’s Schools

Center on Children and the Law

Commission on Disability Rights

Commission on Sexual and Domestic Violence

Commission on Homelessness and Poverty

Center for Human Rights

Center for Racial and Ethnic Diversity

Council for Racial and Ethnic Diversity in the Educational Pipeline

Commission on Racial and Ethnic Diversity in the Profession

Commission on Racial and Ethnic Justice

Commission on Sexual Orientation and Gender Identity

Commission on Women in the Profession

Commission on Youth at Risk

Sections, Divisions

Business Law

Family Law

Government and Public Sector Division

Health Law

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Individual Rights and Responsibilities

Judicial Division

National Conference of Federal Trial Judges

National Conference of Specialized Court Judges

National Conference of State Trial Judges

Litigation

Judicial Division

Senior Lawyers Division

State and Local Government Law

Tort Trial & Insurance Practice

Young Lawyers Division

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

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DRAFT

EXECUTIVE SUMMARY

1. Summary of the Resolution
This resolution urges legislative action to curtail the availability and effectiveness of the “gay panic” and “trans panic” defenses – including requiring courts instruct the jury not to let the sexual orientation or gender identity of the victims, witnesses, or defendants, bias the jury’s decision, specifying that neither a non-violent sexual advance, nor the discovery of a person’s sex or gender identity, constitutes legally adequate provocation to mitigate the severity of a non-capital case.
2. Summary of the Issue that the Resolution Addresses
The use of a gay or trans panic defense deprives victims, their family, and their friends of dignity and justice. More broadly, it is designed to stir up and reinforce the anti-gay or anti-transgender emotions and stereotypes that led to the assault in the first place. It also suggests that violence against LGBT individuals is excusable. Finally, gay and trans panic defenses are irreconcilable with state and federal laws that treat bias crimes against LGBT people as aggravated offenses.
3. Please Explain How the Proposed Policy Position will address the issue
This resolution will help to ensure that juries are aware of the possibility that subconscious or overt bias or prejudice may cloud their judgment; limit the use of gay or trans panic arguments as a basis for provocation in non-capital murder cases.
4. Summary of Minority Views
None are known.

DRAFT

AMERICAN BAR ASSOCIATION

KING COUNTY BAR ASSOCIATION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

- 1 RESOLVED, That the American Bar Association urges lawyer disciplinary authorities not to
- 2 take disciplinary action against lawyers who counsel and assist clients about compliance with
- 3 state and territorial laws legalizing the possession and use of marijuana.

DRAFT

REPORT

1. Background

Eighteen states and the District of Columbia¹ currently have some form of legalized marijuana for medical purposes. At the November 2012 general election, voters in Washington State and Colorado approved initiatives providing for state regulation of the production, processing, distribution, and sale of marijuana for recreation purposes and the taxation of marijuana sold for such purposes. Recent polling by the Pew Research Center indicates a majority of Americans now favor some form of legalization and/or decriminalization of marijuana. It is possible that other jurisdictions may join Washington and Colorado in ending marijuana prohibition and replacing it with comprehensive schemes to regulate and tax this product now legal under state law.

Creating regulations for legal marijuana is a challenging task. Regulations have to deal with what is and is not permissible under new laws, preventing the product from being diverted and used in ways that are not permissible, insuring that marijuana that enters the market is not contaminated and a threat to health, where legal cannabis business may be located, tax reporting and compliance, and a host of other issues. Governments embarking on this process need the assistance of counsel in fashioning the regulatory regime.

Because of the changing legal landscape, investors and those interested in owning or operating need the assistance of lawyers to understand the legal landscape and how to make their businesses compliant with laws and regulations for a cannabis industry legal under state or territorial law.

2. The Problem

Lawyers who are called upon to assist clients, including governments implementing a legal marijuana regime, face an ethical dilemma in responding to their clients' needs. The reason is federal law still criminalizes the possession and use of marijuana. 21 U.S.C. Section 812(c), Schedule 1 (c)(10), lists marijuana as a Schedule 1 drug, making it unlawful to possess, sell or distribute it. *See* 21 U.S.C. § 841(a). Consideration must also be given to whether any facilitation of those who do possess, sell or distribute marijuana would run afoul of criminal conspiracy laws such as 18 U.S.C. Section 371 and 21 U.S.C. Section 846.

Model Rule 1.2(d) provides:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

¹ Alaska, Arizona, California, Colorado, Connecticut, District of Columbia, Delaware, Hawaii, Maine, Massachusetts, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington.

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Model Rule 8.4 “Misconduct” also has provisions that could implicate a lawyer counseling and assisting a client on legalized marijuana because of marijuana’s continued illegal status under federal law. The Rule defines misconduct in the following ways potentially applicable in dealing with state legal marijuana:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;
- (d) engage in conduct that is prejudicial to the administration of justice.

While these Rules directly address lawyer conduct, any supervisory lawyer approving the work of a subordinate who assists clients in regard to state legal marijuana laws also has a potential exposure under Model Rule 5.3.

3. Discussion

As the Scope section to the Model Rules recognizes: “The Rules of Professional Conduct are rules of reason.” However, the Scope section also makes clear that “Failure to comply with an obligation or prohibition imposed by a Rule is a basis for discipline.” Obviously, whether a violation should result in a disciplinary proceeding, and what sanction should be imposed, depends on the circumstances and the appropriate discretion of disciplinary officials.

The proponents of this resolution respect those who work in the disciplinary process. However, disciplinary discretion is not always appropriately used. What is known is that with Washington and Colorado now legalizing marijuana and replacing prohibition with a proposed comprehensive scheme of regulation and taxation, a significant shift in the approach toward marijuana has occurred. To date, it is not clear exactly what, if anything, the federal government is going to do now that these states have acted. While medical marijuana has not been a “priority” of this administration, raids on medical marijuana dispensaries have recently occurred.

We are in uncharted waters because of the conflict between state and territorial laws and those of the U.S. government. One thing is certain, in trying to navigate those waters, clients need the assistance of lawyers.

Accordingly, because of the unique circumstances present in this limited area, the ABA is called upon to give policy guidance to appropriate lawyer disciplinary authorities not to institute disciplinary action against lawyers who counsel and assist clients about compliance with state and territorial laws legalizing the possession and use of marijuana. As the progenitor of the Model Rules, ABA guidance would be particularly beneficial in this area. Passing this resolution would not place the ABA in the position of advocating one way or another in regard to legalization of marijuana. It merely provides guidance and assistance to disciplinary authorities and lawyers who are called upon to counsel and assist clients in states and territories that have decided that a new approach should be taken on marijuana, including its legalization.

Respectfully submitted,

Richard Mitchell, President
King County Bar Association

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GENERAL INFORMATION FORM

Submitting Entity: King County Bar Association, State of Washington

Submitted by: Richard Mitchell, President

1. Summary of Resolution

The resolution urges lawyer disciplinary authorities not to take disciplinary action against lawyers who counsel and assist clients about compliance with state and territorial laws legalizing the possession and use of marijuana.

2. Approval by Submitting Entity

On April 17, 2013, the Board of Trustees of the King County Bar Association during a regularly scheduled meeting, for which the time and agenda had been previously distributed, approved the Recommendation.

3. Has this or a similar recommendation been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption.

None known at the time this report was drafted.

5. If a late report, what urgency exists which requires action at this meeting of the House?

This is not a late report. However, there is some urgency to this matter. The voters of Washington State and Colorado in the general election of November 2012 approved initiatives providing for the taxation and regulation of the production and sale of marijuana for recreational purposes. Both states are now in the process of adopting regulations to implement the voter approved laws permitting the taxation of and production and sale of marijuana for recreational purposes. Eighteen states and the District of Columbia have some form of medical marijuana. Possession and sale of marijuana remains illegal under federal law. The United States has the option to take legal action now to preclude state efforts to take an alternate approach to marijuana by legalizing, regulating, and taxing it. The United States has recently raided legal medical marijuana dispensaries in various jurisdictions. The Justice Department has not yet said what it will do in regard to the legalization, regulation, and tax approach now taken by Colorado and Washington. Clients wanting to enter into a legal marijuana business, and governments that must write and implement appropriate regulations for legal marijuana, need counsel now. Because of the continued illegal status of marijuana under federal law, lawyers who counsel or assist such clients could be subject to lawyer discipline for counseling or assisting clients to engage in illegal activity. These lawyers need the issue of disciplinary jeopardy for doing their job addressed now by the ABA.

6. Status of Legislation (if applicable)

No legislation on these issues is known to the submitting entity. There is pending in Congress a recently introduced bill which would prohibit the federal government from interfering with state laws that legalize marijuana.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

Most disciplinary authorities will learn of the House action in the ordinary course of information being disseminated about House action. In addition, the Policy Implementation Committee of the Center of Professional Responsibility will inform most groups interested in discipline in the ordinary course of its work.

8. Cost to the Association. Both direct and indirect costs.

Adoption of the recommendation will not result in expenditures.

9. Disclosure of Interest (if applicable)

No known conflict of interest exists.

10 Referrals

This Recommendation is being co-sponsored by

Co-sponsorships are currently being sought.

This Recommendation was circulated to the following Association entities and affiliated organizations:

All ABA Sections and Divisions

Ethics and Professional Responsibility
Professional Discipline
Center for Professional Responsibility
National Organization of Bar Counsel
Association of Professional Responsibility Lawyers

Bar Associations:

Alaska State Bar Association
State Bar of Arizona
Maricopa County Bar Association
State Bar of California
Alameda County Bar Association
San Fernando Valley Bar Association

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Beverly Hills Bar Association
Los Angeles County Bar Association
Orange County Bar Association
San Diego County Bar Association
Bar Association of San Francisco
Santa Clara County Bar Association
Colorado Bar Association
Denver Bar Association
Connecticut Bar Association
The District of Columbia Bar
Hawaii State Bar Association
Maine State Bar Association
Massachusetts Bar Association
Boston Bar Association
State Bar of Michigan
Oakland County Bar Association
State Bar of Montana
State Bar of Nevada
Clark County Bar Association
New Jersey State Bar Association
Bergen County Bar Association
Camden County Bar Association
Essex County Bar Association
State Bar of New Mexico
Oregon State Bar
Multnomah Bar Association
Rhode Island Bar Association
Vermont Bar Association
Washington State Bar Association
King County Bar Association

11. Contact Person. (Prior to the meeting)

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12. Contact Person. (Who will present the report to the House)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution urges lawyer disciplinary authorities not to take disciplinary action against lawyers who counsel or assist clients about compliance with state and territorial laws legalizing the possession and use of marijuana.

2. Summary of the Issue that the Resolution Addresses

The legal use of marijuana under state law continues to grow. Eighteen states and the District of Columbia have some form of medical marijuana. Voters in Washington State and Colorado recently approved the legalization of marijuana for recreational purposes under comprehensive schemes to regulate the production, sale, distribution, and taxation of marijuana. In order to comply with these laws, clients need the assistance of legal counsel. This includes assistance of lawyers to help state and local authorities implement schemes for legal marijuana enterprises. Marijuana remains illegal under federal law. Because the Model Rules of Professional Conduct prohibit a lawyer from assisting a client to commit an illegal act, counseling and assisting a client about compliance with state or territorial legal marijuana could be deemed a disciplinary offense because marijuana possession or sale remains illegal under federal law.

3. Please Explain How the Proposed Policy Position Will Address the Issue

This Resolution urges appropriate disciplinary authorities not to take disciplinary actions against lawyers who counsel and assist clients about compliance with state and territorial laws legalizing marijuana.

4. Summary of Minority Views

Unknown at the time this Summary was prepared.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: July 13, 2013
Memo Date: June 10, 2013
From: MCLE Committee
Re: Proposed Rule and Regulation Amendments re Filing Deadlines and Notices to Members

Action Recommended

Consider amending Rules 7.4(b), 7.5(a) and (b) and 8.1(c), and Regulations 1.115(a) and (b), 7.200(a) and (b) in an effort to 1) align the delinquency dates for MCLE noncompliance with the delinquency dates for payment of fees and IOLTA compliance, and 2) allow the bar to send notices of noncompliance by e-mail rather than by certified mail.

Background

During the 2013 Legislative session, ORS 9.200 and ORS 9.675 were amended in order to align the delinquency dates for payment of fees and IOLTA compliance, and allow the bar to send notices of delinquency/noncompliance by e-mail rather than by certified mail. The proposed amendments to the MCLE Rules and Regulations below will align all three deadlines (MCLE compliance, member fees and IOLTA compliance). Our goal is to eliminate confusion among bar members.

MCLE Rule 7.4 Noncompliance.

(a) Grounds. The following are considered grounds for a finding of non-compliance with these Rules:

- (1) Failure to complete the MCLE requirement for the applicable reporting period.
- (2) Failure to file a completed compliance report on time.
- (3) Failure to provide sufficient records of participation in CLE activities to substantiate credits reported, after request by the MCLE Administrator.

(b) Notice. In the event of a finding of noncompliance, the MCLE Administrator shall send ~~certified mail~~ a written notice of noncompliance ~~on~~ to the affected active member. The notice shall ~~be sent via email 30 days after the filing deadline and shall state the nature of the noncompliance and shall~~ summarize the applicable rules regarding noncompliance and its consequences.

MCLE Rule 7.5 Cure.

(a) Noncompliance for failure to file a completed compliance report by the due date can be cured by filing the completed report demonstrating completion of the MCLE requirement during the applicable reporting period, together with the late fee specified in MCLE Regulation 7.200, no

more than within 63-60 days after the email following mailing of the notice of noncompliance was sent.

(b) Noncompliance for failure to complete the MCLE requirement during the applicable reporting period can be cured by doing the following within 63 no more than 60 days after the email following mailing of the notice of noncompliance was sent:

- (1) Completing the credit hours necessary to satisfy the MCLE requirement for the applicable reporting period;
- (2) Filing the completed compliance report; and
- (3) Paying the late filing fee specified in MCLE Regulation 7.200.

(c) Noncompliance for failure to provide the MCLE Administrator with sufficient records of participation in CLE activities to substantiate credits reported can be cured by providing the MCLE Administrator with sufficient records, together with the late fee specified in MCLE Regulation 7.200, no more than 60 days after the email notice of noncompliance was sent within the time established by the MCLE Administrator and paying the late fee specified in MCLE Regulation 7.200.

(d) Credit hours applied to a previous reporting period for the purpose of curing noncompliance as provided in Rule 7.5(b) may only be used for that purpose and may not be used to satisfy the MCLE requirement for any other reporting period.

(e) When it is determined that the noncompliance has been cured, the MCLE Administrator shall notify the affected active member that he or she has complied with the MCLE requirement for the applicable reporting period.

MCLE Regulation 1.115 Service By Mail Method.

(a) MCLE Compliance Reports and Notices of Noncompliance ~~Anything transmitted by mail to a member shall be sent to the member's email address on file with the bar on the date of the notice, except that notice shall be sent by first-class mail (to the last designated business or residence address on file with the Oregon State Bar) to any member who is exempt from having an email address on file with the bar. by first class mail, or certified mail if required by these rules, addressed to the member at the member's last designated business or residence address on file with the Oregon State Bar. Certified mail will not be sent "Return Receipt Requested". Members who are sent certified mail will also be notified about the certified mailing via e-mail or regular mail (for those members who do not have e-mail).~~

~~(b) Service by mail shall be complete on deposit in the mail.~~

MCLE Regulation 7.200 Late Fees.

(a) The late fee for curing a failure to timely file a completed compliance report is \$50 if the report is filed and the late fee is paid within 30 days of the filing deadline and \$100 if the report is filed and the late fee is paid more than 30 days after the filing deadline but within the ~~63- 60~~ day cure period; if additional time for filing is granted by the MCLE Administrator, the fee shall increase by \$50 for every additional 30 days or part thereof.

(b) The late fee for not completing the MCLE requirement during the applicable reporting period is \$200 if the requirement is completed after the end of the reporting period but before the end of the ~~with the~~ 63 60 day cure period; if additional time for meeting the requirement is granted by the MCLE Administrator, the fee shall increase by \$50 for every additional 30 days or part thereof.

Rule 8.1 (c) Suspension Recommendation of the MCLE Administrator. A recommendation for suspension pursuant to Rule 7.6 shall be subject to the following procedures:

1) A copy of the MCLE Administrator's recommendation to the Supreme Court that a member be suspended from membership in the bar shall be sent by email certified mail to the member. ~~Within 14 days of the date of the mailing, the member recommended for suspension may file with the State Court Administrator and the MCLE Administrator a petition for review of the recommended suspension. The petition shall set forth a concise statement of each reason asserted for review of the MCLE Administrator's recommendation and may be accompanied by one or more supporting affidavits.~~

~~(2) Within 14 days after a petition for review is filed by a member recommended for suspension, the MCLE Administrator shall file with the State Court Administrator a response and may submit one or more supporting affidavits. Further submissions by the parties shall not be allowed unless the court so requests.~~

~~(2) (3) The court may review the MCLE Administrator's recommendation, petition for review and response without further briefing or oral argument. The court may, however, request either further briefing or oral argument, or both. Thereafter, the court shall enter its order. If the court approves the recommendation of the MCLE Administrator is approved, the court shall enter its order and an effective date for the member's suspension shall be stated therein.~~

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: July 13, 2013
Memo Date: June 10, 2013
From: MCLE Committee
Re: Proposed Amendment to Rule 7.5

Action Recommended

Amend Rule 7.5 to clarify that compliance reports may be audited after noncompliance has been cured.

Background

A member whose reporting period ended 12/31/2011 was sent a Notice of Noncompliance in February 2012. He cured his noncompliance in April 2012 and his report was processed. Due to questions regarding the accuracy of the report, the MCLE Program Manager forwarded his report and her concerns to Disciplinary Counsel's office in accordance with MCLE Rule 7.3(d).

The disciplinary matter is currently pending. However, in communications with Disciplinary Counsel's office, the member asked why he was being investigated when he was deemed to be in compliance with the MCLE Rules pursuant to the notice he received from the MCLE Department after his compliance report had been processed.

In order to clarify that reports may be referred to Disciplinary Counsel's office even though the member has cured the noncompliance issue, the MCLE Committee recommends amending Rule 7.5 (e) as suggested below:

7.5 Cure.

(a) Noncompliance for failure to file a completed compliance report by the due date can be cured by filing the completed report demonstrating completion of the MCLE requirement during the applicable reporting period, together with the late fee specified MCLE Regulation 7.200, within 63 days following mailing of the notice of noncompliance.

(b) Noncompliance for failure to complete the MCLE requirement during the applicable reporting period can be cured by doing the following within 63 days following mailing of the notice of noncompliance:

(1) Completing the credit hours necessary to satisfy the MCLE requirement for the applicable reporting period;

(2) Filing the completed compliance report; and

(3) Paying the late filing fee specified in MCLE Regulation 7.200.

(c) Noncompliance for failure to provide the MCLE Administrator with sufficient records of participation in CLE activities to substantiate credits reported can be cured by providing the MCLE Administrator with sufficient records within the time established by the MCLE Administrator and paying the late fee specified in MCLE Regulation 7.200.

(d) Credit hours applied to a previous reporting period for the purpose of curing noncompliance as provided in Rule 7.5(b) may only be used for that purpose and may not be used to satisfy the MCLE requirement for any other reporting period.

(e) When it is determined that the noncompliance has been cured, the MCLE Administrator shall notify the affected active member that he or she has complied with the MCLE requirement for the applicable reporting period. Curing noncompliance does not prevent subsequent audit and action specified in Rule 7.3.

MCLE Rule 7.3:

7.3 Audits.

(a) The MCLE Administrator may audit compliance reports selected because of facial defects or by random selection or other appropriate method.

(b) For the purpose of conducting audits, the MCLE Administrator may request and review records of participation in CLE activities reported by active members.

(c) Failure to substantiate participation in CLE activities in accordance with applicable rules and regulations after request by the MCLE Administrator shall result in disallowance of credits for the reported activity and assessment of the late filing fee specified in 7.5(f).

(d) The MCLE Administrator shall refer active members to the Oregon State Bar Disciplinary Counsel for further action where questions of dishonesty in reporting occur.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: July 13, 2013
From: Sylvia E. Stevens, Executive Director
Re: Client Security Fund Award Recommendations

Action Recommended

Consider the recommendation of the Client Security Fund Committee that awards be made in the following claims:

| | |
|----------------------|-------------------------|
| GRUETTER (McClain) | \$23,767.96 |
| GRUETTER (Mosley) | \$16,675.00 |
| McBRIDE (Luna Lopez) | \$9,500.00 |
| HORTON (Calton) | \$5,739.07 ¹ |
| TOTAL | \$55,682.03 |

Background

GRUETTER (McClain) - \$23,767.96

Kathryn McClain hired Bryan Gruetter in early 2008 to pursue a claim for serious injuries sustained in an automobile accident. Because her damages exceeded the limits of the at-fault driver's policy, McClain wanted to also assert an underinsured motorist claim and PIP waiver from her own insurer.

In August 2010, McClain settled with the at-fault driver's insurer for the policy limits of \$100,000. After paying himself for fees and costs and distributing nearly \$32,000 to McClain, Gruetter should have held the balance of \$23,767.96 in trust pursuant to McClain's arrangement with her own insurer that the funds would be so held their negotiations on the PIP lien.

Over the next year McClain made many unsuccessful efforts to get information from Gruetter about his progress resolving the PIP lien waiver issue. In late December 2011, she hired another lawyer to help her complete the matter, but his demands to Gruetter also went unanswered.

¹ This matter was reviewed by the BOG in May 2013 on the claimant's request for review of the CSF Committee's denial of the claim. The BOG referred the claim back to the CSF Committee for further consideration. At its May 11 meeting, the CSF concluded that the claim was eligible for an award from the Fund.

McClain's funds were not in his trust account at the time his office was closed in early 2012. Her uninsured motorist and PIP lien waiver claims are pending in Multnomah County Circuit Court. The CSF Committee recommends that McClain be awarded \$23,767.96. She has agreed that the funds should be delivered to her new counsel to hold pending the outcome of the pending litigation.

GRUETTER (Mosley) - \$16,675

Amanda Mosley hired Bryan Gruetter to handle her personal injury claim after a December 2009 accident. Because her medical expenses alone exceeded the at-fault driver's policy limits, Mosely planned to make a claim on her own uninsured motorist policy and seek a waiver of the PIP reimbursement.

Gruetter settled Mosley's claim with the driver's carrier in January 2011 for the policy limits of \$25,000. Mosley's insurer consented to the settlement on condition that the funds be held in trust pending resolution of the underinsured/PIP waiver dispute. After receiving the settlement, Gruetter did nothing concerning Mosley's UIM/PIP claims and denied her requests for any portion of the settlement funds.

Mosley's funds were not in Gruetter's trust account when his office was closed in early 2012. Mosley retained Joe Walsh² to pursue her UIM/PIP claims, which he ultimately resolved in her favor so that no reimbursement to her own insurer is required. Mosley requested an award of the entire \$25,000 settlement in part because her claim was settled quickly for the policy limits and also because she contends the entire amount was subject to the UIM/PIP lien. The committee disagreed, concluding that Gruetter would have been entitled to his fee and Mosley's insurer would have been entitled only to the remaining funds, \$16,675.

The committee recommends an award of \$16,675 and a waiver of the requirement that Mosley have a civil judgment against Gruetter.

McBRIDE (Luna Lopez) - \$9,500

In 2003 the Department of Homeland Security began deportation proceedings against Alberto Lopez and his daughter Carmen Lopez, who had entered the US illegally in 1989 when Carmen was a young girl. Alberto and Carmen conceded removability and were ordered to leave the country within 60 days, but they did not. Alberto appealed his case to the Board of Immigration Appeals and then the Ninth Circuit but was unsuccessful and in April 2008 was again ordered to leave the country. Alberto and Carmen remained in the US in violation of their agreements and the court orders.

² Walsh was a contract attorney who worked on many of Gruetter's cases. He had no involvement with the handling of client funds and there is no evidence to suggest he participated in, knew about or benefitted from Gruetter's misconduct.

In January 2010, Alberto and Carmen were arrested in an ICE raid of their employer's workplace. They were taken to Tacoma for detention pending deportation. On January 20, 2010 Jennifer Luna Lopez (Alberto's younger daughter who was born in the US) met with Jason McBride, seeking help for her father and sister, disclosing their history and deportation orders. McBride agreed to take on both cases for \$8000. He assured Jennifer that he could obtain lawful residency for her father and sister despite the prior deportation orders. On January 22, McBride submitted preliminary papers to stop the deportation; however, the filings were rejected because they were received after Alberto and Carmen had been deported back to Mexico.

It is not clear when McBride learned that his filing has been rejected. However, on several occasions over the next two years he assured Jennifer that he was waiting for notice of a hearing that would be scheduled in Tijuana. His files don't reflect any activity after the January 22 filings. He made no refund to Jennifer for the unearned portion of his fees.

In March 2012, Jennifer and her husband Gabino retained McBride to help Gabino obtain lawful residency (he had entered the US illegally at age 15 in 2002). McBride agreed to handle the matter for a flat fee of \$3000 and told Jennifer and Gabino it would take about 18 months. McBride did not disclose to Jennifer and Gabino that he was being prosecuted by the bar and that the bar had petitioned for an interim suspension order.

Within a few days, Jennifer and Gabino delivered documents and other background information requested by McBride. They also paid \$1500 toward McBride's fee (the balance was to be paid in monthly installments). Despite several calls to inquire about the status of the matter, Jennifer and Gabino never heard anything more from McBride and no further payments were made. McBride's file contains nothing other than routine intake forms and the documents Jennifer and Gabino delivered, and there is no evidence that he did anything on their behalf.

McBride stipulated to the interim suspension effective June 14, 2012; the PLF assisted with the closure of his office sometime in July and he submitted a Form B resignation in August 2012.

From consultations with other immigration attorneys, Jennifer learned that nothing could have been done to prevent Alberto from being deported and that they would not have accepted his case. (It appears that Carmen might have been eligible for some relief as a victim of domestic violence, but McBride took no action in that regard after his initial notice of appearance was rejected.)

While McBride might (and has in similar situations) ascribed his conduct to malpractice, the Committee concluded that McBride (who held himself out as an experienced immigration attorney) was dishonest in agreeing to and accepting an \$8000 fee when he knew or should have known that he could not help Alberto or Carmen. Even if he hadn't known when he took on the case, he should have refunded the unearned fees once he understood the situation. As for taking Gabino's case, the Committee also found fraud in the inducement by McBride's

taking a matter he knew (or should have known) he wouldn't be able to complete. In both cases, McBride performed virtually no service in exchange for the fees paid.

HORTON (Calton) - \$5,739.07

Christopher Calton hired William Horton in January 2007 to pursue a third party claim for injuries sustained at work for which Calton had been receiving benefits from SAIF. Horton negotiated a settlement with Farmers Insurance for \$31,447.07, which included nearly \$14,000 owed to SAIF. Calton's share after deduction of Horton's fees and costs was \$5,989.07.

Horton received the settlement check (net of the SAIF lien amount) on or about October 25, 2007. There is no deposit to his trust account that matches the sum received from Farmers, but a close amount was deposited on October 26. By the end of October, the balance of Horton's trust account was \$1.00.

On November 26, 2007, Horton deposited \$1250³ into Calton's account at US Bank. In February 2008, Calton acknowledged that \$5,739 of his funds remained.

In late February 2008, Horton received a demand from Calton's ex-wife for the 80% of his injury settlement that had been awarded to her in a default divorce judgment (Calton had been convicted and jailed shortly after retaining Horton). Calton objected and Horton advised the parties that he would hold the funds pending their resolution of the issue or he would interplead them into court.

In November 2008, attorney Morrell contacted Horton on behalf of Calton's ex-wife. In response to Morrell's demand, Horton claimed there was only a small portion of Calton's money left, explaining that he had applied more than \$3800 of it fees for his services relating to Calton's criminal case and divorce. The letter purported to include a check to the ex-wife representing 80% of the trust balance, but Morrell confirms he never received it and heard nothing further from Horton.⁴

There is no evidence whatsoever that Horton provided any services to Calton in connection with either Calton's criminal or domestic relations cases. To the contrary, in a letter to Calton in October 2007, Horton says he is unsure as to the confidentiality of written communications while Calton is in jail, suggesting an unfamiliarity with criminal defense. Similarly, Horton told Calton's ex-wife that he didn't do divorce work and was therefore unsure how to handle her demand.

³ There is a corresponding withdrawal from Horton's business account on that date. Recall that Horton's trust account was depleted within days of receiving Calton's settlement funds.

⁴ Horton took his own life on January 29, 2009 following his admission in a fee arbitration proceeding to have misappropriated another client's settlement funds. In 2009 and 2010, the CSF paid a total of \$86,718 to four of Horton's former clients.

There is little doubt that Horton misappropriated all of Calton's settlement proceeds within a few days of receiving the money and told a continuing series of lies to cover up what he had done. Although he distributed \$1250 of the proceeds, \$5,739.07 remains unaccounted for.

Calton claims to have inquired of Horton about his funds on the day in mid-2008 that he was released from jail. On that and subsequent occasions, Horton informed Calton that he couldn't release the funds in the face of the ex-wife's claim. Calton was reluctant to get into a fight with Horton, fearing it would jeopardize his parole, so by the end of 2008 he dropped the issue and had no further contact with Horton. He denies having learned of Horton's death in early 2009 when the PLF assisted with the closure of the office following Horton's death. Calton claims that all his mail went to his ex-wife's address and she didn't give it to him. Toward the end of 2012, Calton was going through old documents that reminded him of the money that he believed Horton was holding. Unable to contact Horton at his old address, Calton did an internet search and learned both of Horton's death and that the CSF had reimbursed other clients.

The CSF Committee concluded that the claim is eligible for reimbursement in the amount of \$5,739.07 and that no judgment should be required because Horton died insolvent more than four years ago. The Committee also found that Calton's claim was filed within the Fund's six-year "statute of ultimate repose."⁵

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⁵ CSF Rule 2.8 provides that claims must be filed "within two years after the latest of the following: (a) the date of the lawyer's conviction; or (b) in the case of a claim of loss of \$5,000.00 or less, the date of the lawyer's disbarment, suspension, reprimand or resignation from the Bar; or (c) the date a judgment is obtained against the lawyer, or (d) *the date the claimant knew or should have known, in the exercise of reasonable diligence, of the loss.* In no event shall any claim against the Fund be considered for reimbursement if it is submitted more than six (6) years after the date of the loss.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: July 12, 2013
Memo Date: July 27, 2013
From: Tom Kranovich, Board Development Committee Chair
Re: Appointment Recommendations for the BPSST and COCP

Action Recommended

Approve the following appointment recommendation from the Board Development Committee.

Background

As provided in ORS 181.637, the BOG makes a recommendation to the Board on Public Safety Standards and Training (BPSST) for the appointment of one licensed private security representative to serve on the Private Security/Investigators Policy Committee for a two year term.

After reviewing information from the current OSB representative regarding the specific needs of the BPSST policy committee, the Board Development Committee recommends **Ronald J. Miller** for appointment consideration.

Pursuant to ORS 1.730, the BOG is responsible for appointing 12 lawyer members to the Council on Court Procedures. This year 7 positions are up for appointment. The Board Development Committee reviewed the recommendations from the plaintiff and defense sides along with the list of volunteers. The following members are recommended for appointment with terms expiring August, 2017:

- John Bachofner** (reappointment)
- Michael Brian** (reappointment)
- Jennifer Gates** (reappointment)
- Maureen Leonard** (reappointment)
- Deanna Wray** (new appointment)
- Shenoa Payne** (new appointment)
- Travis Eiva** (new appointment)

2014 EXECUTIVE SUMMARY BUDGET



June 27, 2013

Report to the Budget & Finance Committee

PURPOSE OF THIS REPORT

This 2014 Executive Summary Budget Report and the related forecasts are developed on anticipated trends, percentage increases, and various assumptions with the 2013 budget as the base. This report gives only a “first look” toward developing the final 2014 budget.

The 2014 BUDGET column on Exhibit A forecasts a Net Revenue of \$17,900 for 2014.

This is before any bar staff manager or department has prepared his/her line item budget, but that net revenue number becomes a target for the final 2014 budget.

All forecasts incorporated herein include no changes to program service and activity from the current budget.

CONTENTS

1. Assumptions - Revenue
2. Assumptions - Expenditures
3. Diversity & Inclusion
4. Client Security Fund Assessment
5. Fanno Creek Place
6. The Five Years After 2014
7. Budget Development Calendar
8. Recommendations of the Budget & Finance Committee to the Board of Governors

Exhibit A - 2014 Budget and Five-Year Forecast

Exhibit B - Memo from John Gleason

Exhibit C1 – Chart: Mandatory Services Fee

Exhibit C2 – Chart: Voluntary Services Fee

Exhibit C3 - Summary of Fee

Exhibit D - Email Comments from Committee Member

The positive “bottom line” for 2014 is the result of a change in many factors from the \$400,000 deficit mentioned at the previous Committee meetings. The reasons for the positive swing to a \$17,900 Net Revenue are numerous (and explained in more detail later):

- **Membership growth** is the lowest in many years, but slightly higher than anticipated
- Sales of **print Legal Publications** are historically exceeding projections
- **Admissions** revenue shows an increase over 2012, rather than a decline
- Revenue from the **new Lawyer Referral funding model** is far exceeding expectations
- The employer’s **rates for PERS** declined by 4.4% of eligible payroll due to legislative action
- **Non-personnel costs** continue to decline

The Net Expense in 2012 was \$2,641 and the Net Revenue projected for 2013 is \$6,331. The forecast for 2014 without any detailed analysis is a similarly small \$17,900 leaving little margin for error, variances, or changes.

This forecast projects:

- **no member fee increase in 2014**
- **not transferring any reserves to revenue for general operations.**

Assumptions

Here are the assumptions factored into this 2014 budget summary

1. Revenue

■ **Membership Fees**

This forecast includes no increase in the active membership fee for 2014. This would be the ninth consecutive year of no active member fee increase.

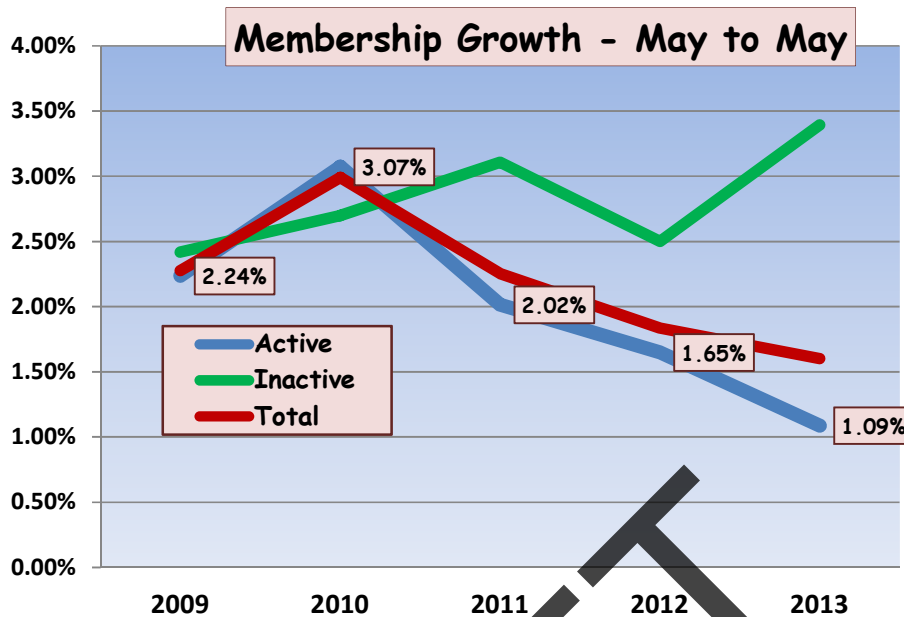
The forecast includes a 1% growth in membership fees, and is a reasonable increase based on the growth of membership from May 2012 to May 2013 (see chart on next page). Also Admissions anticipates slightly more bar exam applications this year than last, which should trend to anticipating at least the 1% growth.

■ **Admissions**

Admissions revenue is exceeding the budget by 26% after five months this year. That is due to slightly more bar exam applications, but primarily due to raising the investigation fee by \$175.00 to \$425.00. In spite of those increases, the 2014 forecast includes a 5% revenue decline.

Member Fee Revenue History

| Year | Actual | \$ Chg YOY | % YOY |
|-----------------------------|--------------------|-----------------|--------------|
| 2014 P | \$7,081,110 | \$70,110 | 1.00% |
| 2013 B | \$7,011,000 | \$51,300 | 0.74% |
| 2012 | \$6,959,700 | \$145,657 | 2.14% |
| 2011 | \$6,814,043 | \$183,588 | 2.77% |
| 2010 | \$6,630,455 | \$153,872 | 2.38% |
| 2009 | \$6,476,583 | \$159,808 | 2.53% |
| 2008 | \$6,316,775 | \$127,911 | 2.07% |
| 2007 | \$6,188,864 | \$156,947 | 2.60% |
| 2006 | \$6,031,917 | | |
| Average 2007 to 2012 | | | 2.41% |



■ CLE Seminars

CLE Seminars has consistently declined the past few years and the 2014 forecast includes a 5% decline from the 2013 budget.

■ Legal Publications

Sales of Legal Publications books have exceeded expectations significantly. Sales in 2012 were \$216,238, which was more than twice the revenue budgeted. After five months in 2013, sales are already \$171,955 and the Publications manager projects 2013 sales to reach \$262,000. The manager projects 2014 sales to be \$235,000 based on the books anticipated to come to market in 2014.

■ Lawyer Referral

The bar was not expecting revenue from the new Lawyer Referral funding model until this year. Then the budget was only \$55,000. The bar received three months of revenue in 2012 and for the first five months of 2013 already has received \$123,521. Admittedly the five month history does not necessarily mean that trend will continue through the rest of 2013, but if it did, revenue for 2013 would be \$296,000.

For the purpose of the 2014 forecast, the 2013 projection is lowered to \$266,000. Assuming a 10% growth in 2014, revenue projects to \$293,000 - a significant change from the forecast a year ago, but not an unattainable number.

In summary, the 2014 forecast for all revenue is \$135,000 more than the 2013 budget – not an impractical increase based on current activity. A 1% reduction in all forecast revenue would still allow a break-even budget assuming expenses would not change.

2. Expenditures . . .

■ Salaries, Taxes & Benefits

A significant change from the forecast made a year ago is in Personnel costs. The 2014 forecast is \$222,000 less than the forecast a year ago – even though a 2% salary pool is included in the 2014 forecast.

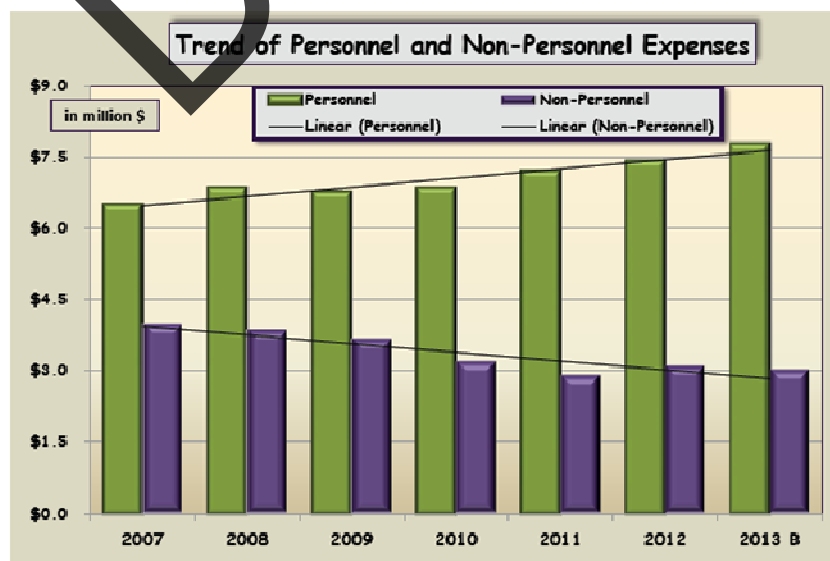
- Previous salary pool increases have been: 2013 – 2%; 2012 – 2%; 2011 – 3%.
- The employer’s rate for PERS changed July 1, 2013. The bar had expected an 8-10% cost increase in benefits due entirely to the cost of PERS. In June, all PERS employers were informed that SB 822 decreased the employer rate and the bar will pay 4.4% less than what was forecast. As a result, the total 2014 cost of Taxes & Benefits is projected to be slightly less than the 2013 budget.
- With the rate change the bar’s 2013 cost for PERS is projected to be \$90,000 to \$95,000 below the amount budgeted.

The chart indicates the impact of including a salary increase in the 2014 budget. The highlighted row contains the amounts included in this forecast.

| Estimated Impact of Salary Pool on 2014 Forecast | | |
|--|-------------------|-------------------------------|
| Per Cent Change | Dollar Amount | Revised Net Revenue (Expense) |
| No change | \$ 0 | \$ 147,200 |
| 1% | \$ 64,300 | \$ 82,200 |
| 2% | \$ 129,300 | \$ 17,900 |
| 3% | \$ 194,500 | \$ (47,300) |

■ Changing Trends

The chart below shows the total cost of Personnel and Non-Personnel since 2007. The trends move in two different directions and the summaries on the next page indicate their impact.



From 2007 to 2013 . . .

- **Non-Personnel** costs have decreased \$964,000. This is a 24.2% decrease, i.e. reducing operational and administrative expenses by a fourth. Some of the drop is due to the on line availability of the Legal Publications library causing the printing of far fewer pages. However, the 24.2% decline is impressive regardless of the reasons.
- **Personnel** costs (salary increases, taxes, and benefits) have gone up \$1.28 million over the six years - an average increase of only 3.3% a year.
- **All costs** are only \$317,000 more than 2007, or an average increase of ½ of 1% a year.

■ Direct Program & Administrative Expenses

Direct Program and Administrative costs are expected to be the same as the 2014 budget. Any change may be caused by a change in revenue – for example, CLE Seminars generating more or less registration revenue or Legal Publications printing and selling more or less books than projected.

Any indirect cost increase probably will be offset by the decrease in the cost of the new lease for copiers and facilities management in mid 2013.

Potential changes in operational costs for Admissions and Disciplinary Counsel are addressed in a memo from John Gleason in **Exhibit B**. If the circumstances in the memo occur, revenue for Admissions and membership fees also will be impacted.

3. Diversity & Inclusion

The Diversity & Inclusion assessment has been \$30.00 since 1990. This program is a standalone budget that maintains its own fund balance.

| 2013 Diversity & Inclusion Budget | | | |
|-----------------------------------|--------------------|-----------------------|---------------|
| | Total | Diversity & Inclusion | OLIO |
| Revenue | \$ 478,200 | \$ 428,200 | \$ 50,000 |
| Expenses | | | |
| Personnel Costs | 295,300 | 295,300 | |
| Program & Administration | 164,850 | 114,950 | 49,900 |
| Indirect Costs | 78,441 | 78,441 | |
| Total Expenses | 538,591 | 488,691 | 49,900 |
| Net Expense | \$ (60,391) | \$ (60,491) | \$ 100 |

Revenue comes from the assessment, interest on the fund balance, and registration or contributions for special events like BOWLIO. The amount of revenue from the \$30.00 assessment in the 2013 budget is \$419,700.

The fund balance at the beginning of 2013 was \$62,672. By the end of this year after the current year net expense, there will be approximately \$2,200 in the fund balance.

Thus, to continue with the programming at the 2013 level in 2014 without dipping into general member fees, there must be significant amounts of additional revenue or significant expense reductions.

4. Client Security Fund

For 2013 the Client Security Fund assessment was raised from \$15.00 to \$45.00 to offset the large volume and size of claims. The increase was warranted as from July 1, 2012 to June 30, 2013 the bar paid \$1,125,404 in 88 claims.

At the end of June, the fund balance is approximately \$300,000. If all claims currently being processed are paid, the fund balance would be wiped out, pushing payments into 2014.

The \$45.00 assessment generates \$675,000 in revenue, so the chance of reaching the current reserve goal of \$500,000 by the end of 2014 is unlikely.

5. Fanno Creek Place

Little change is expected in the Fanno Creek Place budget from 2013 to 2014. The projected net expense is \$683,000 and the cash flow is a negative \$395,000 – both of which are in line with expectations (see page 2 of **Exhibit A**).

Currently, only 2,091 s.f. is vacant at the bar center and the forecast assumes a tenant in place midyear. A current lease expires in April 2014, but that tenant is expected to renew. Operating costs are expected to be in line with current operations.

6. The Five Years After 2014

There are numerous “IF’s” factored into the forecast for the five years beginning 2015. Here are IF’s that could delay the member fee increase even beyond 2015.

- ... **IF** member fee growth increases by at least 1%;
- ... **IF** Admissions revenue can return to the 2012 budgeted revenue;
- ... **IF** CLE Seminars revenue stops declining;
- ... **IF** CLE Publication sales continue comparable to current levels;
- ... **IF** the percentage funding from Lawyer Referral continues to grow substantially to breaking even by 2016;
- ... **IF** the investment portfolio avoids a major decline;
- ... **IF** salary increases don’t exceed 2%;
- ... **IF** PERS rates don’t exceed the increase already factored into the forecasts;
- ... **IF** non-personnel costs remain at no change;
- ... **IF** the net revenue for 2013 is attained or exceeded and 2014 attains the \$17,900 projected net revenue.

Those are a lot of **IF’s**.

If some or all of those don’t materialize:

- a \$50 member fee increase raises enough revenue to keep the fee constant for at least 3 years;

- a \$70 member fee increase raises enough revenue to keep the fee constant for at least 5 years.

Note that the forecast includes the \$200,000 grant from the PLF from 2014 to 2016. This is due to the action of the PLF board committing the grant only for those three years.

■ Exhibits C1, C2, and C3

These exhibits were shared with the Committee at the June meeting. They allocate the current active membership fee of \$522.00 to the mandatory and the voluntary services provided by the bar and the anticipated cost of each activity as a portion of the member fee. These charts are helpful if the Committee and BOG were to evaluate eliminating certain services as limited value to the membership for the purpose of balancing or reducing the budget.

■ Exhibit D

These are the comments from the Committee members in response to Chair Knight's request "to gather preferences from the committee regarding potential programming cuts." They are included as reference to the review of this phase of the 2014 budget development process.

7. 2014 BUDGET DEVELOPMENT CALENDAR

| Date | Process |
|-----------------------|---|
| July 12 | Budget & Finance Committee reviews the 2014 Executive Summary Budget; shares review with the Board of Governors |
| August 23 | The Budget & Finance Committee will not meet unless additional budget review is needed. |
| September 27 | Budget & Finance Committee recommends member fee for 2014; the Board of Governors acts on fee recommendation |
| Early to mid October | Bar staff prepare 2014 line by line program/department budgets |
| October 25 | Budget & Finance Committee reviews the 2014 Budget Report. |
| Early to mid November | Bar staff refine 2014 budget |
| November 1 | House of Delegates meeting. Action on Fee resolution (if increase approved by the BOG). |
| November 22 | Budget & Finance Committee review revised 2014 Budget Report |
| November 22-23 | Board of Governors reviews and approves 2014 Budget |

8. RECOMMENDATIONS OF THE BUDGET & FINANCE COMMITTEE TO THE BOARD OF GOVERNORS

Although no specific recommendations are necessary with this report (the committee will meet twice before a recommendation on the 2014 fee is needed and three times before the final budget approval), the Committee can provide direction on the following:

- the general membership fee currently at \$447.00
- the Diversity & Inclusion assessment currently at \$30.00;
- the Client Security Fund assessment currently at \$45.00;
- changes on the revenue projections
- changes to program or policy considerations
- the 2014 salary pool
- guidance/direction to bar staff budget preparers of the 2014 line item budget
- other _____

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OREGON STATE BAR

Board of Governors Agenda

Meeting Date: July 12, 2013
Memo Date: July 8, 2013
From: Rod Wegener, CFO
Re: Revision of the Bar's Investment Policy

Action Recommended

Approve the revision (listed below) to the investment policy in bylaw 7.402

Background

This topic has been on the Budget & Finance Committee's agenda for the past several meetings as the Committee works with Washington Trust Bank to revise the bar's investment policy specifically the list of approved investments in bylaw 7.402. The board approved a revision to the policy at its May 3, 2013 meeting, but after further discussions with the bank, the Committee is recommending the policy be revised slightly

On July 1, Budget & Finance Committee members Knight, Wade, and Wilhoite and the bar's CFO met via conference call with Rick Cloutier and Sarie Crothers of Washington Trust Bank to clarify a number of items on the bar's investment policy and the Investment Policy Statement as directed at the June 14 Committee meeting.

After relevant discussion and the bank explaining its position, the Committee members agreed to these revisions in the policy, which will be acted upon at its meeting prior to the board meeting:

Mutual funds investing in infrastructure, commodities, and instruments such as high yield bonds, adjustable rate bonds, derivatives, futures, currencies, **mortgage backed securities**, and ETFs, but not swaps or speculative instruments, and only for the purpose of both managing risk and diversifying the portfolio and not at all for the purpose of leveraging, with all such investments in total not to exceed ~~10%~~ **35%** of the total invested assets.

The Committee also will address a slight change to the Investment Policy Statement (ISP) to conform with the list of approved investments that has been made to the investment policy.

Section 2.4 Meetings

Subsection 2.400 Robert's Rules of Order

~~Subject to ORS Chapter 9 and these Policies, the conduct and voting at Board meetings are governed by ORS Chapter 9, these bylaws, and~~ the most recent edition of Robert's Rules of Order.

Subsection 2.401 Regular Meetings

Meetings of the Board ~~must be~~ held at such times and places as the Board determines, ~~and the~~ Executive Director ~~must will~~ provide notice of the time and place ~~of all meetings in accordance with ORS 192.610 to 192.690. Newly elected governors and officers of the Bar take office on January 1 of the year following their election.~~¹

Subsection 2.402 Special Meetings

A special meeting of the Board may be called by the President or by three Governors filing a written request with the Executive Director. If, within five days after a written request by three Governors ~~is filed with the Executive Director~~, the President fails or refuses for any reason to set a time for and give notice of a special meeting, the Executive Director ~~or some other person designated by the three Governors joining in the request, may set a time for and give notice of the meeting. The date fixed for the meeting may be no less than five nor more than ten days from the date of the notice. The Executive Director shall~~ ~~must~~ call the meeting and provide at least 24 hours' notice of the time and place of the special meeting in accordance with ORS 192.610 to 192.690. ~~or the person designated by the three Governors in their request must sign the notice of a special meeting. The notice must set forth the day, hour, place and purpose of the meeting. The notice must be in writing and be communicated to each Governor at his or her principal office address. Notice must be given to each Governor, unless waived. A written waiver by or actual attendance of a Governor is the equivalent of notice to that Governor. Special meetings may consider only the matters set forth in the notice of the meeting.~~

Subsection 2.403 Emergency Meetings

When the President determines that a matter requires immediate attention of the Board, an emergency meeting ~~or conference call~~ may be called ~~with on less than 24-~~ hours' notice ~~to members of the Board~~. Notice ~~shall must~~ ~~be given to members of the board, the media and other interested persons as may be appropriate under the circumstances. The notice shall must~~ indicate the subject matter to be considered. ~~Conference calls and emergency meetings can consider only Only~~ the matters for which

¹ This sentence should be moved to Bylaw 2.101(a):

Subsection 2.101 Election

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

~~Newly elected governors and officers of the Bar take office on January 1 of the year following their election.~~

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

~~notice is given the emergency meeting is called may be considered at the meeting. If all members of the Board are present at the meeting or participating in the conference call, any actions taken are final. If any member does not participate or receive notice, the matters decided must be ratified at the next Board meeting.~~

Subsection 2.404 Minutes

~~The Executive Director or his or her designee must keep accurate minutes of all board meetings must be preserved in writing or in a sound, video or digital recording. The minutes shall must reflect at least the following information: members present, motions or proposals and their disposition, the substance of any discussion on any matter, and a reference to any document discussed at the meeting. The minutes must reflect the vote of each member of the Board by name, on any matter considered by it, must be recorded in the minutes if the vote is not unanimous. Draft minutes, identified as such, will be available to the public within a reasonable time after the meeting. Final minutes will be available to the public within a reasonable time after approval by the Board. The minutes of executive sessions will be available to the public except where disclosure would be inconsistent with the purpose of the executive session.~~

Subsection 2.405 Oregon New Lawyers Division Liaison

The Oregon New Lawyers Division ("ONLD") has a non-voting liaison to the Board, who must be a member of the ONLD Executive Committee. The ONLD liaison is appointed by the chair of the ONLD Executive Committee to serve for a one-year term. No person may serve more than three terms as ONLD liaison. If the ONLD liaison is unable to attend a meeting of the Board, the ONLD chair may appoint another member of the ONLD Executive Committee to attend the meeting.

DRAFT

² This provision was apparently added here because it didn't fit neatly into other parts of the bylaws.

OREGON STATE BAR

Governance and Strategic Planning Committee Agenda

Meeting Date: July 13, 2013
Memo Date: June 27, 2013
From: Helen M. Hirschbiel, General Counsel
Re: Proposed Amendment to Oregon RPC 4.4(b)

Action Recommended

Consider the recommendation of the Legal Ethics Committee that the attached proposed amendment to Oregon RPC 4.4(b) be submitted to the House of Delegates for approval instead of the amendment proposed by the Board of Governors at its November 2012 meeting.

Background

At its meeting in November 2012, the Board of Governors decided to send the following amendment to RPC 4.4(b) to the House of Delegates for approval:

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender, and follow the sender's instructions.

Representatives from the Legal Ethics Committee attended the Governance and Strategic Planning Committee meeting on June 14, 2013 to request that the Board reconsider its proposed amendment to RPC 4.4(b). The LEC representatives explained the LEC's reasoning for following the majority (and ABA) approach, but acknowledged that some jurisdictions have added language that requires maintaining the status quo while the sending and receiving lawyers sort out the proper handling of misdirected documents. The GSP Committee invited the LEC to submit an alternative amendment to RPC 4.4(b) that would better balance the responsibilities of the sender and the receiver.

The LEC met on June 15 and discussed the rule at length. Many committee members felt strongly that the current RPC 4.4(b) should not be amended at all for the reasons set forth in the letter from LEC member David Elkanich to the Board at its November 2012 meeting. Even so, the LEC was sensitive to the GSP Committee concerns. In the end, the LEC voted to submit the following proposed alternate amendment to RPC 4.4(b), which is substantially similar to the Arizona rule on the topic:

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender, and preserve the status quo for a reasonable period of time in order to permit the sender to take protective measures.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: July 12, 2013
Memo Date: July 27, 2013
From: Danielle Edwards, Director of Member Services
Re: Volunteer Appointments

Action Recommended

Review and approve the following appointment recommendations.

Background

Advisory Committee on Diversity and Inclusion

Due to a resignation, the committee needs one member appointed to fill a partial term. The committee and staff liaison recommend **Jacqueline Lizeth Alarcon** (116073). Ms. Alarcon is a 2010 Willamette University graduate practicing in Portland with Yates, Matthews & Eaton.

Recommendation: Jacqueline Lizeth Alarcon, member, term expires 12/31/2015

Legal Services Program Committee

A member of the committee was removed due to a lack of participation. As such, the committee staff liaison recommends the appointment of Judge Timothy C. Gerking (792345) to fill the vacant seat. In addition to his ongoing access to justice support, Judge Gerking offers a rural area perspective.

Recommendation: Judge Timothy C. Gerking, member, term expires 12/31/2014

Pro Bono Committee

The chair of the committee moved out of state and resigned from the committee. Current committee member, **Beverly A. West** (085076) agreed to serve as chair the remainder of the year.

Recommendation: Beverly A. West, chair, term expires 12/31/2013

Unlawful Practice of Law Committee

Staff and the UPL Committee officers recommend the appointment of **Karen M. Oakes** (984631). Ms. Oakes served a two-year term on the committee but is willing to be reappointed. She is a solo practitioner located in Klamath Falls.

Recommendation: Karen M. Oakes, member, term expires 12/31/2016

House of Delegates

The following regions have vacant seats due to resignations or region changes. In most cases, the candidate recommended below is the 2013 HOD Election runner-up.

Region 1: M. Kathryn Olney, term expires 4/19/2016

Region 3: J. Ryan Kirchoff, term expires 4/19/2016

Region 4: Manvir Sekhon, term expires 4/19/2016

Region 5: Courtney C. Dippel, term expires 4/19/2016

Region 5: Jaimie A. Fender, term expires 4/20/2015

Region 6: Ryan Hunt, term expires 4/20/2015

Out of State Region: Jennifer M. Geiger, term expires 4/20/2015

Out of State Region: Nathan Voegeli, term expires 4/20/2015

Disciplinary Board

Two public member seats are vacant in region 5 of the Disciplinary Board. The staff liaison recommends **Virginia Symonds** and **Michael Wallis** for appointment and both have agreed to serve. Ms. Symonds has experience serving as a fee arbitrator and mediator with the bar and has proven to be dependable, intelligent, and even keeled. Mr. Wallis is new to bar volunteering but has exhibited enthusiasm at the opportunity to participate on the Disciplinary Board.

Nomination: Virginia Symonds, public member, term expires 12/31/2015

Nomination: Michael Wallis, public member, term expires 12/31/2015

Oregon Elder Abuse Work Group

During the 2013 legislative cycle, HB 2205 created the Oregon Elder Abuse Work Group, consisting of 22 members. The group is to study and make recommendations on defining "abuse of vulnerable persons". The definition will be relevant to lawyers, who will become mandatory elder abuse reporters effective January 1, 2015. The work group is to recommend legislation to the 2014 legislature. The Board of Governors has two appointments to the work group: a lawyer whose practice is concentrated on elder law and a criminal defense lawyer.

Lara C. Johnson (933230), of Corson & Johnson in Eugene, is recommended for the elder law practitioner position. OCDLA will provide a recommendation for the criminal defense lawyer position during the July 13 meeting.

Recommendation: Lara C. Johnson, Elder Law Practitioner

Recommendation:

RULE 1.15-2 IOLTA ACCOUNTS AND TRUST ACCOUNT OVERDRAFT NOTIFICATION

- (a) A lawyer trust account for client funds that cannot earn interest in excess of the costs of generating such interest (“net interest”) shall be referred to as an IOLTA (Interest on Lawyer Trust Accounts) account. IOLTA accounts shall be operated in accordance with this rule and with operating regulations and procedures as may be established by the Oregon State Bar with the approval of the Oregon Supreme Court.
- (b) All client funds shall be deposited in the lawyer’s or law firm’s IOLTA account unless a particular client’s funds can earn net interest. All interest earned by funds held in the IOLTA account shall be paid to the Oregon Law Foundation as provided in this rule.
- (c) Client funds that can earn net interest shall be deposited in an interest bearing trust account for the client’s benefit and the net interest earned by funds in such an account shall be held in trust as property of the client in the same manner as is provided in paragraphs (a) through (d) of Rule 1.15-1 for the principal funds of the client. The interest bearing account shall be either:
- (1) a separate account for each particular client or client matter; or
 - (2) a pooled lawyer trust account with subaccounting which will provide for computation of interest earned by each client's funds and the payment thereof, net of any bank service charges, to each client.
- (d) In determining whether client funds can or cannot earn net interest, the lawyer or law firm shall consider the following factors:
- (1) the amount of the funds to be deposited;
 - (2) the expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;
 - (3) the rates of interest at financial institutions where the funds are to be deposited;
 - (4) the cost of establishing and administering a separate interest bearing lawyer trust account for the client’s benefit, including service charges imposed by financial institutions, the cost of the lawyer or law firm's services, and the cost of preparing any tax-related documents to report or account for income accruing to the client’s benefit;
 - (5) the capability of financial institutions, the lawyer or the law firm to calculate and pay income to individual clients; and
 - (6) any other circumstances that affect the ability of the client’s funds to earn a net return for the client.
- (e) The lawyer or law firm shall review the IOLTA account at reasonable intervals to determine whether circumstances have changed that require further action with respect to the funds of a particular client.
- (f) If a lawyer or law firm determines that a particular client’s funds in an IOLTA account either did or can earn net interest, the lawyer shall transfer the funds into an account specified in paragraph (c) of this rule and request a refund for any interest earned by the client’s funds that may have been remitted to the Oregon Law Foundation.
- (1) The request shall be made in writing to the Oregon Law Foundation within a reasonable period of time after the interest was remitted to the Foundation and shall be accompanied by written verification from the financial institution of the interest amount.
 - (2) The Oregon Law Foundation will not refund more than the amount of interest it received from the client’s funds in question. The refund shall be remitted to the financial institution for transmittal to the lawyer or law firm, after appropriate accounting and reporting.
- (g) No earnings from a lawyer trust account shall be made available to a lawyer or the lawyer’s firm.

(h) A lawyer or law firm may maintain a lawyer trust account only at a financial institution that:

(1) is authorized by state or federal banking laws to transact banking business in the state where the account is maintained;

(2) is insured by the Federal Deposit Insurance Corporation or an analogous federal government agency;

(3) has entered into an agreement with the Oregon Law Foundation:

(i) to remit to the Oregon Law Foundation, at least quarterly, interest earned by the IOLTA account, computed in accordance with the institution's standard accounting practices, less reasonable service charges, if any; and

(ii) to deliver to the Oregon Law Foundation a report with each remittance showing the name of the lawyer or law firm for whom the remittance is sent, the number of the IOLTA account as assigned by the financial institution, the average daily collected account balance or the balance on which the interest remitted was otherwise computed for each month for which the remittance is made, the rate of interest applied, the period for which the remittance is made, and the amount and description of any service charges deducted during the remittance period; and

(4) has entered into an overdraft notification agreement with the Oregon State Bar requiring the financial institution to report to the Oregon State Bar Disciplinary Counsel when any properly payable instrument is presented against such account containing insufficient funds, whether or not the instrument is honored.

(i) Overdraft notification agreements with financial institutions shall require that the following information be provided in writing to Disciplinary Counsel within ten banking days of the date the item was returned unpaid:

(1) the identity of the financial institution;

(2) the identity of the lawyer or law firm;

(3) the account number; and

(4) either (i) the amount of the overdraft and the date it was created; or (ii) the amount of the returned instrument and the date it was returned.

(j) Agreements between financial institutions and the Oregon State Bar or the Oregon Law Foundation shall apply to all branches of the financial institution. Such agreements shall not be canceled except upon a thirty-day notice in writing to OSB Disciplinary Counsel in the case of a trust account overdraft notification agreement or to the Oregon Law Foundation in the case of an IOLTA agreement.

(k) Nothing in this rule shall preclude financial institutions which participate in any trust account overdraft notification program from charging lawyers or law firms for the reasonable costs incurred by the financial institutions in participating in such program.

(l) Every lawyer who receives notification from a financial institution that any instrument presented against his or her lawyer trust account was presented against insufficient funds, whether or not the instrument was honored, shall promptly notify Disciplinary Counsel in writing of the same information required by paragraph (i). The lawyer shall include a full explanation of the cause of the overdraft.

(m) For the purposes of paragraph (h)(3), "service charges" are limited to the institution's following customary check and deposit processing charges: monthly maintenance fees, per item check charges, items deposited charges and per deposit charges. Any other fees or transactions costs are not "service charges" for purposes of paragraph (h)(3) and must be paid by the lawyer or law firm.

Oregon State Bar
Special Open Meeting of the Board of Governors
July 25, 2013
Minutes

The meeting was called to order by President-elect Tom Kranovich at 12:00 p.m. on July 25, 2013. The meeting adjourned at 12:30 p.m. Members present from the Board of Governors were Jenifer Billman, Patrick Ehlers, Hunter Emerick, Ray Heysell, Ethan Knight, Theresa Kohlhoff, Caitlin Mitchel-Markley, Maureen O'Connor, Travis Prestwich, Joshua Ross, Richard Spier, David Wade and Timothy Williams. Staff present were Sylvia Stevens, Helen Hirschbiel, Kay Pulju, Susan Grabe and Camille Greene.

Approval of Agenda

Mr. Kranovich called for approval of the agenda.

Motion: Mr. Williams moved, Ms. Mitchel-Markley seconded, and the board voted unanimously to approve the agenda as presented.

Appellate Screening Special Committee Recommendation

Ms. Billman presented the list of candidates believed by the Committee to be “highly qualified” for the Court of Appeals vacancies for submission to the Governor’s Office and thanked the committee for their hard work and dedication.

Mr. Wade explained that candidates were evaluated on capability, diversity and collegiality, together with the other requirements of OSB Bylaw 2.703(d). Representatives from the Governor’s Office were present during all the interviews and during the Committee’s deliberations.

The board voted unanimously to approve the committee motion to approve the list of “highly qualified” candidates to send to the Governor’s Office. **[Exhibit A]**

There followed a discussion of how to best distribute the board’s recommendations and whether posting on the bar’s website is consistent with Bylaw 12.700’s direction that the results “be made public...to the press.” After discussion, there was consensus to issue a press release with the list of “highly qualified” candidates and direct readers to the website for additional information. Mr. Kranovich authorized Ms. Billman and Mr. Wade to speak on behalf of the BOG in if there are questions about the process.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: July 25, 2013
From: Jenifer Billman, Appellate Screening Special Committee Chair
Re: Court of Appeals Recommendations

Action Recommended

Approve Appellate Screening Committee recommendation of candidates deemed “highly qualified” for the three Court of Appeals positions for submission to the Governor’s Office.

Background

Below please find the list of candidates the committee believes are highly qualified pursuant to OSB Bylaw 2.7:

Robert L. Aldisert
Donald E. Brookhyser
Claudia M. Burton
Brian C. Dretke
David O. Ferry
Meagan A. Flynn
Jerry B. Hodson
Mary Mertens James
Mustafa T. Kasubhai
Erin C. Lagesen
Chin S. Ming
Susie L. Norby
Kathleen J. Rastetter
C. Robert Steringer
Alycia N. Sykora
Timothy Volpert

Other candidates were:

Jas J. Adams
David J. Amesbury
Robyn E. Aoyagi
Harry M. Auerbach
Haley B. Bjerk
Roderick A. Boutin
William D. Bunch
Kathleen Cegla
Benjamin C. Debney
Joel S. DeVore

Timothy MB Farrell
Ann L. Fisher*
Emerson G. Fisher
Ronald A. Fontana
Rene C. Holmes
Scott N. Hunt
Bronson James
Vera Langer
Ernest G. Lannet
Stacey K. Lowe
Harris S. Matarazzo
Brandon B. Mayfield
James W. Nass
Marcia Ohlemiller
Jack R. Roberts
Melissa M. Ryan
Andy Simrin
Paul L. Smith
Charles P. Sorenson
Douglas L. Tookey
Edward H. Trompke
Daina A. Vitolins

*Chose not to participate in the bar process

Oregon State Bar
Special Open Meeting of the Board of Governors
August 23, 2013
Minutes

The meeting was called to order by President Michael Haglund at 3:30 p.m. on August 23, 2013. The meeting adjourned at 4:00 p.m. Members present from the Board of Governors were Jenifer Billman, Hunter Emerick, Ray Heysell, Matthew Kehoe, Ethan Knight, Theresa Kohlhoff, Tom Kranovich, Audrey Matsumonji, Caitlin Mitchel-Markley, Maureen O'Connor, Travis Prestwich, Richard Spier, David Wade and Timothy Williams. Staff present were Sylvia Stevens, Helen Hirschbiel, Rod Wegener, Kay Pulju, Susan Grabe, Mariann Hyland and Camille Greene.

1. 2013 President's Awards Workgroup Recommendation

Mr. Haglund presented the workgroup recommendations. **[Exhibit A]**

Motion: Mr. Wade moved, Mr. Kranovich seconded, and the board voted unanimously to approve the recommendations as presented.

2. Consider HOD Resolution re: AAP/D&I Assessment

Mr. Knight presented the Budget & Finance Committee recommendation to submit and encourage adoption of a HOD resolution to increase the AAP/D&I annual assessment from \$30 to \$45. Mr. Knight pointed out that the assessment has not changed since 1990, and with inflation, the program has actually experienced a steady decline in resources. **[Exhibit B]**

Motion: The board voted 13-2 in favor of the committee motion; Mr. Kehoe and Ms. Kohlhoff were opposed.

3. HOD Region 5 Request

Ms. Stevens relayed the request of some Region 5 HOD members for an additional HOD "pre-meeting" to discuss RPC 8.4 proposal. Board members expressed some concern about having an additional meeting for only one group; it was also pointed out that the appropriate place for discussion and debate about a resolution is at the HOD meeting where all interested are present.

Motion: The board unanimously agreed to decline the request.

4. Diversity Section Letter to Lewis & Clark Law School

Ms. Hyland asked the board to consider a request from the the Diversity Section and ACIDI to send a letter to the Lewis & Clark Law School Curriculum Committee in support of the Curriculum Diversity Initiative presented by a student coalition.

Motion: Mr. Wade moved, Ms. O'Connor seconded, and the board voted unanimously to approve the request as presented.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: August 23, 2013
Memo Date: August 8, 2013
From: Mike Haglund, OSB President
Re: OSB Award recommendations for 2013

Action Recommended

Approve the following slate of nominees for the 2013 President's awards, Wallace P. Carson, Jr., Award for Judicial Excellence and the Award of Merit:

Membership Service Award: David Heynderickx, Gina Johnnie

Public Service Award: Gene Grant

Affirmative Action Award: Hon. Angel Lopez

Sustainability: Max Miller

Judicial Excellence: Hon. Paul De Muniz

Award of Merit: David Thornburgh

Background

At its July meeting the BOG formed a special committee to review award nominations and submit recommendations to the full board. Committee members Mike Haglund, Ethan Knight and Theresa Kohlhoff met by conference call on August 7 to discuss the nominations, resulting in the recommendations listed above.

The awards will be presented at a luncheon on Thursday, December 5, at the Governor Hotel in Portland.

OLIO Programming Budget*

| | 2013-2014 | | 2012-13 | | 2011-12 | | 2010-11 | | 2009-10 | | 2008-09 | |
|--|-----------------------|---------------------|-----------------------|-----------------------|----------------------|-----------------------|---------------------|-----------------------|---------------------|-----------------------|-----------------------|-----------------------|
| | Budget (tentative) | Actual | Budget | Actual | Budget | Actual | Budget | Actual | Budget | Actual | Budget | Actual |
| Total Revenue - All OLIO Programs | \$ 57,100.00 | \$ 60,570.33 | \$ 58,000.00 | \$ 59,109.00 | \$ 71,000.00 | \$ 38,402.62 | \$ 83,500.00 | \$ 51,758.31 | \$ 90,500.00 | \$ 62,942.90 | \$ 68,750.00 | \$ 86,235.90 |
| Oregon Law Foundation Grant | \$ 1,500.00 | \$ 1,000.00 | \$ 1,500.00 | \$ 2,500.00 | \$ 15,000.00 | \$ 3,889.00 | \$ 35,000.00 | \$ 5,000.00 | \$ 45,000.00 | \$ 15,000.00 | \$ 40,000.00 | \$ 40,000.00 |
| OLIO Sponsorship Revenue | \$ 50,000.00 | \$ 59,570.33 | \$ 50,000.00 | \$ 52,439.00 | \$ 48,000.00 | \$ 27,907.62 | \$ 41,000.00 | \$ 38,754.31 | \$ 38,000.00 | \$ 37,637.90 | \$ 21,250.00 | \$ 31,408.00 |
| BOWLIO Revenue (Sponsorship + Registration) | \$ 5,000.00 | TBD | \$ 5,000.00 | \$ 3,570.00 | \$ 5,000.00 | \$ 5,730.00 | \$ 5,000.00 | \$ 5,560.00 | \$ 5,000.00 | \$ 7,455.00 | \$ 5,000.00 | \$ 13,502.90 |
| Employment Retreat Sponsorship Revenue | \$ 600.00 | TBD | \$ 1,500.00 | \$ 600.00 | \$ 3,000.00 | \$ 600.00 | \$ 2,500.00 | \$ 1,594.00 | \$ 2,500.00 | \$ 1,450.00 | \$ 2,500.00 | \$ 1,325.00 |
| Spring Social Revenue | \$ - | TBD | \$ - | \$ - | \$ - | \$ 276.00 | \$ - | \$ 850.00 | \$ - | \$ 1,400.00 | \$ - | \$ - |
| Total Expenses - All OLIO Programs | \$ 57,300.00 | \$ 39,695.10 | \$ 77,100.00 | \$ 74,717.69 | \$ 77,450.00 | \$ 71,498.93 | \$ 80,910.00 | \$ 72,785.08 | \$ 91,275.00 | \$ 87,709.38 | \$ 86,325.00 | \$ 97,005.45 |
| OLIO Orientation Expenses | \$ 49,900.00 | \$ 39,695.10 | \$ 67,300.00 | \$ 67,784.02 | \$ 67,150.00 | \$ 61,788.03 | \$ 71,410.00 | \$ 63,410.28 | \$ 82,275.00 | \$ 75,230.10 | \$ 78,825.00 | \$ 83,849.89 |
| **General Expenses | | | \$ 3,200.00 | \$ 7,385.10 | \$ 4,100.00 | \$ 3,965.10 | \$ 4,660.00 | \$ 6,228.65 | \$ 9,375.00 | \$ 5,993.46 | \$ 6,625.00 | \$ 13,751.73 |
| Office supplies/on-site supplies | \$ 1,200.00 | TBD | | | | | | | | | | |
| Contract services (DJ, NA dancers) | \$ 1,200.00 | \$ 949.98 | | | | | | | | | | |
| Promo materials/gifts & prizes | \$ 1,500.00 | \$ 1,537.00 | | | | | | | | | | |
| Fundraising letter & postage | \$ 500.00 | \$ 702.00 | | | | | | | | | | |
| Gifts & Prizes | \$ - | \$ - | \$ 600.00 | \$ 843.75 | \$ - | \$ 897.59 | \$ - | \$ 1,080.00 | \$ - | \$ 638.87 | \$ - | \$ - |
| Hotel Expenses | | | | | | | | | | | | |
| Meeting Rooms / AV | \$ 800.00 | \$ 1,100.00 | \$ 1,000.00 | \$ 606.50 | \$ 2,800.00 | \$ 400.00 | \$ 500.00 | \$ - | \$ 500.00 | \$ 365.00 | \$ 500.00 | \$ - |
| Food & Beverage | \$ 19,000.00 | \$ 16,174.26 | \$ 29,000.00 | \$ 28,980.36 | \$ 25,000.00 | \$ 28,465.16 | \$ 30,000.00 | \$ 28,639.86 | \$ 33,000.00 | \$ 33,979.56 | \$ 30,000.00 | \$ 34,108.41 |
| Lodging for Presenters / Students | \$ 19,000.00 | \$ 14,691.20 | \$ 27,000.00 | \$ 24,654.14 | \$ 29,000.00 | \$ 20,909.20 | \$ 28,000.00 | \$ 24,513.94 | \$ 33,000.00 | \$ 25,745.05 | \$ 36,300.00 | \$ 26,084.90 |
| Lodging for OSB Staff | \$ 1,500.00 | \$ 1,105.22 | \$ - | \$ 1,522.73 | \$ - | \$ 4,158.03 | \$ - | \$ - | \$ - | \$ 3,410.90 | \$ - | \$ 4,968.15 |
| Staff Travel & Expense | \$ 2,000.00 | TBD | \$ 3,000.00 | \$ 891.47 | \$ 3,500.00 | \$ 236.15 | \$ 4,500.00 | \$ 599.29 | \$ - | \$ 1,736.55 | \$ - | \$ 850.90 |
| Transportation | \$ 3,200.00 | \$ 3,435.44 | \$ 3,500.00 | \$ 2,899.97 | \$ 2,750.00 | \$ 2,756.80 | \$ 3,750.00 | \$ 2,348.54 | \$ 6,400.00 | \$ 3,360.71 | \$ 5,400.00 | \$ 4,085.80 |
| BOWLIO Expenses | \$ 4,000.00 | TBD | \$ 5,000.00 | \$ 3,878.12 | \$ 5,500.00 | \$ 3,019.55 | \$ 5,500.00 | \$ 4,302.97 | \$ 6,000.00 | \$ 6,012.92 | \$ 5,000.00 | \$ 10,598.56 |
| Employment Retreat Expenses | \$ 1,800.00 | TBD | \$ 1,300.00 | \$ 1,709.55 | \$ 1,300.00 | \$ 2,073.42 | \$ 1,800.00 | \$ 1,120.28 | \$ 1,500.00 | \$ 1,722.00 | \$ 2,500.00 | \$ 2,557.00 |
| Spring Social Expenses | \$ 1,600.00 | TBD | \$ 3,500.00 | \$ 1,346.00 | \$ 3,500.00 | \$ 4,617.93 | \$ 2,200.00 | \$ 3,951.55 | \$ 1,500.00 | \$ 4,744.36 | \$ - | \$ - |
| Total OLIO Revenue - Expenses | \$ (200.00) | \$ 20,875.23 | \$ (19,100.00) | \$ (15,608.69) | \$ (6,450.00) | \$ (33,096.31) | \$ 2,590.00 | \$ (21,026.77) | \$ (775.00) | \$ (24,766.48) | \$ (17,575.00) | \$ (10,769.55) |

* **Note:** Budgeted amounts are based on projected fundraising/sponsorship revenue. Deficits have historically been covered by the member fee assessment. We forecast the 2013-14 budget will not have a deficit amount.

** **Note:** General expenses include costs such as promotional materials, professional contract services, copying, postage, etc. Beginning in 2013, these expenses will have their own categories.

OREGON STATE BAR
Client Security - 113
For the Eight Months Ending August 31, 2013

| Description | August 2013 | YTD 2013 | Budget 2013 | % of Budget | August Prior Year | YTD Prior Year | Change v Pr Yr |
|--------------------------------------|-----------------|----------------|----------------|----------------|----------------------|-------------------|-------------------|
| REVENUE | | | | | | | |
| Interest | \$116 | \$1,626 | \$3,100 | 52.4% | \$319 | \$2,614 | -37.8% |
| Judgments | 50 | 17,381 | 4,000 | 434.5% | 448 | 851 | 1941.6% |
| Membership Fees | 1,290 | 655,770 | 675,000 | 97.2% | 450 | 219,105 | 199.3% |
| TOTAL REVENUE | 1,456 | 674,777 | 682,100 | 98.9% | 1,217 | 222,570 | 203.2% |
| EXPENSES | | | | | | | |
| SALARIES & BENEFITS | | | | | | | |
| Employee Salaries - Regular | 3,301 | 19,807 | 28,200 | 70.2% | 3,195 | 19,171 | 3.3% |
| Employee Taxes & Benefits - Reg | 1,004 | 7,079 | 11,200 | 63.2% | 957 | 6,402 | 10.6% |
| TOTAL SALARIES & BENEFITS | 4,305 | 26,886 | 39,400 | 68.2% | 4,153 | 25,573 | 5.1% |
| DIRECT PROGRAM | | | | | | | |
| Claims | 25,199 | 529,315 | 200,000 | 264.7% | 100,000 | 200,261 | 164.3% |
| Collection Fees | 817 | 9,362 | 1,000 | 936.2% | | 46 | 20208.7% |
| Committees | | | 250 | | | | |
| Pamphlet Production | | | 150 | | | 11 | -100.0% |
| Travel & Expense | 14 | 1,203 | 1,400 | 86.0% | | 2,086 | -42.3% |
| TOTAL DIRECT PROGRAM EXPENSE | 26,030 | 539,881 | 202,800 | 266.2% | 100,000 | 202,405 | 166.7% |
| GENERAL & ADMINISTRATIVE | | | | | | | |
| Messenger & Delivery Services | | | 50 | | | | |
| Office Supplies | | | 150 | | | | |
| Photocopying | | | 150 | | | | |
| Postage | 22 | 272 | 500 | 54.4% | 55 | 348 | -21.9% |
| Professional Dues | | 300 | 200 | 150.0% | | 200 | 50.0% |
| Telephone | | 26 | 150 | 17.5% | 17 | 38 | -31.4% |
| Training & Education | | 425 | 600 | 70.8% | | 475 | -10.5% |
| Staff Travel & Expense | | 60 | 874 | 6.9% | | | |
| TOTAL G & A | 22 | 1,083 | 2,674 | 40.5% | 72 | 1,061 | 2.1% |
| TOTAL EXPENSE | 30,356 | 567,850 | 244,874 | 231.9% | 104,225 | 229,039 | 147.9% |
| NET REVENUE (EXPENSE) | (28,899) | 106,927 | 437,226 | | (103,008) | (6,469) | ##### |
| Indirect Cost Allocation | 1,219 | 9,752 | 14,625 | | 1,119 | 8,952 | 8.9% |
| NET REV (EXP) AFTER ICA | (30,118) | 97,175 | 422,601 | | (104,127) | (15,421) | -730.1% |
| Fund Balance beginning of year | | 123,493 | | | | | |
| Ending Fund Balance | | 220,667 | | | | | |
| Staff - FTE count | | .35 | .00 | | | .35 | |

| CLAIM year | CLAIM No. | CLAIMANT | LAWYER | CLAIM AMT | PENDING | INVESTIGATOR | STATUS |
|------------|-----------|--|------------------------|--------------|----------------|--------------|-------------------------|
| 2013 | 3 | Domingues, Abimael Moreno | McBride, Jason | \$ 5,000.00 | \$ - | Angus | CSF Denied 09.07.2013 |
| 2013 | 7 | Olvera, Jose Alvarado | McBride, Jason | \$ 5,100.00 | \$ 5,000.00 | Angus | Going to BOG 09.27.2013 |
| 2013 | 18 | Robles Lopez, Francisco Javier | McBride, Jason | \$ 5,000.00 | \$ - | Angus | CSF Denied 09.07.2013 |
| 2013 | 36 | Chaves Ramirez, Aquilino | McBride, Jason | \$ 2,600.00 | \$ 2,600.00 | Angus | CSF Approved 09.07.2013 |
| 2013 | 37 | Martinez, Maria | McBride, Jason | \$ 2,600.00 | | Angus | CSF Approved 09.07.2013 |
| 2012 | 68 | Romero Garibay, Oscar G | McBride, Jason | \$ 10,000.00 | \$ 5,000.00 | Angus | Going to BOG 09.27.2013 |
| 2012 | 90 | Vega de Garibay, Maria | McBride, Jason | \$ 10,000.00 | \$ 5,000.00 | Angus | Going to BOG 09.27.2013 |
| 2012 | 113 | Cervantes Garcia, Juan Manuel | McBride, Jason | \$ 5,500.00 | \$ 2,200.00 | Angus | CSF Approved 09.07.2013 |
| 2013 | 33 | Garibay, Jose Luis | McBride, Jason | \$ 5,100.00 | \$ 5,000.00 | Atwood | Going to BOG 09.27.2013 |
| 2013 | 41 | Leon, Celso Sanchez | McBride, Jason | \$ 5,000.00 | \$ 3,000.00 | Atwood | CSF Approved 09.07.2013 |
| 2013 | 43 | Gomes, Heidi Marie | Wolf, Amber | \$ 6,956.63 | \$ 6,956.63 | Atwood | |
| 2013 | 45 | Canenguez, Jorge Adalberto | McBride, Jason | \$ 3,500.00 | \$ 3,500.00 | Atwood | |
| 2012 | 102 | Hernandez, Javier (Pio) | McBride, Jason | \$ 4,650.00 | \$ 4,650.00 | Atwood | waiting for new w-9 |
| 2013 | 26 | Farrar, Bryan | Gruetter, Bryan | \$ 15,694.70 | \$ 14,995.01 | Bennett | Going to BOG 09.27.2013 |
| 2013 | 27 | Farrar, Maureen | Gruetter, Bryan | \$ 28,984.53 | \$ 28,984.53 | Bennett | Going to BOG 09.27.2013 |
| 2013 | 35 | Cheadle, Joseph | Bertoni, Gary | \$ 6,500.00 | \$ - | Bennett | CSF Denied 09.07.2013 |
| 2013 | 38 | Bullwinkel, David | Gruetter, Bryan | \$ 53,950.15 | \$ 48,951.15 | Bennett | Going to BOG 09.27.2013 |
| 2013 | 32 | Conley, Kimberly | Kaufman, Eric | \$ 600.00 | \$ 600.00 | Brown | |
| 2013 | 42 | Meier-Smith, Mary | Hall, C. David | \$ 27,500.00 | \$ 27,500.00 | Brown | |
| 2012 | 62 | Chavez, Francisco and Mendoza, Esme | McBride, Jason | \$ 4,000.00 | \$ 4,000.00 | Calderon | CSF Approved 09.07.2013 |
| 2013 | 21 | Urbina, Teresa | McBride, Jason | \$ 2,540.00 | \$ 2,040.00 | Cousineau | CSF Approved 09.07.2013 |
| 2012 | 71 | Sanchez-Serrano, Jonathan Alejandro | McBride, Jason | \$ 4,950.00 | \$ 4,950.00 | Cousineau | |
| 2013 | 2 | Steidley, James J | Goff, Daniel | \$ 40,000.00 | \$ 40,000.00 | Davis | |
| 2013 | 15 | Rivas, Raul Ruiz | McBride, Jason | \$ 4,300.00 | \$ 1,500.00 | Davis | CSF Approved 09.07.2013 |
| 2013 | 24 | Mantell, Ellitott J | Goff, Daniel | \$ 47,609.00 | \$ 47,609.00 | Davis | |
| 2013 | 34 | Guevara, Elisendo De Dios | McBride, Jason | \$ 5,100.00 | \$ 3,000.00 | Eggert | CSF Approved 09.07.2013 |
| 2012 | 115 | Manriquez, Maria Luz | McBride, Jason | \$ 4,900.00 | \$ 3,600.00 | Eggert | |
| 2009 | 39 | Pottle, John | Ryan, T. Michael | \$ 200.00 | \$ 200.00 | Franco | CSF Approved 07.20.2013 |
| 2012 | 59 | Marquez, Alberto Luis and Talamante | McBride, Jason | \$ 500.00 | \$ 500.00 | Franco | CSF Approved 07.20.2013 |
| 2013 | 17 | Elizarraras, Victoria Ysassi | McBride, Jason | \$ 2,325.00 | \$ - | Kekel | CSF Denied 09.07.2013 |
| 2013 | 30 | Villazana, Olga and Cesar | McBride, Jason | \$ 4,675.00 | \$ 3,575.00 | Kekel | CSF Approved 09.07.2013 |
| 2013 | 31 | Almonza, Clemente Vazquez | McBride, Jason | \$ 10,600.00 | \$ - | Kekel | CSF Denied 09.07.2013 |
| 2012 | 105 | Cisneros, Javier Ramirez | McBride, Jason | \$ 4,000.00 | \$ 4,000.00 | Miller | |
| 2013 | 39 | Watkins, Sandra and Ronald | Handy, Paul | \$ 3,800.00 | \$ 740.35 | Reinecke | CSF Approved 09.07.2013 |
| 2012 | 29 | Estate of Melvin Johnson | La Follett, Thomas | \$ 37,371.92 | \$ - | Timmons | CSF Denied 09.07.2013 |
| 2013 | 40 | Jenkins, Lowell C | von Blumenstein, Debbe | \$ 1,250.00 | \$ 1,250.00 | Timmons | CSF Approved 09.07.2013 |
| 2013 | 44 | Littlefield, Darla and Sickles, Bruce | von Blumenstein, Debbe | \$ 6,000.00 | \$ 6,000.00 | Timmons | |
| 2013 | 46 | Houck, Angela Kay | von Blumenstein, Debbe | \$ 1,010.00 | \$ 1,010.00 | Timmons | |
| 2013 | 47 | Herbert, Rebecca D | Browning, Robert | \$ 5,000.00 | \$ 5,000.00 | Franco | |
| | | | | | \$ 287,911.67 | | |
| | | Funds available for claims and indirect costs allocation as of July 2013 | Total in CSF Account | | \$ 250,786.00 | | |
| | | | Fund Excess | | \$ (37,125.67) | | |

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: September 27, 2013
From: Sylvia E. Stevens, Executive Director
Re: Client Security Fund Committee Final Awards

Action Recommended

None. This report is for the BOG's information pursuant to CSF Rule 4.11.

Discussion

The CSF Committee met on July 20 and September 7, 2013 and gave final approval to awards on the following claims:

| | | |
|----------------------------|---------------------------|--------------------|
| 2012-56 | McBRIDE (Olivier) | \$3,000.00 |
| 2012-75 | McBRIDE (Javier) | \$3,000.00 |
| 2012-97 | McBRIDE (Escobedo Reyes) | \$3,000.00 |
| 2012-59 | McBRIDE (Marquez) | \$500.00 |
| 2012-58 | McBRIDE (Gutierrez/Lopez) | \$700.00 |
| 2012-83 | McBRIDE (Alatorre) | \$3,200.00 |
| 2013-11 | McBRIDE (E. Lopez) | \$4,000.00 |
| 2009-39 | RYAN (Pottle) | \$200.00 |
| 2012-23 | HAMMOND (Leece) | \$1,299.00 |
| 2013-25 | HAMMOND (Norris) | \$920.00 |
| 2013-41 | McBRIDE (Leon) | \$3,000.00 |
| 2013-34 | McBRIDE (Guevarra) | \$3,000.00 |
| 2012-62 | McBRIDE (Chavez, F.) | \$4,000.00 |
| 2012-113 | McBRIDE (Cervantes) | \$2,200.00 |
| 2013-36 & -37 ¹ | McBRIDE (Chavez/Martinez) | \$2,600.00 |
| 2013-30 | McBRIDE (Villazana) | \$3,575.00 |
| 2013-39 | HANDY (Watkins) | \$740.35 |
| 2013-40 | VonBLUMENSTEIN (Jenkins) | \$1,250.00 |
| 2013-15 | McBRIDE (Ruiz Rivas) | \$1,500.00 |
| 2013-21 | McBRIDE (Urbina) | \$2,040.00 |
| | Total | \$40,724.35 |

¹ Claimants are husband and wife who submitted separate claims for the same loss.

**THE NATIONAL
LAW JOURNAL****ALM Properties, Inc.**Page printed from: <http://www.nlj.com>[Back to Article](#)

Prospective Law Students Favor Pro Bono Requirement

Karen Sloan

The National Law Journal

2013-07-29 14:09:05.0

It appears that would-be law students aren't turned off by the prospect of mandatory pro bono work.

Well more than half the 750 pre-law students surveyed in June by Kaplan Test Prep—68 percent to be exact—said they support a rule requiring law students to complete a certain amount of pro bono work before being admitted to the bar.

New York is the only state with such a requirement; starting in 2015, applicants to the bar there must have completed 50 hours of eligible pro bono work. Meanwhile, officials with the State Bar of California are preparing to impose a 50-hour pro bono requirement and a New Jersey Supreme Court panel has recommended a similar rule.

The reception given the New York rule when announced in May 2012 was mixed. Proponents viewed the mandate as a good way to provide much-needed legal services to those who can't afford to pay market rates, and real-world experience for students; to critics, it amounted to indentured servitude for financially taxed law students.

In other findings, the students surveyed appeared less interested in traditional lawyer jobs. A full 56 percent reported that they planned to use their law degree for non-traditional lawyer jobs, up from 50 percent among a similar survey group in February. The tough job market for new lawyers was the single biggest factor cited by those who not aspiring to a traditional law job.

Moreover, 79 percent said that legal education "needs to undergo significant changes to better prepare future attorneys for the changing employment landscape and legal profession."

Contact Karen Sloan at ksloan@alm.com. For more of The National Law Journal's law school coverage, visit: <http://www.facebook.com/NLJLawSchools>.

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Law firms in the Great Recession: looking for change in all the wrong places

Posted Sep 5, 2013 9:19 AM CDT
By Edwin B. Reeser

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Edwin B. Reeser.

The last decade, particularly the last five years during the Great Recession, have generated tremendous change within law firms. Many long-term partners in large law firms poignantly observe that the firm they joined bears little resemblance to the firm it has become.

Most of this change was focused upon internal governance and structure driven by compensation pressures, not upon operating efficiency or delivering change responsive to client demands for a better value proposition for their legal spend. Inside, it is a whole new firm. Outside, clients don't see much change that benefits them.

Answers are not bold stroke mergers, absorption of chic specialty practices, or expansion to new markets in new locations. Those are all strategies that send the following message to the entire firm: "The future success, indeed survival, of this firm depends on people who are not here now, and are yet to be found." Is that the message of a successful organization that motivates its membership to move forward with energy, enthusiasm, passion and resolve? Such moves by those occupying leadership roles exhaust the spirit of everyone in the firm and waste financial resources desperately needed to work real change, increasing the difficulty of recovery. For five years, this has been the approach of too many firms.

Legendary business consultant Peter Drucker once observed: "Management is doing things right; leadership is doing the right things." It is clear that lawyers in positions of management and leadership, and many who advise them, fail to grasp this critical distinction.

Cost cutting remains a major focus. It is not the answer. Only about one third of expenses are typically non-personnel in a law firm. Of those, only about half are eligible for short-to-medium-term adjustment. Take a chainsaw to the one-sixth of costs that are eligible for cuts, and hack 20 percent on average. It only saves, in the best case, a little more than 3 percent from the budget. That isn't going to move the needle on profits very much, and it cannot be replicated every year.

That means people have to be cut, and that gets into the "rightsizing" discussion. Done masterfully (and judging from industry reports, law firms don't even do it well), that still only allows a firm to have enough, but not too much, professional capacity for declining market demand.

The key is not whether law firms have been doing the above well or doing it badly. The two primary focus points above are reactive, short-term and marginally beneficial. And buying revenue through laterals and mergers is expensive and problematic, not proactive and visionary. The stark reality is

that firms have been doing the wrong things.

The focus on wrong things is evidenced on at least two fundamental levels.

The first level is that there has been abandonment of the "people business" essence of law. This impacts upon the investment made internally, and externally on the oft-discussed price/value proposition for clients. The most precious and essential element of professional practice is identifying, recruiting, hiring, training, mentoring, promoting and retaining those professionals, and the properly skilled staff to support them. Systems, procedures and technologies are all important, but they mean little without having the best professionals, (unless you aspire to a practice where the quality of the professionals is not important).

The cost of each professional is very high compared with most other businesses. Every time a firm loses one, it costs a small fortune. This is an incredibly wasteful yet almost institutionalized feature of the industry. Let's say it costs a firm an unrecovered investment of more than \$350,000 each time an associate with less than four full years of service leaves the firm. What does that do to all those cost reductions elsewhere? Capital is important, but compared with manufacturing and other businesses, it is a smaller contributor to the creation of revenue. In law firms, it is people who create revenue. Operating models that treat legal professionals as fungible and interchangeable widgets are inefficient and unpleasant to work at.

To get a feel for just how economically stupid they can be, model a business with an industry average 18 to 20 percent annual associate attrition rate with those costs, and see what devastation it does to the bottom line. Then try cutting the attrition rate in half and running the numbers again. The difference is millions of dollars a year. Adjust the assumptions to fit the firm, but the answer is clear: Hire less, train more, keep them longer. It used to be a firm investment to train people, not a client subsidy. It morphed into armies of young lawyers doing clerical work, with the cost passed on to clients and a profit to the firm. Clients don't let firms do that anymore.

Emphasis on reorganization of law firm structure has for the most part been a cosmic waste of time, energy and money. Going to practice group management models versus geographic management models is but one example. It is nothing more than deciding to play musical chairs by marching clockwise rather than counterclockwise. What is worse, it gives the false impression that the enterprise is actually engaged in doing something that is going to make a difference. Actually, it does make a difference. It gets more people who lack management skills involved in management.

The second level is in the definition of what the "right" things are that firms should be doing: specifically, a very definite, clear and uncompromising definition of a moral "right" thing that is communicated to all and embraced and adhered to by all with rigor. It is through the pursuit and achievement of the "right" thing that the culture of a firm is built, and the team commitment by people to each other and for each other can be framed to achieve everything else that matters in the enterprise.

Without that group commitment to the value-based mission at the beginning of the enterprise endeavor, nothing can be soundly built or grow, and without it applied steadily to the end, nothing of real value can be sustained or survive. Leadership must tend to this culture relentlessly, such that it is embodied in everything the firm does and thus by everyone in what they do.

The defining culture has been abandoned or relegated to just words by many law firms. The absence of meaningful actions that unequivocally demonstrate to everyone in the firm that its culture comes with utmost priority characterizes today's landscape of struggling law firms.

The two levels are, of course, related. Without the collapse of the second level of firm culture, the erosion of the most critical component of the "engine" of the business would either not have happened at all or would be materially less than it is.

Widening partner compensation spreads, borrowing large amounts on working capital lines to make distributions, dramatically increasing partner capital, tranching partnership status ... do nothing to improve operations. They just preserve distribution levels for a few at the expense of the many.

Next time, we look at extricating ourselves from the struggling business model that is no longer matched to the market for legal services.

Careers

New lawyer has three part-time jobs, illustrating stat: 80% of new jobs are part-time

Posted Sep 5, 2013 6:14 AM CDT

By [Debra Cassens Weiss](#)



Image from [Shutterstock](#).

New lawyer Scott Neal is among the lucky law grads who have landed a law firm job.

But his position at the firm in Birmingham, Mich., is only part-time. He also works as a building supervisor at the YMCA and as a tree trimmer, the [Detroit Free Press](#) reports in a story reprinted by [USA Today](#). The story asks the question: Is part-time work the new normal?

“My parents are pressuring me to get a full-time job, even if it’s not in law,” says Neal, who lives with his parents.

Nearly 1 million new jobs were created this year, but 80 percent of the positions were part-time, the story says. Involuntary part-time workers who are looking for full-time work or working multiple jobs make up more than 19 percent of the workforce, up from 17 percent in 2007.

Derrick George is the lawyer who hired Neal. Six out of 10 of his employees are part-time, allowing him to avoid paying for health care and pensions. “Today’s business environment is different,” George told the Free Press. “This is the new normal.”

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THE NATIONAL LAW JOURNAL

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Revenues Up at Larger Law Firms

Leigh Jones

The National Law Journal

2013-07-29 00:00:00.0

The revenue picture for law firms in 2012 was bright for large law firms — and bleak for smaller shops.

The [Survey of Law Firm Economics](#), a joint project of *The National Law Journal* and ALM Legal Intelligence, shows that at law firms with more than 150 attorneys, revenue per lawyer (RPL) rose by 8.5 percent last year. But at law firms on the other end of the spectrum — those with one to nine attorneys — revenue plunged by 8.1 percent. The average per-lawyer gross receipts at larger firms were \$499,518, compared with \$302,818 at the small firms.

Overall, per-lawyer revenue inched up by 1.1 percent at law firms of all sizes during 2012 — welcome news compared with 2011, when it sank by 4.3 percent.

At the same time, profits per lawyer were up ever so slightly — by 0.3 percent — but that still represented an improvement over 2011's decline of 4.2 percent. A 2.6 percent increase in expenses per lawyer in 2012 contributed to the basically flat profits number, compared with a decrease in expenses by 4.4 percent during 2011.

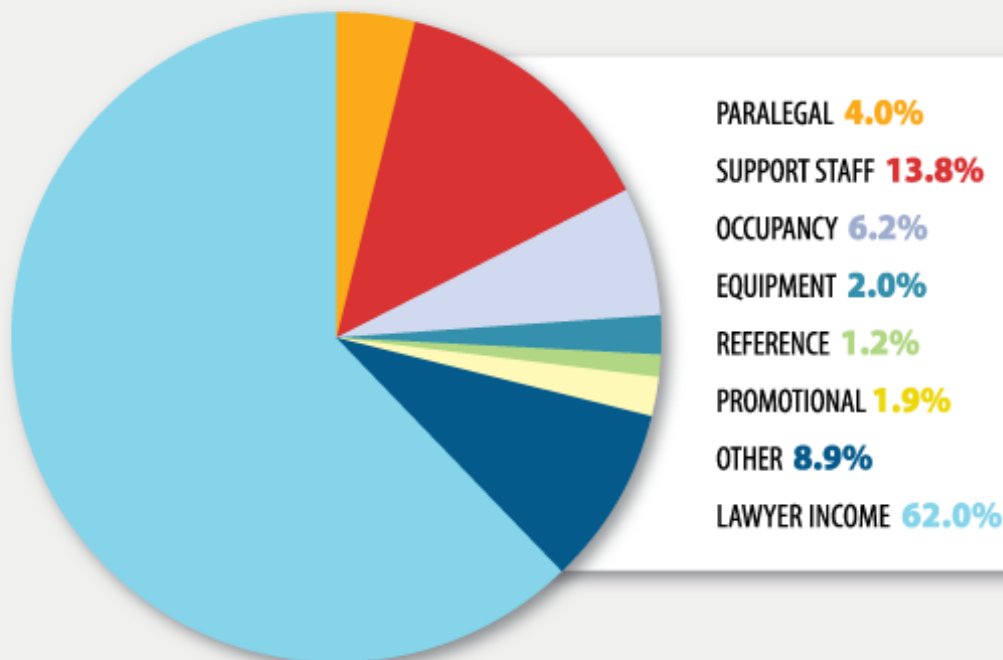
Compensation for all attorneys rose by 1.5 percent in 2012 to an average of \$296,010. Senior partners made \$351,290 while midlevel partners pulled in \$194,036. Midlevel associates' compensation was \$133,193, on average.

The survey results indicate a "recovering economy that is tolerating some rate increases," law firm consultant Peter Zeughauser said. Large law firms have become "more tightly managed," partly through layoffs of underperforming attorneys, he added.

Overall, the average hourly billing rate in 2012 for partners was \$369, up by 4 percent. The average hourly rate for associates was \$242, up by 4 percent as well.

AVERAGE INCOME AND EXPENSES

Breakdown of salaries and expenses as a percentage of receipts.



Source: NLJ/ALM Legal Intelligence Survey of Law Firm Economics.

The [2013 Survey of Law Firm Economics](#) marks the 41st year for the study. Law firms ranging from one to more than 150 lawyers provide information about management, financials, hourly rates, billable hours, compensation and personnel ratios. About 150 firms provided responses.

The reason for the glaring difference in revenue at large firms versus the smallest firms stems from the types of clients they attract, according to law firm consultant Joel Henning.

"Clients of smallest firms are individuals, entrepreneurs and small family businesses — restaurants, small retailers — with marginal operations," Henning said.

Clients with thin margins are slow to pay their lawyers if they see increases in expenses — like those anticipated from pending changes to the health care laws, Henning said. "They can't pay lawyers like midsize and larger companies."

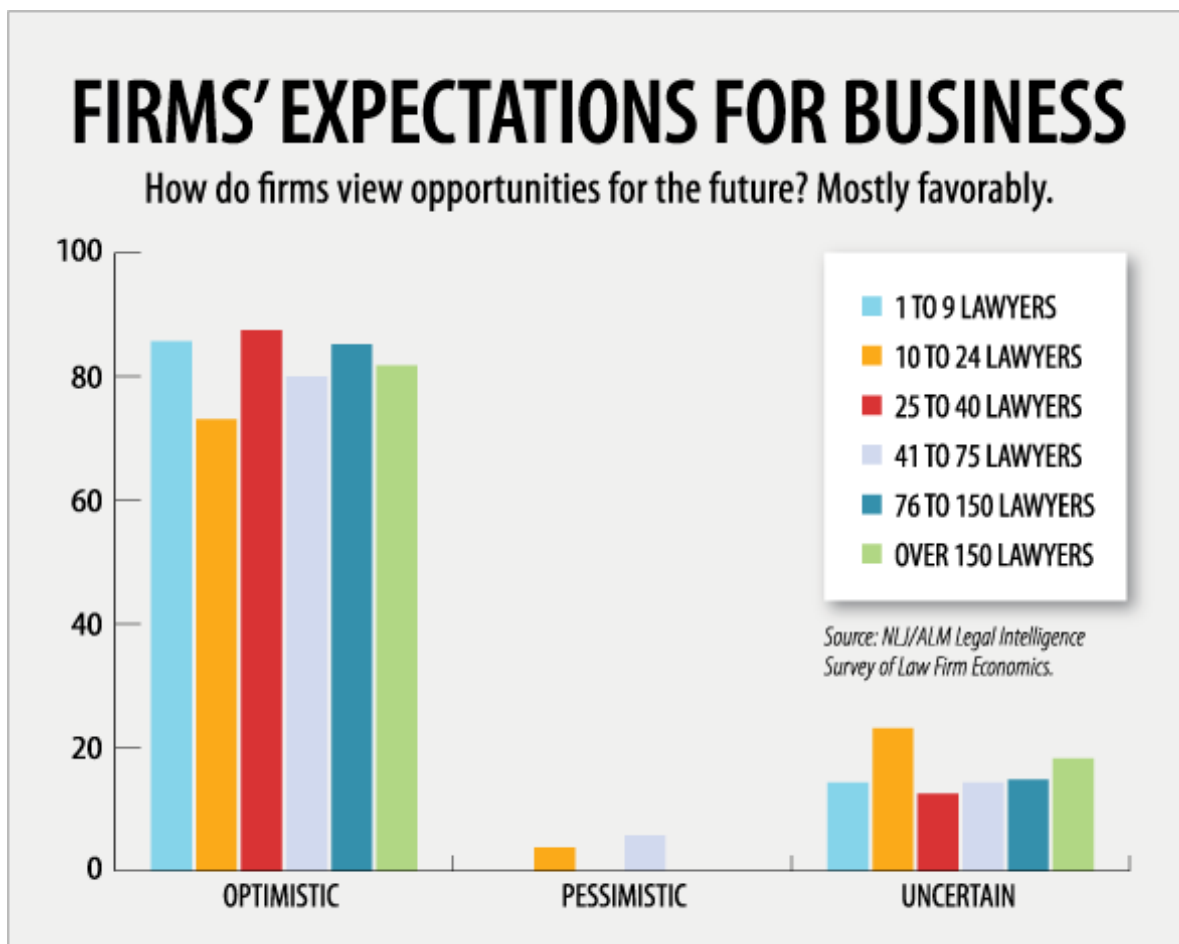
That's likely the reason that the smallest law firms were less inclined to raise rates. Asked if they expected to increase what they charge, 43 percent of firms with one to nine lawyers said they did, while 99 percent of the largest firms said they expected to charge more.

With revenues, overall, on the plus side, lawyers reported feeling positive about the future. Some 82 percent said they were optimistic about 2013, while just 2 percent described themselves as pessimistic. Sixteen percent were uncertain.

LITIGATION GROWTH FORECAST

Asked what practice areas they thought promised the best results, nearly 46 percent said they expected growth in litigation. Law firms with more than 150 attorneys had the highest hopes about litigation, with 64 percent expecting growth in the area.

Law firms also were upbeat about profits per partner. Nearly 66 percent expected them to grow this year, and about 21 percent of those anticipated that they would climb by more than 5 percent. Twenty-five percent of the firms looked for partner profits to remain flat, and 9 percent expected partner profits to drop.



The survey parsed the results for billing rates, compensation and hours worked by region. The highest equity partner hourly billing rate was in the Middle Atlantic, at an average of \$409. That region, comprising New York, Pennsylvania and New Jersey, also saw the highest nonequity partner rate, at \$417, and the highest associate rate, at \$279.

The region with the lowest hourly billing rate for equity partners was the West North Central, at \$290 per hour. That region includes Kansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota. It also had the lowest nonequity partner rate at \$247 and the lowest associate rate at \$192.

Regarding compensation, the West South Central region had the highest partner compensation, with a median of \$336,282. That region includes Arkansas, Louisiana, Oklahoma and Texas.

The East South Central region, which includes Alabama, Mississippi and Tennessee, doled out the highest compensation for associates and staff attorneys, at \$156,109.

Billing the most hours were associates and staff lawyers in the East South Central region. The median number of hours billed there was 1,850. Lawyers billing the lowest number of hours were in New England, where partners billed 1,473 hours. The billable hour by far was the most common method of charging for services, but a full 95 percent of firms said they used alternative billing arrangements at least some of the time. About 60 percent of the firms used alternatives on less than 10 percent of their matters, and 21 percent used them 11 percent to 25 percent of the time.

Leigh Jones can be contacted at ljones@alm.com.

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THE AM LAW DAILY

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A Dangerous, Million-Dollar, Law School Distraction

Steven J. Harper

The Am Law Daily

2013-07-26 11:35:26.0

With their new study, "[The Economic Value of a Law Degree](#)," a pair of university professors become the latest academics to try to defend this country's troubled model of legal education. This particular attempt is especially disheartening because [co-author Michael Simkovic](#) spent the year before he joined Seton Hall University School of Law in 2010 as an associate at Davis Polk & Wardwell. At some level, Simkovic must be aware of the difficulties confronting so many young law graduates.

Nevertheless, he and his co-author, Rutgers Business School assistant professor of finance and economics Frank McIntyre, "reject the claim that law degrees are priced above their value" (p. 41) and "estimate the mean pre-tax lifetime value of a law degree as approximately \$1,000,000 (p. 1)."

As the academic debate over data and methodology continues, [some professors are already relying on the study to resist necessary change](#). That's bad enough. But my concern is for the most vulnerable potential victims caught in the crosshairs of the—to use a term taken from the article's original title—"Million Dollar Law Degree" headlines: today's prelaw students. If these young people rely on an incomplete understanding of the study's limitations to reinforce their own confirmation bias in favor of pursuing a legal career primarily for financial reasons, they will be making a serious mistake.

The Naysayers Are Wrong?

The study targets respected academics (including Professors Herwig Schlunk, Bill Henderson, Jim Chen, Brian Tamanaha, and Paul Campos), along with "scambloggers" and anyone else arguing that legal education has become too expensive while failing to respond to a transformation of the profession that is reducing the value of young lawyers in particular. Professors [Campos](#) and [Tamanaha](#) have begun responses that are [continuing](#). (Tamanaha's latest installment is [here](#).) [University of Chicago Law School Professor Brian Leiter's blog](#), meanwhile, has become the vehicle for Simkovic's answers.

One obvious problem with touting the \$1 million average earnings figure is that, for [the bimodal distribution of lawyer incomes](#), any average is meaningless. In a recent rebuttal to Campos that Simkovic endorsed, professor Stephen Diamond calculated the net lifetime premium at the median (midpoint) to be \$330,000 over a 40-year career. That might be closer to reality. But a degree that returns, at most, a lifetime average of \$687 a month in added value for half of the people who get it isn't much of an attention-getter. As noted below, even that number depends on some questionable assumptions and, when you get down to the 25th percentile, the economic prospects are far bleaker.

Causation

In the haze of statistical jargon and the illusory objectivity of numbers, it's tempting to forget a fundamental point: statisticians investigate correlations. Even sophisticated regression analysis can't prove causation. Every morning, the rooster crows when the

sun rises. After isolating all observable variables, that correlation may be nearly perfect, but the crowing of the rooster still doesn't cause the sun to rise.

Statistical inference can be a useful tool. But it can't bridge the many leaps of faith involved in taking a non-random sample of 1,382 JD-degree holders—the most recent of whom graduated in 2008 (before the Great Recession) and 40 percent of whom have jobs that don't require a JD—and concluding that it should guide the future of legal education in a 1.5 million-member profession. (p. 13 and n. 31)

Caveats

Simkovic and McIntyre provide necessary caveats throughout their analysis, but potential prelaw students (and their parents) aren't likely to focus on them. For example, with respect to JD-degree holders with jobs that don't require such a degree, they "suggest" causation between the degree and lifetime income premiums, but admit they can't prove it. (p. 25)

Likewise, they use recessions in the late 1990s and early 2000s as proxies for the impact of the Great Recession on current law graduates (compared to those who have only bachelor's degrees) (p. 32), minimizing the importance of recent seismic shifts in the legal profession and the impact on students graduating after 2008. (Simkovic graduated from law school in 2007.)

This brings to mind the joke about a law professor who offers his rescue plan to others stranded on a deserted island: "First, assume we have a boat..." The study finesses that issue with this qualification: "[P]ast performance does not guarantee future returns. The return to a law degree [sic] in 2020 can only be known in 2020." (p. 38)

Similarly, the results assume: 1.) total tuition expense of \$90,000 (presumably including the present value cost of law school loan interest repayments; otherwise, that number is too low and the resulting calculated premium too high); 2.) student earnings during law school of \$24,000; 3.) graduation from law school at age 25 (no break after college); and 4.) employment that continues to age 65. (pp. 39-41) More pessimistic assumptions would reduce the study's calculated premiums at all income levels. At some point inside even the Simkovic-McIntyre 25th percentile, there's no lifetime premium for a JD.

Conclusions

After ticking off a long list of their study's "important limitations"—including my personal favorite, the inability to "determine the earnings premium associated with attending any specific law school"—the authors conclude: "In sum, a law degree is often a good investment." (p. 50) I agree. The more important inquiry is: When isn't it?

In his Simkovic-endorsed defense of the study, Diamond offers a basic management principle: any positive net present value means the project should be a go. But attending law school isn't an aggregate "project." It's an individual undertaking for each student. After they graduate, half of them will remain below the median income level—some of them far below it.

Although the authors dismiss Bureau of Labor Statistics employment projections (pp. 6-7), in 2012 alone law schools graduated 46,000 new attorneys. Nine months out, [only 10 percent of law schools \(20 out of 200\) had long-term full-time JD-required job placement rates exceeding 75 percent](#). The overall JD-job placement average for all law schools was 56 percent.

Some of the remaining 44 percent will do other things because they have no realistic opportunity for legal careers. Financially, it could even turn out okay for a lot of them. (In that respect, you have to admire the boldness of the authors' footnote 8, citing the percentage of senators and CEOs with JDs.)

But with better information about their actual prospects as practicing attorneys, how many would have skipped their three-year investments in a JD and taken the alternative path at the outset? That's the question that the Simkovic/McIntyre study doesn't pose and that every prospective law student should consider.

More Elephants in the Room

Notwithstanding the economic benefits of a JD that many graduates certainly enjoy, attorney career dissatisfaction remains pervasive, even among the "winners" who land the most lucrative big firm jobs. That leads to the most important point of all. Anyone desiring to become an attorney shouldn't do it for the money. Even the Simkovic/McIntyre study with its many questionable assumptions proves that for thousands of graduates every year the money will never be there.

But the authors are undoubtedly correct about one thing: "The data suggests [sic] that law school loans are profitable for the federal government." (p. 46) Law schools like them, too.

It doesn't take a multiple regression analysis to see the problems confronting the legal profession—but it can be used to obscure them.

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