

**Oregon State Bar**  
**Meeting of the Board of Governors**  
 November 15, 2014  
 Salishan Spa & Golf Resort, Gleneden Beach, OR  
**Open Session Agenda**

*The Open Session Meeting of the Oregon State Bar Board of Governors will begin at 1:00pm on November 15, 2014.  
 Items on the agenda will not necessarily be discussed in the order as shown.*

**Saturday, November 15, 2014, 1:00pm**

**1. Call to Order / Finalization of Agenda**

**2. Report of Officers & Executive Staff**

- |  |        |         |
|--|--------|---------|
| A. President's Report [Mr. Kranovich]                            | Inform |         |
| B. President-elect's Report [Mr. Spier]                          | Inform | Exhibit |
| C. Executive Director's Report [Ms. Stevens]                     | Inform | Exhibit |
| D. Director of Regulatory Services [Ms. Evans]                   | Inform | Exhibit |
| E. Director of Diversity & Inclusion Report [Ms. Hyland]         | Inform |         |
| F. MBA Liaison Report [Mr. Ross & Mr. Ehlers]                    | Inform |         |
| G. Oregon New Lawyers Division Report [Mr. Eder & Ms. Clevering] | Inform | Exhibit |

**3. Professional Liability Fund [Ms. Bernick]**

- |   |        |         |
|---|--------|---------|
| A. Approve 2015 PLF Coverage Plans (Primary, Excess, ProBono) | Action | Exhibit |
| B. Approve 2015 Excess Rates                                  | Action | Exhibit |
| C. August 31, 2014 PLF Financial Statements                   | Inform | Exhibit |

**4. OSB Committees, Sections and Councils**

- |   |        |         |
|---|--------|---------|
| A. MCLE Committee [Ms. Hirschbiel]                            |        |         |
| 1) Request for amendments to MCLE Regulations 3.300 and 6.100 | Action | Exhibit |
| B. State Lawyers Assistance Committee [Ms. Hirschbiel]        |        |         |
| 1) Amend Bylaw 24.300   | Action | Exhibit |
| C. Client Security Fund Committee [Ms. Stevens]               |        |         |
| 1) Request for Review CSF Claim FOSTER(Wong/Bernath)2014-07   | Action | Exhibit |
| 2) CSF Claims Recommended for Awards                          |        |         |
| a) GRUETTER (Lupton) 2012-54                                  | Action | Exhibit |
| b) LANDERS (Austin) 2014-12                                   | Action | Exhibit |

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

- |  |        |                   |
|--|--------|-------------------|
| A. Board Development Committee [Ms. Mitchel-Markley] |        |                   |
| 1) Committee Update                                  | Inform |                   |
| 2) PLF Appointments                                  | Action | Exhibit           |
| 3) Appointments to Committees, Councils and Boards   | Action | Exhibit & Handout |

- |   |   |        |                      |
|---|---|--------|----------------------|
| <b>B. Budget &amp; Finance Committee [Mr. Emerick]</b>  |   |        |                      |
| 1)  | Approve 2015 OSB Budget   | Action | Exhibit              |
| <b>C. Governance &amp; Strategic Planning [Mr. Spier]</b>   |   |        |                      |
| 1)  | Circuit Court Preference Poll [Mr. Powers]                      | Action | Exhibit              |
| 2)  | Diverse Communities Outreach Ideas                              | Action |                      |
| 3)  | ULTA Procedures   | Action |                      |
| <b>D. Public Affairs Committee [Mr. Prestwich]</b>  |   |        |                      |
| 1)  | Legislative Update & Election Results                           | Inform | Handout              |
| <b>E. Executive Director Evaluation Special Committee [Mr. Kehoe]</b>   |   |        |                      |
| 1)  | Discuss New Executive Director Recruitment/Selection Procedures | Inform | Exhibit &<br>Handout |
| 2)  | Approval of New Executive Director Job Description              | Action | Exhibit              |
| <b>F. International Trade in Legal Services Task Force [Ms. Hierschbiel]</b>  |   |        |                      |
| 1)  | Report and Recommendations                                      | Inform |                      |
| <b>G. Legal Technicians Task Force [Ms. Stevens]</b>  |   |        |                      |
| 1)  | Report and Recommendations                                      | Inform | Exhibit              |
| <b>6. Other Items</b>   |   |        |                      |
| A. 2014 HOD Meeting Results   |   |        |                      |
| B. Approve Nomination of 2015 President-elect   |   |        |                      |
| C. Resolution in Support of Courthouse Funding  |   | Action | Handout              |
| D. ABA Request for Input re: Future of Legal Services   |   | Action | Exhibit              |
| <b>7. Consent Agenda</b>  |   |        |                      |
| A. Reissued Audit Opinion Letter [Mr. Wegener]  |   |        | Exhibit              |
| B. Approve Minutes of Prior BOG Meetings  |   |        |                      |
| 1)  | Regular Session – September 5, 2014                             | Action | Exhibit              |
| 2)  | Special Open Session – October 3, 2014                          | Action | Exhibit              |
| 3)  | Special Open Session – November 7, 2014                         | Action | Exhibit              |
| <b>8. Default Agenda</b>  |   |        |                      |
| A. CSF Claims Financial Report  |   |        | Exhibit              |
| B. ABA HOD 2014 Annual Meeting Report   |   |        | Exhibit              |
| <b>9. Closed Sessions – <u>CLOSED</u> Agenda</b>  |   |        |                      |
| A. Executive Session (pursuant to ORS 192.660(1)(f) and (h)) – General Counsel/UPL Report                           |   |        |                      |
| <b>10. Good of the Order (Non-Action Comments, Information and Notice of Need for Possible Future Board Action)</b> |   |        |                      |
| A. Correspondence   |   |        |                      |
| B. Articles of Interest   |   |        |                      |

## **Report of President-Elect**

**Richard G. Spier**

**November 15, 2014**

September 9	Meeting with Sylvia Stevens and Marianne Hyland, OSB Center
September 23	OAAP Open House, Portland
September 24	<i>OSB Bulletin</i> interview with journalist, OSB Center
September 30	Albina Head Start rededication of Owen Blank Center, Portland
October 1	<i>OSB Bulletin</i> photoshoot, OSB Center
October 3	BOG Committees, OSB Center
October 9	Distribute paychecks to OSB employees, with President Kranovich
October 10	PLF Board of Directors, Yachats
October 18	OGALLA dinner, Portland
October 22	Region 5 HOD meeting, Portland
October 23	MBA Social, Portland
October 29	Uniform Bar Exam Study committee phone meeting
November 5	OLF Event, Oregon Historical Society Museum, Portland
November 6	PLF Bar Leaders Lunch for new admittees, Portland
November 7	HOD
November 7	ONLD executive committee and awards presentations, Portland

This report was prepared October 30, 2014, and includes anticipated activities after that date.

# OREGON STATE BAR

## Board of Governors Agenda

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Meeting Date: November 15, 2014  
 From: Sylvia E. Stevens, Executive Director  
 Re: Operations and Activities Report

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### OSB Programs and Operations

Department	Developments
<ul style="list-style-type: none"> <li>▪ <b>Accounting &amp; Finance/ Facilities/IT (Rod Wegener)</b></li> </ul>	<p><i>Accounting</i></p> <ul style="list-style-type: none"> <li>▪ By mid-month the department will gear up for the 2015 member fee cycle. The email with the fee notice will go to members the week after Thanksgiving.</li> <li>▪ The Controller with the Lawyer Referral manager and IT will begin testing of e-commerce for participants owing a percentage fee for a bar referral to make payment via credit card.</li> <li>▪ The switch to a new payroll provider (Paychex) has not gone smoothly, but will be a time and cost saver once fully implemented.</li> </ul> <p><i>Facilities</i></p> <ul style="list-style-type: none"> <li>▪ Although there continue to be lookers, there is no proposal for leasing the vacant 2,100 s.f. on the first floor. Joffe Medi-Center wants to terminate its lease which still has two years to maturity. The bar's realtor has a prospective takeover tenant.</li> </ul> <p><i>IT</i></p> <ul style="list-style-type: none"> <li>▪ The focus of the department remains the evaluation of vendors for the association management software system. A more detailed summary of the process is outlined in the Budget &amp; Finance Committee's agenda.</li> </ul>
<ul style="list-style-type: none"> <li>▪ <b>Communications &amp; Public Services (includes RIS and Creative Services) (Kay Pulju)</b></li> </ul>	<p><i>Communications</i></p> <ul style="list-style-type: none"> <li>▪ Bulletin features for October included "The Question of Commercial Bail" "Office Productivity Software in the Cloud."</li> <li>▪ Electronic publications included the Bar News, BOG Updates and special notices on eCourt.</li> <li>▪ Multimedia and event planning staff have assisted other bar programs and are now preparing for the annual awards luncheon.</li> </ul> <p><i>Creative Services</i></p> <ul style="list-style-type: none"> <li>▪ Marketing support provided to CLE seminars and OSB sections in promotion of CLEs and annual meetings. New template rolled out for CLE seminar brochures to complement the revised website, and new advertising spots launched on the member dashboard and BarBooks to promote featured seminars. A new monthly advertising spread for CLE seminars and publications was launched in the October Bulletin to continue the new marketing package.</li> <li>▪ Reprogrammed member dashboard to provide members with alerts if their demographic and/or contact information is incomplete.</li> <li>▪ Continued work on website accessibility, with successful launch of new</li> </ul>

	<p>IOLTA form that now works with online sight readers. (Tested and approved by member Bruce Harrell).</p> <p><i>Public Service</i></p> <ul style="list-style-type: none"> <li>▪ Continued updating of legal information topics for the bar’s website, as well as pamphlets, PSAs and videos.</li> <li>▪ Development of marketing plan for RIS.</li> </ul> <p><i>Referral &amp; Information Services (RIS)</i></p> <ul style="list-style-type: none"> <li>▪ Completed the annual registration cycle for the Lawyer Referral Service (LRS) effective September 1, including implementation of the one-year pilot program for new Modest Means Program panels. LRS panelists registered for SSI/SSD, VA Benefits and Workers’ Comp now have the ability to screen referrals for Modest Means Program eligibility.</li> <li>▪ LRS revenue continues to exceed projections with earned fees totaling \$500,799 as of September 30th. LRS is currently at 106% of its annual revenue goal with three months remaining in the budget year.</li> <li>▪ Coordinated with the OSB Controller and the IT department to implement online payment of remittance fees. Formerly, panelists were required to print an invoice and mail it to the accounting department with a check each month.</li> <li>▪ Ongoing staff recruitment and training continues in RIS. There are currently three open LRS Assistant positions due to several employees making lateral moves within the bar. New RIS Manager Eric McClendon has been in place for six months.</li> </ul>
<ul style="list-style-type: none"> <li>▪ <b>CLE Seminars (Karen Lee)</b></li> </ul>	<ul style="list-style-type: none"> <li>▪ Marketing - worked with Creative Services to develop new seminar brochure layouts and ads. Creative Services developed marketing pieces for the department’s latest discount promotion (see below)</li> <li>▪ Business development – implemented a new subscription discount, “24/7” which offers a 20% discount off any OSB CLE Seminars program or product. The subscription is valid for one year from the date of purchase. The subscription is \$119 and can be purchased through December 31, 2014.</li> <li>▪ Programming – held the first joint administrative law institute with the Washington State Bar; the Legal Heritage Committee’s CLE seminar “Echoes of Inequality” was well received; the notario fraud conference planned by Amber Hollister had excellence attendance and included community groups outside the legal profession.</li> </ul>
<ul style="list-style-type: none"> <li>▪ <b>Diversity &amp; Inclusion (Mariann Hyland)</b></li> </ul>	<ul style="list-style-type: none"> <li>▪ BOWLIO was Saturday, November 1. There was a record high of 216 attendees, which included 75 attorneys, 67 law students and 7 judges. Tom Kranovich was master of ceremonies. The volunteer judge panelists were Liani Reeves, BOG Member Simon Whang, and Judge Doug Tookey. BOG Member Josh Ross also attended.</li> <li>▪ Led by D&amp;I staff, other OSB staff and volunteers collaborated on development of the Diversity Story Wall that was unveiled on November 7.</li> </ul>
<ul style="list-style-type: none"> <li>▪ <b>General Counsel (includes CAO and MCLE) (Helen Hirschbiel)</b></li> </ul>	<ul style="list-style-type: none"> <li>▪ The Notario Fraud Conference was held on September 24, 2014 at the Oregon State Bar Center. By all accounts it was a resounding success.</li> <li>▪ In conjunction with the Notario Fraud Conference, General Counsel—in cooperation with the Creative Services and Communications departments—created informational pamphlets and have, to date, distributed</li> </ul>

	<p>approximately 2500 pamphlets to attorneys and community partners.</p> <ul style="list-style-type: none"> <li>▪ As a result of the contacts made from the Notario Fraud Conference, Deputy General Counsel was invited to participate in 1) an Oregon Attorney General Town Hall in Hillsboro on September 30, 2014 that addressed notario fraud, and 2) a Federal Trade Commission and the Washington Attorney General’s Office consumer protection conference discussing notario fraud issues on November 19, 2014.</li> <li>▪ CLE Season is in full swing. General Counsel and Deputy General Counsel have given eight CLE presentations since the September BOG meeting and Client Assistance Office attorneys have presented at four CLE’s.</li> <li>▪ Deputy General Counsel provided the first of three planned ADA trainings for staff, in accordance with the Bar Accessibility Review Team’s goals.</li> <li>▪ CAO continues to handle a steady stream of inquiries about lawyers and the legal system.</li> <li>▪ The CAO manager met with the director of the Office of Equity and Multicultural Services at DHS to exchange ideas about reaching underserved communities.</li> <li>▪ MCLE is in the beginning of the 2014 compliance cycle and anticipates processing approximately 4,000 reports.</li> </ul>
<ul style="list-style-type: none"> <li>▪ <b>Human Resources (Christine Kennedy)</b></li> </ul>	<ul style="list-style-type: none"> <li>▪ Assisted department directors in hiring Angela Bennett for Assistant Disciplinary Counsel; promoting Emily Schwartz to Discipline Paralegal; and hiring Juan Costantini for RIS Assistant.</li> <li>▪ Recruiting for two RIS Assistants and Discipline Legal Secretary.</li> <li>▪ The Supervisor Survey is scheduled for launch on November 10<sup>th</sup>.</li> <li>▪ Invited to make two presentations at the ABA 2014 National Lawyer Referral Conference.</li> <li>▪ Invited two managers to join me at Barran Liebman’s 2014 Annual Seminar</li> <li>▪ Received at \$2,969 dividend from our workers’ compensation carrier, SAIF Corporation.</li> </ul>
<ul style="list-style-type: none"> <li>▪ <b>Legal Publications (Linda Kruschke)</b></li> </ul>	<ul style="list-style-type: none"> <li>▪ The following have been posted to BarBooks™ since my last report:                         <ul style="list-style-type: none"> <li>○ Eighteen reviewed or revised <i>Uniform Civil Jury Instructions</i>.</li> <li>○ Ten chapters of <i>Oregon Real Estate Deskbook</i>.</li> <li>○ Final PDF of the PLF book <i>Oregon Statutory Time Limitations</i>.</li> <li>○ Volume 27 of the <i>Disciplinary Reporter</i></li> </ul> </li> <li>▪ The PLF book <i>Oregon Statutory Time Limitations</i> was finished and the PDF sent to the PLF for printing and distribution at the beginning of September.</li> <li>▪ We are in the process of putting together an <i>Oregon Attorney Fee Codebook</i> and <i>Oregon Attorney Fee Compilation</i> to be printed and shipped in December. This project will make up for some of the revenue shortfall from <i>Oregon Real Estate Deskbook</i> not being completed this year.</li> <li>▪ Our Family <i>Law</i> e-book sales have increased with net sales in October of 12 e-books. Although revenue for those sales was only \$90, it was</li> </ul>

	<p>a significant increase over prior sales and is making this information available to the public and supporting the bar’s access to justice mission. Six <i>Consumer Law</i> e-books were added to our Amazon.com library this week.</p> <ul style="list-style-type: none"> <li>▪ Under our Lexis licensing agreement, we had revenue of over \$500 per quarter for the past two quarters. We have not yet received our first royalty check under our Westlaw licensing agreement.</li> <li>▪ Our blog at <a href="http://legalpubs.osbar.org">http://legalpubs.osbar.org</a> has had 28,562 visitors to date, with more than 300 visitors per day every day.</li> </ul>
<ul style="list-style-type: none"> <li>▪ <b>Legal Services Program (Judith Baker) (includes LRAP, Pro Bono and an OLF report)</b></li> </ul>	<p><i>Legal Services Program</i></p> <ul style="list-style-type: none"> <li>▪ Legal aid programs forwarded statistical information regarding services provided and financials to the OSB LSP for 2013.</li> <li>▪ The LSP Committee formed a subcommittee to review a complaint received by an Oregon Law Center client. After an investigation the subcommittee determined that the Oregon Law Center’s actions were in line with the OSB LSP Standards and Guidelines.</li> <li>▪ The Pro Bono Fair was held on October 23 to show case provider pro bono programs and recognize those lawyers and law firms that provided the most pro bono hours in 2014. It was very successful and well attended.</li> <li>▪ The LRAP Advisory Committee met on November 8 to review the LRAP policies and develop recommendations for any needed revisions.</li> </ul> <p><i>Oregon Law Foundation</i></p> <ul style="list-style-type: none"> <li>▪ The Oregon Law Foundation sponsored an Access to Justice CLE followed by a reception on November 5. The Access to Justice CLE provided an overview of legal aid services and how legal aid is funded. The reception was to thank Leadership Banks for paying a supportive interest rate on IOLTA accounts.</li> </ul>
<ul style="list-style-type: none"> <li>▪ <b>Media Relations (Kateri Walsh)</b></li> </ul>	<ul style="list-style-type: none"> <li>▪ Facilitating relationship-building between <i>The Oregonian</i> and legal services leaders, in hopes of educating several key reporters to enhance coverage of Oregon’s legal services climate. Also trying to increase the comfort level of the legal services community about getting attention for their issues, and for the important work they do. Similarly, there is a new member of the Oregonian editorial board who is interested in learning more and becoming well-grounded in law-related issues.</li> <li>▪ The OSB’s Judicial Voters Guide received very complimentary comments from journalists again this year, who found it helpful in doing their research and helping them understand judicial races more fully.</li> <li>▪ We have approximately 12 current discipline cases being regularly tracked/covered by media around the state. Media relations staff continues to work with journalists to help them better understand ethics issues and the bar’s regulatory process.</li> <li>▪ Beginning the planning for the Bar Press Broadcasters Council “Building a Culture of Dialogue” event in February. Pat Ehlers attended last year if anyone has questions about the program.</li> </ul>
<ul style="list-style-type: none"> <li>▪ <b>Member Services (Dani Edwards)</b></li> </ul>	<ul style="list-style-type: none"> <li>▪ The Board of Governors election ended in late October with a 15% vote return which is in the average range for BOG election participation. The new board members are Guy B. Greco (region 4), Per A. Ramfjord (region</li> </ul>

	<p>5), Vanessa A. Nordyke (region 6), and Kathleen J. Rastetter (region 7). Kerry L. Sharp, a business consultant from Lake Oswego, will join the BOG as the 2015 public member.</p> <ul style="list-style-type: none"> <li>▪ The OSB preference poll for General Election candidates included two races for contested judicial positions in the 7<sup>th</sup> district (Gilliam, Hood River, Sherman, Wasco, and Wheeler Counties) and 19<sup>th</sup> district (Columbia County). The 60% participation rate was significantly higher than the vote return from previous polls.</li> <li>▪ The Section annual meeting season is coming to an end with more than 75% of sections having already held their membership meeting.</li> <li>▪ The Pro Bono Fair and Awards Ceremony was held on October 23 at the World Trade Center and co-sponsored by the ONLD. The event featured three CLE programs, a pro bono provider “vendor fair”, and an awards ceremony honoring law students, lawyers, and firms that provided numerous hours of pro bono service in 2013.</li> <li>▪ New bar members were welcomed during an ONLD-sponsored reception following the October 2 Swearing-in Ceremony at Willamette University. The ONLD invited sections to participate in the reception this year in an effort to help increase section membership and provide new members access to bar groups offering professional development and networking opportunities.</li> </ul>
<ul style="list-style-type: none"> <li>▪ <b>New Lawyer Mentoring (Kateri Walsh)</b></li> </ul>	<ul style="list-style-type: none"> <li>▪ Working on enrolling all our new bar members and beginning the fall matching process.</li> <li>▪ Beginning to certify the completion of the program for those with a 12/31 deadline.</li> <li>▪ Making some minor changes to the curriculum. Most notably we are likely to eliminate the writing requirement, while keeping it in our “optional” activities.</li> <li>▪ Launching a section-based recruiting plan for new mentors.</li> <li>▪ This fall, sadly, will bring our first suspension under the NLMP rule. We are working with court staff to firm up our processes for NLMP suspensions.</li> </ul>
<ul style="list-style-type: none"> <li>▪ <b>Public Affairs (Susan Grabe)</b></li> </ul>	<ul style="list-style-type: none"> <li>▪ Preparing for the 2015 Session.</li> <li>▪ Working with the Citizens’ Campaign for Court Funding; coordinated October 27 breakfast with 50 attendees to discuss goals for 2015.</li> <li>▪ Continuing to work with Legislative Counsel and sections on OSB’s law improvement package of 22 bills.</li> <li>▪ Continuing to assist the OJD eCourt Implementation Task Force with rollout of Oregon eCourt and development of new UTCRs, particularly with regard to document retention requirements. Assisting with coordination of training in anticipation of December 1 mandatory eFiling.</li> <li>▪ Monitoring and engaging on legislative issues including task forces working on court procedures and elder abuse reporting.</li> </ul>
<ul style="list-style-type: none"> <li>▪ <b>Regulatory Services (Dawn Evans)</b></li> </ul>	<p><i>Admissions</i></p> <ul style="list-style-type: none"> <li>▪ The results for the July 2014 bar exam were released on September 19<sup>th</sup>. 311 people passed the exam, which represented a passage rate of 71%. This is Oregon’s lowest first-time exam taker passage rate since February of 2008, but is consistent with national scores.</li> </ul>



	<ul style="list-style-type: none"> <li>▪ 203 new lawyers were sworn in at a swearing-in ceremony held October 2 at Willamette University.</li> <li>▪ The Board of Bar Examiners (BBX) has created a Uniform Bar Exam (UBE) Workgroup to draft a rule for consideration by stakeholders. Participants on the workgroup include representatives from the three law schools, the Board of Governors, and the BBX, as well as a staff attorney from the Supreme Court.</li> <li>▪ Responding to a request received from Willamette University faculty, the BBX is working on proposed revisions to Student Appearance Rule that will be based on courses completed rather than number of hours completed; the objective is to get qualified students into the courtroom sooner.</li> <li>▪ The BBX is working with the law school deans to draft an Early Examination Rule, modeled on Arizona’s new rule that would allow law students to take the February bar exam in Oregon during their third year of law school. Those students would be in a position to begin working as lawyers sooner, as a result.</li> <li>▪ The BBX is continuing work on an admission rule that would pertain to spouses of active military personnel that would, in effect, afford reciprocal licensure based upon the spouse’s out-of-state license during the soldier’s period of military service in Oregon.</li> </ul> <p><i>Discipline</i></p> <ul style="list-style-type: none"> <li>▪ Angela Bennett joined the bar on November 3, 2014, as an Assistant Disciplinary Counsel, where she will handle formal proceedings and pursue enforcement actions in appropriate cases. Angela has a civil litigation background. She is a graduate of Willamette University College of Law and, prior to attending law school, worked as a chemical dependency counselor with several non-profit and state agencies.</li> <li>▪ Emily Schwartz has been promoted from legal secretary to paralegal. She will work with the trial lawyers in managing discovery and preparing for trials, and will undertake investigation of newly-received trust account overdraft notification matters.</li> <li>▪ The Bar’s twice-annual trust account school is scheduled Friday, November 21, from 8:30 to 5:00. Speakers will include staff members from the Disciplinary Counsel’s Office, the Client Assistance Office, and the Oregon Attorney Assistance Program.</li> <li>▪ Dawn Evans and Amber Bevacqua-Lynott spoke about Oregon’s attorney discipline system at local bar events in Pendleton, Coos Bay, Gold Beach, and Grant’s Pass during the month of September.</li> </ul>
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**Executive Director’s Activities September 5-November 15, 2014**

Date	Event
9/9	Presented Ethics Session at US Bankruptcy Court Trustee Training
9/11	Meet w/representatives of IAALS re: Honoring Families Initiative Project in OR
9/12	Knowledge Base Task Force
9/12	Retirement party for Ira Zarov
9/13	Client Security Fund Committee

9/16	CLE: The Intersection of Personal Branding & Social Media
9/17	ED’s Breakfast Group
9/22-25	AMS Vendor Demos
9/23	CLE: Famous USDC Cases
9/23	OAAP Open House
9/25	OWLs Fall CLE and Workplace Leader Award Reception
9/30	Steve Wax Retirement Party
10/1	Miller Nash Femme Fete
10/2	Lunch with Sup. Ct. and BBX/Swearing-In Ceremony
10/3	Special BOG Meeting & Committee meetings
10/3	Oregon Native American Chamber Gathering
10/5	Urban League Equal Opportunity Day Awards Dinner
10/9-10	PLF Board meeting (Yachats, OR)
10/14-16	So. Oregon Local Bar Visits
10/18	OGALLA Annual Auction & Dinner
10/20	Meeting with BBX Chair
10/21	Out-of-State HOD Regional Meeting
10/21	LGBTQ Business Mixer @ Davis Wright Tremaine
10/22	Region 5 HOD Regional Meeting
10/23-25	ABA CPR Leadership Conference & Policy Implementation Committee Meeting (Chicago)
10/28	K&L Gates Global Business Forum
10/28	LASO/OLC Open Houses
10/28	Celebration for Julie Frantz, President, National Assoc. of Women Judges
10/29	Oregon Area Jewish Committee Luncheon
10/29	Stoll Berne Fall Party
11/5	OLF CLE & Reception
11/7	HOD Meeting/Dedication of Diversity Story Wall/ONLD Reception
11/8	Youth Rights & Justice Annual Auction & Dinner
11/12	Meeting with Supreme Court re: Discipline System Review

# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** November 15, 2014  
**Memo Date:** October 31, 2014  
**From:** Dawn M. Evans, Disciplinary Counsel  
**Re:** Disciplinary/Regulatory Counsel's Status Report

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### 1. Decisions Received.

#### a. Supreme Court

Since the Board of Governors last met in September 2014, the Supreme Court took the following action in disciplinary matters:

- Issued an opinion in *In re Daniel J. Gatti* suspending this Salem lawyer for 90 days for violating RPC 1.4(b), RPC 1.7(a)(1), and RPC 1.8(g) when he represented several clients pursuing tort claims against the Archdiocese of Portland and the State of Oregon. At mediation, Gatti entered into a lump sum settlement that exceeded the total of the minimum offers obtained from his clients. The court found that when multiple plaintiffs make any agreement to divide an offer that exceeds the total of their minimum offers, a current client conflict of interest arises as the plaintiffs have competing interests in the surplus; and
- Issued an order immediately suspending Salem lawyer *Debbe J. von Blumenstein* during the pendency of disciplinary proceedings;
- Accepted the Form B resignation from Coeur d'Alene, Idaho, lawyer *Karl W. Kime*; and
- Issued an order transferring Longview, Washington, lawyer *C. Michael McLean* to involuntary inactive status pursuant to BR 3.2.

#### b. Disciplinary Board

No appeal was filed in the following cases and the trial panel opinions are now final:

- *In re Jennifer L. Perez* of Mesa, Arizona, (1-year suspension) became final on August 26, 2014; and
- *In re Eric Kaufman* of Lake Oswego (disbarment) became final on September 9, 2014; and

- *In re Debbe J. von Blumenstein* of Salem (2-year suspension) became final on September 16, 2014.

Disciplinary Board trial panels have not issued any opinions since the BOG last met in September 2014.

In addition to these trial panel opinions, the Disciplinary Board approved a stipulations for discipline in: *In re Brandon G. W. Calheim* of Scappoose (90-day suspension, all but 30 days stayed, 2-year probation), *In re Nathan D. Sanders* of Portland (120-day suspension, with BR 8.1 reinstatement), *In re Gary B. Bertoni* of Portland (6-month suspension), and *In re Brett Corey Jaspers* of Corvallis (reprimand).

The Disciplinary Board Chairperson granted the bar’s petition to revoke the probation of Klamath Falls lawyer *Justin E. Throne* and impose the 1-year suspension that had been stayed earlier this year.

The Disciplinary Board Chairperson approved BR 7.1 suspensions in *In re Justin E. Throne* of Klamath Falls, *In re Eric M. Bosse* of Newberg, *In re Jeffrey Dickey* of Portland, and *In re Travis W. Huisman* of Regent, North Dakota.

## 2. Decisions Pending.

The following matters are pending before the Supreme Court:

*In re Barnes H. Ellis and Lois O. Rosenbaum* – reprimand; accuseds and OSB appealed; under advisement

*In re Rick Sanai* – reciprocal discipline matter referred to Disciplinary Board for trial

*In re David Herman*—disbarment; accused appealed; under advisement

*In re James C. Jagger* –90-day suspension; accused appealed; oral argument  
January 13, 2015

*In re Matthew R. Aylworth* -- reciprocal discipline matter referred to Disciplinary Board

*In re Siovhon Sheridan* – BR 3.2 petition pending

*In re Eric Einhorn* – 3-year suspension, 30 months stayed, probation; OSB  
appealed; awaits briefs

*In re Susan R. Gerber* – BR 3.2 petition pending

*In re Steven M. McCarthy* – Form B resignation pending

*In re Steven M. Cyr* – BR 3.4 petition pending

*In re Jeffrey Dickey* – BR 3.1 petition pending

The following matters are under advisement before trial panels of the Disciplinary Board:

None.

**3. Trials.**

The following matters are on our trial docket in coming weeks/months:

*In re Debbe J. von Blumenstein* – December 3-4, 2014

*In re Lynn M. Murphy* – December 8, 2014

**4. Diversions.**

The SPRB approved the following diversion agreements since September 2014:

*In re Carl D. Crowell* – effective July 25, 2014

*In re Kevin J. Hashizume* – effective October 1, 2014

*In re Gregory Mark Abel* – effective October 17, 2014

*In re Michael Aaron Shurtleff* – effective November 1, 2014

**5. Admonitions.**

The SPRB issued 2 letters of admonition in August and September. The outcome in these matters is as follows:

- 2 lawyers have accepted their admonitions;
- 0 lawyers have rejected their admonitions;
- 0 lawyers have asked for reconsiderations;
- 0 lawyers have time in which to accept or reject their admonitions.

**6. New Matters.**

Below is a table of complaint numbers in 2014, compared to prior years, showing both complaints (first #) and the number of lawyers named in those complaints (second #):

<b>MONTH</b>	<b>2010</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>
January	29/29	19/20	46/49	21/21	29/31
February	24/25	35/36	27/27	23/23	24/25
March	26/26	21/25	38/39	30/30	41/45
April	30/30	40/42	35/38	42/43	45/47
May	119/119*	143/146*	19/20	37/37	23/24
June	23/26	20/20	39/40	31/31	23/24
July	29/34	27/28	22/22	28/30	43/44
August	24/25	22/23	35/35	33/36	19/21
September	33/36	29/29	22/22	26/27	24/24
October	27/33	22/23	23/23	26/26	
November	21/21	27/27	18/18	25/26	
December	24/24	39/40	26/26	19/19	
<b>TOTALS</b>	<b>409/428</b>	<b>444/459</b>	<b>350/359</b>	<b>341/349</b>	<b>271/285</b>

\* = includes IOLTA compliance matters

As of October 1, 2014, there were 172 new matters awaiting disposition by Disciplinary Counsel staff or the SPRB. Of these matters, 37% are less than three months old, 23% are three to six months old, and 40% are more than six months old. Eight of these matters were on the SPRB agenda in October. Staff continues its focus on disposing of oldest cases, with keeping abreast of new matters. The lawyers have recently been organized into two-person teams of intake lawyer and trial lawyer, in an effort to enhance decision-making in each case in recommending outcomes to the SPRB.

**7. Reinstatements.**

Since the last board meeting, there are no reinstatements ready for board action.

**8. Staff outreach.**

DCO staff attorneys engage in continuing legal education opportunities, local and specialty bar functions, and public service opportunities. **Kellie Johnson** was a recent presenter at the Financial Fraud Crime Conference sponsored by the Oregon Department of Justice and Oregon US Attorney Financial Crimes Department. In October, Ms. Johnson chaired and emceed the 3<sup>rd</sup> Annual Battle of the Lawyer Bands presented by the Multnomah County Bar

Association. In November, Ms. Johnson will speak at the Maurice Lucas Foundation, a program that serves underrepresented youths, about the choice to be a lawyer and what it takes to become a lawyer.

**Martha Hicks** volunteers at Lake Oswego High School in their mock trial program, working as a judge.

**Susan Cournoyer** co-presented with David Elkanich at the OSB Worker’s Compensation Section’s annual bench bar conference in Silverton on October 24<sup>th</sup>, presenting the Bar and defense perspectives on ethical issues. On November 21, Ms. Cournoyer will co-present with Peter Jarvis on “Ethical Issues Involving Damaged, Altered or Stolen Evidence” at an Oregon Law Institute seminar on evidence.

**Dawn Evans** spoke about disciplinary procedure and provided an update about the Disciplinary Counsel’s Office at the Oregon Criminal Defense Lawyers Association’s 2014 Public Defense Management Conference on October 10 at Gleneden Beach.

DME/rh

# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** November 15, 2014  
**Memo Date:** October 29, 2014  
**From:** Ben Eder and Karen Clevering, ONLD Chair and Chair-Elect  
**Re:** ONLD Report

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Since the last BOG meeting in September the ONLD met twice to conduct business. Below is a list of updates on the ONLD's work since the last report.

- In our pursuit to offer new lawyers and law students practical skills training the ONLD co-sponsored a full day CLE program with the OSB Litigation Section on September 20. The event was well received by attendees and offered each new participant complementary membership in the section for 2015. A second day of programming is expected to occur next February.
- Held four one-hour noontime CLE programs in Multnomah County. The CLE Subcommittee also sponsored Super Saturday, the division's annual full day multi-track CLE program.
- Hosted a panel presentation at Lewis and Clark Law School focusing on the basics of opening your own practice and how to build a client base. The event included a social hour with law students and local practitioners. The event was free for law student attendees. ONLD representatives also participated in the Lewis & Clark's second annual "bar prow" event for students to learn what each bar related organization offers students and new bar members.
- In early October the Law School Outreach subcommittee held an event for law students at Willamette University College of Law and at U of O School of Law we hosted a networking panel.
- Executed the Pro Bono Fair, Awards Ceremony, and three free CLE programs. This year's event resulted in 20 provider "fair booth" tables. Thank you to Tom Kranovich for speaking and presenting the awards during this event.
- Hosted a reception for the newest bar members and their families after the swearing in ceremony at Willamette University.
- The ABA Young Lawyers Division held its fall conference in Portland this October. ONLD leadership played a prominent role in organizing the event and sent a majority of the board to the conference. We also participated in the Affiliate Showcase where we promoted our programming including: CLE subject area tracks of Family Law and Litigation, the Practical Skills Program, and the Student Loan Repayment Page.
- The Practical Skills subcommittee is preparing to begin another recruitment cycle for the Practical Skills through Public Service Program. They will hold a social for program applicants and organization representatives on November 13 at Barran Liebman LLP. The Multnomah County Circuit Court released a report on their experience with the PSPS Program- <http://www.osbar.org/onld/practicalskills.html>.
- The Student Loan Repayment Resource webpage was launched in early October to provide assistance to bar members as they navigate and weigh loan repayment options. The launch of the new resource page was followed by a free seminar with Bill Penn discussing various options and things to consider when developing a repayment plan. The program was recorded by the PLF and will be made available though their website for members statewide.



On November 7 the ONLD will hold its annual membership meeting to elect new board members and officers. The ONLD will also celebrate the hard work of its members by honoring several award recipients.

**2015 Executive Committee Slate:**

Chair: Karen Clevering

Chair-Elect: Colin Andries

Past Chair: Ben Eder

Secretary: Krista Evans

Treasurer: Kaori Eder

Member, region 3: Jennifer Nichols

Member, region 4: Chelsea Glynn

Member, region 5: Joe Kraus

Member, region 7: Krista Evans

Member, at large 8: Andrew Weiner

**2014 ONLD Award Honorees:**

Member Service Award: Anthony Kuchulis

Public Service Award: Emily Teplin Fox

Volunteer of the Year Award: Krista Evans

Project of the Year Award: Student Loan Repayment Information: Karen Clevering, Krista Evans, Cassie Jones, & Jennifer Nicholls

Hon. John V. Acosta Professionalism Award: William Uhle

# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** November 13-15, 2014  
**Memo Date:** October 20, 2014  
**From:** Carol J. Bernick, PLF CEO  
**Re:** 2015 PLF Claims Made Primary Plan, Excess Plan, and Pro Bono Plan

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### **Action Recommended**

The Board of Directors (BOD) of the Professional Liability Fund requests that the Board of Governors approve the proposed 2015 PLF Claims Made Plan, Excess Plan, and Pro Bono Plan. There are no changes to any of the coverage plans for 2015.

### **Background**

There are three operative PLF Coverage Plans – the Primary Program Coverage Plan, the Excess Plan, and the Pro Bono Plan. The Excess Plan covers firms and individuals who purchase excess coverage from the PLF. The Pro Bono Plan covers lawyers who volunteer for OSB approved legal services programs, but who do not have malpractice coverage either from the PLF or another source.

Even though there were no changes to any of the coverage plans for 2015, the BOG is required to approve them prior to their effective date of January 1, 2015. (OSB Bylaws Section 23.3)

### **Attachments**

1. PLF Primary Coverage Plan
2. PLF Excess Plan
3. PLF Pro Bono Plan

**OREGON STATE BAR**  
**PROFESSIONAL LIABILITY FUND**

**2015 CLAIMS MADE PLAN**

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**January 1, 2015**

**2015 CLAIMS MADE PLAN**

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**OREGON STATE BAR  
PROFESSIONAL LIABILITY FUND**

**2015 CLAIMS MADE PLAN**

**NOTICE**

This Claims Made Plan (“Plan”) contains provisions that reduce the Limits of Coverage by the costs of legal defense. See SECTIONS IV and VI.

Various provisions in this Plan restrict coverage. Read the entire Plan to determine rights, duties, and what is and is not covered.

**INTERPRETATION OF THIS PLAN**

**Preface and Aid to Interpretation.** The Professional Liability Fund (“PLF”) is an instrumentality of the Oregon State Bar created pursuant to powers delegated to it in ORS 9.080(2)(a). The statute states in part:

*The board shall have the authority to require all active members of the state bar engaged in the private practice of law whose principal offices are in Oregon to carry professional liability insurance and shall be empowered, either by itself or in conjunction with other bar organizations, to do whatever is necessary and convenient to implement this provision, including the authority to own, organize and sponsor any insurance organization authorized under the laws of the State of Oregon and to establish a lawyer’s professional liability fund.*

Pursuant to this statute, the Board of Governors of the Oregon State Bar created a professional liability fund (the Professional Liability Fund) not subject to state insurance law. The initial Plan developed to implement the Board of Governors’ decision, and all subsequent changes to the Plan are approved by both the Board of Directors of the Professional Liability Fund and the Board of Governors.

The Plan is not intended to cover all claims that can be made against Oregon lawyers. The limits, exclusions, and conditions of the Plan are in place to enable the PLF to meet the Mission and Goals set forth in Chapter One of the PLF Policies, which includes the Goal, “To provide the mandatory professional liability coverage consistent with a sound financial condition, superior claims handling, efficient administration, and effective loss prevention.” The limits, exclusions, and conditions are to be fairly and objectively construed for that purpose. While mandatory malpractice coverage and the existence of the Professional Liability Fund do provide incidental benefits to the public, the Plan is not to be construed as written with the public as an intended beneficiary. The Plan is not an insurance policy and is not an adhesion contract.

Because the Plan has limits and exclusions, members of the Oregon State Bar are encouraged to purchase excess malpractice coverage and coverage for excluded claims through general liability and other insurance policies. Lawyers and their firms should consult with their own insurance agents as to available coverages. Excess malpractice coverage is also available through the PLF.

**Bracketed Titles.** The bracketed titles appearing throughout this Plan are not part of the Plan and should not be used as an aid in interpreting the Plan. The bracketed titles are intended simply as a guide to locating pertinent provisions.

**Use of Capitals.** Capitalized terms are defined in SECTION I. The definition of COVERED PARTY

appearing in SECTION II and the definition of COVERED ACTIVITY appearing in SECTION III are particularly crucial to the understanding of the Plan.

**Plan Comments.** The discussions labeled "*COMMENTS*" following various provisions of the Plan are intended as aids in interpretation. These interpretive provisions add background information and provide additional considerations to be used in the interpretation and construction of the Plan.

The Comments are similar in form to those in the Uniform Commercial Code and Restatements. They are intended to aid in the construction of the Plan language. The Comments are to assist attorneys in interpreting the coverage available to them and to provide a specific basis for interpretation by courts and arbitrators.

**Attorneys in Private Practice; Coverage and Exemption.** Only Oregon attorneys engaged in the "private practice of law" whose principal office is in Oregon are covered by this Plan. ORS 9.080(2). An attorney not engaged in the private practice of law in Oregon or whose principal office is outside Oregon must file a request for exemption with the PLF indicating the attorney is not subject to PLF coverage requirements. Each year, participating attorneys are issued a certificate entitled "Claims Made Plan Declarations." The participating attorney is listed as the "Named Party" in the Declarations.

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## SECTION I — DEFINITIONS

Throughout this Plan, when appearing in capital letters:

1. "BUSINESS TRUSTEE" means one who acts in the capacity of or with the title "trustee" and whose activities include the operation, management, or control of any business property, business, or institution in a manner similar to an owner, officer, director, partner, or shareholder.

### *COMMENTS*

*The term "BUSINESS TRUSTEE" is used in SECTION III.3 and in SECTION V.5. This Plan is intended to cover the ordinary range of activities in which attorneys in the private practice of law are typically engaged. The Plan is not intended to cover BUSINESS TRUSTEE activities as defined in this Subsection. Examples of types of BUSINESS TRUSTEE activities for which coverage is excluded under the Plan include, among other things: serving on the board of trustees of a charitable, educational, or religious institution; serving as the trustee for a real estate or other investment syndication; serving as trustee for the liquidation of any business or institution; and serving as trustee for the control of a union or other institution.*

*Attorneys who engage in BUSINESS TRUSTEE activities as defined in this Subsection are encouraged to obtain appropriate insurance coverage from the commercial market for their activities.*

2. "CLAIM" means a demand for DAMAGES or written notice to a COVERED PARTY of an intent to hold a COVERED PARTY liable as a result of a COVERED ACTIVITY, if such notice might reasonably be expected to result in an assertion of a right to DAMAGES.

3. "CLAIMS EXPENSE" means:

a. Fees charged by any attorney designated by the PLF;

- b.** All other fees, costs, and expenses resulting from the investigation, adjustment, defense, repair and appeal of a CLAIM, if incurred by the PLF; or
- c.** Fees charged by any attorney designated by the COVERED PARTY with the PLF's written consent.

However, CLAIMS EXPENSE does not include the PLF's costs for compensation of its regular employees and officials or the PLF's other routine administrative costs.

- 4.** "CLAIMS EXPENSE ALLOWANCE" means the separate allowance for aggregate CLAIMS EXPENSE for all CLAIMS as provided for in SECTION VI.1.b of this Plan.
- 5.** "COVERAGE PERIOD" means the coverage period shown in the Declarations under the heading "COVERAGE PERIOD."
- 6.** "COVERED ACTIVITY" means conduct qualifying as such under SECTION III — WHAT IS A COVERED ACTIVITY.
- 7.** "COVERED PARTY" means any person or organization qualifying as such under SECTION II — WHO IS A COVERED PARTY.
- 8.** "DAMAGES" means money to be paid as compensation for harm or loss. It does not refer to fines, penalties, punitive or exemplary damages, or equitable relief such as restitution, disgorgement, rescission, injunctions, accountings, or damages and relief otherwise excluded by this Plan.
- 9.** "EXCESS CLAIMS EXPENSE" means any CLAIMS EXPENSE in excess of the CLAIMS EXPENSE ALLOWANCE. EXCESS CLAIMS EXPENSE is included in the Limits of Coverage at SECTION VI.1.a and reduces amounts available to pay DAMAGES under this Plan.
- 10.** "INVESTMENT ADVICE" refers to any of the following activities:
  - a.** Advising any person, firm, corporation, or other entity respecting the value of a particular investment, or recommending investing in, purchasing, or selling a particular investment;
  - b.** Managing any investment;
  - c.** Buying or selling any investment for another;
  - d.** (1) Acting as a broker for a borrower or lender, or  
(2) Advising or failing to advise any person in connection with the borrowing of any funds or property by any COVERED PARTY for the COVERED PARTY or for another;
  - e.** Issuing or promulgating any economic analysis of any investment, or warranting or guaranteeing the value, nature, collectability, or characteristics of any investment;
  - f.** Giving advice of any nature when the compensation for such advice is in whole or in part



contingent or dependent on the success or failure of a particular investment; or

**g.** Inducing someone to make a particular investment.

**11.** "LAW ENTITY" refers to a professional corporation, partnership, limited liability partnership, limited liability company, or sole proprietorship engaged in the private practice of law in Oregon.

**12.** "PLAN YEAR" means the period January 1 through December 31 of the calendar year for which this Plan was issued.

**13.** "PLF" means the Professional Liability Fund of the Oregon State Bar.

**14.** "SAME OR RELATED CLAIMS" means two or more CLAIMS that are based on or arise out of facts, practices, circumstances, situations, transactions, occurrences, COVERED ACTIVITIES, damages, liability, or the relationships of the people or entities involved (including clients, claimants, attorneys, and/or other advisors) that are logically or causally connected or linked or share a common bond or nexus. CLAIMS are related in the following situations:

**a.** *Secondary or dependent liability.* CLAIMS such as those based on vicarious liability, failure to supervise, or negligent referral are related to the CLAIMS on which they are based.

**b.** *Same transactions or occurrences.* Multiple CLAIMS arising out of the same transaction or occurrence or series of transactions or occurrences are related. However, with regard to this Subsection b only, the PLF will not treat the CLAIMS as related if:

(1) The participating COVERED PARTIES acted independently of one another;

(2) They represented different clients or groups of clients whose interests were adverse; and

(3) The claimants do not rely on any common theory of liability or damage.

**c.** *Alleged scheme or plan.* If claimants attempt to tie together different acts as part of an alleged overall scheme or operation, then the CLAIMS are related.

**d.** *Actual pattern or practice.* Even if a scheme or practice is not alleged, CLAIMS that arise from a method, pattern, or practice in fact used or adopted by one or more COVERED PARTIES or LAW ENTITIES in representing multiple clients in similar matters are related.

**e.** *One loss.* When successive or collective errors each cause or contribute to single or multiple clients' and/or claimants' harm or cumulatively enhance their damages or losses, then the CLAIMS are related.

**f.** *Class actions.* All CLAIMS alleged as part of a class action or purported class action are related.

#### COMMENTS

**SAME OR RELATED CLAIMS.** *Each PLF Plan sets a maximum limit of coverage per year. This limit defines the PLF's total maximum obligation under the terms of each Plan issued by the PLF.*

*However, absent additional Plan provisions, numerous circumstances could arise in which the PLF, as issuer of other PLF Plans, would be liable beyond the limits specified in one individual Plan. For example, Plans issued to the same attorney in different PLAN YEARS might apply. Or, Plans issued to different attorneys might all apply. In some circumstances, the PLF intends to extend a separate limit under each Plan. In other circumstances, when the CLAIMS are related, the PLF does not so intend. Because the concept of “relatedness” is broad and factually based, there is no one definition or rule that will apply to every situation. The PLF has therefore elected to explain its intent by listing certain circumstances in which only one limit is available regardless of the number of Plans that may apply. See Subsections 14.a to 14.f above.*

*Example No. 1: Attorney A is an associate in a firm and commits malpractice. CLAIMS are made against Attorney A and various partners in the firm. All attorneys share one limit. CLAIMS such as those based on vicarious liability, failure to supervise, or negligent referral are always related to the CLAIMS on which they are based. See Subsection 14.a above. Even if Attorney A and some of the other lawyers are at different firms at the time of the CLAIM, all attorneys and the firm share one Limit of Coverage and one CLAIMS EXPENSE ALLOWANCE.*

*Example No. 2: Attorney A writes a tax opinion for an investment offering, and Attorneys B and C, with a different law firm, assemble the offering circular. Investors 1 and 2 bring CLAIMS in 2010 and Investor 3 brings a CLAIM in 2011 relating to the offering. No CLAIM is asserted prior to 2010. Only one Limit of Coverage applies to all CLAIMS. This is because the CLAIMS arise out of the same transaction or occurrence, or series of transactions or occurrences. See Subsection 14.b above. CLAIMS by investors in the same or similar investments will almost always be related. However, because the CLAIMS in this example are made against COVERED PARTIES in two different firms, up to two CLAIMS EXPENSE ALLOWANCES may potentially apply. See Section VI.2. Note also that, under these facts, all CLAIMS against Attorneys A, B, and C are treated as having been first made in 2010, pursuant to Section IV.1.b(2). This could result in available limits having been exhausted before a CLAIM is eventually made against a particular COVERED PARTY. The timing of making CLAIMS does not increase the available limits.*

*Example No. 3: Attorneys A and B represent husband and wife, respectively, in a divorce. Husband sues A for malpractice in litigating his prenuptial agreement. Wife sues B for not getting her proper custody rights over the children. A’s and B’s CLAIMS are not related. A’s and B’s CLAIMS would be related, but for the exception in the second sentence of Subsection 14.b above.*

*Example No. 4: An owner sells his company to its employees by selling shares to two employee benefit plans set up for that purpose. The plans and/or their members sue the company, its outside corporate counsel A, its ERISA lawyer B, the owner, his attorney C, and the plans’ former attorney D, contending there were improprieties in the due diligence, the form of the agreements, and the amount and value of shares issued. The defendants file cross-claims. All CLAIMS are related. They arise out of the same transactions or occurrences and therefore are related under Subsection 14.b. For the exception in Subsection 14.b to apply, all three elements must be satisfied. The exception does not apply because the claimants rely on common theories of liability. In addition, the exception may not apply because not all interests were adverse, theories of damages are common, or the attorneys did not act independently of one another. Finally, even if the exception in Subsection 14.b did apply, the CLAIMS would still be related under Subsection 14.d because they involve one loss. Although the CLAIMS are related, if all four attorneys’ firms are sued, depending on the circumstances, up to four total CLAIMS EXPENSE ALLOWANCES might be available under Section VI.2.*

*Example No. 5: Attorney F represents an investment manager for multiple transactions over multiple years in which the manager purchased stocks in Company A on behalf of various groups of investors. Attorneys G and H represent different groups of investors. Attorney J represents Company A. Attorneys F, G, H, and J are all in different firms. They are all sued by the investors for securities violations arising out of this group of transactions. Although the different acts by different lawyers at different times could legitimately be viewed as separate and unconnected, the claimant in this example attempts to tie them together as part of an alleged overall scheme or operation. The CLAIMS are related because the claimants have made them so. See Subsection 14.c above. This will often be the case in securities CLAIMS. As long as such allegations remain in the case, only one limit will be available, even if alternative CLAIMS are also alleged. In this example, although there is only one Limit of Coverage available for all CLAIMS, depending on the circumstances, multiple CLAIMS EXPENSE ALLOWANCES might be available. See Section VI.2.*

*Example No. 6: Attorneys A, B, and C in the same firm represent a large number of asbestos clients over ten years' time, using a firm-wide formula for evaluating large numbers of cases with minimum effort. They are sued by certain clients for improper evaluation of their cases' values, although the plaintiffs do not allege a common scheme or plan. Because the firm in fact operated a firm-wide formula for handling the cases, the CLAIMS are related based on the COVERED PARTIES' own pattern or practice. The CLAIMS are related because the COVERED PARTIES' own conduct has made them so. See Subsection 14.d above. Attorneys A, B, and C will share one Limit of Coverage and one CLAIMS EXPENSE ALLOWANCE. LAW ENTITIES should protect themselves from such CLAIMS brought by multiple clients by purchasing adequate excess insurance.*

*Example No. 7: Attorney C represents a group of clients at trial and commits certain errors. Attorney D of the same firm undertakes the appeal, but fails to file the notice of appeal on time. Attorney E is hired by clients to sue Attorneys C and D for malpractice, but misses the statute of limitations. Clients sue all three attorneys. The CLAIMS are related and only a single Limit of Coverage applies to all CLAIMS. See Subsection 14.e above. When, as in this example, successive or collective errors each cause single or multiple clients and/or claimants harm or cumulatively enhance their damages or losses, then the CLAIMS are related. In such a situation, a claimant or group of claimants cannot increase the limits potentially available by alleging separate errors by separate attorneys. Attorney E, however, may be entitled to a CLAIMS EXPENSE ALLOWANCE separate from the one shared by C and D.*

*Example No. 8: Attorneys A, B, and C in the same firm represent a large banking institution. They are sued by the bank's customers in a class action lawsuit for their part in advising the bank on allegedly improper banking practices. All CLAIMS are related. No class action or purported class action can ever trigger more than one Limit of Coverage. See Subsection 14.f above.*

**15.** "SUIT" means a civil proceeding in which DAMAGES are alleged. SUIT includes an arbitration or alternative dispute resolution proceeding to which the COVERED PARTY submits with the consent of the PLF.

**16.** "YOU" and "YOUR" mean the Named Party shown in the Declarations.

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## **SECTION II — WHO IS A COVERED PARTY**

**1.** The following are COVERED PARTIES:

- a.** YOU.
  - b.** In the event of YOUR death, adjudicated incapacity, or bankruptcy, YOUR conservator, guardian, trustee in bankruptcy, or legal or personal representative, but only when acting in such capacity.
  - c.** Any attorney or LAW ENTITY legally liable for YOUR COVERED ACTIVITIES, but only to the extent such legal liability arises from YOUR COVERED ACTIVITIES.
- 2.** Notwithstanding Subsection 1, no business enterprise (except a LAW ENTITY) or any partner, proprietor, officer, director, stockholder, or employee of such enterprise is a COVERED PARTY.

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**SECTION III — WHAT IS A COVERED ACTIVITY**

The following are COVERED ACTIVITIES, if the acts, errors, or omissions occur during the COVERAGE PERIOD; or prior to the COVERAGE PERIOD, if on the effective date of this Plan YOU have no knowledge that any CLAIM has been asserted arising out of such prior act, error, or omission, and there is no prior policy or Plan that provides coverage for such liability or CLAIM resulting from the act, error, or omission, whether or not the available limits of liability of such prior policy or Plan are sufficient to pay any liability or CLAIM:

[YOUR CONDUCT]

- 1.** Any act, error, or omission committed by YOU that satisfies all of the following criteria:
  - a.** YOU committed the act, error, or omission in rendering professional services in YOUR capacity as an attorney in private practice, or in failing to render professional services that should have been rendered in YOUR capacity as an attorney in private practice.
  - b.** At the time YOU rendered or failed to render these professional services:
    - (1)** YOUR principal office was located in the State of Oregon;
    - (2)** YOU were licensed to practice law in the State of Oregon; and
    - (3)** Such activity occurred after any Retroactive Date shown in the Declarations.

[CONDUCT OF OTHERS]

- 2.** Any act, error, or omission committed by a person for whose conduct YOU are legally liable in YOUR capacity as an attorney, provided at the time of the act, error, or omission each of the following criteria was satisfied:
  - a.** The act, error, or omission causing YOUR liability:
    - (1)** Arose while YOU were licensed to practice law in the State of Oregon;
    - (2)** Arose while YOUR principal office was located in the State of Oregon; and

(3) Occurred after any Retroactive Date shown in the Declarations.

b. The act, error, or omission, if committed by YOU, would constitute the rendering of professional services in YOUR capacity as an attorney in private practice.

c. The act, error, or omission was not committed by an attorney who at the time of the act, error, or omission:

(1) Maintained his or her principal office outside the State of Oregon; or

(2) Maintained his or her principal office within the State of Oregon and either:

(a) Claimed exemption from participation in the Professional Liability Fund,  
or

(b) Was not an active member of the Oregon State Bar.

[YOUR CONDUCT IN A SPECIAL CAPACITY]

3. Any act, error, or omission committed by YOU in YOUR capacity as a personal representative, administrator, conservator, executor, guardian, guardian *ad litem*, special representative pursuant to ORS 128.179, or trustee (except BUSINESS TRUSTEE); provided that the act, error, or omission arose out of a COVERED ACTIVITY as defined in Subsections 1 and 2 above, and the CLAIM is brought by or for the benefit of a beneficiary of the special capacity relationship and arises out of a breach of that relationship.

COMMENTS

*To qualify for coverage, a CLAIM must arise out of a COVERED ACTIVITY. The definition of COVERED ACTIVITY imposes a number of restrictions on coverage including the following:*

**Principal Office.** *To qualify for coverage, a COVERED PARTY'S "principal office" must be located in the State of Oregon at the time specified in the definition. "Principal office" as used in the Plan has the same definition as provided in ORS 9.080(2)(c). For further clarification, see PLF Board of Directors Policy 3.180 (available on the PLF website, [www.osbplf.org](http://www.osbplf.org) or telephone the PLF to request a copy).*

**Prior CLAIMS.** *Section III limits the definition of COVERED ACTIVITY with respect to acts, errors, or omissions that happen prior to the COVERAGE PERIOD, so that no coverage is granted when there is prior knowledge or prior insurance. For illustration of the application of this language, see *Chamberlin v. Smith*, 140 Cal Rptr 493 (1977).*

*To the extent there is prior insurance or other coverage applicable to the CLAIM, it is reasonable to omit the extension of further coverage. Likewise, to the extent YOU have knowledge that particular acts, errors, or omissions have given rise to a CLAIM, it is reasonable that that CLAIM and other CLAIMS arising out of such acts, errors, or omissions would not be covered. Such CLAIMS should instead be covered under the policy or PLF PLAN in force, if any, at the time the first such CLAIM was made.*

**Types of Activity.** COVERED ACTIVITIES have been divided into three categories. Subsection 1 deals with coverage for YOUR conduct as an attorney in private practice. Subsection 2 deals with coverage for YOUR liability for the conduct of others. Subsection 3 deals with coverage for YOUR conduct in a special capacity (e.g., as a personal representative of an estate). The term "BUSINESS TRUSTEE" as used in this section is defined in Section I.

**Professional Services.** To qualify for coverage under Section III.1 and III.2.b, the act, error or omission causing YOUR liability must be committed "in rendering professional services in YOUR capacity as an attorney, or in failing to render professional services that should have been rendered in YOUR capacity as an attorney." This language limits coverage to those activities commonly regarded as the rendering of professional services as a lawyer. This language, in addition to limiting coverage to YOUR conduct as a lawyer, is expressly intended to limit the definition of COVERED ACTIVITY so that it does not include YOUR conduct in carrying out the commercial or administrative aspects of law practice. Examples of commercial or administrative activities could include: collecting fees or costs; guaranteeing that the client will pay third parties (e.g., court reporters, experts or other vendors) for services provided; depositing, endorsing or otherwise transferring negotiable instruments; depositing or withdrawing monies or instruments into or from trust accounts; or activities as a trustee that require no specialized legal skill or training, such as paying bills on time or not incurring unnecessary expenses. The foregoing list of commercial or administrative activities is not exclusive, but rather is illustrative of the kinds of activities that are regarded as part of the commercial aspect of law (not covered), as opposed to the rendering of professional services (covered).

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

**Special Capacity.** Subsection 3 provides limited coverage for YOUR acts as a personal representative, administrator, conservator, executor, guardian, or trustee. However, not all acts in a special capacity are covered under this Plan. Attorneys acting in a special capacity, as described in Subsection III.3 may subject themselves to claims from third parties that are beyond the coverage provided by this Plan. For example, in acting as a conservator or personal representative, an attorney may engage in certain business activities, such as terminating an employee or signing a contract. If such actions result in a claim by the terminated employee or the other party to the contract, the estate or corpus should respond to such claims in the first instance, and should protect the attorney in the process. Attorneys engaged in these activities should obtain appropriate commercial general liability, errors and omissions, or other commercial coverage. The claim will not be covered under Subsection III.3.

The Plan purposefully uses the term "special capacity" rather than "fiduciary" in Subsection 3 to avoid any implication that this coverage includes fiduciary obligations other than those specifically identified. There is no coverage for YOUR conduct under Subsection 3 unless YOU were formally named or designated as a personal representative, administrator, conservator, executor, guardian, or trustee (except BUSINESS TRUSTEE) and served in such capacity.

**Ancillary Services.** *Some law firms are now branching out and providing their clients with ancillary services, either through their own lawyers and staff or through affiliates. These ancillary services can include such activities as architectural and engineering consulting, counseling, financial and investment services, lobbying, marketing, advertising, trade services, public relations, real estate development and appraisal, and other services. Only CLAIMS arising out of services falling within the definition of COVERED ACTIVITY will be covered under this Plan. For example, a lawyer-lobbyist engaged in the private practice of law, including conduct such as advising a client on lobbying reporting requirements or drafting or interpreting proposed legislation, would be engaged in a COVERED ACTIVITY and would be covered. Generally, however, ancillary services will not be covered because of this requirement.*

**Retroactive Date and Prior Acts.** *Section III introduces the concept of a Retroactive Date. No Retroactive Date will apply to any attorney who has held coverage with the PLF continuously since the inception of the PLF. Attorneys who first obtained coverage with the PLF at a later date and attorneys who have interrupted coverage will find a Retroactive Date in the Declarations. This date will be the date on which YOUR most recent period of continuous coverage commenced. This Plan does not cover CLAIMS arising out of conduct prior to the Retroactive Date.*

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## SECTION IV — GRANT OF COVERAGE

### 1. Indemnity.

**a.** The PLF will pay those sums that a COVERED PARTY becomes legally obligated to pay as DAMAGES because of CLAIMS arising out of a COVERED ACTIVITY to which this Plan applies. No other obligation or liability to pay sums or perform acts or services is covered unless specifically provided for under Subsection 2 - Defense.

**b.** This Plan applies only to CLAIMS first made against a COVERED PARTY during the COVERAGE PERIOD.

**(1)** The applicable COVERAGE PERIOD for a CLAIM will be the earliest of:

**(a)** When a lawsuit is filed or an arbitration or ADR proceeding is formally initiated; or

**(b)** When notice of a CLAIM is received by any COVERED PARTY or by the PLF; or

**(c)** When the PLF first becomes aware of facts or circumstances that reasonably could be expected to be the basis of a CLAIM; or

**(d)** When a claimant intends to make a CLAIM but defers assertion of the CLAIM for the purpose of obtaining coverage under a later COVERAGE PERIOD and the COVERED PARTY knows or should know that the COVERED ACTIVITY that is the basis of the CLAIM could result in a CLAIM.

(2) Two or more CLAIMS that are SAME OR RELATED CLAIMS, whenever made, will all be deemed to have been first made at the time the earliest such CLAIM was first made. This provision will apply to YOU only if YOU have coverage from any source applicable to the earliest such SAME OR RELATED CLAIM (whether or not the available limits of liability of such prior policy or plan are sufficient to pay any liability or CLAIM).

c. This Plan applies only to SUITS brought in the United States, its territories or possessions, Canada, or the jurisdiction of any Indian Tribe in the United States. This Plan does not apply to SUITS brought in any other jurisdiction, or to SUITS brought to enforce a judgment rendered in any jurisdiction other than the United States, its territories or possessions, Canada, or the jurisdiction of any Indian Tribe in the United States.

d. The amount the PLF will pay for damages is limited as described in SECTION VI.

## 2. Defense.

a. Until the CLAIMS EXPENSE ALLOWANCE and the Limits of Coverage extended by this Plan are exhausted, the PLF will defend any SUIT against a COVERED PARTY seeking DAMAGES to which this coverage applies. The PLF has the sole right to investigate, repair, settle, designate defense attorneys, and otherwise conduct defense, repair, or prevention of any CLAIM or potential CLAIM.

b. With respect to any CLAIM or potential CLAIM the PLF defends or repairs, the PLF will pay all CLAIMS EXPENSE the PLF may incur. All payments for EXCESS CLAIMS EXPENSE will reduce the Limits of Coverage.

c. If the CLAIMS EXPENSE ALLOWANCE and Limits of Coverage extended by this Plan are exhausted prior to the conclusion of any CLAIM, the PLF may withdraw from further defense of the CLAIM.

### COMMENTS

**Claims Made Coverage.** *As claims made coverage, this Plan applies to CLAIMS first made during the time period shown in the Declarations. CLAIMS first made either prior to or subsequent to that time period are not covered by this Plan, although they may be covered by a prior or subsequent PLF Plan.*

**Damages.** *This Plan grants coverage only for CLAIMS seeking DAMAGES. There is no coverage granted for other claims, actions, suits, or proceedings seeking equitable remedies such as restitution of funds or property, disgorgement, accountings or injunctions.*

**When Claim First Made.** *Subsection 1.b(1) of this section is intended to make clear that the earliest of the several events listed determines when the CLAIM is first made. Subsection 1.b(1)(c) adopts an objective, reasonable person standard to determine when the PLF's knowledge of facts or circumstances can rise to the level of a CLAIM for purpose of triggering an applicable COVERAGE PERIOD. This subsection is based solely on the objective nature of information received by the PLF. Covered Parties should thus be aware that any information or knowledge they may have that is not transmitted to the PLF is irrelevant to any determination made under this subsection.*



If facts or circumstances meet the requirements of subsection 1.b(1)(c), then any subsequent CLAIM that constitutes a SAME OR RELATED CLAIM under Section 1.14 will relate back to the COVERAGE PERIOD at the time the original notice of information was provided to the PLF.

**SAME OR RELATED CLAIMS.** Subsection 1.b(2) states a special rule applicable when several CLAIMS arise out of the SAME OR RELATED CLAIMS. Under this rule, all such SAME OR RELATED CLAIMS are considered first made at the time the earliest of the several SAME OR RELATED CLAIMS is first made. Thus, regardless of the number of claimants asserting SAME OR RELATED CLAIMS, the number of PLAN YEARS involved, or the number of transactions giving rise to the CLAIMS, all such CLAIMS are treated as first made in the earliest applicable PLAN YEAR and only one Limit of Coverage and one CLAIMS EXPENSE ALLOWANCE apply. There is an exception to the special rule in Subsection 1.b(2) for COVERED PARTIES who had no coverage (with the PLF or otherwise) at the time the initial CLAIM was made, but this exception does not create any additional Limits of Coverage. Pursuant to Subsection VI.2, only one Limit of Coverage would be available.

**Scope of Duty to Defend.** Subsection 2 defines the PLF's obligation to defend. The obligation to defend continues only until the CLAIMS EXPENSE ALLOWANCE and the Limits of Coverage are exhausted. In that event, the PLF will tender control of the defense to the COVERED PARTY or excess insurance carrier, if any. The PLF's payment of the CLAIMS EXPENSE ALLOWANCE and Limits of Coverage ends all of the PLF's duties.

**Control of Defense.** Subsection 2.a allocates to the PLF control of the investigation, settlement, and defense of the CLAIM. See SECTION IX—ASSISTANCE, COOPERATION, AND DUTIES OF COVERED PARTY.

**Costs of Defense.** Subsection 2.b obligates the PLF to pay reasonable and necessary costs of defense. Only those expenses incurred by the PLF or with the PLF's authority are covered.

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## SECTION V — EXCLUSIONS FROM COVERAGE

### [WRONGFUL CONDUCT EXCLUSIONS]

1. This Plan does not apply to a COVERED PARTY for any CLAIM in which that COVERED PARTY participates in a fraudulent or collusive CLAIM.
2. This Plan does not apply to any CLAIM based on or arising out of any intentional, dishonest, fraudulent, criminal, malicious, knowingly wrongful, or knowingly unethical acts, errors, or omissions committed by YOU or at YOUR direction or in which YOU acquiesce or remain passive after having personal knowledge thereof.

### COMMENTS

*Exclusions 1 and 2 set out the circumstances in which wrongful conduct will eliminate coverage. An intent to harm is not required.*

**Voluntary Exposure to CLAIMS.** An attorney may sometimes voluntarily expose himself or herself to a CLAIM or known risk through a course of action or inaction when the attorney knows there is a more reasonable alternative means of resolving a problem. For example, an attorney might disburse settlement proceeds to a client even though the attorney knows of valid hospital, insurance company, or

*PIP liens, or other valid liens or claims to the funds. If the attorney disburses the proceeds to the client and a CLAIM arises from the other claimants, Exclusion 2 will apply and the CLAIM will not be covered.*

**Unethical Conduct.** *If a CLAIM arises that involves unethical conduct by an attorney, Exclusion 2 may also apply to the conduct and the CLAIM would therefore not be covered. This can occur, for example, if an attorney violates Disciplinary Rule ORPC 8.4(a)(3) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation) or ORPC 5.5(a) (aiding a nonlawyer in the unlawful practice of law) and a CLAIM results.*

*Example: Attorney A allows a title company to use his name, letterhead, or forms in connection with a real estate transaction in which Attorney A has no significant involvement. Attorney A's activities violate ORPC 8.4(a)(3) and ORPC 5.5(a). A CLAIM is made against Attorney A in connection with the real estate transaction. Because Attorney A's activities fall within the terms of Exclusion 2, there will be no coverage for the CLAIM. In addition, the CLAIM likely would not even be within the terms of the coverage grant under this Plan because the activities giving rise to the CLAIM do not fall within the definition of a COVERED ACTIVITY. The same analysis would apply if Attorney A allowed an insurance or investment company to use his name, letterhead, or forms in connection with a living trust or investment transaction in which Attorney A has no significant involvement.*

**3.** This Plan does not apply to any CLAIM based on or arising out of a proceeding brought against YOU by the Oregon State Bar or any similar entity.

**4.** This Plan does not apply to:

- a.** The part of any CLAIM seeking punitive, exemplary or statutorily enhanced damages; or
- b.** Any CLAIM for or arising out of the imposition of attorney fees, costs, fines, penalties, or other sanctions imposed under any federal or state statute, administrative rule, court rule, or case law intended to penalize bad faith conduct and/or the assertion of frivolous or bad faith claims or defenses. The PLF will defend the COVERED PARTY against such a CLAIM, but any liability for indemnity arising from such CLAIM will be excluded.

#### COMMENTS

*A COVERED PARTY may become subject to punitive or exemplary damages, attorney fees, costs, fines, penalties, or other sanctions in two ways. The COVERED PARTY may have these damages assessed directly against the COVERED PARTY or the COVERED PARTY may have a client or other person sue the COVERED PARTY for indemnity for causing the client to be subjected to these damages.*

*Subsection a of Exclusion 4 applies to direct actions for punitive, exemplary or enhanced damages. It excludes coverage for that part of any CLAIM asserting such damages. In addition, such CLAIMS do not involve covered DAMAGES as defined in this Plan. If YOU are sued for punitive damages, YOU are not covered for that exposure. Similarly, YOU are not covered to the extent compensatory damages are doubled, trebled or otherwise enhanced.*

*Subsection b of Exclusion 4 applies to both direct actions against a COVERED PARTY and actions for indemnity brought by others. The courts have become increasingly intolerant of attorneys' improper actions in several areas including trial practice, discovery, and conflicts of interest. Statutes, court rules, and common law approaches imposing various monetary sanctions have been developed to*

*deter such inappropriate conduct. The purpose of these sanctions would be threatened if the PLF were to indemnify the guilty attorney and pay the cost of indemnification out of the assessments paid by all attorneys.*

*Thus, if YOU cause YOUR client to be subjected to a punitive damage award (based upon the client's wrongful conduct toward the claimant) because of a failure, for example, to assert a statute of limitations defense, the PLF will cover YOUR liability for the punitive damages suffered by YOUR client. Subsection a does not apply because the action is not a direct action for punitive damages and Subsection b does not apply because the punitive damages suffered by YOUR client are not the type of damages described in Subsection b.*

*On the other hand, if YOU cause YOUR client to be subjected to an award of attorney fees, costs, fines, penalties, or other sanctions imposed because of YOUR conduct, or such an award is made against YOU, Subsection b applies and the CLAIM for such damages (or for any related consequential damages) will be excluded.*

#### [BUSINESS ACTIVITY EXCLUSIONS]

**5.** This Plan does not apply to that part of any CLAIM based on or arising out of YOUR conduct as an officer, director, partner, BUSINESS TRUSTEE, employee, shareholder, member, or manager of any entity except a LAW ENTITY.

#### COMMENTS

*A COVERED PARTY, in addition to his or her role as an attorney, may act as an officer, director, partner, BUSINESS TRUSTEE, employee, shareholder, member, or manager of an entity. This exclusion eliminates coverage for the COVERED PARTY'S liability while acting in these capacities. However, the exclusion does not apply if the liability is based on such status in a LAW ENTITY.*

**6.** This Plan does not apply to any CLAIM by or on behalf of any business enterprise:

**a.** In which YOU have an ownership interest, or in which YOU had an ownership interest at the time of the alleged acts, errors, or omissions on which the CLAIM is based;

**b.** In which YOU are a general partner, managing member, or employee, or in which YOU were a general partner, managing member, or employee at the time of the alleged acts, errors, or omissions on which the CLAIM is based; or

**c.** That is controlled, operated, or managed by YOU, either individually or in a fiduciary capacity, including the ownership, maintenance, or use of any property in connection therewith, or was so controlled, operated, or managed by YOU at the time of the alleged acts, errors, or omissions on which the CLAIM is based.

Ownership interest, for the purpose of this exclusion, does not include an ownership interest now or previously held by YOU solely as a passive investment, as long as YOU, those YOU control, YOUR spouse, parent, step-parent, child, step-child, sibling, or any member of YOUR household, and those with whom YOU are regularly engaged in the practice of law, collectively now own or previously owned an interest of 10 percent or less in the business enterprise.

## COMMENTS

*Intimacy with a client can increase risk of loss in two ways: (1) The attorney's services may be rendered in a more casual and less thorough manner than if the services were extended at arm's length; and (2) After a loss, the attorney may feel particularly motivated to assure the client's recovery. While the PLF is cognizant of a natural desire of attorneys to serve those with whom they are closely connected, the PLF has determined that coverage for such services should be excluded. Exclusion 6 delineates the level of intimacy required to defeat coverage. See also Exclusion 11.*

7. This Plan does not apply to any CLAIM made by:
- a. YOUR present, former, or prospective partner, employer, or employee; or
  - b. A present, former, or prospective officer, director, or employee of a professional corporation in which YOU were a shareholder,

unless such CLAIM arises out of YOUR conduct in an attorney-client capacity for one of the parties listed in Subsections a or b.

## COMMENTS

*The PLF does not always cover YOUR conduct in relation to YOUR past, present, or prospective partners, employers, employees, and fellow shareholders, even if such conduct arises out of a COVERED ACTIVITY. Coverage is limited by this exclusion to YOUR conduct in relation to such persons in situations in which YOU are acting as their attorney and they are YOUR client.*

8. This Plan does not apply to any CLAIM based on or arising out of any business transaction subject to ORPC 1.8(a) or its equivalent in which YOU participate with a client unless disclosure in the form of Disclosure Form ORPC 1 (attached as Exhibit A to this Plan) has been properly executed prior to the occurrence giving rise to the CLAIM and either:
- a. A copy of the executed disclosure form is forwarded to the PLF within 10 calendar days of execution; or
  - b. If delivery of a copy of the disclosure form to the PLF within 10 calendar days of execution would violate ORPC 1.6, ORS 9.460(3), or any other rule governing client confidences and secrets, YOU may instead send the PLF an alternative letter stating: (1) the name of the client with whom YOU are participating in a business transaction; (2) that YOU have provided the client with a disclosure letter pursuant to the requirements of ORPC 1.0(g) and 1.8(a); (3) the date of the disclosure letter; and (4) that providing the PLF with a copy of the disclosure letter at the present time would violate applicable rules governing client confidences and secrets. This alternative letter must be delivered to the PLF within 10 calendar days of execution of the disclosure letter.

## COMMENTS

**ORPC 1.** *Form ORPC 1, referred to above, is attached to this Plan following SECTION XV. The form includes an explanation of ORPC 1.8(a) which should be provided to the client involved in the*

*business transaction.*

***Applicability of Exclusion.*** *When an attorney engages in a business transaction with a client, the attorney has an ethical duty to make certain disclosures to the client. ORPC 1.0(g) and 1.8(a) provide:*

***RULE 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES***

*(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to client unless:*

*(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;*

*(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and*

*(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.*

***RULE 1.0(g)***

*(g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.*

*This exclusion is not intended to be an interpretation of ORPC 1.8(a). Instead, the Plan is invoking the body of law interpreting ORPC 1.8(a) to define when the exclusion is applicable.*

***Use of the PLF's Form Not Mandated.*** *Because of the obvious conflict of interest and the high duty placed on attorneys, when the exclusion applies, the attorney is nearly always at risk of being liable when things go wrong. The only effective defense is to show that the attorney has made full disclosure, which includes a sufficient explanation to the client of the potential adverse impact of the differing interests of the parties to make the client's consent meaningful. Form ORPC 1 is the PLF's attempt to set out an effective disclosure which will provide an adequate defense to such CLAIMS. The PLF is sufficiently confident that this disclosure will be effective to agree that the exclusion will not apply if YOU use the PLF's proposed form. YOU are free to use YOUR own form in lieu of the PLF's form, but if YOU do so YOU proceed at YOUR own risk, i.e., if YOUR disclosure is less effective than the PLF's disclosure form, the exclusion will apply. Use of the PLF's form is not intended to assure YOU of compliance with the ethical requirements applicable to YOUR particular circumstances. It is YOUR responsibility to consult ORPC 1.0(g) and 1.8(a) and add any disclosures necessary to satisfy the*

*disciplinary rules.*

**Timing of Disclosure.** *To be effective, it is important that the PLF can prove the disclosure was made prior to entering into the business transaction. Therefore, the disclosure should be reduced to writing and signed prior to entering into the transaction. There may be limited situations in which reducing the required disclosure to writing prior to entering into the transaction is impractical. In those circumstances, execution of the disclosure letter after entry into the transaction will not render the exclusion effective provided the execution takes place while the client still has an opportunity to withdraw from the transaction and the effectiveness of the disclosure is not compromised. Additional language may be necessary to render the disclosure effective in these circumstances.*

**Delivery to the PLF.** *Following execution of the disclosure letter, a copy of the letter or an alternative letter must be delivered to the PLF in a timely manner. Failure to do so will result in any subsequent CLAIM against YOU being excluded.*

**Other Disclosures.** *By its terms, ORPC 1.8(a) and this exclusion apply only to business transactions with a client in which the client expects the lawyer to exercise the lawyer's professional judgment therein for the protection of the client. However, lawyers frequently enter into business transactions with others not recognizing that the other expects the lawyer to exercise professional judgment for his or her protection. It can be the "client's" expectation and not the lawyer's recognition that triggers application of ORPC 1.8(a) and this exclusion.*

*Whenever YOU enter into a business transaction with a client, former client, or any other person, YOU should make it **clear in writing** at the **start** for YOUR own protection whether or not YOU will also be providing legal services or exercising YOUR professional judgment for the protection of other persons involved in the transaction (or for the business entity itself). Avoiding potential misunderstandings up front can prevent difficult legal malpractice CLAIMS from arising later.*

**9.** This Plan does not apply to any CLAIM based on or arising out of any act, error, or omission committed by YOU (or by someone for whose conduct YOU are legally liable) while in the course of rendering INVESTMENT ADVICE if the INVESTMENT ADVICE is in fact either the sole cause or a contributing cause of any resulting damage. However, if all INVESTMENT ADVICE rendered by YOU constitutes a COVERED ACTIVITY described in Section III.3, this exclusion will not apply unless part or all of such INVESTMENT ADVICE is described in Subsections d, e, f, or g of the definition of INVESTMENT ADVICE in Section I.10.

#### COMMENTS

*In prior years, the PLF suffered extreme losses as a result of COVERED PARTIES engaging in INVESTMENT ADVICE activity. It was never intended that the Plan cover such activities. An INVESTMENT ADVICE exclusion was added to the Plan in 1984. Nevertheless, losses continued in situations where the COVERED PARTY had rendered both INVESTMENT ADVICE and legal advice. In addition, some CLAIMS resulted where the attorney provided INVESTMENT ADVICE in the guise of legal advice.*

*Exclusion 9, first introduced in 1987, represented a totally new approach to this problem. Instead of excluding all INVESTMENT ADVICE, the PLF has clearly delineated specific activities which will not be covered whether or not legal as well as INVESTMENT ADVICE is involved. These specific activities are defined in Section I.10 under the definition of INVESTMENT ADVICE. The PLF's choice of delineated activities was guided by specific cases that exposed the PLF in situations never intended to*

*be covered. The PLF is cognizant that COVERED PARTIES doing structured settlements and COVERED PARTIES in business practice and tax practice legitimately engage in the rendering of general INVESTMENT ADVICE as a part of their practices. In delineating the activities to be excluded, the PLF has attempted to retain coverage for these legitimate practices. For example, the last sentence of the exclusion permits coverage for certain activities normally undertaken by conservators and personal representatives (i.e., COVERED ACTIVITIES described in Section III.3) when acting in that capacity even though the same activities would not be covered if performed in any other capacity. See the definition of INVESTMENT ADVICE in Section I.10.*

*Exclusion 9 applies whether the COVERED PARTY is directly or vicariously liable for the INVESTMENT ADVICE.*

*Note that Exclusion 9 could defeat coverage for an entire CLAIM even if only part of the CLAIM involved INVESTMENT ADVICE. If INVESTMENT ADVICE is in fact either the sole or a contributing cause of any resulting damage that is part of the CLAIM, the entire CLAIM is excluded.*

#### [PERSONAL RELATIONSHIP AND BENEFITS EXCLUSIONS]

**10.** This Plan does not apply to any CLAIM:

- a.** For the return of any fees, costs, or disbursements paid to a COVERED PARTY (or paid to any other attorney or LAW ENTITY with which the COVERED PARTY was associated at the time the fees, costs, or disbursements were incurred or paid), including but not limited to fees, costs, and disbursements alleged to be excessive, not earned, or negligently incurred;
- b.** Arising from or relating to the negotiation, securing, or collection of fees, costs, or disbursements owed or claimed to be owed to a COVERED PARTY or any LAW ENTITY with which the COVERED PARTY is now associated, or was associated at the time of the conduct giving rise to the CLAIM; or
- c.** For damages or the recovery of funds or property that have or will directly or indirectly benefit any COVERED PARTY.

#### COMMENTS

*This Plan is intended to cover liability for errors committed in rendering professional services. It is not intended to cover liabilities arising out of the business aspects of the practice of law. Here, the Plan clarifies this distinction by excluding liabilities arising out of fee disputes whether the CLAIM seeks a return of a paid fee, cost, or disbursement. Subsection c, in addition, excludes CLAIMS for damages or the recovery of funds or property that, for whatever reason, have resulted or will result in the accrual of a benefit to any COVERED PARTY.*

*Attorneys sometimes attempt to correct their own mistakes without notifying the PLF. In some cases, the attorneys charge their clients for the time spent in correcting their prior mistakes, which can lead to a later CLAIM from the client. The better course of action is to notify the PLF of a potential CLAIM as soon as it arises and allow the PLF to hire and pay for repair counsel if appropriate. In the PLF's experience, repair counsel is usually more successful in obtaining relief from a court or an opposing party than the attorney who made the mistake. In addition, under Subsection a of this exclusion, the PLF does not cover CLAIMS from a client for recovery of fees previously paid by the client to a COVERED PARTY (including fees charged by an attorney to correct the attorney's prior mistake).*

*Example No. 1: Attorney A sues Client for unpaid fees; Client counterclaims for the return of fees already paid to Attorney A which allegedly were excessive and negligently incurred by Attorney A. Under Subsection a, there is no coverage for the CLAIM.*

*Example No. 2: Attorney B allows a default to be taken against Client, and bills an additional \$2,500 in attorney fees incurred by Attorney B in his successful effort to get the default set aside. Client pays the bill, but later sues Attorney B to recover the fees paid. Under Subsection a there is no coverage for the CLAIM.*

*Example No. 3: Attorney C writes a demand letter to Client for unpaid fees, then files a lawsuit for collection of the fees. Client counterclaims for unlawful debt collection. Under Subsection b, there is no coverage for the CLAIM. The same is true if Client is the plaintiff and sues for unlawful debt collection in response to the demand letter from Attorney C.*

*Example No. 4: Attorney D negotiates a fee and security agreement with Client on behalf of Attorney D's own firm. Other firm members, not Attorney D, represent Client. Attorney D later leaves the firm, Client disputes the fee and security agreement, and the firm sues Attorney D for negligence in representing the firm. Under Subsection b, there is no coverage for the CLAIM.*

*Example No. 5: Attorney E takes a security interest in stock belonging to Client as security for fees. Client fails to pay the fees and Attorney E executes on the stock and becomes the owner. Client sues for recovery of the stock and damages. Under Subsection c, there is no coverage for the CLAIM. The same is true if Attorney E receives the stock as a fee and later is sued for recovery of the stock or damages.*

**11.** This Plan does not apply to any CLAIM based upon or arising out of YOUR legal services performed on behalf of YOUR spouse, parent, step-parent, child, step-child, sibling, or any member of YOUR household, or on behalf of a business entity in which any of them, individually or collectively, have a controlling interest.

#### COMMENT

*Work performed for family members is not covered under this Plan. A CLAIM based upon or arising out of such work, even for example a CLAIM against other lawyers or THE FIRM for failure to supervise, will be excluded from coverage. This exclusion does not apply, however, if one attorney performs legal services for another attorney's family member.*

**12.** This Plan does not apply to any CLAIM arising out of a COVERED PARTY'S activity as a fiduciary under any employee retirement, deferred benefit, or other similar plan.

**13.** This Plan does not apply to any CLAIM arising out of any witnessing of a signature or any acknowledgment, verification upon oath or affirmation, or other notarial act without the physical appearance before such witness or notary public, unless such CLAIM arises from the acts of YOUR employee and YOU have no actual knowledge of such act.

#### [GOVERNMENT ACTIVITY EXCLUSION]

**14.** This Plan does not apply to any CLAIM arising out of YOUR conduct:

- a.** As a public official or an employee of a governmental body, subdivision, or agency; or



**b.** In any other capacity that comes within the defense and indemnity requirements of ORS 30.285 and 30.287, or other similar state or federal statute, rule, or case law. If a public body rejects the defense and indemnity of such a CLAIM, the PLF will provide coverage for such COVERED ACTIVITY and will be subrogated to all YOUR rights against the public body.

*COMMENTS*

*Subsection a excludes coverage for all public officials and government employees. The term "public official" as used in this section does not include part-time city attorneys hired on a contract basis. The term "employee" refers to a salaried person. Thus, the exclusion does not apply, for example, to YOU when YOU are hired on an hourly or contingent fee basis so long as the governmental entity does not provide YOU with office facilities, staff, or other indicia of employment.*

*Subsection a applies whether or not the public official or employee is entitled to defense or indemnity from the governmental entity. Subsection b, in addition, excludes coverage for YOU in other relationships with a governmental entity, but only if statute, rule, or case law entitles YOU to defense or indemnity from the governmental entity.*

[HOUSE COUNSEL EXCLUSION]

**15.** This Plan does not apply to any CLAIM arising out of YOUR conduct as an employee in an employer-employee relationship other than YOUR conduct as an employee for a LAW ENTITY.

*COMMENTS*

*This exclusion applies to conduct as an employee even when the employee represents a third party in an attorney-client relationship as part of the employment. Examples of this application include employment by an insurance company, labor organization, member association, or governmental entity that involves representation of the rights of insureds, union or association members, clients of the employer, or the employer itself.*

[GENERAL TORTIOUS CONDUCT EXCLUSIONS]

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

- a.** Bodily injury, sickness, disease, or death of any person;
- b.** Injury to, loss of, loss of use of, or destruction of any real, personal, or intangible property; or
- c.** Mental anguish or emotional distress in connection with any CLAIM described under Subsections a or b.

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

*COMMENTS*

*The CLAIMS excluded are not typical errors-and-omissions torts and are, therefore, considered*

*inappropriate for coverage under the Plan. YOU are encouraged to seek coverage for these CLAIMS through commercial insurance markets.*

*Prior to 1991 the Plan expressly excluded "personal injury" and "advertising injury," defining those terms in a manner similar to their definitions in standard commercial general liability policies. The deletion of these defined terms from this Exclusion is not intended to imply that all personal injury and advertising injury CLAIMS are covered. Instead, the deletion is intended only to permit coverage for personal injury or advertising injury CLAIMS, if any, that fall within the other coverage terms of the Plan.*

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

*Example No. 1: Client gives Attorney A valuable jewelry to hold for safekeeping. The jewelry is stolen or lost. There is no coverage for the value of the stolen or lost jewelry, since the loss of the property did not adversely affect the performance of professional services. Attorney A can obtain appropriate coverage for such losses from commercial insurance sources.*

*Example No. 2: Client gives Attorney B a defective ladder from which Client fell. The ladder is evidence in the personal injury case Attorney B is handling for Client. Attorney B loses the ladder. Because the ladder is lost, Client loses the personal injury case. The CLAIM for the loss of the personal injury case is covered. The damages are the difference in the outcome of the personal injury case caused by the loss of the ladder. There would be no coverage for the loss of the value of the ladder. Coverage for the value of the ladder can be obtained through commercial insurance sources.*

*Example No. 3: Client gives Attorney C important documents relevant to a legal matter being handled by Attorney C for Client. After the conclusion of handling of the legal matter, the documents are lost or destroyed. Client makes a CLAIM for loss of the documents, reconstruction costs, and consequential damages due to future inability to use the documents. There is no coverage for this CLAIM, as loss of the documents did not adversely affect any professional services because the professional services had been completed. Again, coverage for loss of the property (documents) itself can be obtained through commercial general liability or other insurance or through a valuable papers endorsement to such coverage.*

***Child Abuse Reporting Statute.*** *This exclusion would ordinarily exclude coverage for the type of damages that might be alleged against an attorney for failure to comply with ORS 419B.010, the child abuse reporting statute. (It is presently uncertain whether civil liability can arise under the statute.) If there is otherwise coverage under this Plan for a CLAIM arising under ORS 419B.010, the PLF will not apply Exclusion 16 to the CLAIM.*

**17.** This Plan does not apply to any CLAIM based on or arising out of harassment or discrimination on the basis of race, creed, age, religion, sex, sexual preference, disability, pregnancy, national origin, marital status, or any other basis prohibited by law.

## COMMENTS

*The CLAIMS excluded are not typical errors-and-omissions torts and are, therefore, inappropriate for coverage under the Plan.*

### [PATENT EXCLUSION]

**18.** This Plan does not apply to any CLAIM based upon or arising out of professional services rendered or any act, error, or omission committed in relation to the prosecution of a patent if YOU were not registered with the U.S. Patent and Trademark Office at the time the CLAIM arose.

**19.** *Reserved.*

### [CONTRACTUAL OBLIGATION EXCLUSION]

**20.** This Plan does not apply to any CLAIM:

**a.** Based upon or arising out of any bond or any surety, guaranty, warranty, joint control, or similar agreement, or any assumed obligation to indemnify another, whether signed or otherwise agreed to by YOU or someone for whose conduct YOU are legally liable, unless the CLAIM arises out of a COVERED ACTIVITY described in SECTION III.3 and the person against whom the CLAIM is made signs the bond or agreement solely in that capacity;

**b.** Any costs connected to ORS 20.160 or similar statute or rule;

**c.** For liability based on an agreement or representation, if the Covered Party would not have been liable in the absence of the agreement or representation; or

**d.** Claims in contract based upon an alleged promise to obtain a certain outcome or result.

## COMMENTS

*In the Plan, the PLF agrees to assume certain tort risks of Oregon attorneys for certain errors or omissions in the private practice of law; it does not assume the risk of making good on attorneys' contractual obligations. So, for example, an agreement to indemnify or guarantee an obligation will generally not be covered, except in the limited circumstances described in Subsection a. That subsection is discussed further below in this Comment.*

*Subsection b, while involving a statutory rather than contractual obligation, nevertheless expresses a similar concept, since under ORS 20.160 an attorney who represents a nonresident or foreign corporation plaintiff in essence agrees to guarantee payment of litigation costs not paid by his or her client.*

*Subsection c states the general rule that contractual liabilities are not covered under the PLF Plan. For example, an attorney who places an attorney fee provision in his or her retainer agreement voluntarily accepts the risk of making good on that contractual obligation. Because a client's attorney fees incurred in litigating a dispute with its attorney are not ordinarily damages recoverable in tort, they are not a risk the PLF agrees to assume. In addition, if a Covered Party agrees or represents that he or she will pay a claim, reduce fees, or the like, a claim based on a breach of that agreement or*

*representation will not be covered under the Plan.*

*Subsection d involves a specific type of agreement or representation: an alleged promise to obtain a particular outcome or result. One example of this would be an attorney who promises to get a case reinstated or to obtain a particular favorable result at trial or in settlement. In that situation, the attorney can potentially be held liable for breach of contract or misrepresentation regardless of whether his or her conduct met the standard of care. That situation is to be distinguished from an attorney's liability in tort or under the third party beneficiary doctrine for failure to perform a particular task, such as naming a particular beneficiary in a will or filing and serving a complaint within the statute of limitations, where the liability, if any, is not based solely on a breach of the attorney's guarantee, promise or representation.*

*Attorneys sometimes act in one of the special capacities for which coverage is provided under Section III.3 (i.e., as a named personal representative, administrator, conservator, executor, guardian, or trustee except BUSINESS TRUSTEE). If the attorney is required to sign a bond or any surety, guaranty, warranty, joint control, or similar agreement while carrying out one of these special capacities, Exclusion 20.a does not apply, although b, c, or d of this Exclusion may be applicable.*

*On the other hand, when an attorney is acting in an ordinary capacity not within the provisions of Section III.3, Exclusion 20 does apply to any CLAIM based on or arising out of any bond or any surety, guaranty, warranty, joint control, indemnification, or similar agreement signed by the attorney or by someone for whom the attorney is legally liable. In these situations, attorneys should not sign such bonds or agreements. For example, if an attorney is acting as counsel to a personal representative and the personal representative is required to post a bond, the attorney should resist any attempt by the bonding company to require the attorney to co-sign as a surety for the personal representative or to enter into a joint control or similar agreement that requires the attorney to review, approve, or control expenditures by the personal representative. If the attorney signs such an agreement and a CLAIM is later made by the bonding company, the estate, or another party, Exclusion 20 applies and there will be no coverage for the CLAIM.*

#### [BANKRUPTCY TRUSTEE EXCLUSION]

**21.** This Plan does not apply to any CLAIM arising out of YOUR activity (or the activity of someone for whose conduct you are legally liable) as a bankruptcy trustee.

#### [CONFIDENTIAL OR PRIVATE DATA EXCLUSION]

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

#### COMMENTS

*There is a growing body of law directed at protecting confidential or private information from disclosure. The protected information or data may involve personal information such as credit card information, social security numbers, drivers licenses, or financial or medical information. They may also involve business-related information such as trade secrets or intellectual property. Examples of loss, compromise, breach or access include but are not*

*limited to electronically stored information or data being inadvertently disclosed or released by a Covered Party; being compromised by the theft, loss or misplacement of a computer containing the data; being stolen or intentionally damaged; or being improperly accessed by a Covered Party or someone acting on his or her behalf. However, such information or data need not be in electronic format, and a data breach caused through, for example, the improper safeguarding or disposal of paper records would also fall within this exclusion.*

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

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## SECTION VI — LIMITS OF COVERAGE AND CLAIMS EXPENSE ALLOWANCE

### 1. Limits for This Plan

**a. Coverage Limits.** The PLF's maximum liability under this Plan is \$300,000 DAMAGES and EXCESS CLAIMS EXPENSE for all CLAIMS first made during the COVERAGE PERIOD (and during any extended reporting period granted under Section XIV). The making of multiple CLAIMS or CLAIMS against more than one COVERED PARTY will not increase the PLF's Limit of Coverage.

**b. Claims Expense Allowance Limits.** In addition to the Limit of Coverage stated in Section VI.1.a above, there is a single CLAIMS EXPENSE ALLOWANCE of \$50,000 for CLAIMS EXPENSE for all CLAIMS first made during the COVERAGE PERIOD (and during any extended reporting period granted under Section XIV). The making of multiple CLAIMS or CLAIMS against more than one COVERED PARTY will not increase the CLAIMS EXPENSE ALLOWANCE. In the event CLAIMS EXPENSE exceeds the CLAIMS EXPENSE ALLOWANCE, the Limit of Coverage will be reduced by the amount of EXCESS CLAIMS EXPENSE incurred. The CLAIMS EXPENSE ALLOWANCE is not available to pay DAMAGES or settlements.

**c. No Consequential Damages.** No person or entity may recover any damages for breach of any provision in this Plan except those specifically provided for in this Plan.

### 2. Limits Involving Same or Related Claims Under Multiple Plans

If this Plan and one or more other Plans issued by the PLF apply to the SAME OR RELATED CLAIMS, then regardless of the number of claimants, clients, COVERED PARTIES, or LAW ENTITIES involved, only one Limit of Coverage and one CLAIMS EXPENSE ALLOWANCE will apply. Notwithstanding the preceding sentence, if the SAME OR RELATED CLAIMS are brought against two or more separate LAW ENTITIES, each of which requests and is entitled to separate defense counsel, the PLF will make one CLAIMS EXPENSE ALLOWANCE available to each of the separate LAW ENTITIES requesting a separate allowance. For purposes of this provision, whether LAW ENTITIES are separate is determined as of the time of the COVERED ACTIVITIES that are alleged in the CLAIMS. No LAW ENTITY, or group of LAW ENTITIES practicing together as a single firm, will be entitled to more than one CLAIMS EXPENSE ALLOWANCE

under this provision. The CLAIMS EXPENSE ALLOWANCE granted will be available solely for the defense of the LAW ENTITY requesting it.

#### COMMENTS

*This Plan is intended to provide a basic “floor” level of coverage for all Oregon attorneys engaged in the private practice of law whose principal offices are in Oregon. Because of this, there is a general prohibition against the stacking of either Limits of Coverage or CLAIMS EXPENSE ALLOWANCES. Except for the provision involving CLAIMS EXPENSE ALLOWANCES under Subsection 2, only one Limit of Coverage and CLAIMS EXPENSE ALLOWANCE will ever be paid under any one Plan issued to a COVERED PARTY in any one PLAN YEAR, regardless of the circumstances. Limits of Coverage or CLAIMS EXPENSE ALLOWANCES in multiple individual Plans do not stack for any CLAIMS that are “related.” As the definition of SAME OR RELATED CLAIMS and its Comments and Examples demonstrate, the term “related” has a broad meaning when determining the number of Limits of Coverage and CLAIMS EXPENSE ALLOWANCES potentially available. This broad definition is designed to ensure the long-term economic viability of the PLF by protecting it from multiple limits exposures, ensuring fairness for all Oregon attorneys who are paying annual assessments, and keeping the overall coverage affordable.*

*Anti-stacking provisions in the PLF Plan may create hardships for particular COVERED PARTIES who do not purchase excess coverage. COVERED PARTIES who represent clients in situations in which single or multiple CLAIMS could result in exposure beyond one Limit of Coverage should purchase excess professional liability coverage.*

*Effective January 1, 2005, the PLF has created a limited exception to the one-limit rule for SAME OR RELATED CLAIMS. When such CLAIMS are asserted against more than one separate LAW ENTITY, and one of the LAW ENTITIES is entitled to and requests a separate defense of the SUIT, then the PLF will allow a separate CLAIMS EXPENSE ALLOWANCE for that LAW ENTITY.*

*The coverage provisions and limitations provided in this Plan are the absolute maximum amounts that can be recovered under the Plan. Therefore, no person or party is entitled to recover any consequential damages for breach of the Plan.*

*Example No. 1: Attorney A performed COVERED ACTIVITIES for a client while Attorney A was at two different law firms. Client sues A and both firms. Both firms request separate counsel, each one contending most of the alleged errors took place while A was at the other firm. The defendants are collectively entitled to a maximum of one \$300,000 Limit of Coverage and two CLAIMS EXPENSE ALLOWANCES. For purposes of this provision, Attorney A (or, if applicable, her professional corporation) is not a separate LAW ENTITY from the firm at which she worked. Accordingly, two, not three, CLAIMS EXPENSE ALLOWANCES are potentially available.*

*Example No. 2: Attorney A is a sole practitioner, practicing as an LLC, but also working of counsel for a partnership of B and C. While working of counsel, A undertook a case which he concluded involved special issues requiring the expertise of Attorney D, from another firm. D and C work together in representing the client and commit errors in handling the case. Two CLAIMS EXPENSE ALLOWANCES are potentially available. There are only two separate firms – the BC partnership and D’s firm.*

## SECTION VII — NOTICE OF CLAIMS

1. The COVERED PARTY must, as a condition precedent to the right of protection afforded by this coverage, give the PLF, at the address shown in the Declarations, as soon as practicable, written notice of any CLAIM made against the COVERED PARTY. In the event a SUIT is brought against the COVERED PARTY, the COVERED PARTY must immediately notify and deliver to the PLF, at the address shown in the Declarations, every demand, notice, summons, or other process received by the COVERED PARTY or the COVERED PARTY'S representatives.
2. If the COVERED PARTY becomes aware of facts or circumstances that reasonably could be expected to be the basis of a CLAIM for which coverage may be provided under this Plan, the COVERED PARTY must give written notice to the PLF as soon as practicable during the COVERAGE PERIOD of:
  - a. The specific act, error, or omission;
  - b. DAMAGES and any other injury that has resulted or may result; and
  - c. The circumstances by which the COVERED PARTY first became aware of such act, error, or omission.
3. If the PLF opens a suspense or claim file involving a CLAIM or potential CLAIM which otherwise would require notice from the COVERED PARTY under subsection 1. or 2. above, the COVERED PARTY'S obligations under those subsections will be considered satisfied for that CLAIM or potential CLAIM.

### COMMENTS

*This is a Claims Made Plan. Section IV.1.b determines when a CLAIM is first made for the purpose of triggering coverage under this Plan. Section VII states the COVERED PARTY'S obligation to provide the PLF with prompt notice of CLAIMS, SUITS, and potential CLAIMS.*

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## SECTION VIII — COVERAGE DETERMINATIONS

1. This Plan is governed by the laws of the State of Oregon, regardless of any conflict-of-law principle that would otherwise result in the laws of any other jurisdiction governing this Plan. Any disputes as to the applicability, interpretation, or enforceability of this Plan, or any other issue pertaining to the provision of benefits under this Plan, between any COVERED PARTY (or anyone claiming through a COVERED PARTY) and the PLF will be tried in the Multnomah County Circuit Court of the State of Oregon which will have exclusive jurisdiction and venue of such disputes at the trial level.
2. The PLF will not be obligated to provide any amounts in settlement, arbitration award, judgment, or indemnity until all applicable coverage issues have been finally determined by agreement or judgment.
3. In the event of exceptional circumstances in which the PLF, at the PLF's option, has paid a portion or all Limits of Coverage toward settlement of a CLAIM before all applicable coverage issues have been finally determined, then resolution of the coverage dispute as set forth in this Section will occur as soon as reasonably practicable following the PLF's payment. In the event it is determined that this Plan is not applicable to the CLAIM, or only partially applicable, then judgment will be entered in

Multnomah County Circuit Court in the PLF's favor and against the COVERED PARTY (and all others on whose behalf the PLF's payment was made) in the amount of any payment the PLF made on an uncovered portion of the CLAIM, plus interest at the rate applicable to judgments from the date of the PLF's payment. Nothing in this Section creates an obligation by the PLF to pay a portion or all of the PLF's Limits of Coverage before all applicable coverage issues have been fully determined.

4. The bankruptcy or insolvency of a COVERED PARTY does not relieve the PLF of its obligations under this Plan.

#### COMMENTS

*Historically, Section VIII provided for resolution of coverage disputes by arbitration. After 25 years of resolving disputes in this manner, the PLF concluded it would be more beneficial to YOU and the PLF to try these matters to a court where appeals are available and precedent can be established.*

*Until the dispute over coverage is concluded, the PLF is not obligated to pay any amounts in dispute. The PLF recognizes there may occasionally be exceptional circumstances making a coverage determination impracticable prior to a payment by the PLF of a portion or all of the PLF's Limit of Coverage toward resolution of a CLAIM. For example, a claimant may make a settlement demand having a deadline for acceptance that would expire before coverage could be determined, or a court might determine on the facts before it that a binding determination on the relevant coverage issue should not be made while the CLAIM is pending. In some of these exceptional circumstances, the PLF may at its option pay a portion or all of the Limit of Coverage before the dispute concerning the question of whether this Plan is applicable to the CLAIM is decided. If the PLF pays a portion or all of the Limit of Coverage and the court subsequently determines that this Plan is not applicable to the CLAIM, then the COVERED PARTY or others on whose behalf the payment was made must reimburse the PLF, in order to prevent unjust enrichment and protect the solvency and financial integrity of the PLF. For a COVERED PARTY'S duties in this situation, see Section IX.3.*

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#### SECTION IX — ASSISTANCE, COOPERATION, AND DUTIES OF COVERED PARTY

1. As a condition of coverage under this Plan, the COVERED PARTY will, without charge to the PLF, cooperate with the PLF and will:

- a. Provide to the PLF, within 30 days after written request, sworn statements providing full disclosure concerning any CLAIM or any aspect thereof;
- b. Attend and testify when requested by the PLF;
- c. Furnish to the PLF, within 30 days after written request, all files, records, papers, and documents that may relate to any CLAIM against the COVERED PARTY;
- d. Execute authorizations, documents, papers, loan receipts, releases, or waivers when so requested by the PLF;
- e. Submit to arbitration of any CLAIM when requested by the PLF;
- f. Permit the PLF to cooperate and coordinate with any excess or umbrella insurance



carrier as to the investigation, defense, and settlement of all CLAIMS;

**g.** Not communicate with any person other than the PLF or an insurer for the COVERED PARTY regarding any CLAIM that has been made against the COVERED PARTY, after notice to the COVERED PARTY of such CLAIM, without the PLF's written consent;

**h.** Assist, cooperate, and communicate with the PLF in any other way necessary to investigate, defend, repair, settle, or otherwise resolve any CLAIM against the COVERED PARTY.

**2.** To the extent the PLF makes any payment under this Plan, it will be subrogated to any COVERED PARTY's rights against third parties to recover all or part of these sums. When requested, every COVERED PARTY must assist the PLF in bringing any subrogation or similar claim. The PLF's subrogation or similar rights will not be asserted against any non-attorney employee of YOURS or YOUR law firm except for CLAIMS arising from intentional, dishonest, fraudulent, or malicious conduct of such person.

**3.** The COVERED PARTY may not, except at his or her own cost, voluntarily make any payment, assume any obligation, or incur any expense with respect to a CLAIM.

**4.** In the event the PLF proposes in writing a settlement to be funded by the PLF but subject to the COVERED PARTY's being obligated to reimburse the PLF if it is later determined that the Plan did not cover all or part of the CLAIM settled, the COVERED PARTY must advise the PLF in writing that the COVERED PARTY:

**a.** Agrees to the PLF's proposal, or

**b.** Objects to the PLF's proposal.

The written response must be made by the COVERED PARTY as soon as practicable and, in any event, must be received by the PLF no later than one business day (and at least 24 hours) before the expiration of any time-limited demand for settlement. A failure to respond, or a response that fails to unequivocally object to the PLF's written proposal, constitutes an agreement to the PLF's proposal. A response objecting to the settlement relieves the PLF of any duty to settle that might otherwise exist.

#### COMMENTS

*Subsection 4 addresses a problem that arises only when the determination of coverage prior to trial or settlement of the underlying claim is impracticable either because litigation of the coverage issue is not possible, permissible, or advisable, or because a pending trial date or time limit demand presents too short a period for resolution of the coverage issue prior to settlement or trial. In these circumstances, to avoid any argument that the PLF is acting as a volunteer, the PLF needs specific advice from the COVERED PARTY (or anyone claiming through the COVERED PARTY) either unequivocally agreeing that the PLF may proceed with the proposed settlement (i.e., waiving the volunteer argument) or unequivocally objecting to the proposed settlement (i.e., waiving any right to contend that the PLF has a duty to settle). While the PLF recognizes the requirement of an unequivocal response in some circumstances forces the COVERED PARTY (or anyone claiming through the COVERED PARTY) to make a difficult judgment, the exigencies of the situation require an unequivocal response so the PLF will know whether it can proceed with settlement without forfeiting its right to reimbursement to the extent the CLAIM is not covered.*

*The obligations of the Covered Party under Section IX as well as the other Sections of the Plan are to be performed without charge to the PLF.*

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## **SECTION X — ACTIONS BETWEEN THE PLF AND COVERED PARTIES**

- 1.** No legal action in connection with this Plan will be brought against the PLF unless the COVERED PARTY has fully complied with all terms of this Plan.
- 2.** The PLF may bring legal action in connection with this Plan against a COVERED PARTY if:
  - a.** The PLF pays a CLAIM under another Plan issued by the PLF;
  - b.** A COVERED PARTY under this Plan is alleged to be liable for all or part of the damages paid by the PLF;
  - c.** As between the COVERED PARTY under this Plan and the person or entity on whose behalf the PLF has paid the CLAIM, the latter has an alleged right to pursue the COVERED PARTY under this Plan for contribution, indemnity, or otherwise, for all or part of the damages paid; and
  - d.** Such right can be alleged under a theory or theories for which no coverage is provided to the COVERED PARTY under this Plan.
- 3.** In the circumstances outlined in Subsection 2, the PLF reserves the right to sue the COVERED PARTY, either in the PLF's name or in the name of the person or entity on whose behalf the PLF has paid, to recover such amounts as the PLF determines appropriate, up to the full amount the PLF has paid under one or more other Plans issued by the PLF. However, this Subsection will not entitle the PLF to sue the COVERED PARTY if the PLF's alleged rights against the COVERED PARTY are premised on a theory of recovery that would entitle the COVERED PARTY to indemnity under this Plan if the PLF's action were successful.

### **COMMENTS**

*Under certain circumstances, a CLAIM against YOU may not be covered because of an exclusion or other applicable provision of the Plan issued to YOU. However, in some cases the PLF may be required to pay the CLAIM nonetheless because of the PLF's obligation to another COVERED PARTY under the terms of his or her Plan. This might occur, for example, when YOU are the attorney responsible for a CLAIM and YOU have no coverage due to YOUR intentional or wrongful conduct, but YOUR partner did not engage in or know of YOUR wrongful conduct but is nevertheless allegedly liable. In these circumstances, if the PLF pays some or all of the CLAIM arising from YOUR conduct it is fair that the PLF has the right to seek recovery back from YOU; otherwise, the PLF would effectively be covering YOUR non-covered CLAIMS simply because other COVERED PARTIES were vicariously liable.*

*Example No. 1: Attorney A misappropriates trust account funds belonging to Client X. Attorney A's partner, Attorney B, does not know of or acquiesce in Attorney A's wrongful conduct. Client X sues both Attorneys A and B. Attorney A has no coverage for the CLAIM under his Plan, but Attorney B has coverage for her liability under her Plan. The PLF pays the CLAIM under Attorney B's Plan. Section X.2 of Attorney A's Plan makes clear the PLF has the right to sue Attorney A for the damages the PLF*

*paid under Attorney B's Plan.*

*Example No. 2: Same facts as the prior example, except that the PLF loans funds to Attorney B under terms that obligate Attorney B to repay the loan to the extent she recovers damages from Attorney A in an action for indemnity. Section X.2 of Attorney A's Plan makes clear that the PLF has the right pursuant to such arrangement with Attorney B to participate in her action against Attorney A.*

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## **SECTION XI — SUPPLEMENTAL ASSESSMENTS**

This Claims Made Plan is assessable. Each PLAN YEAR is accounted for and assessable using reasonable accounting standards and methods of assessment. If the PLF determines that a supplemental assessment is necessary to pay for CLAIMS, CLAIMS EXPENSE, or other expenses arising from or incurred during either this PLAN YEAR or a previous PLAN YEAR, YOU agree to pay YOUR supplemental assessment to the PLF within 30 days of request.

The PLF is authorized to make additional assessments against YOU for this PLAN YEAR until all the PLF's liability for this PLAN YEAR is terminated, whether or not YOU are a COVERED PARTY under a Plan issued by the PLF at the time the assessment is imposed.

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## **SECTION XII — RELATION OF PLF COVERAGE TO INSURANCE COVERAGE OR OTHER COVERAGE**

If the COVERED PARTY has valid and collectible insurance coverage or other obligation to indemnify that also applies to any loss or CLAIM covered by this Plan, the PLF will not be liable under the Plan until the limits of the COVERED PARTY'S insurance or other obligation to indemnify, including any applicable deductible, have been exhausted, unless such insurance or other obligation to indemnify is written only as specific excess coverage over the CLAIMS EXPENSE ALLOWANCE and Limits of Coverage of this Plan.

### *COMMENTS*

*As explained in the Preface, this Plan is not an insurance policy. To the extent that insurance or other coverage exists, this Plan may not be invoked. This provision is designed to preclude the application of the other insurance law rules applicable under Lamb-Weston v. Oregon Automobile Ins. Co. 219 Or 110, 341 P2d 110, 346 P2d 643 (1959).*

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## **SECTION XIII — WAIVER AND ESTOPPEL**

Notice to or knowledge of the PLF's representative, agent, employee, or any other person will not effect a waiver, constitute an estoppel, or be the basis of any change in any part of this Plan nor will the terms of this Plan be waived or changed except by written endorsement issued and signed by the PLF's authorized representative.

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## **SECTION XIV — AUTOMATIC EXTENDED CLAIMS REPORTING PERIOD**

1. If YOU:
  - a. Terminate YOUR PLF coverage during the PLAN YEAR, or
  - b. Do not obtain PLF coverage as of the first day of the next PLAN YEAR,

YOU will automatically be granted an extended reporting period for this Plan at no additional cost. The extended reporting period will commence on the day after YOUR last day of PLF coverage and will continue until the expiration of the time allowed for any CLAIM to be made against YOU or any other COVERED PARTY listed in SECTION II of this Plan, or the date specified in Subsection 2, whichever date is earlier. Any extension granted under this Subsection will not increase the CLAIMS EXPENSE ALLOWANCE or the Limits of Coverage available under this Plan, nor provide coverage for YOUR activities which occur after YOUR last day of PLF coverage.

2. If YOU terminate YOUR PLF coverage during this PLAN YEAR and return to PLF coverage later in this same PLAN YEAR:
  - a. The extended reporting period granted to YOU under Subsection 1 will automatically terminate as of the date YOU return to PLF coverage;
  - b. The coverage provided under this Plan will be reactivated; and
  - c. YOU will not receive a new Limit of Coverage or CLAIMS EXPENSE ALLOWANCE on YOUR return to coverage.

#### COMMENTS

*Subsection 1 sets forth YOUR right to extend the reporting period in which a CLAIM must be made. The granting of YOUR rights hereunder does not establish a new or increased CLAIMS EXPENSE ALLOWANCE or Limits of Coverage, but instead merely extends the reporting period under this Plan which will apply to all covered CLAIMS made against YOU during the extended reporting period. The terms and conditions of this Plan will continue to apply to all CLAIMS that may be made against YOU during the extended reporting period. This extended CLAIMS reporting period is subject to other limitations and requirements, which are available from the PLF on request.*

*Attorneys with PLF coverage who leave the private practice of law in Oregon during the PLAN YEAR are permitted to terminate their coverage mid-year and seek a prorated refund of their annual assessment under PLF Policy 3.400. Attorneys who do so will receive extended reporting coverage under this section effective as of the day following their last day of PLF coverage. For attorneys who engage in the private practice of law in Oregon through the end of the current PLAN YEAR but do not obtain PLF coverage at the start of the next PLAN YEAR, their extended reporting coverage begins on the first day after the current PLAN YEAR.*

*Example No. 1: Attorney A obtains regular PLF coverage in 2010 with a CLAIMS EXPENSE ALLOWANCE of \$50,000 and Limits of Coverage of \$300,000. One CLAIM is asserted in 2010 for which a total of \$200,000 is paid in indemnity and expense (including the entire \$50,000 CLAIMS EXPENSE ALLOWANCE). The remaining Limits of Coverage under the 2010 Plan are \$150,000. Attorney A leaves the private practice of law on December 31, 2010 and obtains extended reporting coverage at no charge. The 2010 Plan will apply to all CLAIMS made in 2011 or later years, and only \$150,000 in Limits of Coverage (the balance left under Attorney A's 2010 Plan) is available for all*

*CLAIMS made in 2011 or later years. There is no remaining CLAIMS EXPENSE ALLOWANCE for any new CLAIMS.*

*Example No. 2: Attorney B obtains regular PLF coverage in 2010, but leaves private practice on March 31, 2010 and obtains a prorated refund of her 2010 assessment. Attorney B will automatically obtain extended reporting coverage under her 2010 Plan as of April 1, 2010. Attorney B returns to PLF coverage on October 1, 2010. Her extended reporting coverage terminates as of that date, and she will not receive new Limits of Coverage or CLAIMS EXPENSE ALLOWANCE. If a CLAIM is made against her in November 2010, her 2010 Plan will cover the CLAIM whether it arises from an alleged error occurring before April 1, 2010 or on or after October 1, 2010.*

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## **SECTION XV — ASSIGNMENT**

The interest hereunder of any COVERED PARTY is not assignable.

EXHIBIT A -- FORM ORPC 1

Dear [ Client ]:

*This letter confirms that we have discussed [specify the essential terms of the business transaction that you intend to enter into with your client and your role in the transaction. Be sure to inform the client whether you will be representing the client in the transaction. This is required by ORPC 1.8(a)(3)]. This letter also sets forth the conflict of interest that arises for me as your attorney because of this proposed business transaction.*

*The Oregon Rules of Professional Conduct prohibit an attorney from representing a client when the attorney's personal interests conflict with those of the client unless the client consents. Consequently, I can only act as your lawyer in this matter if you consent after being adequately informed. Rule 1.0(g) provides as follows:*

*(g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.*

*Although our interests presently appear to be consistent, my interests in this transaction could at some point be different than or adverse to yours. Specifically, [include an explanation which is sufficient to apprise the client of the potential adverse impact on the client of the matter to which the client is asked to consent, and any reasonable alternative courses of action, if applicable].*

*Please consider this situation carefully and decide whether or not you wish to enter into this transaction with me and to consent to my representation of you in this transaction. Rule 1.8(a)(2) requires me to recommend that you consult with another attorney in deciding whether or not your consent should be given. Another attorney could also identify and advise you further on other potential conflicts in our interests.*

*I enclose an article "Business Deals Can Cause Problems," which contains additional information. If you do decide to consent, please sign and date the enclosed extra copy of this letter in the space provided below and return it to me.*

*Very truly yours,*

**[Attorney Name and Signature]**

*I hereby consent to the legal representation, the terms of the business transaction, and the lawyer's role in transaction as set forth in this letter:*

---

**[Client's Signature]**

**[Date]**

*Enclosure: "Business Deals Can Cause Problems," by Jeffrey D. Sapiro.*

***BUSINESS DEALS CAN CAUSE PROBLEMS (Complying With ORPC 1.8(a))***

*By Jeffrey D. Sapiro, Disciplinary Counsel, Oregon State Bar*

Something that clients often lose sight of is that attorneys are not only legal advisors, but are business people as well. It is no secret that most practitioners wish to build a successful practice, rendering quality legal services to their clients, as a means of providing a comfortable living for themselves and/or their families. Given this objective, it is not surprising that many attorneys are attracted to business opportunities outside their practices that may prove to be financially rewarding. The fact that these business opportunities are often brought to an attorney's attention by a client or through involvement in a client's financial affairs is reason to explore the ethical problems that may arise.

ORPC 1.8(a) and 1.0(g) read as follows:

*Rule 1.8 Conflict of Interest: Current Clients: Specific Rules*

*(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:*

*(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;*

*(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and*

*(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.*

*ORPC 1.0 Terminology*

*(g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.*

The rationale behind this rule should be obvious. An attorney has a duty to exercise professional judgment solely for the benefit of a client, independent of any conflicting influences or loyalties. If an attorney is motivated by financial interests adverse to that of the client, the undivided loyalty due to the client may very well be compromised. (See also ORPC 1.7 and 1.8(c) and (i)) Full disclosure in writing gives the client the opportunity and necessary information to obtain independent legal advice when the

attorney's judgment may be affected by personal interest. Under ORPC 1.8(a) it is the client and not the attorney who should decide upon the seriousness of the potential conflict and whether or not to seek separate counsel.

A particularly dangerous situation is where the attorney not only engages in the business aspect of a transaction, but also furnishes the legal services necessary to put the deal together. In *In re Brown*, 277 Or 121, 559 P2d 884, rev. den. 277 Or 731, 561 P2d 1030 (1977), an attorney became partners with a friend of many years in a timber business, the attorney providing legal services and the friend providing the capital. The business later incorporated, with the attorney drafting all corporate documents, including a buy-sell agreement permitting the surviving stockholder to purchase the other party's stock. The Oregon Supreme Court found that the interests of the parties were adverse for a number of reasons, including the disparity in capital invested and the difference in the parties' ages, resulting in a potential benefit to the younger attorney under the buy-sell provisions. Despite the fact that the friend was an experienced businessman, the court held that the attorney violated the predecessor to ORPC 1.8(a), DR 5-104(A), because the friend was never advised to seek independent legal advice.

Subsequent to *Brown*, the Supreme Court has disciplined several lawyers for improper business transactions with clients. Among these cases are *In re Drake*, 292 Or 704, 642 P2d 296 (1982), which provides a comprehensive analysis of ORPC 1.8(a)'s predecessor, DR 5-104(A); *In re Montgomery*, 292 Or 796, 643 P2d 338 (1982), in which the fact that the client was a more sophisticated business person than the attorney did not affect the court's analysis; *In re Germundson*, 201 Or 656, 724 P2d 793 (1986), in which a close friendship between the attorney and the client was deemed insufficient reason to dispense with conflict disclosures; and *In re Griffith*, 304 Or 575, 748 P2d (1987), in which the court noted that, even if no conflict is present when a transaction is entered into, subsequent events may lead to a conflict requiring disclosures or withdrawal by the attorney.

Even in those situations where the attorney does not furnish legal services, problems may develop. There is a danger that, while the attorney may feel he or she is merely an investor in a business deal, the client may believe the attorney is using his or her legal skills to protect the client's interests in the venture. Indeed, this may be the very reason the client approached the attorney with a business proposition in the first place. When a lawyer borrows money from a client, there may even be a presumption that the client is relying on the lawyer for legal advice in the transaction. *In re Montgomery*, 292 Or 796, 643 P2d 338 (1982). To clarify for the client the role played by the attorney in a business transaction, ORPC 1.8(a)(3) now provides that a client's consent to the attorney's participation in the transaction is not effective unless the client signs a writing that describes, among other things, the attorney's role and whether the attorney is representing the client in the transaction.

In order to avoid the ethical problems addressed by the conflict of interest rules, the Supreme Court has said that an attorney must at least advise the client to seek independent legal counsel (*In re Bartlett*, 283 Or 487, 584 P2d 296 (1978)). This is now required by ORPC 1.8(a)(2). The attorney should disclose not only that a conflict of interest may exist, but should also explain the nature of the conflict "in such detail so that (the client) can understand the reasons why it may be desirable for each to have independent counsel. . ." (*In re Boivin*, 271 Or 419, 424, 533 P2d 171 (1975)). Risks incident to a transaction with a client must also be disclosed (ORPC 1.0(g); *In re Montgomery*, 297 Or 738, 687 P2d 157 (1984); *In re Whipple*, 296 Or 105, 673 P2d 172 (1983)). Such a disclosure will help ensure that there is no misunderstanding over the role the attorney is to play in the transaction and will help prevent the attorney from running afoul of the disciplinary rule discussed above.



2015

PLF Claims Made Excess Plan

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# OREGON STATE BAR PROFESSIONAL LIABILITY FUND

## CLAIMS MADE EXCESS PLAN

*Effective January 1, 2015*

**THIS IS A CLAIMS MADE EXCESS PLAN – PLEASE READ CAREFULLY**

### NOTICE

**THIS EXCESS PLAN IS WRITTEN AS SPECIFIC EXCESS COVERAGE TO THE PLF CLAIMS MADE PLAN AND CONTAINS PROVISIONS MORE RESTRICTIVE THAN THE COVERAGE AFFORDED BY THE PLF CLAIMS MADE PLAN. THIS EXCESS PLAN CONTAINS PROVISIONS THAT REDUCE THE LIMITS OF COVERAGE BY THE COSTS OF LEGAL DEFENSE. THIS EXCESS PLAN IS ASSESSABLE.**

Various provisions in this Excess Plan restrict coverage. Read the entire Excess Plan to determine rights, duties and what is and is not covered.

### INTERPRETATION OF THIS EXCESS PLAN

**Bracketed Titles.** The bracketed titles appearing throughout this Excess Plan are not part of the Excess Plan and should not be used as an aid in interpreting the Excess Plan. The bracketed titles are intended simply as a guide to aid the reader in locating pertinent provisions.

**Plan Comments.** In contrast, the discussions labeled "COMMENTS" following various provisions of this Excess Plan are intended as aids in interpretation. These interpretive provisions add background information and provide additional considerations to be used in the interpretation and construction of this Excess Plan.

**Use of Capitals.** Capitalized terms are defined in Section I of this Excess Plan and the PLF CLAIMS MADE PLAN. The definition of COVERED PARTY appearing in Section II and the definition of COVERED ACTIVITY appearing in Section III are particularly crucial to the understanding of the coverage grant.

### *COMMENTS*

**History.** *Through the issuance of separate PLF PLANS to each individual attorney, the PLF provides primary malpractice coverage to all attorneys engaged in the private practice of law in Oregon. This Excess Plan was created pursuant to enabling legislation empowering the Board of Governors of the Oregon State Bar to establish an optional, underwritten program of excess malpractice coverage through the PLF for those attorneys and firms which want higher coverage limits. See ORS 9.080 (2) (a) and its legislative history. The PLF has been empowered to do whatever is necessary and convenient to achieve*

*this objective. See, e.g., Balderree v. Oregon State Bar, 301 Or 155, 719 P2d 1300 (1986). Pursuant to this authority, the PLF has adopted this Excess Plan.*

**Claims Made Form.** *This Excess Plan is a claims made coverage plan. This Excess Plan is a contractual agreement between the PLF and THE FIRM.*

**Interpretation of the Excess Plan.** *This Excess Plan is to be interpreted throughout in a manner consistent with the interpretation of the PLF CLAIMS MADE PLAN.*

*Accordingly, Comments to language in the PLF PLAN apply to similar language in this Excess Plan.*

**Purpose of Comments.** *These Comments are similar in form to the UCC and Restatements. They are intended to aid in the construction of the language of this Excess Plan. By the addition of these Comments, the PLF hopes to avoid the existence of any ambiguities, to assist attorneys in interpreting the coverage available to them, and to provide a specific basis for interpretation.*

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## SECTION I – DEFINITIONS

**1.** Throughout this Excess Plan, the following terms, when appearing in capital letters, mean the same as their definitions in the PLF CLAIMS MADE PLAN:

- a. PLF
- b. SUIT
- c. CLAIM
- d. SAME OR RELATED CLAIMS
- e. DAMAGES
- f. BUSINESS TRUSTEE
- g. CLAIMS EXPENSE
- h. COVERAGE PERIOD
- i. INVESTMENT ADVICE
- j. LAW ENTITY

**2.** Throughout this Excess Plan, when appearing in capital letters:

**a.** The words “THE FIRM” refer to the law entities designated in Sections 1 and 11 of the Declarations.

**b.** “COVERED PARTY” means any person or organization qualifying as such under Section II – WHO IS A COVERED PARTY.

**c.** “COVERED ACTIVITY” means conduct qualifying as such under Section III -- WHAT IS A COVERED ACTIVITY.

**d.** “PLAN YEAR” means the period January 1 through December 31 of the calendar year for which this Excess Plan was issued.

**e.** The words "PLF CLAIMS MADE PLAN" or "PLF PLAN" refer to the PLF Claims Made Plan issued by the PLF as primary coverage for the PLAN YEAR.

**f.** The words "APPLICABLE UNDERLYING LIMIT" mean the aggregate total of (1) the amount of the coverage afforded by the applicable PLF PLANS issued to all persons qualifying as COVERED PARTIES under the terms of this Excess Plan, plus (2) the amount of any other coverage available to any COVERED PARTY with respect to the CLAIM for which coverage is sought.

**g.** "FIRM ATTORNEY" means an attorney listed in Section 10 of the Declarations.

**h.** "FORMER ATTORNEY" means an attorney listed in Section 12 of the Declarations.

**i.** "NON-OREGON ATTORNEY" means an attorney listed in Section 14 or 15 of the Declarations.

**j.** "EXCLUDED ATTORNEY" means an attorney listed in Section 16 of the Declarations.

**k.** "EXCLUDED FIRM" means a LAW ENTITY listed in Section 17 of the Declarations.

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## SECTION II – WHO IS A COVERED PARTY

The following are COVERED PARTIES:

**1.** THE FIRM, except that THE FIRM is not a COVERED PARTY with respect to liability arising out of conduct of an attorney who was affiliated in any way with THE FIRM at any time during the five years prior to the beginning of the COVERAGE PERIOD but is not listed as a FIRM ATTORNEY, FORMER ATTORNEY, or NON-OREGON ATTORNEY in the Declarations.

**2.** Any person listed as a FIRM ATTORNEY, FORMER ATTORNEY, or NON-OREGON ATTORNEY in the Declarations, but only with respect to CLAIMS which arise out of a COVERED ACTIVITY rendered on behalf of THE FIRM.

**3.** Any former partner, shareholder, member, or attorney employee of THE FIRM, or any person formerly in an "of counsel" relationship to THE FIRM, who ceased to be affiliated in any way with THE FIRM more than five years prior to the beginning of the COVERAGE PERIOD, but only with respect to CLAIMS which arise out of a COVERED ACTIVITY rendered on behalf of THE FIRM and only for COVERED ACTIVITIES that took place while a PLF CLAIMS MADE PLAN issued to that person was in effect.

**4.** In the event of death, adjudicated incapacity, or bankruptcy, the conservator, guardian, trustee in bankruptcy, or legal or personal representative of any COVERED PARTY listed in Subsections 1 to 3 but only to the extent that such COVERED PARTY would otherwise be provided coverage under this Excess Plan.

**5.** Any attorney who becomes affiliated with THE FIRM after the beginning of the COVERAGE PERIOD who has been issued a PLF PLAN by the PLF, but only with respect to CLAIMS which arise out of a COVERED ACTIVITY rendered on behalf of THE FIRM. However, newly affiliated attorneys are not automatically COVERED PARTIES under this Subsection if: (a) the number of FIRM ATTORNEYS increases by more than 100 percent; (b) there is a firm merger or split; (c) an attorney joins or leaves a branch office of THE FIRM outside Oregon; (d) a new branch office is established outside Oregon; (e) THE FIRM or a current attorney with THE FIRM enters into an "of counsel" relationship with another firm or with an attorney who was not listed as a current attorney at the start of the COVERAGE PERIOD; or (f) THE FIRM hires an attorney who is not eligible to participate in the PLF's CLAIMS MADE PLAN.

*COMMENTS*

*Firms are generally not required to notify the PLF if an attorney joins or leaves THE FIRM after the start of the COVERAGE PERIOD, and are neither charged a prorated excess assessment nor receive a prorated refund for such changes. New attorneys who join after the start of the COVERAGE PERIOD are covered for their actions on behalf of THE FIRM during the remainder of the year. All changes after the start of the COVERAGE PERIOD should be reported to the PLF in THE FIRM'S renewal application for the next year.*

*Firms are required to notify the PLF after the start of the COVERAGE PERIOD, however, if any of the six circumstances listed in Subsection 5 apply. Under these circumstances, THE FIRM'S coverage will be subject again to underwriting, and a prorated adjustment may be made to THE FIRM'S excess assessment.*

*Please note also that FIRM ATTORNEYS, FORMER ATTORNEYS, and NON-OREGON ATTORNEYS have coverage under this Excess Plan only for CLAIMS which arise out of work performed for THE FIRM. For example, there is no coverage for CLAIMS which arise out of work performed for another firm before an attorney began working for THE FIRM; the attorney will have coverage, if at all, only under any Excess Plan or policy maintained by the other firm.*

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## SECTION III – WHAT IS A COVERED ACTIVITY

The following are COVERED ACTIVITIES:

[COVERED PARTY'S CONDUCT]

**1.** Any act, error, or omission by an attorney COVERED PARTY in the performance of professional services in the COVERED PARTY'S capacity as an attorney in private practice, as long as the act, error, or omission was rendered on behalf of THE FIRM and occurred after any applicable Retroactive Date and before any applicable Separation Date specified in the Declarations.

[CONDUCT OF OTHERS]

**2.** Any act, error, or omission by a person, other than an EXCLUDED ATTORNEY, for whose conduct an attorney COVERED PARTY is legally liable in the COVERED PARTY'S capacity as an attorney for THE FIRM provided each of the following criteria is satisfied:

**a.** The act, error, or omission causing the attorney COVERED PARTY'S liability occurred after any applicable Retroactive Date and before any applicable Separation Date specified in the Declarations;

**b.** The act, error, or omission, if committed by the attorney COVERED PARTY, would constitute the providing of professional services in the attorney COVERED PARTY'S capacity as an attorney in private practice; and

**c.** The act, error, or omission was not committed by an attorney who either (1) was affiliated in any way with THE FIRM during the five years prior to the COVERAGE PERIOD but was not listed as a FIRM ATTORNEY, FORMER ATTORNEY, or NON-OREGON ATTORNEY in the Declarations; or (2) ceased to be affiliated with THE FIRM more than five years prior to the beginning of the COVERAGE PERIOD but was not covered by a PLF CLAIMS MADE PLAN at the time of the act, error, or omission.

## [COVERED PARTY'S CONDUCT IN A SPECIAL CAPACITY]

**3.** Any act, error, or omission by an attorney COVERED PARTY in his or her capacity as a personal representative, administrator, conservator, executor, guardian, special representative pursuant to ORS 128.179 or similar statute, or trustee (except BUSINESS TRUSTEE); provided that the act, error, or omission arose out of a COVERED ACTIVITY as defined in Subsections 1 and 2 above; the CLAIM is brought by or for the benefit of a beneficiary of the special capacity relationship and arises out of a breach of that relationship; and such activity occurred after any applicable Retroactive Date and before any applicable Separation Date specified in the Declarations.

### COMMENTS

*To qualify for coverage a claim must arise out of a COVERED ACTIVITY. The definition of COVERED ACTIVITY imposes a number of restrictions on coverage. For additional Comments and examples discussing this requirement, see the Comments to Section III in the PLF CLAIMS MADE PLAN.*

***Retroactive Date.*** This Section introduces the concept of a Retroactive Date. If a Retroactive Date applies to a CLAIM to place it outside the definition of a COVERED ACTIVITY, there will be no coverage for the CLAIM under this Excess Plan as to any COVERED PARTY, even for vicarious liability.

***Example:*** Attorneys A and B practice as partners and apply for excess coverage from the PLF for Year 1. A has had several recent large claims arising from an inadequate docket control system, but implemented an adequate system on July 1 of the previous year. For underwriting reasons, the PLF decides to offer coverage to the firm under this Excess Plan with a Retroactive Date of July 1 of the previous year. A CLAIM is made against Attorney A, Attorney B, and the firm during Year 1 arising from conduct of Attorney A occurring prior to July 1 of the previous year. Because the conduct in question occurred prior to the firm's Retroactive Date under this Excess Plan, the CLAIM does not fall within the definition of a COVERED ACTIVITY and there is no coverage for the CLAIM for Attorney A, B, or the firm.

---

## SECTION IV – GRANT OF COVERAGE

### 1. Indemnity.

**a.** The PLF will pay those sums in excess of any APPLICABLE UNDERLYING LIMITS or applicable Deductible that a COVERED PARTY becomes legally obligated to pay as DAMAGES because of CLAIMS arising out of a COVERED ACTIVITY to which this Excess Plan applies. No other obligation or liability to pay sums or perform acts or services is covered unless specifically provided for under Subsection 2 – Defense.

**b.** This Excess Plan applies only to CLAIMS first made against a COVERED PARTY during the COVERAGE PERIOD, except as provided in this Subsection. A CLAIM will be deemed to have been first made at the time it would be deemed first made under the terms of the PLF PLAN. Two or more CLAIMS that are SAME OR RELATED CLAIMS, whenever made, will all be deemed to have been first made at the time they are deemed first made under the terms of the applicable PLF PLAN; provided, however, that a CLAIM that is asserted against a COVERED PARTY during the COVERAGE PERIOD will not relate back to a previous SAME OR RELATED CLAIM if prior to the COVERAGE PERIOD (1) none of the SAME OR RELATED CLAIMS were made against any COVERED PARTY in this Excess Plan and (2) no COVERED

PARTY had knowledge of any facts reasonably indicating that any CLAIM could or would be made in the future against any COVERED PARTY.

c. This Excess Plan applies only if the COVERED ACTIVITY giving rise to the CLAIM happens:

(1) During the COVERAGE PERIOD, or

(2) Prior to the COVERAGE PERIOD, provided that both of the following conditions are met:

(a) Prior to the effective date of this Excess Plan no COVERED PARTY had a basis to believe that the act, error, or omission was a breach of professional duty or may result in a CLAIM; and

(b) There is no prior policy or policies or agreements to indemnify which provide coverage for such liability or CLAIM, whether or not the available limits of liability of such prior policy or policies or agreements to indemnify are sufficient to pay any liability or CLAIM or whether or not the underlying limits and amount of such policy or policies or agreements to indemnify are different from this Excess Plan.

Subsection c(2)(a) of this Section will not apply as to any COVERED PARTY who, prior to the effective date of this Excess Plan, did not have a basis to believe that the act, error, or omission was a breach of professional duty or may result in a CLAIM, but only if THE FIRM circulated its Application for coverage among all FIRM ATTORNEYS listed in Section 10 of the Declarations and Current NON-OREGON ATTORNEYS listed in Section 14 of the Declarations before THE FIRM submitted it to the PLF.

d. This Excess Plan applies only to SUITS brought in the United States, its territories or possessions, Canada, or the jurisdiction of any Indian Tribe within the United States. This Excess Plan does not apply to SUITS brought in any other jurisdiction, or to SUITS brought to enforce a judgment rendered in any jurisdiction other than the United States, its territories or possessions, Canada, or the jurisdiction of any Indian Tribe within the United States.

e. The amount the PLF will pay is limited as described in SECTION VI.

f. Coverage under this Excess Plan is conditioned upon full and timely payment of all assessments.

#### COMMENTS

**Claims Made Form.** *This is a claims made Excess Plan. It applies to CLAIMS first made during the COVERAGE PERIOD shown in the Declarations. CLAIMS first made either prior to or subsequent to the COVERAGE PERIOD are not covered by this Excess Plan.*

**When Claim First Made; Multiple Claims.** *Except as specifically provided, this Excess Plan does not cover CLAIMS made prior to the COVERAGE PERIOD. The Excess Plan is intended to follow the terms of the PLF CLAIMS MADE PLAN with respect to when a CLAIM is first made and with respect to the treatment of multiple CLAIMS. See Section I.8, IV.1(b)(2), and VI.2, and related Comments and Examples in the PLF PLAN. However, because of the exception in Subsection 1.b. in this Excess Plan, CLAIMS made during the COVERAGE PERIOD will not relate back to previously made CLAIMS that were made against other attorneys or firms, as long as THE FIRM did not reasonably know that a CLAIM would be made under this Excess Plan.*



Example: Firm G does not maintain excess coverage. Firm G and one of its members, Attorney A, are sued by Claimant in Year 1. The claim is covered under Attorney A's Year 1 primary PLF PLAN. Claimant amends the complaint in Year 2, and for the first time asserts the same claim also against Firm H and one of its members, Attorney B. Neither Firm H nor Attorney B had previously been aware of the potential claim, and no notice of a potential claim against Attorney B or Firm H had previously been given to the PLF or any other carrier. Firm H carried its Year 1 excess coverage with Carrier X and carries its Year 2 excess coverage with the PLF. Carrier X denies coverage for the claim because Firm H did not give notice of the claim to Carrier X in Year 1 and did not purchase tail coverage from Carrier X. Under the terms of Subsection b.1, in these limited circumstances, Firm H's Year 2 Excess Plan would become excess to the Year 1 PLF CLAIMS MADE PLAN issued by the PLF as primary coverage to Attorney B.

**Covered Activity During Coverage Period.** To the extent that any COVERED PARTY under this Excess Plan has knowledge prior to the COVERAGE PERIOD that particular acts, errors, or omissions have given rise or could give rise to a CLAIM, it is reasonable that that CLAIM and other CLAIMS arising out of such acts, errors, or omissions would not be covered under this Excess Plan. Such CLAIMS should instead be covered under the policy or plan in force, if any, at the time the first such CLAIM was made or notice of a potential CLAIM could have been given under the terms of the prior policy or plan. Subsection (c) achieves these purposes by limiting the terms of the Coverage Grant with respect to acts, errors, or omissions which happen prior to the COVERAGE PERIOD so that no coverage is granted where there is prior knowledge, prior insurance or other coverage.

Example: Law firm maintains excess malpractice coverage with Carrier X in Year 1. The firm knows of a potential malpractice claim in September of that year, and could report it as a suspense matter or incident report to Carrier X at that time and obtain coverage under the firm's excess policy. The firm does not report the potential claim to Carrier X in Year 1. The firm obtains excess coverage from the PLF in Year 2, and the potential claim is actually asserted in April of Year 2. Whether or not the PLF has imposed a Retroactive Date for the firm's Year 2 coverage, there is no coverage for the claim under the firm's Year 2 Excess Plan with the PLF. This is true whether or not Carrier X provides coverage for the claim.

Example: Attorneys A, B, and C practice in a partnership. In Year 1, Attorney C knows of a potential claim arising from his activities, but does not tell the PLF or Attorneys A or B. Attorney A completes a Year 2 PLF excess program application on behalf of the firm, but does not reveal the potential claim because it is unknown to her. Attorney A does not circulate the application to attorneys B and C before submitting it to the PLF. The PLF issues an Excess Plan to the firm for Year 2, and the potential claim known to Attorney C in Year 1 is actually made against Attorneys A, B, and C and the firm in June of Year 2. Because the potential claim was known to a Covered Party (i.e., Attorney C) prior to the beginning of the Coverage Period, and because the firm did not circulate its application among the FIRM ATTORNEYS and Current NON-OREGON ATTORNEYS before submitting it to the PLF, the claim is not within the Coverage Grant. There is no coverage under the Year 2 Excess Plan for Attorneys A, B, or C or for the firm even though Attorneys A and B did not know of the potential claim in Year 1.

Example: Same facts as prior example, except that Attorney A did circulate the application to Attorneys B and C before submitting it to the PLF. Subsection c(2) will not be applied to deny coverage for the CLAIM as to Attorneys A and B and THE FIRM.

*However, there will be no coverage for Attorney C because the CLAIM falls outside the coverage grant under the terms of Subsection c(2)(b) and because Attorney C made a material misrepresentation to the PLF in the application.*

## **2. Defense**

**a.** After all APPLICABLE UNDERLYING LIMITS have been exhausted and the applicable Deductible has been expended, the PLF will defend any SUIT against a COVERED PARTY seeking DAMAGES to which this coverage applies until the Limits of Coverage extended by this Excess Plan are exhausted. The PLF has the sole right to investigate, repair, settle, designate defense attorneys, and otherwise conduct defense, repair, or prevention of any CLAIM or potential CLAIM.

**b.** With respect to any CLAIM or potential CLAIM the PLF defends or repairs, the PLF will pay all CLAIMS EXPENSES the PLF may incur. All payments will reduce the Limits of Coverage.

**c.** If the Limits of Coverage stated in the Declarations are exhausted prior to the conclusion of any CLAIM, the PLF may withdraw from further defense of the CLAIM.

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## **SECTION V – EXCLUSIONS FROM COVERAGE**

### *COMMENTS*

*Although many of the Exclusions in this Excess Plan are similar to the Exclusions in the PLF CLAIMS MADE PLAN, the Exclusions have been modified to apply to the Excess Plan and should be read carefully. For example, because the Excess Plan is issued to law firms rather than to individual attorneys, the Exclusions were modified to make clear which ones apply to all firm members and which apply only to certain firm members. Exclusions 22 (office sharing), 23 (excluded attorney), and 24 (excluded firm) are not contained in the PLF CLAIMS MADE PLAN.*

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### **[WRONGFUL CONDUCT EXCLUSIONS]**

**1.** This Excess Plan does not apply to any COVERED PARTY for any CLAIM in which that COVERED PARTY participates in a fraudulent or collusive CLAIM.

**2.** This Excess Plan does not apply to any COVERED PARTY for any CLAIM based upon or arising out of any intentional, dishonest, fraudulent, criminal, malicious, knowingly wrongful, or knowingly unethical acts, errors, or omissions committed by that COVERED PARTY or at the direction of that COVERED PARTY, or in which that COVERED PARTY acquiesces or remains passive after having personal knowledge thereof.

**3.** This Excess Plan does not apply to any CLAIM based upon or arising out of a proceeding brought by the Oregon State Bar or any similar entity.

**4.** This Excess Plan does not apply to:

**a.** The part of any CLAIM seeking punitive, exemplary or statutorily enhanced damages; or

**b.** Any CLAIM for or arising out of the imposition of attorney fees, costs, fines, penalties, or other sanctions imposed under any federal or state statute, administrative rule, court rule, or

case law intended to penalize bad faith conduct and/or the assertion of frivolous or bad faith claims or defenses. The PLF will defend the COVERED PARTY against such a CLAIM, but any liability for indemnity arising from such CLAIM will be excluded.

[BUSINESS ACTIVITY EXCLUSIONS]

**5.** This Excess Plan does not apply to that part of any CLAIM based upon or arising out of any COVERED PARTY'S conduct as an officer, director, partner, BUSINESS TRUSTEE, employee, shareholder, member, or manager of any entity except a LAW ENTITY.

**6.** This Excess Plan does not apply to any CLAIM by or on behalf of any business enterprise:

**a.** In which any COVERED PARTY has an ownership interest or had an ownership interest at the time of the alleged acts, errors, or omissions upon which the CLAIM is based;

**b.** In which any COVERED PARTY is a general partner, managing member, or employee, or was a general partner, managing member, or employee at the time of the alleged acts, errors, or omissions upon which the CLAIM is based; or

**c.** That is controlled, operated, or managed by any COVERED PARTY, either individually or in a fiduciary capacity, including the ownership, maintenance, or use of any property in connection therewith, or was so controlled, operated, or managed at the time of the alleged acts, errors, or omissions upon which the CLAIM is based.

Ownership interest, for purposes of this exclusion, will not include any ownership interest now or previously held solely as a passive investment as long as all COVERED PARTIES, those they control, spouses, parents, step-parents, children, step-children, siblings, or any member of their households, collectively now own or previously owned an interest of 10 percent or less in the business enterprise.

**7.** This Excess Plan does not apply to any CLAIM made by:

**a.** THE FIRM'S present, former, or prospective partner, employer, or employee, or

**b.** A present, former, or prospective officer, director, or employee of a professional corporation in which any COVERED PARTY was a shareholder,

unless such CLAIM arises out of conduct in an attorney-client capacity for one of the parties listed in Subsections a or b.

**8.** This Excess Plan does not apply to any CLAIM based upon or arising out of any business transaction subject to ORPC 1.8(a) or its equivalent in which any COVERED PARTY participated with a client unless disclosure in the form of Disclosure Form ORPC 1, attached as Exhibit A to this Excess Plan, has been properly executed prior to the occurrence giving rise to the CLAIM and either:

**a.** A copy of the executed disclosure form is forwarded to the PLF within ten (10) calendar days of execution, or

**b.** If delivery of a copy of the disclosure form to the PLF within ten (10) calendar days of execution would violate ORPC 1.6, ORS 9.460(3), or any other rule governing client confidences and secrets, the COVERED PARTY may instead send the PLF an alternative letter stating: (1) the name of the client with whom the COVERED PARTY is participating in a business transaction; (2) that the COVERED PARTY has provided the client with a disclosure letter pursuant to the requirements of ORPC 1.0(g) and 1.8(a) or their equivalents; (3) the date of the disclosure letter; and (4) that providing the PLF with a copy of the disclosure letter at the present time would violate applicable rules governing client

confidences and secrets. This alternative letter must be delivered to the PLF within ten (10) calendar days of execution of the disclosure letter.

**9.** This Excess Plan does not apply to any CLAIM based upon or arising out of any act, error, or omission in the course of providing INVESTMENT ADVICE if the INVESTMENT ADVICE is in fact either the sole cause or a contributing cause of any resulting damage. However, if all of the INVESTMENT ADVICE constitutes a COVERED ACTIVITY described in Section III.3, this exclusion will not apply unless part or all of such INVESTMENT ADVICE is described in Subsections d, e, f, or g of the definition of INVESTMENT ADVICE in Section I.10 of the PLF CLAIMS MADE PLAN.

[PERSONAL RELATIONSHIP AND BENEFITS EXCLUSIONS]

**10.** This Excess Policy does not apply to any CLAIM:

**a.** For the return of any fees, costs, or disbursements, including but not limited to fees, costs, and disbursements alleged to be excessive, not earned, or negligently incurred;

**b.** Arising from or relating to the negotiation, securing, or collection of fees, costs, or disbursements; or

**c.** For damages or the recovery of funds or property that have or will directly or indirectly benefit any COVERED PARTY.

**11.** This Excess Plan does not apply to any CLAIM based upon or arising out of an attorney COVERED PARTY'S legal services performed on behalf of the attorney COVERED PARTY'S spouse, parent, step-parent, child, step-child, sibling, or any member of his or her household, or on behalf of a business entity in which any of them, individually or collectively, have a controlling interest, based upon or arising out of the acts, errors, or omissions of that COVERED PARTY.

COMMENTS

*Work performed for family members is not covered under this Excess Plan. A CLAIM based upon or arising out of such work, even for example a CLAIM against other lawyers or THE FIRM for failure to supervise will be excluded from coverage. This exclusion does not apply, however, if one attorney performs legal services for another attorney's family member.*

**12.** This Excess Plan does not apply to any CLAIM arising out of any COVERED PARTY'S activity as a fiduciary under any employee retirement, deferred benefit, or other similar plan.

**13.** This Excess Plan does not apply to any CLAIM arising out of any witnessing of a signature or any acknowledgment, verification upon oath or affirmation, or other notarial act without the physical appearance before such witness or notary public, unless such CLAIM arises from the acts of THE FIRM'S employee and no COVERED PARTY has actual knowledge of such act.

[GOVERNMENT ACTIVITY EXCUSION]

**14.** This Excess Plan does not apply to any CLAIM arising out of any conduct:

**a.** As a public official or an employee of a governmental body, subdivision, or agency; or

**b.** In any other capacity which comes within the defense and indemnity requirements of ORS 30.285 and 30.287 or other similar state or federal statute, rule, or case law. If a public body rejects the defense and indemnity of such a CLAIM, the PLF will provide coverage for such COVERED ACTIVITY and will be subrogated to all rights against the public body.

[HOUSE COUNSEL EXCLUSION]

**15.** This Excess Plan does not apply to any CLAIM arising out of any conduct as an employee in an employer-employee relationship other than as an employee for a LAW ENTITY.

[GENERAL TORTIOUS CONDUCT EXCLUSIONS]

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

- a.** Bodily injury, sickness, disease, or death of any person;
- b.** Injury to, loss of, loss of use of, or destruction of any real, personal, or intangible property; or
- c.** Mental anguish or emotional distress in connection with any CLAIM described under Subsections a or b.

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

**17.** This Excess Plan does not apply to any CLAIM based on or arising out of harassment or discrimination on the basis of race, creed, age, religion, sex, sexual preference, disability, pregnancy, national origin, marital status, or any other basis prohibited by law.

[PATENT EXCLUSION]

**18.** This Excess Plan does not apply to any CLAIM based upon or arising out of professional services performed or any act, error, or omission committed in relation to the prosecution of a patent if the COVERED PARTY who performed the services was not registered with the U.S. Patent and Trademark Office at the time the CLAIM arose.

**19.** Reserved.

[CONTRACTUAL OBLIGATION EXCLUSION]

**20.** This Plan does not apply to any CLAIM:

- a.** Based upon or arising out of any bond or any surety, guaranty, warranty, joint control, or similar agreement, or any assumed obligation to indemnify another, whether signed or otherwise agreed to by YOU or someone for whose conduct YOU are legally liable, unless the CLAIM arises out of a COVERED ACTIVITY described in SECTION III.3 and the person against whom the CLAIM is made signs the bond or agreement solely in that capacity;
- b.** Any costs connected to ORS 20.160 or similar statute or rule;
- c.** For liability based on an agreement or representation, if the Covered Party would not have been liable in the absence of the agreement or representation; or
- d.** Claims in contract based upon an alleged promise to obtain a certain outcome or result.

[BANKRUPTCY TRUSTEE EXCLUSION]

**21.** This Excess Plan does not apply to any CLAIM arising out of any COVERED PARTY'S activity as a bankruptcy trustee.

[OFFICE SHARING EXCLUSION]

**22.** This Excess Plan does not apply to any CLAIM alleging the vicarious liability of any COVERED PARTY under the doctrine of apparent partnership, partnership by estoppel, or any similar theory, for the acts, errors, or omissions of any attorney, professional corporation, or other entity not listed in the Declarations with whom THE FIRM or attorney COVERED PARTIES shared office space or office facilities at the time of any of the alleged acts, errors, or omissions.

[EXCLUDED ATTORNEY EXCLUSION]

**23.** This Excess Plan does not apply to any CLAIM against any COVERED PARTY:

**a.** Arising from or relating to any act, error, or omission of any EXCLUDED ATTORNEY in any capacity or context, whether or not the COVERED PARTY personally participated in any such act, error, or omission or is vicariously liable, or

**b.** Alleging liability for the failure of a COVERED PARTY or any other person or entity to supervise, control, discover, prevent, or mitigate any activities of or harm caused by any EXCLUDED ATTORNEY.

[EXCLUDED FIRM EXCLUSION]

**24.** This Excess Plan does not apply to any CLAIM made against a COVERED PARTY:

**a.** Which arises from or is related to any act, error, or omission of:

**(1)** An EXCLUDED FIRM, or

**(2)** A past or present partner, shareholder, associate, attorney, or employee (including any COVERED PARTY) of an EXCLUDED FIRM while employed by, a partner or shareholder of, or in any way associated with an EXCLUDED FIRM,

in any capacity or context, and whether or not the COVERED PARTY personally participated in any such act, error, or omission or is vicariously liable therefore, or

**b.** Alleging liability for the failure of a COVERED PARTY or any other person or entity to supervise, control, discover, prevent, or mitigate any activities of or harm caused by any EXCLUDED FIRM or any person described in Subsection a(2) above.

[CONFIDENTIAL OR PRIVATE DATA EXCLUSION]

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

COMMENTS

*There is a growing body of law directed at protecting confidential or private information from disclosure. The protected information or data may involve personal information such as credit card information, social security numbers, drivers licenses, or financial or medical information. They may also involve business-related information such as trade secrets or intellectual property. Examples of loss, compromise, breach or access include but are not limited to electronically stored information or data being inadvertently disclosed or released by a Covered Party; being*

*compromised by the theft, loss or misplacement of a computer containing the data; being stolen or intentionally damaged; or being improperly accessed by a Covered Party or someone acting on his or her behalf. However, such information or data need not be in electronic format, and a data breach caused through, for example, the improper safeguarding or disposal of paper records would also fall within this exclusion.*

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

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## SECTION VI – LIMITS OF COVERAGE AND DEDUCTIBLE

### 1. Limits of Coverage

**a.** Regardless of the number of COVERED PARTIES under this Excess Plan, the number of persons or organizations who sustain damage, or the number of CLAIMS made, the PLF's maximum liability for indemnity and CLAIMS EXPENSE under this Excess Plan will be limited to the amount shown as the Limits of Coverage in the Declarations, less the Deductible listed in the Declarations, if applicable. The making of CLAIMS against more than one COVERED PARTY does not increase the PLF's Limit of Coverage.

**b.** If the SAME OR RELATED CLAIMS are made in the PLAN YEAR of this Excess Plan and the PLAN YEARS of other Excess Plans issued to THE FIRM by the PLF, then only a single Limit of Coverage will apply to all such CLAIMS.

### 2. Deductible

**a.** The Deductible for COVERED PARTIES under this Excess Plan who are not also covered under the PLF CLAIMS MADE PLAN is either the maximum Limit of Liability for indemnity and Claims Expense under any insurance policy covering the CLAIM or, if there is no such policy or the insurer is either insolvent, bankrupt, or in liquidation, the amount listed in Section 5 of the Declarations.

**b.** THE FIRM is obligated to pay any Deductible not covered by insurance. The PLF's obligation to pay any indemnity or CLAIMS EXPENSE as a result of a CLAIM for which a Deductible applies is only in excess of the applicable amount of the Deductible. The Deductible applies separately to each CLAIM, except for SAME OR RELATED CLAIMS. The Deductible amount must be paid by THE FIRM as CLAIMS EXPENSES are incurred or a payment of indemnity is made. At the PLF's option, it may pay such CLAIMS EXPENSES or indemnity, and THE FIRM will be obligated to reimburse the PLF for the Deductible within ten (10) days after written demand from the PLF.

### COMMENTS

*The making of the SAME OR RELATED CLAIMS against one or more lawyers in THE FIRM will not "stack" or create multiple Limits of Coverage. This is true even if the CLAIMS are made in different Plan Years. In that event, the applicable limit will be available limits from the Excess Plan in effect in the Plan Year in which the SAME OR*

*RELATED CLAIMS are deemed first made. In no event will more than one Limit of Liability be available for all such CLAIMS.*

*Under the PLF CLAIMS MADE PLAN, the SAME OR RELATED CLAIMS will result in only one Limit of Coverage being available, even if CLAIMS are made against COVERED PARTIES in different LAW ENTITIES. The Excess Plan works differently. The limits of Excess Plans issued to different firms may, where appropriate, “stack”; Excess Plans issued to any one firm do not. If SAME OR RELATED CLAIMS are made against COVERED PARTIES under Excess Plans issued by the PLF to two or more Law Firms, the available Limit of Coverage for THE FIRM under this Excess Plan will not be affected by the Limits of Coverage in other Excess Plans. THE FIRM, however, cannot “stack” limits of multiple Excess Plans issued to it for the SAME OR RELATED CLAIMS.*

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## SECTION VII – NOTICE OF CLAIMS

- 1.** THE FIRM must, as a condition precedent to the right of protection afforded any COVERED PARTY by this coverage, give the PLF, at the address shown in the Declarations, written notice of any CLAIM that is reasonably likely to involve any of the coverages of this Excess Plan. In the event a SUIT is brought against any COVERED PARTY, which is reasonably likely to involve any of the coverages of this Excess Plan, THE FIRM must immediately notify and deliver to the PLF, at the address shown in the Declarations, every demand, notice, summons, or other process received by the COVERED PARTY or the COVERED PARTY'S representatives.
- 2.** If during the COVERAGE PERIOD, any COVERED PARTY becomes aware of facts or circumstances that reasonably could be expected to be the basis of a CLAIM for which coverage may be provided under this Excess Plan, THE FIRM must give written notice to the PLF as soon as practicable during the COVERAGE PERIOD of:
  - a.** The specific act, error, or omission;
  - b.** The injury or damage that has resulted or may result; and
  - c.** The circumstances by which the COVERED PARTY first became aware of such act, error, or omission.
- 3.** If the PLF opens a suspense or claim file involving a CLAIM or potential CLAIM which otherwise would require notice from the COVERED PARTY under Subsection 1. or 2. above, the COVERED PARTY'S obligations under those subsections will be considered satisfied for that CLAIM or potential CLAIM.

### COMMENTS

*This is a Claims Made Plan. Section IV.1.b determines when a CLAIM is first made for the purpose of triggering coverage under this Plan. Section VII states the COVERED PARTY'S obligation to provide the PLF with prompt notice of CLAIMS, SUITS, and potential CLAIMS.*

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## SECTION VIII – COVERAGE DETERMINATIONS



- 1.** This Excess Plan is governed by the laws of the State of Oregon, regardless of any conflict-of-law principle that would otherwise result in the laws of any other jurisdiction governing this Excess Plan. Any dispute as to the applicability, interpretation, or enforceability of this Excess Plan, or any other issue pertaining to the provision of benefits under this Excess Plan, between any COVERED PARTY (or anyone claiming through a COVERED PARTY) and the PLF will be tried in the Multnomah County Circuit Court of the State of Oregon, which will have exclusive jurisdiction and venue of such disputes at the trial level.
- 2.** The PLF will not be obligated to provide any amounts in settlement, arbitration award, judgment, or indemnity until all applicable coverage issues have been finally determined by agreement or judgment.
- 3.** In the event of exceptional circumstances in which the PLF, at the PLF's option, has paid a portion or all Limits of Coverage toward settlement of a CLAIM before all applicable coverage issues have been finally determined, then resolution of the coverage dispute as set forth in this Section will occur as soon as reasonably practicable following the PLF's payment. In the event it is determined that this Excess Plan is not applicable to the CLAIM, or only partially applicable, then judgment will be entered in Multnomah County Circuit Court in the PLF's favor and against the COVERED PARTY (and all others on whose behalf the PLF's payment was made) in the amount of any payment the PLF made on an uncovered portion of the CLAIM, plus interest at the rate applicable to judgments from the date of the PLF's payment. Nothing in this Section creates an obligation by the PLF to pay a portion or all of the PLF's Limits of Coverage before all applicable coverage issues have been fully determined.
- 4.** The bankruptcy or insolvency of a COVERED PARTY will not relieve the PLF of its obligations under this Excess Plan.

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## SECTION IX – ASSISTANCE, COOPERATION, AND DUTIES OF COVERED PARTY

As a condition of coverage under this Excess Plan, every COVERED PARTY must satisfy all conditions of the PLF CLAIMS MADE PLAN.

### *COMMENTS*

*Among the conditions of coverage referred to in this section are the conditions of coverage stated at Section IX of the PLF PLAN.*

*The obligations of the COVERED PARTIES under this section as well as the other sections of the Excess Plan are to be performed without charge to the PLF.*

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## SECTION X – ACTIONS BETWEEN THE PLF AND COVERED PARTIES

- 1.** No legal action in connection with this Excess Plan may be brought against the PLF unless all COVERED PARTIES have fully complied with all terms of this Excess Plan.
- 2.** The PLF may bring an ACTION against a COVERED PARTY if:
  - a.** The PLF pays a CLAIM under this Excess Plan or any other Excess Plan issued by the PLF;

- b.** The COVERED PARTY under this Excess Plan is alleged to be liable for all or part of the damages paid by the PLF;
- c.** As between the COVERED PARTY and the person or entity on whose behalf the PLF has paid the CLAIM, the latter has an alleged right to pursue the COVERED PARTY for contribution, indemnity, or otherwise, for all or part of the damages paid; and
- d.** Such right can be alleged under a theory or theories for which no coverage is provided to the COVERED PARTY under this Excess Plan.
- 3.** In the circumstances outlined in Subsection 2, the PLF reserves the right to sue the COVERED PARTY, either in the PLF's name or in the name of the person or entity on whose behalf the PLF has paid, to recover such amounts as the PLF determines appropriate up to the full amount the PLF has paid. However, this section shall not entitle the PLF to sue the COVERED PARTY if the PLF's alleged rights against the COVERED PARTY are premised on a theory of recovery which would entitle the COVERED PARTY to indemnity under this Excess Plan if the PLF's action were successful.

#### COMMENTS

*Under certain circumstances, a claim against a COVERED PARTY may not be covered because of an exclusion or other applicable provision of the Excess Plan issued to a firm. However, in some cases the PLF may be required to pay the claim nonetheless because of its obligation to another COVERED PARTY under the terms of the firm's Excess Plan or under another Excess Plan issued by the PLF. This might occur, for example, when the attorney responsible for a claim has no coverage due to his or her intentional wrongful conduct, but his or her partner did not engage in or know of the wrongful conduct but is nevertheless allegedly liable. In these circumstances, if the PLF pays some or all of the claim arising from the responsible attorney's conduct, it is only fair that the PLF have the right to seek recovery back from that attorney; otherwise, the PLF would effectively be covering the attorney's non-covered claims under this Excess Plan simply because other COVERED PARTIES were also liable.*

*Example:* Attorney A misappropriates trust account funds belonging to Client X.

*Attorney A's partner, Attorney B, does not know of or acquiesce in Attorney A's wrongful conduct. Client X sues both Attorneys A and B. Attorney A has no coverage for the claim under his applicable PLF PLAN or the firm's Excess Plan, but Attorney B has coverage for her liability under an Excess Plan issued by the PLF. The PLF pays the claim. Section X.2 makes clear the PLF has the right to sue Attorney A for the damages the PLF paid.*

*Example:* Same facts as prior example, except that the PLF loans funds to the person or entity liable under terms which obligate the borrower to repay the loan to the extent the borrower recovers damages from Attorney A in an action for indemnity. Section X.2 makes clear the PLF has the right pursuant to such arrangement to participate in the borrower's indemnity action against Attorney A.

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## SECTION XI – SUPPLEMENTAL ASSESSMENTS

This Excess Plan is assessable. Each PLAN YEAR is accounted for and assessable using reasonable accounting standards and methods of assessment. If the PLF determines in its discretion that a

supplemental assessment is necessary to pay for CLAIMS, CLAIMS EXPENSE, or other expenses arising from or incurred during either this PLAN YEAR or a previous PLAN YEAR, THE FIRM agrees to pay its supplemental assessment to the PLF within thirty (30) days of request. THE FIRM further agrees that liability for such supplemental assessments shall be joint and several among THE FIRM and the partners, shareholders, and professional corporations listed as FIRM ATTORNEYS in the Declarations.

The PLF is authorized to make additional assessments for this PLAN YEAR until all its liability for this PLAN YEAR is terminated, whether or not any COVERED PARTY maintains coverage under an Excess Plan issued by the PLF at the time assessments are imposed.

#### COMMENTS

*This section is limited to a statement of the COVERED PARTIES' contractual obligation to pay supplemental assessments should the assessments originally levied be inadequate to pay all claims, claims expense, and other expenses arising from this PLAN YEAR. It is not intended to cover other assessments levied by the PLF, such as the assessment initially paid to purchase coverage under this Excess Plan or any regular or special underwriting assessment paid by any member of THE FIRM in connection with the primary PLF PLAN.*

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## SECTION XII – RELATION OF THE PLF'S COVERAGE TO INSURANCE COVERAGE OR OTHER COVERAGE

If any COVERED PARTY has valid and collectible insurance coverage or other obligation to indemnify, including but not limited to self-insured retentions, deductibles, or self insurance, which also applies to any loss or CLAIM covered by this Excess Plan, the PLF will not be liable under this Excess Plan until the limits of the COVERED PARTY'S insurance or other obligation to indemnify, including any applicable deductible, have been exhausted, unless such insurance or other obligation to indemnify is written only as specific excess coverage over the Limits of Coverage of this Excess Plan.

#### COMMENTS

*This Excess Plan is not an insurance policy. To the extent that insurance or other coverage exists, this Excess Plan may not be invoked. This provision is designed to preclude the application of the other insurance law rules applicable under Lamb-Weston v. Oregon Automobile Ins. Co., 219 Or 110, 341 P2d 110, 346 P2d 643 (1959).*

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## SECTION XIII – WAIVER AND ESTOPPEL

Notice to or knowledge of the PLF's representative, agent, employee, or any other person will not effect a waiver, constitute an estoppel, or be the basis of any change in any part of this Excess Plan, nor shall the terms of this Excess Plan be waived or changed except by written endorsement issued and signed by the PLF's authorized representative.

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## SECTION XIV – EXTENDED REPORTING COVERAGE

THE FIRM becomes eligible to purchase extended reporting coverage after 24 months of continuous excess coverage with the PLF. Upon termination or cancellation of this Excess Plan by either THE FIRM or the PLF, THE FIRM, if qualified, has the right to purchase extended reporting coverage for one of the following periods for an additional assessment equal to the percent shown below of the assessment levied against THE FIRM for this Excess Plan (as calculated on an annual basis).

<b>Extended Reporting Coverage Period</b>	<b>Additional Assessment</b>
12 Months	100 percent
24 Months	160 percent
36 Months	200 percent
60 Months	250 percent

THE FIRM must exercise this right and pay the assessment within 30 days after the termination or cancellation. Failure to exercise THE FIRM'S right and make payment within this 30-day period will result in forfeiture of all THE FIRM'S rights under this Section.

If THE FIRM qualifies for extended reporting coverage under this Section and timely exercises its rights and pays the required assessment, it will be issued an endorsement extending the period within which a CLAIM can be first made for the additional reporting period after the date of termination or cancellation which THE FIRM has selected. This endorsement will not otherwise change the terms of this Excess Plan. The right to extended reporting coverage under this Section will not be available if cancellation is by the PLF because of:

- a.** The failure to pay when due any assessment or other amounts to the PLF; or
- b.** The failure to comply with any other term or condition of this Excess Plan.

#### COMMENTS

*This section sets forth THE FIRM'S right to extended reporting coverage. Exercise of the rights hereunder does not establish new or increased limits of coverage and does not extend the period during which the COVERED ACTIVITY must occur to be covered by this Excess Plan.*

*Example: A firm obtains excess coverage from the PLF in Year 1, but discontinues coverage in Year 2. The firm exercises its rights under Section XIV of the Year 1 Excess Plan and purchases an extended reporting coverage period of 36 months during the first 30 days of Year 2. A CLAIM is made against THE FIRM in March of Year 3 based upon a COVERED ACTIVITY of a firm member occurring in October of Year 1. Because the claim was made during the 36-month extended reporting coverage period and arose from a COVERED ACTIVITY occurring during the COVERAGE PERIOD, it is covered under the terms and within the remaining Limits of Coverage of THE FIRM'S Year 1 Excess Plan.*

*Example: Same facts as prior example, except the claim which is made against THE FIRM in March of Year 3 is based upon an alleged error of a firm member occurring in January of Year 2. Because the alleged error occurred after the end of the COVERAGE PERIOD for the Year 1 Excess Plan, the claim does not fall within the terms of the*

*extended reporting coverage and so there is no coverage for the claim under THE FIRM'S Year 1 Excess Plan.*

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## SECTION XV – ASSIGNMENT

THE FIRM'S interest hereunder and the interest of any COVERED PARTY is not assignable.

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## SECTION XVI – OTHER CONDITIONS

### **1. Application**

A copy of the Application which THE FIRM submitted to the PLF in seeking coverage under this Excess Plan is attached to and shall be deemed a part of this Excess Plan. All statements and descriptions in the Application are deemed to be representations to the PLF upon which it has relied in agreeing to provide THE FIRM with coverage under this Excess Plan. Any misrepresentations, omissions, concealments of fact, or incorrect statements will negate coverage and prevent recovery under this Excess Plan if the misrepresentations, omissions, concealments of fact, or incorrect statements:

- a.** Are contained in the Application;
- b.** Are material and have been relied upon by the PLF; and
- c.** Are either:
  - (1)** Fraudulent; or
  - (2)** Material either to the acceptance of the risk or to the hazard assumed by the PLF.

### **2. Cancellation**

**a.** This Excess Plan may be canceled by THE FIRM by surrender of the Excess Plan to the PLF or by mailing or delivering written notice to the PLF stating when thereafter such cancellation will be effective. If canceled by THE FIRM, the PLF will retain the assessment on a pro rata basis.

**b.** This Excess Plan may be canceled by the PLF for any of the following reasons:

**(1)** IF THE FIRM has failed to pay an assessment when due, the PLF may cancel the Excess Plan by mailing to THE FIRM written notice stating when, not less than ten (10) days thereafter, such cancellation shall be effective.

**(2)** Other than for nonpayment of assessments as provided for in Subsection b(1) above, coverage under this Excess Plan may be canceled by the PLF prior to the expiration of the COVERAGE PERIOD only for one of the following specific reasons:

- a.** Material misrepresentation by any COVERED PARTY;
- b.** Substantial breaches of contractual duties, conditions, or warranties by any COVERED PARTY; or

c. Revocation, suspension, or surrender of any COVERED PARTY'S license or right to practice law.

Such cancellation may be made by mailing or delivering of written notice to THE FIRM stating when, not less than ten (10) days thereafter, such cancellation shall be effective.

The time of surrender of this Excess Plan or the effective date and hour of cancellation stated in the notice shall become the end of the COVERAGE PERIOD. Delivery of a written notice either by THE FIRM or by the PLF will be equivalent to mailing. If the PLF cancels, assessments shall be computed and refunded to THE FIRM pro rata. Assessment adjustment may be made either at the time cancellation is effected or as soon as practicable thereafter.

### **3. Termination**

This Excess Plan is non-renewable. This Excess Plan will automatically terminate on the date and time shown as the end of the COVERAGE PERIOD in the Declarations unless canceled by the PLF or by THE FIRM in accordance with the provisions of this Excess Plan prior to such date and time.

EXHIBIT A -- FORM ORPC 1

Dear [ **Client** ]:

*This letter confirms that we have discussed [specify the essential terms of the business transaction that you intend to enter into with your client and your role in the transaction. Be sure to inform the client whether you will be representing the client in the transaction. This is required by ORPC 1.8(a)(3)]. This letter also sets forth the conflict of interest that arises for me as your attorney because of this proposed business transaction.*

*The Oregon Rules of Professional Conduct prohibit an attorney from representing a client when the attorney's personal interests conflict with those of the client unless the client consents. Consequently, I can only act as your lawyer in this matter if you consent after being adequately informed. Rule 1.0(g) provides as follows:*

*(g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.*

*Although our interests presently appear to be consistent, my interests in this transaction could at some point be different than or adverse to yours. Specifically, [include an explanation which is sufficient to apprise the client of the potential adverse impact on the client of the matter to which the client is asked to consent, and any reasonable alternative courses of action, if applicable].*

*Please consider this situation carefully and decide whether or not you wish to enter into this transaction with me and to consent to my representation of you in this transaction. Rule 1.8(a)(2) requires me to recommend that you consult with another attorney in deciding whether or not your consent should be given. Another attorney could also identify and advise you further on other potential conflicts in our interests.*

*I enclose an article "Business Deals Can Cause Problems," which contains additional information.*

*If you do decide to consent, please sign and date the enclosed extra copy of this letter in the space provided below and return it to me.*

*Very truly yours,*

**[Attorney Name and Signature]**

*I hereby consent to the legal representation, the terms of the business transaction, and the lawyer's role in transaction as set forth in this letter:*

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**[Client's Signature]**

**[Date]**

Enclosure: "Business Deals Can Cause Problems," by Jeffrey D. Sapiro.

## *BUSINESS DEALS CAN CAUSE PROBLEMS (Complying With ORPC 1.8(a))*

*By Jeffrey D. Sapiro, Disciplinary Counsel, Oregon State Bar*

Something that clients often lose sight of is that attorneys are not only legal advisors, but are business people as well. It is no secret that most practitioners wish to build a successful practice, rendering quality legal services to their clients, as a means of providing a comfortable living for themselves and/or their families. Given this objective, it is not surprising that many attorneys are attracted to business opportunities outside their practices that may prove to be financially rewarding. The fact that these business opportunities are often brought to an attorney's attention by a client or through involvement in a client's financial affairs is reason to explore the ethical problems that may arise.

ORPC 1.8(a) and 1.0(g) read as follows:

### *Rule 1.8 Conflict of Interest: Current Clients: Specific Rules*

*(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:*

*(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;*

*(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and*

*(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.*

### *ORPC 1.0 Terminology*

*(g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.*

The rationale behind this rule should be obvious. An attorney has a duty to exercise professional judgment solely for the benefit of a client, independent of any conflicting influences or loyalties. If an attorney is motivated by financial interests adverse to that of the client, the undivided loyalty due to the client may very well be compromised. (See also ORPC 1.7 and 1.8(c) and (i)) Full disclosure in writing gives the client the opportunity and necessary information to obtain independent legal advice when the attorney's judgment may be affected by personal interest. Under ORPC 1.8(a) it is the client and not the attorney who should decide upon the seriousness of the potential conflict and whether or not to seek separate counsel.



A particularly dangerous situation is where the attorney not only engages in the business aspect of a transaction, but also furnishes the legal services necessary to put the deal together. In *In re Brown*, 277 Or 121, 559 P2d 884, rev. den. 277 Or 731, 561 P2d 1030 (1977), an attorney became partners with a friend of many years in a timber business, the attorney providing legal services and the friend providing the capital. The business later incorporated, with the attorney drafting all corporate documents, including a buy-sell agreement permitting the surviving stockholder to purchase the other party's stock. The Oregon Supreme Court found that the interests of the parties were adverse for a number of reasons, including the disparity in capital invested and the difference in the parties' ages, resulting in a potential benefit to the younger attorney under the buy-sell provisions. Despite the fact that the friend was an experienced businessman, the court held that the attorney violated the predecessor to ORPC 1.8(a),

DR 5-104(A), because the friend was never advised to seek independent legal advice.

Subsequent to *Brown*, the Supreme Court has disciplined several lawyers for improper business transactions with clients. Among these cases are *In re Drake*, 292 Or 704, 642 P2d 296 (1982), which provides a comprehensive analysis of ORPC 1.8(a)'s predecessor, DR 5-104(A); *In re Montgomery*, 292 Or 796, 643 P2d 338 (1982), in which the fact that the client was a more sophisticated business person than the attorney did not affect the court's analysis; *In re Germundson*, 201 Or 656, 724 P2d 793 (1986), in which a close friendship between the attorney and the client was deemed insufficient reason to dispense with conflict disclosures; and *In re Griffith*, 304 Or 575, 748 P2d (1987), in which the court noted that, even if no conflict is present when a transaction is entered into, subsequent events may lead to a conflict requiring disclosures or withdrawal by the attorney.

Even in those situations where the attorney does not furnish legal services, problems may develop. There is a danger that, while the attorney may feel he or she is merely an investor in a business deal, the client may believe the attorney is using his or her legal skills to protect the client's interests in the venture. Indeed, this may be the very reason the client approached the attorney with a business proposition in the first place. When a lawyer borrows money from a client, there may even be a presumption that the client is relying on the lawyer for legal advice in the transaction. *In re Montgomery*, 292 Or 796, 643 P2d 338 (1982). To clarify for the client the role played by the attorney in a business transaction, ORPC 1.8(a)(3) now provides that a client's consent to the attorney's participation in the transaction is not effective unless the client signs a writing that describes, among other things, the attorney's role and whether the attorney is representing the client in the transaction.

In order to avoid the ethical problems addressed by the conflict of interest rules, the Supreme Court has said that an attorney must at least advise the client to seek independent legal counsel (*In re Bartlett*, 283 Or 487, 584 P2d 296 (1978)). This is now required by ORPC 1.8(a)(2). The attorney should disclose not only that a conflict of interest may exist, but should also explain the nature of the conflict "in such detail so that (the client) can understand the reasons why it may be desirable for each to have independent counsel. . ." (*In re Boivin*, 271 Or 419, 424, 533 P2d 171 (1975)). Risks incident to a transaction with a client must also be disclosed (ORPC 1.0(g); *In re Montgomery*, 297 Or 738, 687 P2d 157 (1984); *In re Whipple*, 296 Or 105, 673 P2d 172 (1983)). Such a disclosure will help ensure that there is no misunderstanding over the role the attorney is to play in the transaction and will help prevent the attorney from running afoul of the disciplinary rule discussed above.

## CYBER LIABILITY AND BREACH RESPONSE ENDORSEMENT

### NOTICE

COVERAGE AGREEMENTS I.A., I.C. AND I.D. OF THIS ENDORSEMENT PROVIDE COVERAGE ON A CLAIMS MADE AND REPORTED BASIS AND APPLY ONLY TO CLAIMS FIRST MADE AGAINST A COVERED PARTY DURING THE COVERAGE PERIOD OR THE OPTIONAL EXTENSION PERIOD (IF APPLICABLE) AND REPORTED TO THE PLF DURING THE COVERAGE PERIOD OR AS OTHERWISE PROVIDED IN CLAUSE IX. OF THIS ENDORSEMENT. AMOUNTS INCURRED AS CLAIMS EXPENSES UNDER THIS ENDORSEMENT SHALL REDUCE AND MAY EXHAUST THE LIMIT OF LIABILITY.

COVERAGE AGREEMENT I.B. OF THIS ENDORSEMENT PROVIDES FIRST PARTY COVERAGE ON AN INCIDENT DISCOVERED AND REPORTED BASIS AND APPLIES ONLY TO INCIDENTS FIRST DISCOVERED BY A COVERED PARTY AND REPORTED TO THE PLF DURING THE COVERAGE PERIOD.

THIS ENDORSEMENT IS INTENDED TO COVER CERTAIN CLAIMS EXCLUDED UNDER THE PLF CLAIMS MADE PLAN AND PLF CLAIMS MADE EXCESS PLAN. HOWEVER, THE COVERAGE TERMS OF THIS ENDORSEMENT ARE DIFFERENT FROM THE PLF PLANS AND SHOULD BE REVIEWED CAREFULLY. THIS ENDORSEMENT DOES NOT MODIFY IN ANY RESPECT THE TERMS OF THE PLF CLAIMS MADE PLAN OR CLAIMS MADE EXCESS PLAN.

THIS IS A CLAIMS MADE AND REPORTED ENDORSEMENT.

### SCHEDULE

Item 1. **The Firm and Covered Parties** qualifying as such under Section II - WHO IS A COVERED PARTY of the applicable PLF Claims Made Excess Plan and Declarations Sheet to which this endorsement is attached.

Item 2. **Coverage Period:** see Section 3 of the Declarations to which this endorsement is attached.

Item 3. **Limits of Liability:**

**Endorsement Aggregate Limit of Liability** for Coverage Agreements I.A. (Information Security & Privacy Liability), I.B. (Privacy Breach Response Services), I.C. (Regulatory Defense & Penalties), I.D. (Website and Media Content Liability) and I.E. (Crisis Management & Public Relations):

<b>1-10 attorneys</b>	USD 100,000
<b>11+ attorneys:</b>	USD 250,000

But sublimited to:

A. Aggregate sublimit of liability applicable to Coverage Agreement I.B. (Privacy Breach Response Services)	USD 100,000
B. Aggregate sublimit of liability applicable to Coverage	USD 50,000

Agreement I.B.1 (legal and forensic)

- C. Aggregate sublimit of liability applicable to Coverage Agreement I.C. (Regulatory Defense & Penalties): USD 50,000
- D. Aggregate sublimit applicable to Coverage Agreement I.E. (Crisis Management & Public Relations): USD 10,000

Item 4. **Retentions:**

- A. Coverage Agreements I.A. (Information Security & Privacy Liability), I.C. (Regulatory Defense & Penalties), I.D. (Website and Media Content Liability) and I.E. (Crisis Management & Public Relations): USD 0

- B. Coverage Agreement I.B. (Privacy Breach Response Services):

Each Incident, event or related incidents or events giving rise to an obligation to provide **Privacy Breach Response Services:**

1. Costs for services provided under Coverage Agreements I.B.1. (legal and forensic services) and I.B.2. (notification costs) combined: USD 0
2. Services provided under I.B.3. (Call Center Services) and I.B.4. (Credit Monitoring Program): Breaches involving an obligation to notify fewer than 100 individuals

Item 5. **Endorsement Retroactive Date:** see Section 7 of the Declarations to which this endorsement is attached.

In consideration for the premium charged for the **PLF Claims Made Excess Plan**, the following additional coverages are added to the **FIRM's PLF Claims Made Excess Plan**. The following provisions in the **PLF Claims Made Excess Plan** shall also apply to this Endorsement: SECTION II – WHO IS A COVERED PARTY, SECTION VIII – COVERAGE DETERMINATIONS, SECTION IX – ASSISTANCE, COOPERATION, AND DUTIES OF COVERED PARTY, paragraphs 1. to 3. of the PLF Claims Made Plan only, SECTION X – ACTIONS BETWEEN THE PLF AND COVERED PARTIES, SECTION XII – RELATION OF THE PLF COVERAGE TO INSURANCE COVERAGE OR OTHER COVERAGE, SECTION XIII – WAIVER AND ESTOPPEL and SECTION XV – ASSIGNMENT. Except as otherwise specifically set forth herein, no other provisions in the **PLF Claims Made Excess Plan** shall apply to this Endorsement.

I. **COVERAGE AGREEMENTS**

A. **Information Security & Privacy Liability**

To pay on behalf of a **Covered Party:**

**Damages and Claims Expenses**, in excess of the **Retention**, which a **Covered Party** shall become legally obligated to pay because of any **Claim**, including a **Claim** for violation of a **Privacy Law**, first made against any **Covered Party** during the **Coverage Period** or **Optional Extension Period** (if applicable) and reported in

writing to the PLF during the **Coverage Period** or as otherwise provided in Clause IX. of this Endorsement for:

1. (a) theft, loss, or **Unauthorized Disclosure of Personally Identifiable Non-Public Information**; or  
(b) theft or loss of **Third Party Corporate Information**;  
that is in the care, custody or control of **The Firm**, or a third party for whose theft, loss or **Unauthorized Disclosure of Personally Identifiable Non-Public Information** or **Third Party Corporate Information** **The Firm** is legally liable (a third party shall include a Business Associate as defined by the Health Insurance Portability and Accountability Act (“HIPAA”)), provided such theft, loss or **Unauthorized Disclosure** first takes place on or after the **Retroactive Date** and before the end of the **Coverage Period**;
2. one or more of the following acts or incidents that directly result from a failure of **Computer Security** to prevent a **Security Breach**, provided that such act or incident first takes place on or after the **Retroactive Date** and before the end of the **Coverage Period**;
  - (a) the alteration, corruption, destruction, deletion, or damage to a **Data Asset** stored on **Computer Systems**;
  - (b) the failure to prevent transmission of **Malicious Code** from **Computer Systems** to **Third Party Computer Systems**; or
  - (c) the participation by **The Firm’s Computer System** in a **Denial of Service Attack** directed against a **Third Party Computer System**;
3. **The Firm's** failure to timely disclose an incident described in Coverage Agreement I.A.1. or I.A.2. in violation of any **Breach Notice Law**; provided such incident giving rise to **The Firm's** obligation under a **Breach Notice Law** must first take place on or after the **Retroactive Date** and before the end of the **Coverage Period**;
4. failure by a **Covered Party** to comply with that part of a **Privacy Policy** that specifically:
  - (a) prohibits or restricts **The Firm’s** disclosure, sharing or selling of a person’s **Personally Identifiable Non-Public Information**;
  - (b) requires **The Firm** to provide access to **Personally Identifiable Non-Public Information** or to correct incomplete or inaccurate **Personally Identifiable Non-Public Information** after a request is made by a person; or
  - (c) mandates procedures and requirements to prevent the loss of **Personally Identifiable Non-Public Information**;provided the acts, errors or omissions that constitute such failure to comply with a **Privacy Policy** must first take place on or after the **Retroactive Date** and before the end of the **Coverage Period**, and a **Covered Party** must, at the time of such acts, errors or omissions have in force a **Privacy Policy** that addresses those subsections above that are relevant to such **Claim**; or

**B. Privacy Breach Response Services**

To provide **Privacy Breach Response Services** to a **Covered Party** in excess of the **Retention** because of an incident (or reasonably suspected incident) described in Coverage Agreement I.A.1. or I.A.2. that first takes place on or after the **Retroactive Date** and before the end of the **Coverage Period** and is discovered by a **Covered Party** and is reported to the PLF during the **Coverage Period**.

**Privacy Breach Response Services** means the following:

1. Costs incurred:
  - (a) for a computer security expert to determine the existence and cause of any electronic data breach resulting in an actual or reasonably suspected theft, loss or **Unauthorized Disclosure of Personally Identifiable Non-Public Information** which may require a **Covered Party** to comply with a **Breach Notice Law** and to determine the extent to which such information was accessed by an unauthorized person or persons; and
  - (b) for fees charged by an attorney to determine the applicability of and actions necessary by a **Covered Party** to comply with **Breach Notice Law** due to an actual or reasonably suspected theft, loss or **Unauthorized Disclosure of Personally Identifiable Non-Public Information**;

provided amounts covered by (a) and (b) in this paragraph combined shall not exceed the amount set forth in Item 3.B. of the Schedule in the aggregate for the **Coverage Period**.

2. Costs incurred to provide notification to:
  - (a) individuals who are required to be notified by a **Covered Party** under the applicable **Breach Notice Law**; and
  - (b) in the PLF's discretion, to individuals affected by an incident in which their **Personally Identifiable Non-Public Information** has been subject to theft, loss, or **Unauthorized Disclosure** in a manner which compromises the security or privacy of such individual by posing a significant risk of financial, reputational or other harm to the individual.
3. The offering of **Call Center Services** to **Notified Individuals**.
4. The offering of the **Credit Monitoring Product** to **Notified Individuals** residing in the United States whose **Personally Identifiable Non-Public Information** was compromised or reasonably believed to be compromised as a result of theft, loss or **Unauthorized Disclosure**. Such offer will be provided in the notification communication provided pursuant to paragraph I.B.2. above.
5. **The Firm** will be provided with access to educational and loss control information provided by or on behalf of the PLF at no charge.

**Privacy Breach Response Services** and the conditions applicable thereto are set forth more fully in Clause XIII. of this Endorsement, Conditions Applicable to Privacy Breach Response Services.

**Privacy Breach Response Services** shall not include any internal salary or overhead expenses of a **Covered Party**.

C. **Regulatory Defense and Penalties**

To pay on behalf of a **Covered Party**:

**Claims Expenses and Penalties** in excess of the **Retention**, which a **Covered Party** shall become legally obligated to pay because of any **Claim** in the form of a **Regulatory Proceeding**, first made against any **Covered Party** during the **Coverage Period** or **Optional Extension Period** (if applicable) and reported in writing to the PLF during the **Coverage Period** or as otherwise provided in Clause IX. of this Endorsement, resulting from a violation of a **Privacy Law** and caused by an incident described in Coverage Agreement I.A.1., I.A.2. or I.A.3. that first takes place on or after the **Retroactive Date** and before the end of the **Coverage Period**.

**D. Website Media Content Liability**

To pay on behalf of a **Covered Party**:

**Damages and Claims Expenses**, in excess of the **Retention**, which a **Covered Party** shall become legally obligated to pay resulting from any **Claim** first made against any **Covered Party** during the **Coverage Period** or **Optional Extension Period** (if applicable) and reported in writing to the PLF during the **Coverage Period** or as otherwise provided in Clause IX. of this Endorsement for one or more of the following acts first committed on or after the **Retroactive Date** and before the end of the **Coverage Period** in the course of **Covered Media Activities**:

1. defamation, libel, slander, trade libel, infliction of emotional distress, outrage, outrageous conduct, or other tort related to disparagement or harm to the reputation or character of any person or organization;
2. a violation of the rights of privacy of an individual, including false light and public disclosure of private facts;
3. invasion or interference with an individual's right of publicity, including commercial appropriation of name, persona, voice or likeness;
4. plagiarism, piracy, misappropriation of ideas under implied contract;
5. infringement of copyright;
6. infringement of domain name, trademark, trade name, trade dress, logo, title, metatag, or slogan, service mark, or service name; or
7. improper deep-linking or framing within electronic content.

**E. Crisis Management and Public Relations**

To pay **Public Relations and Crisis Management Expenses** incurred by **The Firm** resulting from a **Public Relations Event**. **Public Relations Event** means:

1. the publication or imminent publication in a newspaper (or other general circulation print publication) or on radio or television of a covered **Claim** under this Endorsement; or
2. an incident described in Coverage Agreement I.A.1. or I.A.2. which results in the provision of **Privacy Breach Response Services**, or which reasonably may result in a covered **Claim** under this Endorsement and which **The Firm** has notified the PLF as a circumstance under Clause IX.C. of this Endorsement.

**Public Relations and Crisis Management Expenses** shall mean the following costs, if agreed in advance by the PLF in its reasonable discretion, which are directly related to mitigating harm to **The Firm's** reputation or potential **Loss** covered by this Endorsement resulting from a covered **Claim** or incident:

1. costs incurred by a public relations or crisis management consultant;

2. costs for media purchasing or for printing or mailing materials intended to inform the general public about the event;
3. costs to provide notifications to clients where such notifications are not required by law (“voluntary notifications”), including notices to non-affected clients of **The Firm**;
4. costs to provide government mandated public notices related to breach events (including such notifications required under HIPAA/Health Information Technology for Economic and Clinical Health Act (“HITECH”));
5. costs to provide services to restore healthcare records of **Notified Individuals** residing in the United States whose **Personally Identifiable Non-Public Information** was compromised as a result of theft, loss or **Unauthorized Disclosure**; and
6. other costs approved in advance by the PLF.

**Public Relations and Crisis Management Expenses** must be incurred no later than twelve (12) months following the reporting of such **Claim** or breach event to the PLF and, with respect to clauses 1. and 2., within ninety (90) days following the first publication of such **Claim** or breach event.

## II. DEFENSE AND SETTLEMENT OF CLAIMS

- A. The PLF shall have the right and duty to defend, subject to all the provisions, terms and conditions of this Endorsement:
  1. any **Claim** against a **Covered Party** seeking **Damages** which are payable under the terms of this Endorsement, even if any of the allegations of the **Claim** are groundless, false or fraudulent; or
  2. under Coverage Agreement I.C., any **Claim** in the form of a **Regulatory Proceeding**.
- B. With respect to any **Claim** against a **Covered Party** seeking **Damages** or **Penalties** which are payable under the terms of this Endorsement, the PLF will pay **Claims Expenses** incurred with its prior written consent. The Limit of Liability available to pay **Damages** and **Penalties** shall be reduced and may be completely exhausted by payment of **Claims Expenses**.
- C. If a **Covered Party** shall refuse to consent to any settlement or compromise recommended by the PLF and acceptable to the claimant under this Endorsement and elects to contest the **Claim**, the PLF’s liability for all **Damages**, **Penalties** and **Claims Expenses** shall not exceed:
  1. the amount for which the **Claim** could have been settled, less the remaining **Retention**, plus the **Claims Expenses** incurred up to the time of such refusal; plus
  2. fifty percent (50%) of any **Claims Expenses** incurred after the date such settlement or compromise was recommended to a **Covered Party** plus fifty percent (50%) of any **Damages** above the amount for which the **Claim** could have been settled. The remaining fifty percent (50%) of such **Claims Expenses** and **Damages** must be borne by **The Firm** at its own risk and would not be covered;

or the applicable Limit of Liability, whichever is less, and the PLF shall have the right to withdraw from the further defense thereof by tendering control of said defense to a

**Covered Party.** The portion of any proposed settlement or compromise that requires a **Covered Party** to cease, limit or refrain from actual or alleged infringing or otherwise injurious activity or is attributable to future royalties or other amounts that are not **Damages** (or **Penalties** for **Claims** covered under Coverage Agreement I.C.) shall not be considered in determining the amount for which a **Claim** could have been settled.

### III. TERRITORY

This Coverage applies only to **Claims** brought in the United States, its territories or possessions, Canada, or the jurisdiction of any Indian Tribe in the United States. This Coverage does not apply to **Claims** brought in any other jurisdiction, or to **Claims** brought to enforce a judgment rendered in any jurisdiction other than the United States, its territories or possessions, Canada, or the jurisdiction of any Indian Tribe in the United States.

### IV. EXCLUSIONS

The coverage under this Coverage does not apply to any **Claim** or **Loss**;

- A. For, arising out of or resulting from **Bodily Injury or Property Damage**;
- B. For, arising out of or resulting from any employer-employee relations, policies, practices, acts or omissions, or any actual or alleged refusal to employ any person, or misconduct with respect to employees, whether such **Claim** is brought by an employee, former employee, applicant for employment, or relative or domestic partner of such person; provided, however, that this exclusion shall not apply to an otherwise covered **Claim** under the Coverage Agreement I.A.1., I.A.2., or I.A.3. by a current or former employee of **The Firm**; or to the providing of **Privacy Breach Response Services** involving current or former employees of **The Firm**;
- C. For, arising out of or resulting from any actual or alleged act, error or omission or breach of duty by any director or officer in the discharge of their duty if the **Claim** is brought by the **Firm**, a subsidiary, or any principals, directors, officers, members or employees of the **Firm**.
- D. For, arising out of or resulting from any contractual liability or obligation, or arising out of or resulting from breach of contract or agreement either oral or written, provided, however, that this exclusion will not apply:
  1. only with respect to the coverage provided by Coverage Agreement I.A.1., to any obligation of **The Firm** to maintain the confidentiality or security of **Personally Identifiable Non-Public Information** or of **Third Party Corporate Information**;
  2. only with respect to Coverage Agreement I.D.4., for misappropriation of ideas under implied contract; or
  3. to the extent a **Covered Party** would have been liable in the absence of such contract or agreement;
- E. For, arising out of or resulting from any liability or obligation under a **Merchant Services Agreement**;
- F. For, arising out of or resulting from any actual or alleged antitrust violation, restraint of trade, unfair competition, or false or deceptive or misleading advertising or violation of the Sherman Antitrust Act, the Clayton Act, or the Robinson-Patman Act, as amended;
- G. For, arising out of or resulting from any actual or alleged false, deceptive or unfair trade practices; however this exclusion does not apply to:



1. any **Claim** covered under Coverage Agreements I.A.1., I.A.2., I.A.3. or I.C.; or
2. the providing of **Privacy Breach Response Services** covered under Coverage Agreement I.B.,

that results from a theft, loss or **Unauthorized Disclosure** of **Personally Identifiable Non-Public Information** provided that no **Covered Party** participated or is alleged to have participated or colluded in such theft, loss or **Unauthorized Disclosure**;

H. For, arising out of or resulting from:

1. the actual or alleged unlawful collection, acquisition or retention of **Personally Identifiable Non-Public Information** or other personal information by, on behalf of, or with the consent or cooperation of **The Firm**; or the failure to comply with a legal requirement to provide individuals with the ability to assent to or withhold assent (e.g. opt-in or opt-out) from the collection, disclosure or use of **Personally Identifiable Non-Public Information**; provided, that this exclusion shall not apply to the actual or alleged unlawful collection, acquisition or retention of **Personally Identifiable Non-Public Information** by a third party committed without the knowledge of a **Covered Party**; or
2. the distribution of unsolicited email, direct mail, or facsimiles, wire tapping, audio or video recording, or telemarketing, if such distribution, wire tapping or recording is done by or on behalf of a **Covered Party**;

I. For, arising out of or resulting from any act, error, omission, incident, failure of **Computer Security**, or **Security Breach** committed or occurring prior to the **Endorsement Retroactive Date**:

1. if any **Covered Party** on or before the **Endorsement Retroactive Date** knew or could have reasonably foreseen that such act, error or omission, incident, failure of **Computer Security**, or **Security Breach** might be expected to be the basis of a **Claim** or **Loss**; or
2. in respect of which any **Covered Party** has given notice of a circumstance, which might lead to a **Claim** or **Loss**, to the insurer of any other coverage in force prior to the **Endorsement Retroactive Date**;

J. For, arising out of or resulting from any related or continuing acts, errors, omissions, incidents or events, where the first such act, error, omission, incident or event was committed or occurred prior to the **Endorsement Retroactive Date**;

K. For, arising out of resulting from any of the following:

1. any actual or alleged violation of the Organized Crime Control Act of 1970 (commonly known as Racketeer Influenced and Corrupt Organizations Act or RICO), as amended, or any regulation promulgated thereunder or any similar federal law or legislation, or law or legislation of any state, province or other jurisdiction similar to the foregoing, whether such law is statutory, regulatory or common law;
2. any actual or alleged violation of any securities law, regulation or legislation, including but not limited to the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Act of 1940, any state or provincial blue sky or securities law, any other federal securities law or legislation, or any other similar law or legislation of any state, province or other jurisdiction, or any amendment

to the above laws, or any violation of any order, ruling or regulation issued pursuant to the above laws;

3. any actual or alleged violation of the Fair Labor Standards Act of 1938, the National Labor Relations Act, the Worker Adjustment and Retraining Act of 1988, the Certified Omnibus Budget Reconciliation Act of 1985, the Occupational Safety and Health Act of 1970, any similar law or legislation of any state, province or other jurisdiction, or any amendment to the above law or legislation, or any violation of any order, ruling or regulation issued pursuant to the above laws or legislation; or
4. any actual or alleged discrimination of any kind including but not limited to age, color, race, sex, creed, national origin, marital status, sexual preference, disability or pregnancy;

however this exclusion does not apply to any otherwise covered **Claim** under Coverage Agreement I.A.1., I.A.2., or I.A.3., or to providing **Privacy Breach Response Services** covered under Coverage Agreement I.B., that results from a theft, loss or **Unauthorized Disclosure of Personally Identifiable Non-Public Information**, provided that no **Covered Party** participated, or is alleged to have participated or colluded, in such theft, loss or **Unauthorized Disclosure**;

- L. For, arising out of or resulting from any actual or alleged acts, errors, or omissions related to any of **The Firm's** pension, healthcare, welfare, profit sharing, mutual or investment plans, funds or trusts, including any violation of any provision of the Employee Retirement Income Security Act of 1974 (ERISA) or any similar federal law or legislation, or similar law or legislation of any state, province or other jurisdiction, or any amendment to ERISA or any violation of any regulation, ruling or order issued pursuant to ERISA or such similar laws or legislation; however this exclusion does not apply to any otherwise covered **Claim** under Coverage Agreement I.A.1., I.A.2., or I.A.3., or to the providing of **Privacy Breach Response Services** under Coverage Agreement I.B., that results from a theft, loss or **Unauthorized Disclosure of Personally Identifiable Non-Public Information**, provided that no **Covered Party** participated, or is alleged to have participated or colluded, in such theft, loss or **Unauthorized Disclosure**;
- M. Arising out of or resulting from any criminal, dishonest, fraudulent, or malicious act, error or omission, any intentional **Security Breach**, intentional violation of a **Privacy Policy**, or intentional or knowing violation of the law, if committed by a **Covered Party**, or by others if the **Covered Party** colluded or participated in any such conduct or activity; provided this Endorsement shall apply to **Claims Expenses** incurred in defending any such **Claim** alleging the foregoing until such time as there is a final adjudication, judgment, binding arbitration decision or conviction against the **Covered Party**, or written admission by the **Covered Party**, establishing such conduct, or a plea of *nolo contendere* or no contest regarding such conduct, at which time **The Firm** shall reimburse the PLF for all **Claims Expenses** incurred defending the **Claim** and the PLF shall have no further liability for **Claims Expenses**;

provided further, that whenever coverage under this Endorsement would be excluded, suspended or lost because of this exclusion relating to acts or violations by a **Covered Party**, and with respect to which any other **Covered Party** did not personally commit or personally participate in committing or personally acquiesce in or remain passive after having personal knowledge thereof, then the PLF agrees that such Coverage as would otherwise be afforded under this Endorsement shall cover and be paid with respect to those **Covered Parties** who did not personally commit or personally

- participate in committing or personally acquiesce in or remain passive after having personal knowledge of one or more of the acts, errors or omissions described in above.
- N. For, arising out of or resulting from any actual or alleged:
1. infringement of patent or patent rights or misuse or abuse of patent;
  2. infringement of copyright arising from or related to software code or software products other than infringement resulting from a theft or **Unauthorized Access or Use** of software code by a person who is not a **Covered Party** or employee of **The Firm**;
  3. use or misappropriation of any ideas, trade secrets or **Third Party Corporate Information** (i) by, or on behalf of, **The Firm**, or (ii) by any other person or entity if such use or misappropriation is done with the knowledge, consent or acquiescence of a **Covered Party**;
  4. disclosure, misuse or misappropriation of any ideas, trade secrets or confidential information that came into the possession of any person or entity prior to the date the person or entity became an employee, officer, director, **member**, principal, partner or subsidiary of **The Firm**; or
  5. under Coverage Agreement I.A.2., theft of or **Unauthorized Disclosure** of a **Data Asset**;
- O. For, in connection with or resulting from a **Claim** brought by or on behalf of the Federal Trade Commission, the Federal Communications Commission, or any other state, federal, local or foreign governmental entity, in such entity's regulatory or official capacity; provided, this exclusion shall not apply to an otherwise covered **Claim** under Coverage Agreement I.C. or to the providing of **Privacy Breach Response Services** under Coverage Agreement I.B. to the extent such services are legally required to comply with a **Breach Notice Law**;
- P. Reserved.
- Q. For, arising out of or resulting from:
1. any **Claim** made by any business enterprise in which any **Covered Party** has greater than a fifteen percent (15%) ownership interest or made by **The Firm**; or
  2. a **Covered Party's** activities as a trustee, partner, member, manager, officer, director or employee of any employee trust, charitable organization, corporation, company or business other than that of **The Firm**;
- R. For, arising out of or resulting from any of the following: (1) trading losses, trading liabilities or change in value of accounts; any loss, transfer or theft of monies, securities or tangible property of others in the care, custody or control of **The Firm**; (2) the monetary value of any transactions or electronic fund transfers by or on behalf of a **Covered Party** which is lost, diminished, or damaged during transfer from, into or between accounts; or (3) the value of coupons, price discounts, prizes, awards, or any other valuable consideration given in excess of the total contracted or expected amount;
- S. With respect to Coverage Agreements I.A., I.B. and I.C., any **Claim** or **Loss** for, arising out of or resulting from the distribution, exhibition, performance, publication, display or broadcasting of content or material in:
1. broadcasts, by or on behalf of, or with the permission or direction of any **Covered Party**, including but not limited to, television, motion picture, cable, satellite television and radio broadcasts;

2. publications, by or on behalf of, or with the permission or direction of any **Covered Party**, including, but not limited to, newspaper, newsletter, magazine, book and other literary form, monograph, brochure, directory, screen play, film script, playwright and video publications, and including content displayed on an Internet site; or
3. advertising by or on behalf of any **Covered Party**;

provided however this exclusion does not apply to the publication, distribution or display of **The Firm's Privacy Policy**;

T. With respect to Coverage Agreement I.D., any **Claim** or **Loss**:

1. for, arising out of or resulting from the actual or alleged obligation to make licensing fee or royalty payments, including but limited to the amount or timeliness of such payments;
2. for, arising out of or resulting from any costs or expenses incurred or to be incurred by a **Covered Party** or others for the reprinting, reposting, recall, removal or disposal of any **Media Material** or any other information, content or media, including any media or products containing such **Media Material**, information, content or media;
3. brought by or on behalf of any intellectual property licensing bodies or organizations, including but not limited to, the American Society of Composers, Authors and Publishers, the Society of European Stage Authors and Composers or Broadcast Music, Inc;
4. for, arising out of or resulting from the actual or alleged inaccurate, inadequate or incomplete description of the price of goods, products or services, cost guarantees, cost representations, or contract price estimates, the authenticity of any goods, products or services, or the failure of any goods or services to conform with any represented quality or performance;
5. for, arising out of or resulting from any actual or alleged gambling, contest, lottery, promotional game or other game of chance; or
6. in connection with a **Claim** made by or on behalf of any independent contractor, joint venturer or venture partner arising out of or resulting from disputes over ownership of rights in **Media Material** or services provided by such independent contractor, joint venturer or venture partner;

U. Arising out of or resulting from, directly or indirectly occasioned by, happening through or in consequence of: war, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, military or usurped power or confiscation or nationalization or requisition or destruction of or damage to property by or under the order of any government or public or local authority;

V. For, arising out of or resulting from a Claim covered by the PLF Claims Made Excess Plan or any other professional liability Coverage available to any **Covered Party**, including any self insured retention or deductible portion thereof;

W. For, arising out of or resulting from any theft, loss or disclosure of **Third Party Corporate Information** by a **Related Party**;

X. Either in whole or in part, directly or indirectly arising out of or resulting from or in consequence of, or in any way involving:

1. asbestos, or any materials containing asbestos in whatever form or quantity;

2. the actual, potential, alleged or threatened formation, growth, presence, release or dispersal of any fungi, molds, spores or mycotoxins of any kind; any action taken by any party in response to the actual, potential, alleged or threatened formation, growth, presence, release or dispersal of fungi, molds, spores or mycotoxins of any kind, such action to include investigating, testing for, detection of, monitoring of, treating, remediating or removing such fungi, molds, spores or mycotoxins; and any governmental or regulatory order, requirement, directive, mandate or decree that any party take action in response to the actual, potential, alleged or threatened formation, growth, presence, release or dispersal of fungi, molds, spores or mycotoxins of any kind, such action to include investigating, testing for, detection of, monitoring of, treating, remediating or removing such fungi, molds, spores or mycotoxins;

the PLF will have no duty or obligation to defend any **Covered Party** with respect to any **Claim** or governmental or regulatory order, requirement, directive, mandate or decree which either in whole or in part, directly or indirectly, arises out of or results from or in consequence of, or in any way involves the actual, potential, alleged or threatened formation, growth, presence, release or dispersal of any fungi, molds, spores or mycotoxins of any kind;

3. the existence, emission or discharge of any electromagnetic field, electromagnetic radiation or electromagnetism that actually or allegedly affects the health, safety or condition of any person or the environment, or that affects the value, marketability, condition or use of any property; or
4. the actual, alleged or threatened discharge, dispersal, release or escape of Pollutants; or any governmental, judicial or regulatory directive or request that a **Covered Party** or anyone acting under the direction or control of a **Covered Party** test for, monitor, clean up, remove, contain, treat, detoxify or neutralize Pollutants. Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant including gas, acids, alkalis, chemicals, heat, smoke, vapor, soot, fumes or waste. Waste includes but is not limited to materials to be recycled, reconditioned or reclaimed.

## v. DEFINITIONS

As used in this Endorsement:

- A. **Bodily Injury** means physical injury, sickness, disease or death of any person, including any mental anguish or emotional distress resulting therefrom.
- B. **Breach Notice Law** means any United States federal, state, or territory statute or regulation that requires notice to persons whose **Personally Identifiable Non-Public Information** was accessed or reasonably may have been accessed by an unauthorized person.

**Breach Notice Law** also means a foreign statute or regulation that requires notice to persons whose **Personally Identifiable Non-Public Information** was accessed or reasonably may have been accessed by an unauthorized person; provided, however, that the **Credit Monitoring Product** provided by Coverage Agreement I.B.4. shall not apply to persons notified pursuant to any such foreign statute or regulation.

- C. **Call Center Services** means the provision of a call center to answer calls during standard business hours for a period of ninety (90) days following notification (or longer if required by applicable law or regulation) of an incident pursuant to Coverage Agreement I.B.2. Such notification shall include a toll free telephone number that connects to the call center during standard business hours. Call center employees will

answer questions about the incident from **Notified Individuals** and will provide information required by HITECH media notice or by other applicable law or regulation. **Call Center Services** will only be available for incidents (or reasonably suspected incidents) involving one hundred (100) or more **Notified Individuals**.

D. **Claim** means:

1. a written demand received by any **Covered Party** for money or services, including the service of a suit or institution of regulatory or arbitration proceedings;
2. with respect to coverage provided under Coverage Agreement I.C. only, institution of a **Regulatory Proceeding** against any **Covered Party**; and
3. a written request or agreement to toll or waive a statute of limitations relating to a potential **Claim** described in paragraph 1. above.

Multiple **Claims** arising from the same or a series of related or repeated acts, errors, or omissions, or from any continuing acts, errors, omissions, or from multiple **Security Breaches** arising from a failure of **Computer Security**, shall be considered a single **Claim** for the purposes of this Endorsement, irrespective of the number of claimants or **Covered Parties** involved in the **Claim**. All such **Claims** shall be deemed to have been made at the time of the first such **Claim**.

E. **Claims Expenses** means:

1. reasonable and necessary fees charged by an attorney designated pursuant to Clause II., Defense and Settlement of Claims, paragraph A.;
2. all other legal costs and expenses resulting from the investigation, adjustment, defense and appeal of a **Claim**, suit, or proceeding arising in connection therewith, or circumstance which might lead to a **Claim**, if incurred by the PLF, or by a **Covered Party** with the PLF's prior written consent; and
3. the premium cost for appeal bonds for covered judgments or bonds to release property used to secure a legal obligation, if required in any **Claim** against a **Covered Party**; provided the PLF shall have no obligation to appeal or to obtain bonds.

**Claims Expenses** do not include any salary, overhead, or other charges by a **Covered Party** for any time spent in cooperating in the defense and investigation of any **Claim** or circumstance that might lead to a **Claim** notified under this Endorsement, or costs to comply with any regulatory orders, settlements or judgments.

F. **Computer Security** means software, computer or network hardware devices, as well as **The Firm's** written information security policies and procedures, the function or purpose of which is to prevent **Unauthorized Access or Use**, a **Denial of Service Attack** against **Computer Systems**, infection of **Computer Systems** by **Malicious Code** or transmission of **Malicious Code** from **Computer Systems**. **Computer Security** includes anti-virus and intrusion detection software, firewalls and electronic systems that provide access control to **Computer Systems** through the use of passwords, biometric or similar identification of authorized users.

G. **Computer Systems** means computers and associated input and output devices, data storage devices, networking equipment, and back up facilities:

1. operated by and either owned by or leased to **The Firm**; or

2. systems operated by a third party service provider and used for the purpose of providing hosted computer application services to **The Firm** or for processing, maintaining, hosting or storing **The Firm's** electronic data, pursuant to written contract with **The Firm** for such services.

H. **Coverage Period** means the Coverage period as set forth in Item 2. of the Schedule.

I. Reserved.

J. **Covered Media Activities** means the display of **Media Material** on **The Firm's** web site.

K. **Covered Party** has the same meaning as set forth in Section II – WHO IS A COVERED PARTY in the PLF Claims Made Excess Plan.

L. **Credit Monitoring Product** means a credit monitoring product that provides daily credit monitoring from the following credit bureaus: Experian, TransUnion and Equifax.

**Notified Individuals** who subscribe to the **Credit Monitoring Product** shall also receive:

1. access to their credit report from one of the three credit bureaus at the time of enrollment;
2. ID theft insurance for certain expenses resulting from identity theft;
3. notification of a critical change to their credit that may indicate fraud (such as an address change, new credit inquiry, new account opening, posting of negative credit information such as late payments, public record posting, as well as other factors); and
4. fraud resolution services if they become victims of identity theft as a result of the incident for which notification is provided pursuant to Coverage Agreement I.B.2.

If the Credit Monitoring Product becomes commercially unavailable, it shall be substituted with a similar commercial product that provides individual credit monitoring for potential identity theft. The **Credit Monitoring Product** will only be available for incidents (or reasonably suspected incidents) involving one hundred (100) or more **Notified Individuals**.

M. **Data Asset** means any software or electronic data that exists in **Computer Systems** and that is subject to regular back up procedures, including computer programs, applications, account information, customer information, private or personal information, marketing information, financial information and any other information maintained by **The Firm** in its ordinary course of business.

N. **Damages** means a monetary judgment, award or settlement; provided that the term **Damages** shall not include or mean:

1. future profits, restitution, disgorgement of unjust enrichment or profits by a **Covered Party**, or the costs of complying with orders granting injunctive or equitable relief;
2. return or offset of fees, charges, or commissions charged by or owed to a **Covered Party** for goods or services already provided or contracted to be provided;
3. any damages which are a multiple of compensatory damages, fines, taxes or loss of tax benefits, sanctions or penalties;

4. punitive or exemplary damages;
  5. discounts, coupons, prizes, awards or other incentives offered to a **Covered Party's** customers or clients;
  6. liquidated damages to the extent that such damages exceed the amount for which a **Covered Party** would have been liable in the absence of such liquidated damages agreement;
  7. fines, costs or other amounts a **Covered Party** is responsible to pay under a **Merchant Services Agreement**; or
  8. any amounts for which a **Covered Party** is not liable, or for which there is no legal recourse against a **Covered Party**.
- O. **Denial of Service Attack** means an attack intended by the perpetrator to overwhelm the capacity of a **Computer System** by sending an excessive volume of electronic data to such **Computer System** in order to prevent authorized access to such **Computer System**.
- P. **Endorsement Aggregate Limit of Liability** means the aggregate Limit of Liability set forth in Item 3. of the Schedule.
- Q. **Endorsement Retroactive Date** means the date specified in Section 7 of the Declarations Sheet attached to this Endorsement.
- R. **The Firm** means the entities as defined in Section I – Definitions of the applicable Claims Made Excess Plan and Declarations Sheet to which this Endorsement is attached.
- S. **Loss** means **Damages, Claims Expenses, Penalties, Public Relations and Crisis Management Expenses** and **Privacy Breach Response Services**.
- T. **Malicious Code** means any virus, Trojan horse, worm or any other similar software program, code or script intentionally designed to insert itself into computer memory or onto a computer disk and spread itself from one computer to another.
- U. **Media Material** means any information in electronic form, including words, sounds, numbers, images, or graphics and shall include advertising, video, streaming content, web-casting, online forum, bulletin board and chat room content, but does not mean computer software or the actual goods, products or services described, illustrated or displayed in such **Media Material**.
- V. **Merchant Services Agreement** means any agreement between a **Covered Party** and a financial institution, credit/debit card company, credit/debit card processor or independent service operator enabling a **Covered Party** to accept credit card, debit card, prepaid card, or other payment cards for payments or donations.
- W. Reserved.
- X. **Notified Individual** means an individual person to whom notice is given or attempted to be given under Coverage Agreement I.B.2.; provided any persons notified under a foreign **Breach Notice Law** shall not be considered **Notified Individuals**.
- Y. **Optional Extension Period** means the period of time after the end of the **Coverage Period** for reporting **Claims** as provided in Clause VIII., Optional Extension Period, of this Endorsement.



Z. **Penalties** means:

1. any civil fine or money penalty payable to a governmental entity that was imposed in a **Regulatory Proceeding** by the Federal Trade Commission, Federal Communications Commission, or any other federal, state, local or foreign governmental entity, in such entity's regulatory or official capacity; and
2. amounts which a **Covered Party** is legally obligated to deposit in a fund as equitable relief for the payment of consumer claims due to an adverse judgment or settlement of a **Regulatory Proceeding** (including such amounts required to be paid into a "Consumer Redress Fund"); but and shall not include payments to charitable organizations or disposition of such funds other than for payment of consumer claims for losses caused by an event covered by Coverage Agreements A.1., A.2. or A.3.;

but shall not mean (a) costs to remediate or improve **Computer Systems**, (b) costs to establish, implement, maintain, improve or remediate security or privacy practices, procedures, programs or policies, (c) audit, assessment, compliance or reporting costs, or (d) costs to protect the confidentiality, integrity and/or security of **Personally Identifiable Non-Public Information** from theft, loss or disclosure, even if it is in response to a regulatory proceeding or investigation.

AA. **Personally Identifiable Non-Public Information** means:

1. information concerning the individual that constitutes "nonpublic personal information" as defined in the Gramm-Leach Bliley Act of 1999, as amended, and regulations issued pursuant to the Act;
2. medical or health care information concerning the individual, including "protected health information" as defined in the Health Insurance Portability and Accountability Act of 1996, as amended, and regulations issued pursuant to the Act;
3. information concerning the individual that is defined as private personal information under statutes enacted to protect such information in foreign countries, for **Claims** subject to the law of such jurisdiction;
4. information concerning the individual that is defined as private personal information under a **Breach Notice Law**; or
5. the individual's drivers license or state identification number; social security number; unpublished telephone number; and credit, debit or other financial account numbers in combination with associated security codes, access codes, passwords or pins;

if such information allows an individual to be uniquely and reliably identified or contacted or allows access to the individual's financial account or medical record information but does not include publicly available information that is lawfully made available to the general public from government records.

BB. Reserved.

CC. **Privacy Law** means a federal, state or foreign statute or regulation requiring **The Firm** to protect the confidentiality and/or security of **Personally Identifiable Non-Public Information**.

DD. **Privacy Policy** means **The Firm's** public declaration of its policy for collection, use, disclosure, sharing, dissemination and correction or supplementation of, and access to **Personally Identifiable Non-Public Information**.

- EE. **Property Damage** means physical injury to or destruction of any tangible property, including the loss of use thereof.
- FF. **Regulatory Proceeding** means a request for information, civil investigative demand, or civil proceeding commenced by service of a complaint or similar proceeding brought by or on behalf of the Federal Trade Commission, Federal Communications Commission, or any federal, state, local or foreign governmental entity in such entity's regulatory or official capacity in connection with such proceeding.
- GG. Reserved.
- HH. **Retention** means the applicable retention for each Coverage Agreement as specified in Item 4. of the Schedule.
- II. Reserved.
- JJ. **Security Breach** means:
1. **Unauthorized Access or Use of Computer Systems**, including **Unauthorized Access or Use** resulting from the theft of a password from a **Computer System** or from any **Covered Party**;
  2. a **Denial of Service Attack** against **Computer Systems** or **Third Party Computer Systems**; or
  3. infection of **Computer Systems** by **Malicious Code** or transmission of **Malicious Code** from **Computer Systems**,
- whether any of the foregoing is a specifically targeted attack or a generally distributed attack.
- A series of continuing **Security Breaches**, related or repeated **Security Breaches**, or multiple **Security Breaches** resulting from a continuing failure of **Computer Security** shall be considered a single **Security Breach** and be deemed to have occurred at the time of the first such **Security Breach**.
- KK. **Third Party Computer Systems** means any computer systems that: (1) are not owned, operated or controlled by a **Covered Party**; and (2) does not include computer systems of a third party on which a **Covered Party** performs services. Computer systems include associated input and output devices, data storage devices, networking equipment, and back up facilities.
- LL. **Third Party Corporate Information** means any trade secret, data, design, interpretation, forecast, formula, method, practice, credit or debit card magnetic strip information, process, record, report or other item of information of a third party not covered under this Endorsement which is not available to the general public and is provided to a **Covered Party** subject to a mutually executed written confidentiality agreement or which **The Firm** is legally required to maintain in confidence; however, **Third Party Corporate Information** shall not include **Personally Identifiable Non-Public Information**.
- MM. **Unauthorized Access or Use** means the gaining of access to or use of **Computer Systems** by an unauthorized person or persons or the use of **Computer Systems** in an unauthorized manner.
- NN. **Unauthorized Disclosure** means the disclosure of (including disclosure resulting from phishing) or access to information in a manner that is not authorized by **The Firm** and is without knowledge of, consent, or acquiescence of any **Covered Party**.

## VI. LIMIT OF LIABILITY AND COVERAGE

- A. The **Endorsement Aggregate Limit of Liability** stated in Item 3. of the Schedule is the PLF's combined total limit of liability for all **Damages, Penalties, Privacy Breach Response Services, Public Relations and Crisis Management Expenses and Claims Expenses** payable under this Endorsement. The **Endorsement Aggregate Limit of Liability** is in addition to the Limit of Coverage under the PLF Claims Made Excess Plan.

The sublimit of liability stated in Item 3.A. of the Schedule is the aggregate sublimit of liability payable under Coverage Agreement I.B. Privacy Breach Response Services of this Endorsement and is part of and not in addition to the **Endorsement Aggregate Limit of Liability**.

The sublimit of liability stated in Item 3.B. of the Schedule is the aggregate sublimit of liability payable under Coverage Agreement I.B.(1) of this Endorsement and is part of and not in addition to the **Endorsement Aggregate Limit of Liability**.

The sublimit of liability stated in Item 3.C. of the Schedule is the aggregate sublimit of liability payable under Coverage Agreement I.C. Regulatory Defense and Penalties of this Endorsement and is part of and not in addition to the **Endorsement Aggregate Limit of Liability**.

The sublimit of liability stated in Item 3.D. of the Schedule is the aggregate sublimit of liability payable under Coverage Agreement I.E. Crisis Management and Public Relations of this Endorsement and is part of and not in addition to the **Endorsement Aggregate Limit of Liability**.

Neither the inclusion of more than one **Covered Party** under this Endorsement, nor the making of **Claims** by more than one person or entity shall increase the Limit of Liability.

- B. The Limit of Liability for the **Optional Extension Period** shall be part of and not in addition to the **Endorsement Aggregate Limit of Liability**.
- C. The PLF shall not be obligated to pay any **Damages, Penalties, Privacy Breach Response Services, Public Relations and Crisis Management Expenses or Claims Expenses**, or to undertake or continue defense of any suit or proceeding, after the **Endorsement Aggregate Limit of Liability** has been exhausted by payment of **Damages, Penalties, Public Relations and Crisis Management Expenses or Claims Expenses**, or after deposit of the **Endorsement Aggregate Limit of Liability** in a court of competent jurisdiction. Upon such payment, the PLF shall have the right to withdraw from the further defense of any **Claim** under this Endorsement by tendering control of said defense to a **Covered Party**.

## VII. RETENTION

- A. The **Retention** amount set forth in Item 4.A. of the Schedule applies separately to each incident, event or related incidents or events, giving rise to a **Claim**. The **Retention** shall be satisfied by monetary payments by **The Firm of Damages, Claims Expenses, Public Relations and Crisis Management Expenses or Penalties**.
- B. The **Retention** amount set forth in Item 4.B. of the Schedule applies separately to each incident, event or related incidents or events, giving rise to an obligation to provide Privacy Breach Response Services. Services under Coverage Agreements I.B.3. and I.B.4. will only be provided for incidents requiring notification to 100 or more individuals..

## VIII. OPTIONAL EXTENSION PERIOD

- A. In the event **The Firm** purchases Extended Reporting Coverage for its Excess Plan, as provided for in Section XIV of the Excess Plan, **The Firm** will also be provided a corresponding **Optional Extension Period** under this Endorsement. If such **Optional Extension Period** is provided, then the time period for **Claims** to be made and reported to the PLF and Beazley Group will be extended by the same Extended Reporting Coverage Period purchased in the Extended Reporting Coverage; provided that such **Claims** must arise out of acts, errors or omissions committed on or after the **Endorsement Retroactive Date** and before the end of the **Coverage Period**.
- B. The Limit of Liability for the **Optional Extension Period** shall be part of, and not in addition to, the applicable Limit of Liability of the PLF for the **Coverage Period** and the exercise of the **Optional Extension Period** shall not in any way increase the **Endorsement Aggregate Limit of Liability** or any sublimit of liability. The **Optional Extension Period** does not apply to Coverage Agreement I.B.
- C. All notices and premium payments with respect to the **Optional Extension Period** option shall be directed to the PLF and Beazley Group.
- D. At the commencement of the **Optional Extension Period** the entire premium shall be deemed earned, and in the event **The Firm** terminates the **Optional Extension Period** for any reason prior to its natural expiration, the PLF will not be liable to return any premium paid for the **Optional Extension Period**.

## IX. NOTICE OF CLAIM, LOSS OR CIRCUMSTANCE THAT MIGHT LEAD TO A CLAIM

- A. If any **Claim** is made against a **Covered Party**, the **Covered Party** shall forward as soon as practicable to both the PLF and Beazley Group, 1270 Avenue of the Americas, 12<sup>th</sup> Floor, New York, NY 10020, Tel: (646) 943-5912 or Tel: (866) 567-8570, Fax: (646) 378-4039, Email: tmbclaims@beazley.com written notice of such **Claim** in the form of a telecopy, email or express or certified mail together with every demand, notice, summons or other process received by a **Covered Party** or a **Covered Party's** representative. In no event shall such notice be later than the end of the **Coverage Period** or the end of the **Optional Extension Period** (if applicable).
- B. With respect to Coverage Agreement I.B., for a legal obligation to comply with a **Breach Notice Law** because of an incident (or reasonably suspected incident) described in Coverage Agreement I.A.1. or I.A.2., such incident or reasonably suspected incident must be reported as soon as practicable to the persons in paragraph A. above during the **Coverage Period** after discovery by a **Covered Party**.
- C. If during the **Coverage Period**, a **Covered Party** first becomes aware of any circumstance that could reasonably be the basis for a **Claim** it may give written notice to both the PLF through and Beazley Group in the form of a telecopy, email or express or certified mail as soon as practicable during the **Coverage Period**. Such a notice must include:
  - 1. the specific details of the act, error, omission, or **Security Breach** that could reasonably be the basis for a **Claim**;
  - 2. the injury or damage which may result or has resulted from the circumstance; and
  - 3. the facts by which a **Covered Party** first became aware of the act, error, omission or **Security Breach**.

Any subsequent **Claim** made against a **Covered Party** arising out of such circumstance which is the subject of the written notice will be deemed to have been made at the time written notice complying with the above requirements was first given to the PLF.

An incident or reasonably suspected incident reported to both the PLF and Beazley Group during the **Coverage Period** and in conformance with Clause IX.B shall also constitute notice of a circumstance under this Clause IX.C.

- D. A **Claim** or legal obligation under paragraph A. or B. above shall be considered to be reported to the PLF when written notice is first received by both the PLF or Beazley Group in the form of a telecopy, email or express or certified mail or email through persons named in paragraph A. above of the **Claim** or legal obligation, or of an act, error, or omission, which could reasonably be expected to give rise to a **Claim** if provided in compliance with paragraph C. above.

#### X. MERGERS AND ACQUISITIONS

If during the **Coverage Period** **The Firm** consolidates or merges with or is acquired by another entity, or sells substantially all of its assets to any other entity, then this Endorsement shall remain in full force and effect, but only with respect to a **Security Breach**, or other act or incidents that occur prior to the date of the consolidation, merger or acquisition. There shall be no coverage provided by this Endorsement for any other **Claim** or **Loss**.

#### XI. THE FIRM AS AGENT

**The Firm** shall be considered the agent of all **Covered Parties**, and shall act on behalf of all **Covered Parties** with respect to the giving of or receipt of all notices pertaining to this Endorsement, the acceptance of any endorsements to this Endorsement, and **The Firm** shall be responsible for the payment of all premiums and **Retentions**.

#### XII. AUTHORIZATION

By acceptance of this Endorsement, the **Covered Parties** agree that **The Firm** will act on their behalf with respect to the giving and receiving of any notice provided for in this Endorsement, the payment of premiums and the receipt of any return premiums that may become due under this Endorsement, and the agreement to and acceptance of endorsements.

#### XIII. CONDITIONS APPLICABLE TO PRIVACY BREACH RESPONSE SERVICES

The availability of any coverage under Coverage Agreement I.B. for Privacy Breach Response **Services** (called the "Services" in this Clause) is subject to the following conditions.

In the event of an incident (or reasonably suspected incident) covered by Coverage Agreement I.B of this Endorsement, the PLF (referred to as "we" or "us" in this Clause) will provide **The Firm** (referred to as "you" in this Clause) with assistance with the Services and with the investigation and notification process as soon as you notify us of an incident or reasonably suspected incident (an "Incident").

- A. The Services provided under the Endorsement have been developed to expedite the investigation and notification process and help ensure that your response to a covered Incident will comply with legal requirements and will be performed economically and efficiently. It is therefore important that in the event of an Incident, you follow the program's requirements stated below, as well as any further procedures described in the *Information Packet* provided with this Endorsement, and that you communicate with us so that we can assist you with handling the Incident and with the Services. You must also assist us and cooperate with us and any third parties involved in providing the Services. In addition to the requirements stated below, such assistance and cooperation

shall include, without limitation, responding to requests and inquiries in a timely manner and entering into third party contracts required for provision of the Services.

- B. If the costs of a computer security expert are covered under Coverage Agreement I.B.1, you must select such expert, in consultation with us, from the program's list of approved computer security experts included in the *Information Packet* provided with this Endorsement, which list may be updated by us from time to time. The computer security expert will require access to information, files and systems and you must comply with the expert's requests and cooperate with the expert's investigation. Reports or findings of the expert will be made available to you, us and any attorney that is retained to provide advice to you with regard to the Incident.
- C. If the costs of an attorney are covered under Coverage Agreement I.B.1., such attorney shall be selected by you from the program's list of approved legal counsel included in the *Information Packet* provided with this Endorsement, which list may be updated by us from time to time. The attorney will represent you in determining the applicability of, and the actions necessary to comply with, **Breach Notice Laws** in connection with the Incident.
- D. If notification to individuals in connection with an Incident is covered under Coverage Agreement I.B.2., such notice will be accomplished through a mailing, email, or other method if allowed by statute and if it is more economical to do so (though we will not provide notice by publication unless you and we agree or it is specifically required by law), and will be performed by a service provider selected by us from the program's list of approved breach notification service providers included in the *Information Packet* provided with this Endorsement, which list may be updated by us from time to time. The selected breach notification service provider will work with you to provide the required notifications.

Our staff will assist you with the notification process, but it is important that you timely respond to requests, approve letter drafts, and provide address lists and other information as required to provide the Services. It will be your responsibility to pay any costs caused by your delay in providing information or approvals necessary to provide the Services, mistakes in information you provide, changes to the letter after approval, or any other failure to follow the notification procedure if it increases the cost of providing the Services in connection with an Incident.

- E. If **Call Center Services** are offered under Coverage Agreement I.B.3., such services shall be performed by a service provider selected by us who will work with you to provide the **Call Center Services** as described in Clause V.C. above.
  - F. If a **Credit Monitoring Product** is offered under Coverage Agreement I.B.4, such product shall be provided by a service provider selected by us.
-



## Excess Coverage

t: (503) 639-6911 | (800) 452-1639

f: (503) 684-7250

16037 SW Upper Boones Ferry Rd., Suite 300  
PO Box 231600  
Tigard, OR 97281-1600

[excess@osbplf.org](mailto:excess@osbplf.org) / [www.osbplf.org](http://www.osbplf.org)

**OREGON STATE BAR**

**PROFESSIONAL LIABILITY FUND**

**2015 PRO BONO PROGRAM**

**CLAIMS MADE MASTER PLAN**

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**January 1, 2015**



# 2015 PRO BONO CLAIMS MADE PLAN

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**OREGON STATE BAR  
PROFESSIONAL LIABILITY FUND**

**2015 PRO BONO PROGRAM  
CLAIMS MADE MASTER PLAN**

**NOTICE**

This Pro Bono Program Claims Made Master Plan (“Master Plan”) contains provisions that reduce the Limits of Coverage by the costs of legal de-fense. See SECTIONS IV and VI.

Various provisions in this Master Plan restrict coverage. Read the entire Master Plan to determine rights, duties, and what is and is not covered.

**INTERPRETATION OF THIS MASTER PLAN**

**Bracketed Titles.** The bracketed titles appearing throughout this Master Plan are not part of the Master Plan and should not be used as an aid in interpreting the Master Plan. The bracketed titles are intended simply as a guide to locating pertinent provisions.

**Use of Capitals.** Capitalized terms are defined in SECTION I. The definition of COVERED PARTY appearing in SECTION II and the definition of COVERED ACTIVITY appearing in SECTION III are particularly crucial to the understanding of the Master Plan.

**Master Plan Comments.** The discussions labeled "*COMMENTS*" following various provisions of the Master Plan are intended as aids in interpretation. These interpretive provisions add background information and provide additional considerations to be used in the interpretation and construction of the Master Plan.

The Comments are similar in form to those in the Uniform Commercial Code and Restatements. They are intended to aid in the construction of the Master Plan language. The Comments are to assist attorneys in interpreting the coverage available to them and to provide a specific basis for interpretation by courts and arbitrators.

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**SECTION I — DEFINITIONS**

Throughout this Master Plan, when appearing in capital letters:

1. "BUSINESS TRUSTEE" means one who acts in the capacity of or with the title "trustee" and whose activities include the operation, management, or control of any business property, business, or institution in a manner similar to an owner, officer, director, partner, or shareholder.

*COMMENTS*

*The term "BUSINESS TRUSTEE" is used in SECTION III.3 and in SECTION V.5. This Master Plan is intended to cover the ordinary range of activities in which attorneys typically engage while providing services through a PRO BONO PROGRAM. The Master Plan is not intended to cover BUSINESS TRUSTEE activities as defined in this Subsection. Examples of types of BUSINESS TRUSTEE activities for which coverage is excluded under the Master Plan include, among other things:*

*...serving on the board of trustees of a charitable, educational, or religious institution; serving as the trustee for a real estate or other investment syndication; serving as trustee for the liquidation of any business or institution; and serving as trustee for the control of a union or other institution.*

**2.** “CLAIM” means a demand for DAMAGES or written notice to a COVERED PARTY of an intent to hold a COVERED PARTY liable as a result of a COVERED ACTIVITY, if such notice might reasonably be expected to result in an assertion of a right to DAMAGES.

**3.** "CLAIMS EXPENSE" means:

- a.** Fees charged by any attorney designated by the PLF;
- b.** All other fees, costs, and expenses resulting from the investigation, adjustment, defense, repair, and appeal of a CLAIM, if incurred by the PLF; or
- c.** Fees charged by any attorney designated by the COVERED PARTY with the PLF’s written consent.

However, CLAIMS EXPENSE does not include the PLF’s costs for compensation of its regular employees and officials or the PLF’s other routine administrative costs.

**4.** "CLAIMS EXPENSE ALLOWANCE" means the separate allowance for aggregate CLAIMS EXPENSE for all CLAIMS as provided for in SECTION VI.1.b. of this Master Plan.

**5.** "COVERAGE PERIOD" means the coverage period shown in the Declarations under the heading "COVERAGE PERIOD."

**6.** "COVERED ACTIVITY" means conduct qualifying as such under SECTION III — WHAT IS A COVERED ACTIVITY.

**7.** "COVERED PARTY" means any person or organization qualifying as such under SECTION II — WHO IS A COVERED PARTY.

**8.** “DAMAGES” means money to be paid as compensation for harm or loss. It does not refer to fines, penalties, punitive or exemplary damages, or equitable relief such as restitution, disgorgement, rescission, injunctions, accountings or damages and relief otherwise excluded by this Plan.

**9.** "EXCESS CLAIMS EXPENSE" means any CLAIMS EXPENSE in excess of the CLAIMS EXPENSE ALLOWANCE. EXCESS CLAIMS EXPENSE is included in the Limits of Coverage at SECTION VI.1.a and reduces amounts available to pay DAMAGES under this Master Plan.

**10.** "INVESTMENT ADVICE" refers to any of the following activities:

- a.** Advising any person, firm, corporation, or other entity respecting the value of a particular investment, or recommending investing in, purchasing, or selling a particular investment;
- b.** Managing any investment;

- c. Buying or selling any investment for another;
  - d. (1) Acting as a broker for a borrower or lender, or  
 (2) Advising or failing to advise any person in connection with the borrowing of any funds or property by any COVERED PARTY for the COVERED PARTY or for another;
  - e. Issuing or promulgating any economic analysis of any investment, or warranting or guaranteeing the value, nature, collectability, or characteristics of any investment;
  - f. Giving advice of any nature when the compensation for such advice is in whole or in part contingent or dependent on the success or failure of a particular investment; or
  - g. Inducing someone to make a particular investment.
11. "LAW ENTITY" refers to a professional corporation, partnership, limited liability partnership, limited liability company, or sole proprietorship engaged in the private practice of law in Oregon.
12. "MASTER PLAN YEAR" means the period January 1 through December 31 of the calendar year for which this Master Plan was issued.
13. "PLF" means the Professional Liability Fund of the Oregon State Bar.
14. "SAME OR RELATED CLAIMS" means two or more CLAIMS that are based on or arise out of facts, practices, circumstances, situations, transactions, occurrences, COVERED ACTIVITIES, damages, liability, or the relationships of the people or entities involved (including clients, claimants, attorneys, and/or other advisors) that are logically or causally connected or linked or share a common bond or nexus. CLAIMS are related in the following situations:
- a. *Secondary or dependent liability.* CLAIMS such as those based on vicarious liability, failure to supervise, or negligent referral are related to the CLAIMS on which they are based.
  - b. *Same transactions or occurrences.* Multiple CLAIMS arising out of the same transaction or occurrence or series of transactions or occurrences are related. However, with regard to this Subsection b only, the PLF will not treat the CLAIMS as related if:
    - (1) the participating COVERED PARTIES acted independently of one another;
    - (2) they represented different clients or groups of clients whose interests were adverse; and
    - (3) the claimants do not rely on any common theory of liability or damage.
  - c. *Alleged scheme or plan.* If claimants attempt to tie together different acts as part of an alleged overall scheme or operation, then the CLAIMS are related.
  - d. *Actual pattern or practice.* Even if a scheme or practice is not alleged, CLAIMS that arise from a method, pattern, or practice in fact used or adopted by one or more COVERED PARTIES or LAW ENTITIES in representing multiple clients in similar matters are related.

- e. *One loss.* When successive or collective errors each cause or contribute to single or multiple clients' and/or claimants' harm or cumulatively enhance their damages or losses, then the CLAIMS are related.
- f. *Class actions.* All CLAIMS alleged as part of a class action or purported class action are related.

#### COMMENTS

**SAME OR RELATED CLAIMS.** *Each PLF Master Plan and PLF Claims Made Plan sets a maximum limit of coverage per year. This limit defines the PLF's total maximum obligation under the terms of each Plan issued by the PLF. However, absent additional Plan provisions, numerous circumstances could arise in which the PLF, as issuer of other PLF Master Plans and PLF Claims Made Plans, would be liable beyond the limits specified in one individual Plan. For example, Plans issued to the same attorney in different years might apply. Or, Plans issued to different attorneys might all apply. In some circumstances, the PLF intends to extend a separate limit under each Plan. In other circumstances, when the CLAIMS are related, the PLF does not so intend. Because the concept of "relatedness" is broad and factually based, there is no one definition or rule that will apply to every situation. The PLF has therefore elected to explain its intent by listing certain circumstances in which only one limit is available regardless of the number of Plans that may apply. See Subsections 14.a to 14.f above.*

*Example No. 1: Attorney A is an associate in a firm and commits malpractice. CLAIMS are made against Attorney A and various partners in the firm. All attorneys share one limit. CLAIMS such as those based on vicarious liability, failure to supervise, or negligent referral are always related to the CLAIMS on which they are based. See Subsection 14.a above. Even if Attorney A and some of the other lawyers are at different firms at the time of the CLAIM, all attorneys and the firm share one Limit of Coverage and one CLAIMS EXPENSE ALLOWANCE.*

*Example No. 2: Attorney A writes a tax opinion for an investment offering, and Attorneys B and C with a different law firm assemble the offering circular. Investors 1 and 2 bring CLAIMS in 2010 and Investor 3 brings a CLAIM in 2011 relating to the offering. No CLAIM is asserted prior to 2010. Only one Limit of Coverage applies to all CLAIMS. This is because the CLAIMS arise out of the same transaction or occurrence, or series of transactions or occurrences. See Subsection 14.b above. CLAIMS by investors in the same or similar investments will almost always be related. However, because the CLAIMS in this example are made against COVERED PARTIES in two different firms, up to two CLAIMS EXPENSE ALLOWANCES may potentially apply. See Section VI.2. Note also that, under these facts, all CLAIMS against Attorneys A, B, and C are treated as having been first made in 2010, pursuant to Section IV.1.b.(2). This could result in available limits having been exhausted before a CLAIM is eventually made against a particular COVERED PARTY. The timing of making CLAIMS does not increase the available limits.*

*Example No. 3: Attorneys A and B represent husband and wife, respectively, in a divorce. Husband sues A for malpractice in litigating his prenuptial agreement. Wife sues B for not getting her proper custody rights over the children. A's and B's CLAIMS are not related. A's and B's CLAIMS would be related, but for the exception in the second sentence of Subsection 14.b above.*

*Example No. 4: An owner sells his company to its employees by selling shares to two employee benefit plans set up for that purpose. The plans and/or their members sue the company, its outside corporate counsel A, its ERISA lawyer B, the owner, his attorney C, and the plans' former attorney D, contending there were improprieties in the due diligence, the form of the agreements, and the amount and value of shares issued. The defendants file cross-claims. All CLAIMS are related. They arise out of the same transactions or occurrences and therefore are related under Subsection 14.b. For the exception in Subsection 14.b to apply, all three elements must be satisfied. The exception does not apply because the claimants rely on common theories of liability. In addition, the exception may not apply because not all interests were adverse, theories of damages are common, or the attorneys did not act independently of one another. Finally, even if the exception in Subsection 14.b did apply, the CLAIMS would still be related under Subsection 14.d because they involve one loss. Although the CLAIMS are related, if all four attorneys' firms are sued, depending on the circumstances, up to four total CLAIMS EXPENSE ALLOWANCES might be available under Section VI.2.*

*Example No. 5: Attorney F represents an investment manager for multiple transactions over multiple years in which the manager purchased stocks in Company A on behalf of various groups of investors. Attorneys G and H represent different groups of investors. Attorney J represents Company A. Attorneys F, G, H, and J are all in different firms. They are all sued by the investors for securities violations arising out of this group of transactions. Although the different acts by different lawyers at different times could legitimately be viewed as separate and unconnected, the claimant in this example attempts to tie them together as part of an alleged overall scheme or operation. The CLAIMS are related because the claimants have made them so. See Subsection 14.c above. This will often be the case in securities CLAIMS. As long as such allegations remain in the case, only one limit will be available, even if alternative CLAIMS are also alleged. In this example, although there is only one Limit of Coverage available for all CLAIMS, depending on the circumstances, multiple CLAIMS EXPENSE ALLOWANCES might be available. See Section VI.2.*

*Example No. 6: Attorneys A, B, and C in the same firm represent a large number of asbestos clients over ten years' time, using a firm-wide formula for evaluating large numbers of cases with minimum effort. They are sued by certain clients for improper evaluation of their cases' values, although the plaintiffs do not allege a common scheme or plan. Because the firm in fact operated a firm-wide formula for handling the cases, the CLAIMS are related based on the COVERED PARTIES' own pattern or practice. The CLAIMS are related because the COVERED PARTIES' own conduct has made them so. See Subsection 14.d above. Attorneys A, B, and C will share one Limit of Coverage and one CLAIMS EXPENSE ALLOWANCE. LAW ENTITIES should protect themselves from such CLAIMS brought by multiple clients by purchasing adequate excess insurance.*

*Example No. 7: Attorney C represents a group of clients at trial and commits certain errors. Attorney D of the same firm undertakes the appeal, but fails to file the notice of appeal on time. Attorney E is hired by clients to sue Attorneys C and D for malpractice, but misses the statute of limitations. Clients sue all three attorneys. The CLAIMS are related and only a single Limit of Coverage applies to all CLAIMS. See Subsection 14.e above. When, as in this example, successive or collective errors each cause single or multiple clients and/or claimants harm or cumulatively enhance their damages or losses, then the CLAIMS are related. In such a situation, a claimant or group of claimants cannot increase the limits potentially available by alleging separate errors by separate attorneys. Attorney E, however, may be entitled to a CLAIMS EXPENSE ALLOWANCE separate from the one shared by C and D.*

*Example No. 8: Attorneys A, B, and C in the same firm represent a large banking institution. They are sued by the bank's customers in a class action lawsuit for their part in advising the bank on allegedly improper banking practices. All CLAIMS are related. No class action or purported class action can ever trigger more than one Limit of Coverage. See Subsection 14.f above.*

15. "SUIT" means a civil proceeding in which DAMAGES are alleged. "SUIT" includes an arbitration or alternative dispute resolution proceeding to which the COVERED PARTY submits with the consent of the PLF.
16. "YOU" and "YOUR" mean the PRO BONO PROGRAM shown in the Declarations.
17. "PRO BONO PROGRAM" means the Pro Bono Program shown in the Declarations under the heading "PRO BONO PROGRAM."
18. "VOLUNTEER ATTORNEY" means an attorney who meets all of the following conditions:
  - a. The attorney has provided volunteer pro bono legal services to clients without compensation through the PRO BONO PROGRAM;
  - b. At the time of providing the legal services referred to in Subsection a above, the attorney was not employed by the PRO BONO PROGRAM or compensated in any way by the PRO BONO PROGRAM;
  - c. At the time of providing the legal services referred to in Subsection a above, the attorney was eligible under Oregon State Bar Rules to volunteer for the certified PRO BONO PROGRAM.

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## SECTION II — WHO IS A COVERED PARTY

1. The following are COVERED PARTIES:
  - a. YOU.
  - b. Any current or former VOLUNTEER ATTORNEY, but only with respect to CLAIMS which arise out of a COVERED ACTIVITY.
  - c. In the event of death, adjudicated incapacity, or bankruptcy, the conservator, guardian, trustee in bankruptcy, or legal or personal representative of any COVERED PARTY listed in Subsection b, but only to the extent that such COVERED PARTY would otherwise be provided coverage under this Master Plan.
  - d. Any attorney or LAW ENTITY legally liable for YOUR COVERED ACTIVITIES, but only to the extent such legal liability arises from YOUR COVERED ACTIVITIES.

### COMMENTS

*Please note that VOLUNTEER ATTORNEYS have coverage under this Master Plan only for CLAIMS which arise out of work performed for YOU. For example, there is no coverage for CLAIMS which arise out of work performed for another organization or program, for a client*



*outside of YOUR program, or for a COVERED PARTY'S private practice, employment, or outside activities.*

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### **SECTION III — WHAT IS A COVERED ACTIVITY**

The following are COVERED ACTIVITIES, if the acts, errors, or omissions occur during the COVERAGE PERIOD; or prior to the COVERAGE PERIOD, if on the effective date of this Master Plan YOU have no knowledge that any CLAIM has been asserted arising out of such prior act, error, or omission, and there is no prior policy, PLF Claims Made Plan or Master Plan that provides coverage for such liability or CLAIM resulting from the act, error, or omission, whether or not the available limits of liability of such prior policy or Master Plan are sufficient to pay any liability or CLAIM:

#### **[VOLUNTEER ATTORNEY'S CONDUCT]**

**1.** Any act, error, or omission committed by a VOLUNTEER ATTORNEY which satisfies all of the following criteria:

**a.** The VOLUNTEER ATTORNEY committed the act, error, or omission in rendering professional services in the VOLUNTEER ATTORNEY'S capacity as an attorney, or in failing to render professional services that should have been rendered in the VOLUNTEER ATTORNEY'S capacity as an attorney.

**b.** At the time the VOLUNTEER ATTORNEY rendered or failed to render these professional services:

**(1)** The VOLUNTEER ATTORNEY was providing services to a client served by YOUR program and was acting within the scope of duties assigned to the VOLUNTEER ATTORNEY by YOU, and

**(2)** Such activity occurred after any Retroactive Date shown in the Declarations to this Master Plan.

#### **[CONDUCT OF OTHERS]**

**2.** Any act, error or omission committed by a person for whom a VOLUNTEER ATTORNEY is legally liable in the VOLUNTEER ATTORNEY'S capacity as an attorney while providing legal services to clients through YOU; provided each of the following criteria is satisfied:

**a.** The act, error, or omission causing the VOLUNTEER ATTORNEY'S liability:

**(1)** Occurred while the VOLUNTEER ATTORNEY was providing services to a client served by YOU and was acting within the scope of duties assigned to the VOLUNTEER ATTORNEY by YOU, and

**(2)** Occurred after any Retroactive Date shown in the Declarations to this Master Plan.

- b. The act, error, or omission, if committed by the VOLUNTEER ATTORNEY, would constitute a COVERED ACTIVITY under this Master Plan.

[VOLUNTEER ATTORNEY'S CONDUCT IN A SPECIAL CAPACITY]

3. Any act, error, or omission committed by the VOLUNTEER ATTORNEY in the capacity of personal representative, administrator, conservator, executor, guardian, special representative pursuant to ORS 128.179, or trustee (except BUSINESS TRUSTEE); provided, at the time of the act, error, or omission, each of the following criteria was satisfied:

- a. The VOLUNTEER ATTORNEY was providing services to a client served by YOU and was acting within the scope of duties assigned to the VOLUNTEER ATTORNEY by YOU.
- b. Such activity occurred after any Retroactive Date shown in the Declarations to this Master Plan.

COMMENTS

*To qualify for coverage, a CLAIM must arise out of a COVERED ACTIVITY. The definition of COVERED ACTIVITY imposes a number of restrictions on coverage including the following:*

**Prior CLAIMS.** *Section III limits the definition of COVERED ACTIVITY with respect to acts, errors, or omissions that happen prior to the COVERAGE PERIOD, so that no coverage is granted when there is prior knowledge or prior insurance. For illustration of the application of this language, see Chamberlin v. Smith, 140 Cal Rptr 493 (1977).*

*To the extent there is prior insurance or other coverage applicable to the CLAIM, it is reasonable to omit the extension of further coverage. Likewise, to the extent YOU or the VOLUNTEER ATTORNEY have knowledge that particular acts, errors, or omissions have given rise to a CLAIM, it is reasonable that that CLAIM and other CLAIMS arising out of such acts, errors, or omissions would not be covered. Such CLAIMS should instead be covered under the policy or Master Plan in force, if any, at the time the first such CLAIM was made.*

**VOLUNTEER ATTORNEY.** *For a VOLUNTEER ATTORNEY'S actions to constitute a COVERED ACTIVITY, the VOLUNTEER ATTORNEY must have been performing work or providing services with the scope of activities assigned to the VOLUNTEER ATTORNEY by YOU.*

**Types of Activity.** *COVERED ACTIVITIES have been divided into three categories. Subsection 1 deals with coverage for a VOLUNTEER ATTORNEY'S own conduct as an attorney. Subsection 2 deals with coverage for a VOLUNTEER ATTORNEY'S liability for the conduct of others. Subsection 3 deals with coverage for a VOLUNTEER ATTORNEY'S conduct in a special capacity (e.g. as a personal representative of an estate). The terms "BUSINESS TRUSTEE" and "VOLUNTEER ATTORNEY" as used in this section are defined at SECTION I – DEFINITIONS.*

**Special Capacity.** *Subsection 3 provides limited coverage for VOLUNTEER ATTORNEY acts as a personal representative, administrator, conservator, executor, guardian, or trustee. However, not all acts in a special capacity are covered under this Master Plan. Attorneys acting in a special capacity described in Subsection 3 of Section III may subject themselves to claims from third parties that are beyond the coverage provided by this Master Plan. For example, in acting as a conservator or personal representative, an attorney may engage in certain business activities, such as terminating an employee or*

signing a contract. If such actions result in a claim by the terminated employee or the other party to the contract, the estate or corpus should respond to such claims in the first instance, and should protect the attorney in the process. Attorneys engaged in these activities should obtain appropriate commercial general liability, errors and omissions, or other commercial coverage. The claim will not be covered under Subsection 3 of Section III.

The Master Plan purposefully uses the term "special capacity" rather than "fiduciary" in Subsection 3 to avoid any implication that this coverage includes fiduciary obligations other than those specifically identified. There is no coverage for VOLUNTEER ATTORNEY'S conduct under Subsection 3 unless VOLUNTEER ATTORNEY was formally named or designated as a personal representative, administrator, conservator, executor, guardian, or trustee (except BUSINESS TRUSTEE) and served in such capacity.

**Retroactive Date.** This section introduces the concept of a Retroactive Date. A PRO BONO PROGRAM may have a Retroactive Date in its Master Plan which may place an act, error, or omission outside the definition of a COVERED ACTIVITY, thereby eliminating coverage for any resulting CLAIM under the Master Plan for the PRO BONO PROGRAM and its VOLUNTEER ATTORNEYS. If a Retroactive Date applies to a CLAIM to place it outside the definition of a COVERED ACTIVITY herein, there will be no coverage for the CLAIM under this Master Plan as to any COVERED PARTY, even for vicarious liability.

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## SECTION IV – GRANT OF COVERAGE

### 1. Indemnity.

**a.** The PLF will pay those sums that a COVERED PARTY becomes legally obligated to pay as DAMAGES because of CLAIMS arising out of a COVERED ACTIVITY to which this Master Plan applies. No other obligation or liability to pay sums or perform acts or services is covered unless specifically provided for under Subsection 2 - Defense.

**b.** This Master Plan applies only to CLAIMS first made against a COVERED PARTY during the COVERAGE PERIOD.

**(1)** The applicable COVERAGE PERIOD for a CLAIM will be the earliest of:

**(a)** When a lawsuit is filed or an arbitration or ADR proceeding is formally initiated, or

**(b)** When notice of a CLAIM is received by any COVERED PARTY or by the PLF; or

**(c)** When the PLF first becomes aware of facts or circumstances that reasonably could be expected to be the basis of a CLAIM; or

**(d)** When a claimant intends to make a CLAIM but defers assertion of the CLAIM for the purpose of obtaining coverage under a later COVERAGE PERIOD and the COVERED PARTY knows or should know that the COVERED ACTIVITY that is the basis of the CLAIM could result in a

## CLAIM.

(2) Two or more CLAIMS that are SAME OR RELATED CLAIMS, whenever made, will all be deemed to have been first made at the time the earliest such CLAIM was first made. This provision will apply to YOU only if YOU have coverage from any source applicable to the earliest such SAME OR RELATED CLAIM (whether or not the available limits of liability of such prior policy or plan are sufficient to pay any liability or claim.

c. This Master Plan applies only to SUITS brought in the United States, its territories or possessions, Canada, or the jurisdiction of any Indian Tribe in the United States. This Master Plan does not apply to SUITS brought in any other jurisdiction, or to SUITS brought to enforce a judgment rendered in any jurisdiction other than the United States, its territories or possessions, Canada, or the jurisdiction of any Indian Tribe in the United States.

d. The amount the PLF will pay for damages is limited as described in SECTION VI.

e. Coverage under this Master Plan is conditioned upon compliance with all requirements for Pro Bono Programs under PLF Policy 3.800 and all terms and conditions of this Master Plan.

## 2. Defense.

a. Until the CLAIMS EXPENSE ALLOWANCE and the Limits of Coverage extended by this Master Plan are exhausted, the PLF will defend any SUIT against a COVERED PARTY seeking DAMAGES to which this coverage applies. The PLF has the sole right to investigate, repair, settle, designate defense attorneys, and otherwise conduct defense, repair, or prevention of any CLAIM or potential CLAIM.

b. With respect to any CLAIM or potential CLAIM the PLF defends or repairs, the PLF will pay all CLAIMS EXPENSE the PLF may incur. All payments for EXCESS CLAIMS EXPENSE will reduce the Limits of Coverage.

c. If the CLAIMS EXPENSE ALLOWANCE and Limits of Coverage extended by this Master Plan are exhausted prior to the conclusion of any CLAIM, the PLF may withdraw from further defense of the CLAIM.

## COMMENTS

**Claims Made Coverage.** *As claims made coverage, this Master Plan applies to CLAIMS first made during the time period shown in the Declarations. CLAIMS first made either prior to or subsequent to that time period are not covered by this Master Plan, although they may be covered by a prior or subsequent Master Plan.*

**Damages.** *This Master Plan grants coverage only for CLAIMS seeking DAMAGES. There is no coverage granted for other claims, actions, suits, or proceedings seeking equitable remedies such as restitution of funds or property, disgorgement, accountings or injunctions.*

**When Claim First Made.** *Subsection 1.b(1) of this section is intended to make clear that the earliest of the several events listed determines when the CLAIM is first made. Subsection 1.b(1)(c) adopts an objective, reasonable person standard to determine when the PLF's knowledge of facts or*

*circumstances can rise to the level of a CLAIM for purpose of triggering an applicable COVERAGE PERIOD. This subsection is based solely on the objective nature of information received by the PLF. Covered Parties should thus be aware that any information or knowledge they may have that is not transmitted to the PLF is irrelevant to any determination made under this subsection.*

*If facts or circumstances meet the requirements of subsection 1.b(1)(c), then any subsequent CLAIM that constitutes a SAME OR RELATED CLAIM under Section I.14 will relate back to the COVERAGE PERIOD at the time the original notice of information was provided to the PLF.*

**SAME OR RELATED CLAIMS.** *Subsection 1.b(2) states a special rule applicable when several CLAIMS arise out of the SAME OR RELATED CLAIMS. Under this rule, all such SAME OR RELATED CLAIMS are considered first made at the time the earliest of the several SAME OR RELATED CLAIMS is first made. Thus, regardless of the number of claimants asserting SAME OR RELATED CLAIMS, the number of Master Plan Years involved, or the number of transactions giving rise to the CLAIMS, all such CLAIMS are treated as first made in the earliest applicable Master Plan Year and only one Limit of Coverage and one CLAIMS EXPENSE ALLOWANCE apply. There is an exception to the special rule in Subsection 1.b(2) for COVERED PARTIES who had no coverage (with the PLF or otherwise) at the time the initial CLAIM was made, but this exception does not create any additional Limits of Coverage. Pursuant to Subsection VI.2, only one Limit of Coverage would be available.*

**Scope of Duty to Defend.** *Subsection 2 defines the PLF's obligation to defend. The obligation to defend continues only until the CLAIMS EXPENSE ALLOWANCE and the Limits of Coverage are exhausted. In that event, the PLF will tender control of the defense to the COVERED PARTY or excess insurance carrier, if any. The PLF's payment of the CLAIMS EXPENSE ALLOWANCE and Limits of Coverage ends all of the PLF's duties.*

**Control of Defense.** *Subsection 2.a allocates to the PLF control of the investigation, settlement, and defense of the CLAIM. See SECTION IX—ASSISTANCE, COOPERATION AND DUTIES OF COVERED PARTY.*

**Costs of Defense.** *Subsection 2.b obligates the PLF to pay reasonable and necessary costs of defense. Only those expenses incurred by the PLF or with the PLF's authority are covered.*

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## SECTION V – EXCLUSIONS FROM COVERAGE

### [WRONGFUL CONDUCT EXCLUSIONS]

- 1.** This Master Plan does not apply to a COVERED PARTY for any CLAIM in which that COVERED PARTY participates in a fraudulent or collusive CLAIM.
- 2.** This Master Plan does not apply to any CLAIM based on or arising out of any intentional, dishonest, fraudulent, criminal, malicious, knowingly wrongful, or knowingly unethical acts, errors, or omissions committed by YOU or at YOUR direction or in which YOU acquiesce or remain passive after having personal knowledge thereof;

### COMMENTS

*Exclusions 1 and 2 set out the circumstances in which wrongful conduct will eliminate coverage. An intent to harm is not required.*

**Voluntary Exposure to CLAIMS.** An attorney may sometimes voluntarily expose himself or herself to a CLAIM or known risk through a course of action or inaction when the attorney knows there is a more reasonable alternative means of resolving a problem. For example, an attorney might disburse settlement proceeds to a client even though the attorney knows of valid hospital, insurance company, or PIP liens, or other valid liens or claims to the funds. If the attorney disburses the proceeds to the client and a CLAIM arises from the other claimants, Exclusion 2 will apply and the CLAIM will not be covered.

**Unethical Conduct.** If a CLAIM arises that involves unethical conduct by an attorney, Exclusion 2 may also apply to the conduct and the CLAIM would therefore not be covered. This can occur, for example, if an attorney violates Disciplinary Rule ORPC 8.4(a)(3) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation) or ORPC 5.5(a) (aiding a nonlawyer in the unlawful practice of law) and a CLAIM results.

*Example:* Attorney A allows a title company to use his name, letterhead, or forms in connection with a real estate transaction in which Attorney A has no significant involvement. Attorney A's activities violate ORPC 8.4(a)(3) and ORPC 5.5(a). A CLAIM is made against Attorney A in connection with the real estate transaction. Because Attorney A's activities fall within the terms of Exclusion 2, there will be no coverage for the CLAIM. In addition, the CLAIM likely would not even be within the terms of the coverage grant under this Plan because the activities giving rise to the CLAIM do not fall within the definition of a COVERED ACTIVITY. The same analysis would apply if Attorney A allowed an insurance or investment company to use his name, letterhead, or forms in connection with a living trust or investment transaction in which Attorney A has no significant involvement.

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3. This Master Plan does not apply to any CLAIM based on or arising out of a proceeding brought against a COVERED PARTY by the Oregon State Bar or any similar entity.

4. This Master Plan does not apply to:

- a. That part of any CLAIM seeking punitive, exemplary or statutorily enhanced damages; or
- b. Any CLAIM for or arising out of the imposition of attorney fees, costs, fines, penalties, or other sanctions imposed under any federal or state statute, administrative rule, court rule, or case law intended to penalize bad faith conduct and/or the assertion of frivolous or bad faith claims or defenses. The PLF will defend the COVERED PARTY against such a CLAIM, but any liability for indemnity arising from such CLAIM will be excluded.

#### COMMENTS

A COVERED PARTY may become subject to punitive or exemplary damages, attorney fees, costs, fines, penalties, or other sanctions in two ways. The COVERED PARTY may have these damages assessed directly against the COVERED PARTY or the COVERED PARTY may have a client or other person sue the COVERED PARTY for indemnity for causing the client to be subjected to these damages.

Subsection a of Exclusion 4 applies to direct actions for punitive, exemplary or enhanced damages. It excludes coverage for that part of any CLAIM asserting such damages. In addition, such CLAIMS do not involve covered DAMAGES as defined in this Master Plan. If YOU are sued for punitive

damages, YOU are not covered for that exposure. Similarly, YOU are not covered to the extent compensatory damages are doubled, trebled or otherwise enhanced.

*Subsection b of Exclusion 4 applies to both direct actions against a COVERED PARTY and actions for indemnity brought by others. The courts have become increasingly intolerant of attorneys' improper actions in several areas including trial practice, discovery, and conflicts of interest. Statutes, court rules, and common law approaches imposing various monetary sanctions have been developed to deter such inappropriate conduct. The purpose of these sanctions would be threatened if the PLF were to indemnify the guilty attorney and pay the cost of indemnification out of the assessments paid by all attorneys.*

*Thus, if a COVERED PARTY causes the COVERED PARTY'S client to be subjected to a punitive damage award (based upon the client's wrongful conduct toward the claimant) because of a failure, for example, to assert a statute of limitations defense, the PLF will cover a COVERED PARTY'S liability for the punitive damages suffered by the client. Subsection a does not apply because the action is not a direct action for punitive damages and Subsection b does not apply because the punitive damages suffered by YOUR client are not the type of damages described in Subsection b.*

*On the other hand, if a COVERED PARTY causes the COVERED PARTY'S client to be subjected to an award of attorney fees, costs, fines, penalties, or other sanctions imposed because of the COVERED PARTY'S conduct, or such an award is made against the COVERED PARTY, Subsection b applies and the CLAIM for such damages (or for any related consequential damages) will be excluded.*

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[BUSINESS ACTIVITY EXCLUSIONS]

**5.** This Master Plan does not apply to that part of any CLAIM based on or arising out of a COVERED PARTY'S conduct as an officer, director, partner, BUSINESS TRUSTEE, employee, shareholder, member, or manager of any entity except a LAW ENTITY.

COMMENTS

*A COVERED PARTY, in addition to his or her role as an attorney, may clothe himself or herself as an officer, director, partner, BUSINESS TRUSTEE, employee, shareholder, member, or manager of an entity. This exclusion eliminates coverage for the COVERED PARTY'S liability while acting in these capacities. However, the exclusion does not apply if the liability is based on such status in a LAW ENTITY.*

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**6.** This Master Plan does not apply to any CLAIM by or on behalf of any business enterprise:

**a.** In which a COVERED PARTY has an ownership interest, or in which a COVERED PARTY had an ownership interest at the time of the alleged acts, errors, or omissions on which the CLAIM is based;

**b.** In which a COVERED PARTY is a general partner, managing member, or employee, or in which a COVERED PARTY was a general partner, managing member, or employee at the time of the alleged acts, errors, or omissions on which the CLAIM is based; or

**c.** That is controlled, operated, or managed by a COVERED PARTY, either individually or

in a fiduciary capacity, including the ownership, maintenance, or use of any property in connection therewith, or was so controlled, operated, or managed by a COVERED PARTY at the time of the alleged acts, errors, or omissions on which the CLAIM is based.

Ownership interest, for the purpose of this exclusion, does not include an ownership interest now or previously held by a COVERED PARTY solely as a passive investment, as long as a COVERED PARTY, those a COVERED PARTY controls, a COVERED PARTY'S spouse, parent, step-parent, child, step-child, sibling, or any member of a COVERED PARTY'S household, and those with whom a COVERED PARTY is regularly engaged in the practice of law, collectively now own or previously owned an interest of 10 percent or less in the business enterprise.

#### COMMENTS

*Intimacy with a client can increase risk of loss in two ways: (1) The attorney's services may be rendered in a more casual and less thorough manner than if the services were extended at arm's length; and (2) After a loss, the attorney may feel particularly motivated to assure the client's recovery. While the PLF is cognizant of a natural desire of attorneys to serve those with whom they are closely connected, the PLF has determined that coverage for such services should be excluded. Exclusion 6 delineates the level of intimacy required to defeat coverage. See also Exclusion 11.*

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**7.** This Master Plan does not apply to any CLAIM made by:

- a.** A COVERED PARTY'S present, former, or prospective partner, employer, or employee; or
- b.** A present, former, or prospective officer, director, or employee of a professional corporation in which YOU were a shareholder, unless such CLAIM arises out of a COVERED PARTY'S conduct in an attorney-client capacity for one of the parties listed in Subsections a or b.

#### COMMENTS

*The PLF does not always cover a COVERED PARTY'S conduct in relation to the COVERED PARTY'S past, present, or prospective partners, employers, employees, and fellow shareholders, even if such conduct arises out of a COVERED ACTIVITY. Coverage is limited by this exclusion to a COVERED PARTY'S conduct in relation to such persons in situations in which the COVERED PARTY is acting as their attorney and they are the COVERED PARTY'S client.*

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**8.** This Master Plan does not apply to any CLAIM based on or arising out of any business transaction subject to ORPC 1.8(a) in which a COVERED PARTY participates with a client unless disclosure in the form of Disclosure Form ORPC 1 (attached as Exhibit A to this Master Plan) has been properly executed prior to the occurrence giving rise to the CLAIM and either:

- a.** A copy of the executed disclosure form is forwarded to the PLF within 10 calendar days of execution, or
- b.** If delivery of a copy of the disclosure form to the PLF within 10 calendar days of execution would violate ORPC 1.6, ORS 9.460(3), or any other rule governing client



confidences and secrets, the COVERED PARTY may instead send the PLF an alternative letter stating: (1) the name of the client with whom the COVERED PARTY is participating in a business transaction; (2) that the COVERED PARTY has provided the client with a disclosure letter pursuant to the requirements of ORPC 1.0(g) and 1.8(a); (3) the date of the disclosure letter; and (4) that providing the PLF with a copy of the disclosure letter at the present time would violate applicable rules governing client confidences and secrets. This alternative letter must be delivered to the PLF within 10 calendar days of execution of the disclosure letter.

#### COMMENTS

**ORPC 1.** *Form ORPC 1, referred to above, is attached to this Master Plan following SECTION XIV. The form includes an explanation of ORPC 1.8(a) which should be provided to the client involved in the business transaction.*

**Applicability of Exclusion.** *When an attorney engages in a business transaction with a client, the attorney has an ethical duty to make certain disclosures to the client. ORPC 1.0(g) and 1.8(a) provide:*

#### **RULE 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES**

*(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to client unless:*

*(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;*

*(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and*

*(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.*

#### **RULE 1.0(g)**

*(g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.*

*This exclusion is not intended to be an interpretation of ORPC 1.8(a). Instead, the Master Plan is invoking the body of law interpreting ORPC 1.8(a) to define when the exclusion is applicable.*

**Use of the PLF's Form Not Mandated.** *Because of the obvious conflict of interest and the high duty placed on attorneys, when the exclusion applies, the attorney is nearly always at risk of being liable when things go wrong. The only effective defense is to show that the attorney has made full disclosure, which includes a sufficient explanation to the client of the potential adverse impact of the differing interests of the parties to make the client's consent meaningful. Form ORPC 1 is the PLF's attempt to set out an effective disclosure which will provide an adequate defense to such CLAIMS. The PLF is sufficiently confident that this disclosure will be effective to agree that the exclusion will not apply if YOU use the PLF's proposed form. YOU are free to use YOUR own form in lieu of the PLF's form, but if YOU do so YOU proceed at YOUR own risk, i.e., if YOUR disclosure is less effective than the PLF's disclosure form, the exclusion will apply. Use of the PLF's form is not intended to assure YOU of compliance with the ethical requirements applicable to YOUR particular circumstances. It is YOUR responsibility to consult ORPC 1.0(g) and 1.8(a) and add any disclosures necessary to satisfy the disciplinary rules.*

**Timing of Disclosure.** *To be effective, it is important that the PLF can prove the disclosure was made prior to entering into the business transaction. Therefore, the disclosure should be reduced to writing and signed prior to entering into the transaction. There may be limited situations in which reducing the required disclosure to writing prior to entering into the transaction is impractical. In those circumstances, execution of the disclosure letter after entry into the transaction will not render the exclusion effective provided the execution takes place while the client still has an opportunity to withdraw from the transaction and the effectiveness of the disclosure is not compromised. Additional language may be necessary to render the disclosure effective in these circumstances.*

**Delivery to the PLF.** *Following execution of the disclosure letter, a copy of the letter or an alternative letter must be delivered to the PLF in a timely manner. Failure to do so will result in any subsequent CLAIM against YOU being excluded.*

**Other Disclosures.** *By its terms, ORPC 1.8(a) and this exclusion apply only to business transactions with a client in which the client expects the lawyer to exercise the lawyer's professional judgment therein for the protection of the client. However, lawyers frequently enter into business transactions with others not recognizing that the other expects the lawyer to exercise professional judgment for his or her protection. It can be the "client's" expectation and not the lawyer's recognition that triggers application of ORPC 1.8(a) and this exclusion.*

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**9.** This Master Plan does not apply to any CLAIM based on or arising out of any act, error, or omission committed by a COVERED PARTY (or by someone for whose conduct a COVERED PARTY is legally liable) while in the course of rendering INVESTMENT ADVICE if the INVESTMENT ADVICE is in fact either the sole cause or a contributing cause of any resulting damage. However, if all INVESTMENT ADVICE rendered by the COVERED PARTY constitutes a COVERED ACTIVITY described in SECTION III.3, this exclusion will not apply unless part or all of such INVESTMENT ADVICE is described in Subsections d, e, f. or g of the definition of INVESTMENT ADVICE in SECTION I.10.

#### COMMENTS

*In prior years, the PLF suffered extreme losses as a result of COVERED PARTIES engaging in INVESTMENT ADVICE activity. It was never intended that the PLF cover such activities. An*

*INVESTMENT ADVICE* exclusion was added to the Claims Made Plan in 1984. Nevertheless, losses continued in situations where the COVERED PARTY had rendered both INVESTMENT ADVICE and legal advice. In addition, some CLAIMS resulted where the attorney provided INVESTMENT ADVICE in the guise of legal advice.

Exclusion 9, first introduced to the Claims Made Plan in 1987, represented a totally new approach to this problem. Instead of excluding all INVESTMENT ADVICE, the PLF has clearly delineated specific activities which will not be covered whether or not legal as well as INVESTMENT ADVICE is involved. These specific activities are defined in Section I under the definition of INVESTMENT ADVICE. The PLF's choice of delineated activities was guided by specific cases that exposed the PLF in situations never intended to be covered. The PLF is cognizant that COVERED PARTIES doing structured settlements and COVERED PARTIES in business practice and tax practice legitimately engage in the rendering of general INVESTMENT ADVICE as a part of their practices. In delineating the activities to be excluded, the PLF has attempted to retain coverage for these legitimate practices. For example, the last sentence of the exclusion permits coverage for certain activities normally undertaken by conservators and personal representatives (i.e., COVERED ACTIVITIES described in Section III.3) when acting in that capacity even though the same activities would not be covered if performed in any other capacity. See the definition of INVESTMENT ADVICE in Section I.

Exclusion 9 applies whether the COVERED PARTY is directly or vicariously liable for the INVESTMENT ADVICE.

Note that Exclusion 9 could defeat coverage for an entire CLAIM even if only part of the CLAIM involved INVESTMENT ADVICE. If INVESTMENT ADVICE is in fact either the sole or a contributing cause of any resulting damage that is part of the CLAIM, the entire CLAIM is excluded.

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#### [PERSONAL RELATIONSHIP AND BENEFITS EXCLUSIONS]

- 10.** This Master Plan does not apply to any CLAIM:
- a.** For the return of any fees, costs, or disbursements paid to a COVERED PARTY (or paid to any other attorney or LAW ENTITY with which the COVERED PARTY was associated at the time the fees, costs, or disbursements were incurred or paid), including but not limited to fees, costs, and disbursements alleged to be excessive, not earned, or negligently incurred;
  - b.** Arising from or relating to the negotiation, securing, or collection of fees, costs, or disbursements owed or claimed to be owed to a COVERED PARTY or any LAW ENTITY with which the COVERED PARTY is now associated, or was associated at the time of the conduct giving rise to the CLAIM; or
  - c.** For damages or the recovery of funds or property that have or will directly or indirectly benefit any COVERED PARTY.

#### COMMENTS

*This Master Plan is intended to cover liability for errors committed in rendering professional services. It is not intended to cover liabilities arising out of the business aspects of the practice of law. Here, the Master Plan clarifies this distinction by excluding liabilities arising out of fee disputes whether the CLAIM seeks a return of a paid fee, cost, or disbursement. Subsection c, in addition, excludes*

*CLAIMS for damages or the recovery of funds or property that, for whatever reason, have resulted or will result in the accrual of a benefit to any COVERED PARTY.*

*Attorneys sometimes attempt to correct their own mistakes without notifying the PLF. In some cases, the attorneys charge their clients for the time spent in correcting their prior mistakes, which can lead to a later CLAIM from the client. The better course of action is to notify the PLF of a potential CLAIM as soon as it arises and allow the PLF to hire and pay for repair counsel if appropriate. In the PLF's experience, repair counsel is usually more successful in obtaining relief from a court or an opposing party than the attorney who made the mistake. In addition, under Subsection a of this exclusion, the PLF does not cover CLAIMS from a client for recovery of fees previously paid by the client to a COVERED PARTY (including fees charged by an attorney to correct the attorney's prior mistake).*

*Example No. 1: Attorney A sues Client for unpaid fees; Client counterclaims for the return of fees already paid to Attorney A which allegedly were excessive and negligently incurred by Attorney A. Under Subsection a, there is no coverage for the CLAIM.*

*Example No. 2: Attorney B allows a default to be taken against Client, and bills an additional \$2,500 in attorney fees incurred by Attorney B in his successful effort to get the default set aside. Client pays the bill, but later sues Attorney B to recover the fees paid. Under Subsection a there is no coverage for the CLAIM.*

*Example No. 3: Attorney C writes a demand letter to Client for unpaid fees, then files a lawsuit for collection of the fees. Client counterclaims for unlawful debt collection. Under Subsection b., there is no coverage for the CLAIM. The same is true if Client is the plaintiff and sues for unlawful debt collection in response to the demand letter from Attorney C.*

*Example No. 4: Attorney D negotiates a fee and security agreement with Client on behalf of Attorney D's own firm. Other firm members, not Attorney D, represent Client. Attorney D later leaves the firm, Client disputes the fee and security agreement, and the firm sues Attorney D for negligence in representing the firm. Under Subsection b., there is no coverage for the CLAIM.*

*Example No. 5: Attorney E takes a security interest in stock belonging to Client as security for fees. Client fails to pay the fees and Attorney E executes on the stock and becomes the owner. Client sues for recovery of the stock and damages. Under Subsection c., there is no coverage for the CLAIM. The same is true if Attorney E receives the stock as a fee and later is sued for recovery of the stock or damages.*

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**11.** This Master Plan does not apply to any CLAIM based upon or arising out of a COVERED PARTY'S legal services performed on behalf of a COVERED PARTY'S spouse, parent, step-parent, child, step-child, sibling, or any member of a COVERED PARTY'S household, or on behalf of a business entity in which any of them, individually or collectively, have a controlling interest.

#### COMMENTS

*Work performed for family members is not covered under this Plan. A CLAIM based upon or arising out of such work, even for example a CLAIM against other lawyers or THE FIRM for failure to supervise, will be excluded from coverage. This exclusion does not apply, however, if one attorney performs legal services for another attorney's family member.*

**12.** This Master Plan does not apply to any CLAIM arising out of a COVERED PARTY'S activity as a fiduciary under any employee retirement, deferred benefit, or other similar Master Plan.

**13.** This Master Plan does not apply to any CLAIM arising out of any witnessing of a signature or any acknowledgment, verification upon oath or affirmation, or other notarial act without the physical appearance before such witness or notary public, unless such CLAIM arises from the acts of a COVERED PARTY'S employee and the COVERED PARTY has no actual knowledge of such act.

[GOVERNMENT ACTIVITY EXCLUSION]

**14.** This Master Plan does not apply to any CLAIM arising out of a COVERED PARTY'S conduct:

**a.** As a public official or an employee of a governmental body, subdivision, or agency; or

**b.** In any other capacity that comes within the defense and indemnity requirements of ORS 30.285 and 30.287, or other similar state or federal statute, rule, or case law. If a public body rejects the defense and indemnity of such a CLAIM, the PLF will provide coverage for such COVERED ACTIVITY and will be subrogated to all of the COVERED PARTY'S rights against the public body.

*Subsection a applies whether or not the public official or employee is entitled to defense or indemnity from the governmental entity. Subsection b, in addition, excludes coverage for COVERED PARTIES in other relationships with a governmental entity, but only if statute, rule, or case law entitles a COVERED PARTY to defense or indemnity from the governmental entity.*

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[HOUSE COUNSEL EXCLUSION]

**15.** This Master Plan does not apply to any CLAIM arising out of a COVERED PARTY'S conduct as an employee in an employer-employee relationship.

*COMMENTS*

*This exclusion applies to conduct as an employee even when the employee represents a third party in an attorney-client relationship as part of the employment. Examples of this application include employment by an insurance company, labor organization, member association, or governmental entity that involves representation of the rights of insureds, union or association members, clients of the employer, or the employer itself.*

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[GENERAL TORTIOUS CONDUCT EXCLUSIONS]

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

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

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

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

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

#### COMMENTS

*The CLAIMS excluded are not typical errors-and-omissions torts and were, therefore, considered inappropriate for coverage under the Master Plan. YOU are encouraged to seek coverage for these CLAIMS through commercial insurance markets.*

*Prior to 1991 the Claims Made Plan expressly excluded "personal injury" and "advertising injury," defining those terms in a manner similar to their definitions in standard commercial general liability policies. The deletion of these defined terms from this Exclusion is not intended to imply that all personal injury and advertising injury CLAIMS are covered. Instead, the deletion is intended only to permit coverage for personal injury or advertising injury CLAIMS, if any, that fall within the other coverage terms of the Master Plan.*

*Subsection b of this exclusion is intended to encompass a broad definition of property. For these purposes, property includes real, personal and intangible property (e.g. electronic data, financial instruments, money etc.) held by an attorney. However, Subsection b is not intended to apply to the extent the loss or damage of property materially and adversely affects an attorney's performance of professional services, in which event a CLAIM resulting from the loss or damage would not be excluded by Exclusion 16.*

*Example No. 1: Client gives Attorney A valuable jewelry to hold for safekeeping. The jewelry is stolen or lost. There is no coverage for the value of the stolen or lost jewelry, since the loss of the property did not adversely affect the performance of professional services. Attorney A can obtain appropriate coverage for such losses from commercial insurance sources.*

*Example No. 2: Client gives Attorney B a defective ladder from which Client fell. The ladder is evidence in the personal injury case Attorney B is handling for Client. Attorney B loses the ladder. Because the ladder is lost, Client loses the personal injury case. The CLAIM for the loss of the personal injury case is covered. The damages are the difference in the outcome of the personal injury case caused by the loss of the ladder. There would be no coverage for the loss of the value of the ladder. Coverage for the value of the ladder can be obtained through commercial insurance sources.*

*Example No. 3: Client gives Attorney C important documents relevant to a legal matter being handled by Attorney C for Client. After conclusion of handling of the legal matter, the documents are lost or destroyed. Client makes a CLAIM for loss of the documents, reconstruction costs, and consequential damages due to future inability to use the documents. There is no coverage for this CLAIM, as loss of the documents did not adversely affect any professional services because the professional services had been completed. Again, coverage for loss of the property (documents) itself can be obtained through commercial general liability or other insurance or through a valuable papers endorsement to such coverage.*

***Child Abuse Reporting Statute.** This exclusion would ordinarily exclude coverage for the type of damages that might be alleged against an attorney for failure to comply with ORS 419B.010, the child abuse reporting statute. (It is presently uncertain whether civil liability can arise under the statute.) If*

*there is otherwise coverage under this Master Plan for a CLAIM arising under ORS 419B.010, the PLF will not apply Exclusion 16 to the CLAIM.*

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**17.** This Master Plan does not apply to any CLAIM based on or arising out of harassment or discrimination on the basis of race, creed, age, religion, sex, sexual preference, disability, pregnancy, national origin, marital status, or any other basis prohibited by law.

*COMMENTS*

*The CLAIMS excluded are not typical errors-and-omissions torts and are, therefore, inappropriate for coverage under the Master Plan.*

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[PATENT EXCLUSION]

**18.** This Master Plan does not apply to any CLAIM based upon or arising out of professional services rendered or any act, error, or omission committed in relation to the prosecution of a patent if YOU were not registered with the U.S. Patent and Trademark Office at the time the CLAIM arose.

**19.** *Reserved.*

[CONTRACTUAL OBLIGATION EXCLUSION]

**20.** This Master Plan does not apply to any CLAIM:

- a.** Based upon or arising out of any bond or any surety, guaranty, warranty, joint control, or similar agreement, or any assumed obligation to indemnify another, whether signed or otherwise agreed to by YOU or someone for whose conduct YOU are legally liable, unless the CLAIM arises out of a COVERED ACTIVITY described in SECTION III.3 and the person against whom the CLAIM is made signs the bond or agreement solely in that capacity;
- b.** Any costs connected to ORS 20.160 or similar statute or rule;
- c.** For liability based on an agreement or representation, if the Covered Party would not have been liable in the absence of the agreement or representation; or
- d.** Claims in contract based upon an alleged promise to obtain a certain outcome or result.

*COMMENTS*

*In the Plan, the PLF agrees to assume certain tort risks of Oregon attorneys for certain errors or omissions in the private practice of law; it does not assume the risk of making good on attorneys' contractual obligations. So, for example, an agreement to indemnify or guarantee an obligation will generally not be covered, except in the limited circumstances described in Subsection a. That subsection is discussed further below in this Comment.*

*Subsection b, while involving a statutory rather than contractual obligation, nevertheless expresses a similar concept, since under ORS 20.160 an attorney who represents a nonresident or foreign corporation plaintiff in essence agrees to guarantee payment of litigation costs not paid by his or her client.*

*Subsection c states the general rule that contractual liabilities are not covered under the PLF Plan. For example, an attorney who places an attorney fee provision in his or her retainer agreement voluntarily accepts the risk of making good on that contractual obligation. Because a client's attorney fees incurred in litigating a dispute with its attorney are not ordinarily damages recoverable in tort, they are not a risk the PLF agrees to assume. In addition, if a Covered Party agrees or represents that he or she will pay a claim, reduce fees, or the like, a claim based on a breach of that agreement or representation will not be covered under the Plan.*

*Subsection d involves a specific type of agreement or representation: an alleged promise to obtain a particular outcome or result. One example of this would be an attorney who promises to get a case reinstated or to obtain a particular favorable result at trial or in settlement. In that situation, the attorney can potentially be held liable for breach of contract or misrepresentation regardless of whether his or her conduct met the standard of care. That situation is to be distinguished from an attorney's liability in tort or under the third party beneficiary doctrine for failure to perform a particular task, such as naming a particular beneficiary in a will or filing and serving a complaint within the statute of limitations, where the liability, if any, is not based solely on a breach of the attorney's guarantee, promise or representation.*

*Attorneys sometimes act in one of the special capacities for which coverage is provided under Section III.3 (i.e., as a named personal representative, administrator, conservator, executor, guardian, or trustee except BUSINESS TRUSTEE). If the attorney is required to sign a bond or any surety, guaranty, warranty, joint control, or similar agreement while carrying out one of these special capacities, Exclusion 20.a does not apply, although b, c, or d of this Exclusion may be applicable.*

*On the other hand, when an attorney is acting in an ordinary capacity not within the provisions of Section III.3, Exclusion 20 does apply to any CLAIM based on or arising out of any bond or any surety, guaranty, warranty, joint control, indemnification, or similar agreement signed by the attorney or by someone for whom the attorney is legally liable. In these situations, attorneys should not sign such bonds or agreements. For example, if an attorney is acting as counsel to a personal representative and the personal representative is required to post a bond, the attorney should resist any attempt by the bonding company to require the attorney to co-sign as a surety for the personal representative or to enter into a joint control or similar agreement that requires the attorney to review, approve, or control expenditures by the personal representative. If the attorney signs such an agreement and a CLAIM is later made by the bonding company, the estate, or another party, Exclusion 20 applies and there will be no coverage for the CLAIM.*

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[BANKRUPTCY TRUSTEE EXCLUSION]

- 21.** This Master Plan does not apply to any CLAIM arising out of YOUR activity (or the activity of someone for whose conduct you are legally liable) as a bankruptcy trustee.
- 22.** This Master Plan does not apply to any CLAIM against a COVERED PARTY arising from or



related to work or services beyond the scope of activities assigned to the COVERED PARTY by the PRO BONO PROGRAM.

#### COMMENTS

*Activities by a volunteer lawyer which are outside of the scope of activities assigned to the lawyer by the pro bono program for which the lawyer has volunteered do not constitute a COVERED ACTIVITY under this Master Plan and will also be excluded by this exclusion. The term “PRO BONO PROGRAM” as used in this exclusion is defined at SECTION I – DEFINITIONS.*

*The various exclusions which follow in this subsection were adopted from the PLF’s standard Coverage Plan. Many of the exclusions are, by their nature, unlikely to apply to a volunteer attorney working for a pro bono program. The fact that a type of activity is mentioned in these exclusions does not imply that such activity will be a COVERED ACTIVITY under this Master Plan.*

#### [CONFIDENTIAL OR PRIVATE DATA EXCLUSION]

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

#### COMMENTS

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

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

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### SECTION VI – LIMITS OF COVERAGE AND CLAIMS EXPENSE ALLOWANCE

#### **1. Limits for This Master Plan**

**a. Coverage Limits.** The PLF’s maximum liability under this Master Plan is \$300,000 DAMAGES and EXCESS CLAIMS EXPENSE for all CLAIMS first made during the

COVERAGE PERIOD (and during any extended reporting period granted under SECTION XIV). The making of multiple CLAIMS or CLAIMS against more than one COVERED PARTY will not increase the PLF's Limit of Coverage.

**b. Claims Expense Allowance Limits.** In addition to the Limit of Coverage stated in SECTION VI.1.a above, there is a single CLAIMS EXPENSE ALLOWANCE of \$50,000 for CLAIMS EXPENSE for all CLAIMS first made during the COVERAGE PERIOD (and during any extended reporting period granted under SECTION XIV). The making of multiple CLAIMS or CLAIMS against more than one COVERED PARTY will not increase the CLAIMS EXPENSE ALLOWANCE. In the event CLAIMS EXPENSE exceeds the CLAIMS EXPENSE ALLOWANCE, the Limit of Coverage will be reduced by the amount of EXCESS CLAIMS EXPENSE incurred. The CLAIMS EXPENSE ALLOWANCE is not available to pay DAMAGES or settlements.

**c. No Consequential Damages.** No person or entity may recover any damages for breach of any provision in this Master Plan except those specifically provided for in this Master Plan.

## **2. Limits Involving Same or Related Claims Under Multiple PLF Plans**

If this Master Plan and one or more other Master Plans or Claims Made Plans issued by the PLF apply to the SAME OR RELATED CLAIMS, then regardless of the number of claimants, clients, COVERED PARTIES, PRO BONO PROGRAMS, or LAW ENTITIES involved, only one Limit of Coverage and one CLAIMS EXPENSE ALLOWANCE will apply. Notwithstanding the preceding sentence, if the SAME OR RELATED CLAIMS are brought against two or more separate LAW ENTITIES or PRO BONO PROGRAMS, each of which requests and is entitled to separate defense counsel, the PLF will make one CLAIMS EXPENSE ALLOWANCE available to each of the separate LAW ENTITIES or PRO BONO PROGRAMS requesting a separate allowance. For purposes of this provision, whether LAW ENTITIES or PRO BONO PROGRAMS are separate is determined as of the time of the COVERED ACTIVITIES that are alleged in the CLAIMS. No LAW ENTITY, PRO BONO PROGRAM, or group of LAW ENTITIES or PRO BONO PROGRAMS practicing together as a single firm, will be entitled to more than one CLAIMS EXPENSE ALLOWANCE under this provision. The CLAIMS EXPENSE ALLOWANCE granted will be available solely for the defense of the LAW ENTITY or PRO BONO PROGRAM requesting it.

### *COMMENTS*

*The PLF Claims Made Plan is intended to provide a basic "floor" level of coverage for all Oregon attorneys engaged in the private practice of law whose principal offices are in Oregon. Likewise, the Pro Bono Master Plan is intended to provide basic limited coverage. Because of this, there is a general prohibition against the stacking of either Limits of Coverage or CLAIMS EXPENSE ALLOWANCES. Except for the provision involving CLAIMS EXPENSE ALLOWANCES under Subsection 2, only one Limit of Coverage and CLAIMS EXPENSE ALLOWANCE will ever be paid under any one Claims Made Plan or Pro Bono Master Plan issued to a COVERED PARTY in any one MASTER PLAN YEAR, regardless of the circumstances. Limits of Coverage or CLAIMS EXPENSE ALLOWANCES in multiple individual Claims Made Plans and Pro Bono Master Plans do not stack for any CLAIMS that are "related." As the definition of SAME OR RELATED CLAIMS and its Comments and Examples demonstrate, the term "related" has a broad meaning when determining the number of Limits of Coverage and CLAIMS EXPENSE ALLOWANCES potentially*

available. This broad definition is designed to ensure the long-term economic viability of the PLF by protecting it from multiple limits exposures, ensuring fairness for all Oregon attorneys who are paying annual assessments, and keeping the overall coverage affordable.

The Limits of Coverage apply to claims against more than one COVERED PARTY so that naming more than one VOLUNTEER ATTORNEY, the PRO BONO PROGRAM, or other COVERED PARTIES as defendants does not increase the amount available.

Effective January 1, 2005, the PLF has created a limited exception to the one-limit rule for SAME OR RELATED CLAIMS. When such CLAIMS are asserted against more than one separate LAW ENTITY or PRO BONO PROGRAM, and one of the LAW ENTITIES or PRO BONO PROGRAMS is entitled to and requests a separate defense of the SUIT, then the PLF will allow a separate CLAIMS EXPENSE ALLOWANCE for that LAW ENTITY or PRO BONO PROGRAM.

The coverage provisions and limitations provided in this Master Plan are the absolute maximum amounts that can be recovered under the Master Plan. Therefore, no person or party is entitled to recover any consequential damages for breach of the Master Plan.

Example No. 1: Attorney A performed COVERED ACTIVITIES for a client while she was at two different law firms. Client sues A and both firms. Both firms request separate counsel, each one contending most of the alleged errors took place while A was at the other firm. The defendants are collectively entitled to a maximum of one \$300,000 Limit of Coverage and two CLAIMS EXPENSE ALLOWANCES. For purposes of this provision, Attorney A (or, if applicable, her professional corporation) is not a separate LAW ENTITY from the firm at which she worked. Accordingly, two, not three, CLAIMS EXPENSE ALLOWANCES are potentially available.

Example No. 2: Attorney A is a sole practitioner, practicing as an LLC, but also working of counsel for a partnership of B and C. While working of counsel, A undertook a case which he concluded involved special issues requiring the expertise of Attorney D, from another firm. D and C work together in representing the client and commit errors in handling the case. Two CLAIMS EXPENSE ALLOWANCES are potentially available. There are only two separate firms – the BC partnership and D's firm.

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## SECTION VII - NOTICE OF CLAIMS

1. The COVERED PARTY must, as a condition precedent to the right of protection afforded by this coverage, give the PLF, at the address shown in the Declarations, as soon as practicable, written notice of any CLAIM made against the COVERED PARTY. In the event a SUIT is brought against the COVERED PARTY, the COVERED PARTY must immediately notify and deliver to the PLF, at the address shown in the Declarations, every demand, notice, summons, or other process received by the COVERED PARTY or the COVERED PARTY'S representatives.

2. If the COVERED PARTY becomes aware of facts or circumstances that reasonably could be expected to be the basis of a CLAIM for which coverage may be provided under this Master Plan, the COVERED PARTY must give written notice to the PLF as soon as practicable during the COVERAGE PERIOD of:

- a. The specific act, error, or omission;

- b. DAMAGES and any other injury that has resulted or may result; and
  - c. The circumstances by which the COVERED PARTY first became aware of such act, error, or omission.
3. If the PLF opens a suspense or claim file involving a CLAIM or potential CLAIM which otherwise would require notice from the COVERED PARTY under subsection 1. or 2. above, the COVERED PARTY'S obligations under those subsections will be considered satisfied for that CLAIM or potential CLAIM.

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## SECTION VIII – COVERAGE DETERMINATIONS

1. This Master Plan is governed by the laws of the state of Oregon, regardless of any conflict-of-law principle that would otherwise result in the laws of any other jurisdiction governing this Master Plan. Any disputes as to the applicability, interpretation, or enforceability of this Master Plan, or any other issue pertaining to the provision of benefits under this Master Plan, between any COVERED PARTY (or anyone claiming through a COVERED PARTY) and the PLF will be tried in the Multnomah County Circuit Court of the state of Oregon which will have exclusive jurisdiction and venue of such disputes at the trial level.
2. The PLF will not be obligated to provide any amounts in settlement, arbitration award, judgment, or indemnity until all applicable coverage issues have been finally determined by agreement or judgment.
3. In the event of exceptional circumstances in which the PLF, at the PLF's option, has paid a portion or all Limits of Coverage toward settlement of a CLAIM before all applicable coverage issues have been finally determined, then resolution of the coverage dispute as set forth in this Section will occur as soon as reasonably practicable following the PLF's payment. In the event it is determined that this Master Plan is not applicable to the CLAIM, or only partially applicable, then judgment will be entered in Multnomah County Circuit Court in the PLF's favor and against the COVERED PARTY (and all others on whose behalf the PLF's payment was made) in the amount of any payment the PLF made on an uncovered portion of the CLAIM, plus interest at the rate applicable to judgments from the date of the PLF's payment. Nothing in this Section creates an obligation by the PLF to pay a portion or all of the PLF's Limits of Coverage before all applicable coverage issues have been fully determined.
4. The bankruptcy or insolvency of a COVERED PARTY does not relieve the PLF of its obligations under this Master Plan.

### COMMENTS

*Historically, Section VIII provided for resolution of coverage disputes by arbitration. After 25 years of resolving disputes in this manner, the PLF concluded it would be more beneficial to COVERED PARTIES and the PLF to try these matters to a court where appeals are available and precedent can be established.*

*Until the dispute over coverage is concluded, the PLF is not obligated to pay any amounts in dispute. The PLF recognizes there may occasionally be exceptional circumstances making a coverage determination impracticable prior to a payment by the PLF of a portion or all of the PLF's Limit of Coverage toward resolution of a CLAIM. For example, a claimant may make a settlement demand having a deadline for acceptance that would expire before coverage could be determined, or a court*

*might determine on the facts before it that a binding determination on the relevant coverage issue should not be made while the CLAIM is pending. In some of these exceptional circumstances, the PLF may at its option pay a portion or all of the Limit of Coverage before the dispute concerning the question of whether this Master Plan is applicable to the CLAIM is decided. If the PLF pays a portion or all of the Limit of Coverage and the court subsequently determines that this Master Plan is not applicable to the CLAIM, then the COVERED PARTY or others on whose behalf the payment was made must reimburse the PLF, in order to prevent unjust enrichment and protect the solvency and financial integrity of the PLF. For a COVERED PARTY'S duties in this situation, see Section IX.3.*

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## **SECTION IX - ASSISTANCE, COOPERATION, AND DUTIES OF COVERED PARTY**

**1.** As a condition of coverage under this Master Plan, the COVERED PARTY will, without charge to the PLF, cooperate with the PLF and will:

- a.** Provide to the PLF, within 30 days after written request, sworn statements providing full disclosure concerning any CLAIM or any aspect thereof;
- b.** Attend and testify when requested by the PLF;
- c.** Furnish to the PLF, within 30 days after written request, all files, records, papers, and documents that may relate to any CLAIM against the COVERED PARTY;
- d.** Execute authorizations, documents, papers, loan receipts, releases, or waivers when so requested by the PLF;
- e.** Submit to arbitration of any CLAIM when requested by the PLF;
- f.** Permit the PLF to cooperate and coordinate with any excess or umbrella insurance carrier as to the investigation, defense, and settlement of all CLAIMS;
- g.** Not communicate with any person other than the PLF or an insurer for the COVERED PARTY regarding any CLAIM that has been made against the COVERED PARTY, after notice to the COVERED PARTY of such CLAIM, without the PLF's written consent;
- h.** Assist, cooperate, and communicate with the PLF in any other way necessary to investigate, defend, repair, settle, or otherwise resolve any CLAIM against the COVERED PARTY.

**2.** To the extent the PLF makes any payment under this Plan, it will be subrogated to any COVERED PARTY's rights against third parties to recover all or part of these sums. When requested, every COVERED PARTY must assist the PLF in bringing any subrogation or similar claim. The PLF's subrogation or similar rights will not be asserted against any non-attorney employee of YOURS or YOUR law firm except for CLAIMS arising from intentional, dishonest, fraudulent, or malicious conduct of such person.

**3.** The COVERED PARTY may not, except at his or her own cost, voluntarily make any payment, assume any obligation, or incur any expense with respect to a CLAIM.

4. In the event the PLF proposes in writing a settlement to be funded by the PLF but subject to the COVERED PARTY's being obligated to reimburse the PLF if it is later determined that the Master Plan did not cover all or part of the CLAIM settled, the COVERED PARTY must advise the PLF in writing that the COVERED PARTY:

- a. Agrees to the PLF's proposal, or
- b. Objects to the PLF's proposal.

The written response must be made by the COVERED PARTY as soon as practicable and, in any event, must be received by the PLF no later than one business day (and at least 24 hours) before the expiration of any time-limited demand for settlement. A failure to respond, or a response that fails to unequivocally object to the PLF's written proposal, constitutes an agreement to the PLF's proposal. A response objecting to the settlement relieves the PLF of any duty to settle that might otherwise exist.

#### COMMENTS

*Subsection 4 addresses a problem that arises only when the determination of coverage prior to trial or settlement of the underlying claim is impracticable either because litigation of the coverage issue is not possible, permissible, or advisable, or because a pending trial date or time limit demand presents too short a period for resolution of the coverage issue prior to settlement or trial. In these circumstances, to avoid any argument that the PLF is acting as a volunteer, the PLF needs specific advice from the COVERED PARTY (or anyone claiming through the COVERED PARTY) either unequivocally agreeing that the PLF may proceed with the proposed settlement (i.e., waiving the volunteer argument) or unequivocally objecting to the proposed settlement (i.e., waiving any right to contend that the PLF has a duty to settle). While the PLF recognizes the requirement of an unequivocal response in some circumstances forces the COVERED PARTY (or anyone claiming through the COVERED PARTY) to make a difficult judgment, the exigencies of the situation require an unequivocal response so the PLF will know whether it can proceed with settlement without forfeiting its right to reimbursement to the extent the CLAIM is not covered.*

*The obligations of the Covered Party under Section IX as well as the other Sections of the Master Plan are to be performed without charge to the PLF.*

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#### SECTION X — ACTIONS BETWEEN THE PLF AND COVERED PARTIES

- 1. No legal action in connection with this Master Plan will be brought against the PLF unless the COVERED PARTY has fully complied with all terms of this Master Plan.
- 2. The PLF may bring legal action in connection with this Master Plan against a COVERED PARTY if:
  - a. The PLF pays a CLAIM under another Master Plan issued by the PLF;
  - b. A COVERED PARTY under this Master Plan is alleged to be liable for all or part of the damages paid by the PLF;
  - c. As between the COVERED PARTY under this Master Plan and the person or entity on

whose behalf the PLF has paid the CLAIM, the latter has an alleged right to pursue the COVERED PARTY under this Master Plan for contribution, indemnity, or otherwise, for all or part of the damages paid; and

**d.** Such right can be alleged under a theory or theories for which no coverage is provided to the COVERED PARTY under this Master Plan.

**3.** In the circumstances outlined in Subsection 2, the PLF reserves the right to sue the COVERED PARTY, either in the PLF's name or in the name of the person or entity on whose behalf the PLF has paid, to recover such amounts as the PLF determines appropriate, up to the full amount the PLF has paid under one or more other Master Plans issued by the PLF. However, this Subsection will not entitle the PLF to sue the COVERED PARTY if the PLF's alleged rights against the COVERED PARTY are premised on a theory of recovery that would entitle the COVERED PARTY to indemnity under this Master Plan if the PLF's action were successful.

#### COMMENTS

*Under certain circumstances, a CLAIM against a COVERED PARTY may not be covered because of an exclusion or other applicable provision. However, in some cases the PLF may be required to pay the CLAIM nonetheless because of the PLF's obligation to another COVERED PARTY under the terms of his or her Claims Made Plan or Pro Bono Master Plan.*

*Example No. 1: Attorney A misappropriates trust account funds belonging to Client X. Attorney A's partner, Attorney B, does not know of or acquiesce in Attorney A's wrongful conduct. Client X sues both Attorneys A and B. Attorney A has no coverage for the CLAIM under his Master Plan, but Attorney B has coverage for her liability under her Master Plan. The PLF pays the CLAIM under Attorney B's Master Plan. Section X.2 of Attorney A's Master Plan makes clear the PLF has the right to sue Attorney A for the damages the PLF paid under Attorney B's Master Plan.*

*Example No. 2: Same facts as the prior example, except that the PLF loans funds to Attorney B under terms that obligate Attorney B to repay the loan to the extent she recovers damages from Attorney A in an action for indemnity. Section X.2 of Attorney A's Master Plan makes clear that the PLF has the right pursuant to such arrangement with Attorney B to participate in her action against Attorney A.*

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#### SECTION XI - RELATION OF PRO BONO MASTER PLAN COVERAGE TO INSURANCE COVERAGE OR OTHER COVERAGE

**1.** If the COVERED PARTY has valid and collectible insurance coverage or other obligation to indemnify that also applies to any loss or CLAIM covered by this Master Plan, the PLF will not be liable under the Master Plan until the limits of the COVERED PARTY'S insurance or other obligation to indemnify, including any applicable deductible, have been exhausted, unless such insurance or other obligation to indemnify is written only as specific excess coverage over the CLAIMS EXPENSE ALLOWANCE and Limits of Coverage of this Master Plan.

**2.** This Master Plan shall not apply to any CLAIM which is covered by any PLF Claims Made Plan which has been issued to any COVERED PARTY, regardless of whether or not the CLAIMS EXPENSE ALLOWANCE and the Limits of Coverage available to defend against or satisfy such CLAIM are sufficient to pay any liability or CLAIM or whether or not the underlying limits or terms of such PLF Claims Made Plan are different from this Master Plan.

## COMMENTS

*As explained in the Preface, this Master Plan is not an insurance policy. To the extent that insurance or other coverage exists, this Master Plan may not be invoked. This provision is designed to preclude the application of the other insurance law rules applicable under the Lamb-Weston v. Oregon Automobile Ins. Co. 219 Or 110, 341 P2d 110, 346 P2d 643 (1959).*

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### SECTION XII – WAIVER AND ESTOPPEL

Notice to or knowledge of the PLF’s representative, agent, employee, or any other person will not effect a waiver, constitute an estoppel, or be the basis of any change in any part of this Master Plan nor will the terms of this Master Plan be waived or changed except by written endorsement issued and signed by the PLF’s authorized representative.

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### SECTION XIII — ASSIGNMENT

The interest hereunder of any COVERED PARTY is not assignable.

### SECTION XIV – TERMINATION

This Master Plan will terminate immediately and automatically in the event YOU are no longer certified as an OSB Pro Bono Program by the Oregon State Bar.



EXHIBIT A -- FORM ORPC 1

Dear [ Client ]:

*This letter confirms that we have discussed [specify the essential terms of the business transaction that you intend to enter into with your client and your role in the transaction. Be sure to inform the client whether you will be representing the client in the transaction. This is required by ORPC 1.8(a)(3)]. This letter also sets forth the conflict of interest that arises for me as your attorney because of this proposed business transaction.*

*The Oregon Rules of Professional Conduct prohibit an attorney from representing a client when the attorney's personal interests conflict with those of the client unless the client consents. Consequently, I can only act as your lawyer in this matter if you consent after being adequately informed. Rule 1.0(g) provides as follows:*

*(g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.*

*Although our interests presently appear to be consistent, my interests in this transaction could at some point be different than or adverse to yours. Specifically, [include an explanation which is sufficient to apprise the client of the potential adverse impact on the client of the matter to which the client is asked to consent, and any reasonable alternative courses of action, if applicable].*

*Please consider this situation carefully and decide whether or not you wish to enter into this transaction with me and to consent to my representation of you in this transaction. Rule 1.8(a)(2) requires me to recommend that you consult with another attorney in deciding whether or not your consent should be given. Another attorney could also identify and advise you further on other potential conflicts in our interests.*

*I enclose an article "Business Deals Can Cause Problems," which contains additional information. If you do decide to consent, please sign and date the enclosed extra copy of this letter in the space provided below and return it to me.*

*Very truly yours,*

*[Attorney Name and Signature]*

*I hereby consent to the legal representation, the terms of the business transaction, and the lawyer's role in transaction as set forth in this letter:*

---

*[Client's Signature]*

*[Date]*

*Enclosure: "Business Deals Can Cause Problems," by Jeffrey D. Sapiro.*

***BUSINESS DEALS CAN CAUSE PROBLEMS (Complying With ORPC 1.8(a))***

*By Jeffrey D. Sapiro, Disciplinary Counsel, Oregon State Bar*

Something that clients often lose sight of is that attorneys are not only legal advisors, but are business people as well. It is no secret that most practitioners wish to build a successful practice, rendering quality legal services to their clients, as a means of providing a comfortable living for themselves and/or their families. Given this objective, it is not surprising that many attorneys are attracted to business opportunities outside their practices that may prove to be financially rewarding. The fact that these business opportunities are often brought to an attorney's attention by a client or through involvement in a client's financial affairs is reason to explore the ethical problems that may arise.

ORPC 1.8(a) and 1.0(g) read as follows:

*Rule 1.8 Conflict of Interest: Current Clients: Specific Rules*

*(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:*

*(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;*

*(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and*

*(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.*

*ORPC 1.0 Terminology*

*(g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.*

The rationale behind this rule should be obvious. An attorney has a duty to exercise professional judgment solely for the benefit of a client, independent of any conflicting influences or loyalties. If an attorney is motivated by financial interests adverse to that of the client, the undivided loyalty due to the client may very well be compromised. (See also ORPC 1.7 and 1.8(c) and (i)) Full disclosure in writing gives the client the opportunity and necessary information to obtain independent legal advice when the

attorney's judgment may be affected by personal interest. Under ORPC 1.8(a) it is the client and not the attorney who should decide upon the seriousness of the potential conflict and whether or not to seek separate counsel.

A particularly dangerous situation is where the attorney not only engages in the business aspect of a transaction, but also furnishes the legal services necessary to put the deal together. In *In re Brown*, 277 Or 121, 559 P2d 884, rev. den. 277 Or 731, 561 P2d 1030 (1977), an attorney became partners with a friend of many years in a timber business, the attorney providing legal services and the friend providing the capital. The business later incorporated, with the attorney drafting all corporate documents, including a buy-sell agreement permitting the surviving stockholder to purchase the other party's stock. The Oregon Supreme Court found that the interests of the parties were adverse for a number of reasons, including the disparity in capital invested and the difference in the parties' ages, resulting in a potential benefit to the younger attorney under the buy-sell provisions. Despite the fact that the friend was an experienced businessman, the court held that the attorney violated the predecessor to ORPC 1.8(a), DR 5-104(A), because the friend was never advised to seek independent legal advice.

Subsequent to *Brown*, the Supreme Court has disciplined several lawyers for improper business transactions with clients. Among these cases are *In re Drake*, 292 Or 704, 642 P2d 296 (1982), which provides a comprehensive analysis of ORPC 1.8(a)'s predecessor, DR 5-104(A); *In re Montgomery*, 292 Or 796, 643 P2d 338 (1982), in which the fact that the client was a more sophisticated business person than the attorney did not affect the court's analysis; *In re Germundson*, 201 Or 656, 724 P2d 793 (1986), in which a close friendship between the attorney and the client was deemed insufficient reason to dispense with conflict disclosures; and *In re Griffith*, 304 Or 575, 748 P2d (1987), in which the court noted that, even if no conflict is present when a transaction is entered into, subsequent events may lead to a conflict requiring disclosures or withdrawal by the attorney.

Even in those situations where the attorney does not furnish legal services, problems may develop. There is a danger that, while the attorney may feel he or she is merely an investor in a business deal, the client may believe the attorney is using his or her legal skills to protect the client's interests in the venture. Indeed, this may be the very reason the client approached the attorney with a business proposition in the first place. When a lawyer borrows money from a client, there may even be a presumption that the client is relying on the lawyer for legal advice in the transaction. *In re Montgomery*, 292 Or 796, 643 P2d 338 (1982). To clarify for the client the role played by the attorney in a business transaction, ORPC 1.8(a)(3) now provides that a client's consent to the attorney's participation in the transaction is not effective unless the client signs a writing that describes, among other things, the attorney's role and whether the attorney is representing the client in the transaction.

In order to avoid the ethical problems addressed by the conflict of interest rules, the Supreme Court has said that an attorney must at least advise the client to seek independent legal counsel (*In re Bartlett*, 283 Or 487, 584 P2d 296 (1978)). This is now required by ORPC 1.8(a)(2). The attorney should disclose not only that a conflict of interest may exist, but should also explain the nature of the conflict "in such detail so that (the client) can understand the reasons why it may be desirable for each to have independent counsel. . ." (*In re Boivin*, 271 Or 419, 424, 533 P2d 171 (1975)). Risks incident to a transaction with a client must also be disclosed (ORPC 1.0(g); *In re Montgomery*, 297 Or 738, 687 P2d 157 (1984); *In re Whipple*, 296 Or 105, 673 P2d 172 (1983)). Such a disclosure will help ensure that there is no misunderstanding over the role the attorney is to play in the transaction and will help prevent the attorney from running afoul of the disciplinary rule discussed above.

# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** November 13-15, 2014  
**Memo Date:** October 20, 2014  
**From:** Carol J. Bernick, PLF CEO  
**Re:** 2015 Excess Rates

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### **Action Recommended**

The PLF Board of Directors (BOD) requests that the Board of Governors approve the rates for 2015 Excess Coverage. The rates are included in the accompanying materials. There were no revisions to the rates from 2014.

### **Background**

In addition to its primary coverage, the PLF provides optional excess coverage to Oregon attorneys. The excess coverage is completely reinsured. Rates are determined through negotiations between the PLF and the excess reinsurers, usually Lloyds of London syndicates. Each year's rates are based on the ongoing PLF experience and predicted future trends, as well as in-person discussions between representatives of the PLF and reinsurers.

There are four classes of Excess Program rates. Class 1 rates are the standard rates for covered party firms for which there are no underwriting issues. Class 2 rates are charged for covered parties that practice in higher risk areas such as securities and real estate or firms that have a history of claims that meet certain criteria. Out-of-State Class 1 and 2 represent the same division as in-state classes but are for out-of-state firms.<sup>1</sup>

Attachment – 2015 Rates

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<sup>1</sup> The PLF Primary program does not insure out-of-state attorneys. Firms that have out-of-state offices that meet certain criteria can purchase coverage for attorneys in those offices through the Excess Program. The cost of that coverage is calculated by adding the cost of the primary program assessment and the excess rates. There is a \$5,000 deductible with out-of-state excess coverage as well.



# Professional Liability Fund

16037 SW Upper Boones Ferry Road, Suite 300  
Tigard, Oregon 97224

PO Box 231600 | Tigard, Oregon 97281

## 2015 Excess Rates

CAROL J. BERNICK  
CHIEF EXECUTIVE OFFICER

### ----- CLASS 1 -----

### With Endorsement 2015

	Coverage Level	2014 Rates	2015 Rates	Change	Rates	Change
<i>Board of Directors and Officers</i>	\$700,000	\$1,241	\$1,241	0.00%	\$1,276	0.00%
	\$1,700,000	\$2,172	\$2,172	0.00%	\$2,207	0.00%
GUY B. GRECO CHAIR	\$2,700,000	\$2,963	\$2,963	0.00%	\$2,998	0.00%
Newport	\$3,700,000	\$3,336	\$3,336	0.00%	\$3,371	0.00%
VALERIE D. SAIKI SECRETARY-TREASURER (PUBLIC MEMBER)	\$4,700,000	\$3,569	\$3,569	0.00%	\$3,604	0.00%
Salem	\$9,700,000	\$5,962	\$5,692	0.00%	\$5,727	0.00%

VALERIE D. FISHER  
Portland

### ----- CLASS 2 -----

### With Endorsement 2015

	Coverage Level	2014 Rates	2015 Rates	Change	Rates	Change
ROBERT D. NEWELL Portland	\$700,000	\$2,111	\$2,111	0.00%	\$2,146	0.00%
	\$1,700,000	\$3,595	\$3,595	0.00%	\$3,630	0.00%
JULIA I. MANELA Eugene	\$2,700,000	\$4,856	\$4,856	0.00%	\$4,891	0.00%
	\$3,700,000	\$5,450	\$5,450	0.00%	\$5,485	0.00%
TIM MARTINEZ (PUBLIC MEMBER)	\$4,700,000	\$5,821	\$5,821	0.00%	\$5,856	0.00%
Salem	\$9,700,000	\$9,205	\$9,205	0.00%	\$9,240	0.00%

TERESA A. STATLER  
Portland

### ----- OUT OF STATE CLASS 1 -----

### With Endorsement 2015

	Coverage Level	2014 Rates	2015 Rates	Change	Rates	Change
DENNIS H. BLACK Medford	\$700,000	\$4,741	\$4,741	0.00%	\$4,776	0.00%
	\$1,700,000	\$5,672	\$5,672	0.00%	\$5,707	0.00%
	\$2,700,000	\$6,463	\$6,463	0.00%	\$6,498	0.00%
	\$3,700,000	\$6,836	\$6,836	0.00%	\$6,871	0.00%
	\$4,700,000	\$7,069	\$7,069	0.00%	\$7,104	0.00%
	\$9,700,000	\$9,192	\$9,192	0.00%	\$9,227	0.00%

### ----- OUT OF STATE CLASS 2 -----

### With Endorsement 2015

	Coverage Level	2014 Rates	2015 Rates	Change	Rates	Change
	\$700,000	\$5,611	\$5,611	0.00%	\$5,646	0.00%
	\$1,700,000	\$7,095	\$7,095	0.00%	\$7,130	0.00%
	\$2,700,000	\$8,356	\$8,356	0.00%	\$8,391	0.00%
	\$3,700,000	\$8,950	\$8,950	0.00%	\$8,985	0.00%
	\$4,700,000	\$9,321	\$9,321	0.00%	\$9,356	0.00%
	\$9,700,000	\$12,705	\$12,705	0.00%	\$12,740	0.00%

**Oregon State Bar  
Professional Liability Fund  
Financial Statements  
8/31/2014**

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6	Excess Program Operating Expenses
7	Combined Investment Schedule

**Oregon State Bar  
Professional Liability Fund  
Combined Primary and Excess Programs  
Statement of Net Position  
8/31/2014**

<u>ASSETS</u>		
	<u>THIS YEAR</u>	<u>LAST YEAR</u>
Cash	\$2,190,112.67	\$850,821.27
Investments at Fair Value	48,371,211.02	43,037,040.31
Assessment Installment Receivable	2,792,674.83	2,746,602.00
Due from Reinsurers	159,324.19	18,751.69
Other Current Assets	75,585.81	94,698.10
Net Fixed Assets	861,181.41	896,201.42
Claim Receivables	72,088.15	56,176.92
Other Long Term Assets	<u>7,890.50</u>	<u>9,825.00</u>
<b>TOTAL ASSETS</b>	<b><u>\$54,530,068.58</u></b>	<b><u>\$47,710,116.71</u></b>
 <u>LIABILITIES AND FUND POSITION</u>		
	<u>THIS YEAR</u>	<u>LAST YEAR</u>
<b>Liabilities:</b>		
Accounts Payable and Other Current Liabilities	\$138,753.67	\$196,048.54
Due to Reinsurers	\$402,042.56	\$383,154.46
Liability for Compensated Absences	370,817.99	445,620.51
Liability for Indemnity	12,688,319.22	13,058,171.80
Liability for Claim Expense	14,817,326.52	13,736,418.04
Liability for Future ERC Claims	2,400,000.00	2,700,000.00
Liability for Suspense Files	1,500,000.00	1,400,000.00
Liability for Future Claims Administration (AOE)	2,300,000.00	2,400,000.00
Excess Ceding Commission Allocated for Rest of Year	270,162.53	247,987.66
Assessment and Installment Service Charge Allocated for Rest of Year	<u>8,313,420.23</u>	<u>8,450,946.59</u>
<b>Total Liabilities</b>	<b><u>\$43,200,842.72</u></b>	<b><u>\$43,018,347.60</u></b>
<b>Change in Net Position:</b>		
Retained Earnings (Deficit) Beginning of the Year	\$9,270,287.61	\$4,047,255.11
Year to Date Net Income (Loss)	<u>2,058,938.25</u>	<u>644,514.00</u>
<b>Net Position</b>	<b><u>\$11,329,225.86</u></b>	<b><u>\$4,691,769.11</u></b>
<b>TOTAL LIABILITIES AND FUND POSITION</b>	<b><u>\$54,530,068.58</u></b>	<b><u>\$47,710,116.71</u></b>

**Oregon State Bar  
Professional Liability Fund  
Primary Program  
Statement of Revenues, Expenses, and Changes in Net Position  
8 Months Ended 8/31/2014**

	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>
<b>REVENUE</b>					
Assessments	\$16,404,301.78	\$16,748,666.64	\$344,364.86	\$16,641,161.83	\$25,123,000.00
Installment Service Charge	222,538.66	260,000.00	37,461.34	260,731.33	390,000.00
Other Income	41,077.33	0.00	(41,077.33)	35,993.54	0.00
Investment Return	<u>2,674,279.10</u>	<u>1,794,842.64</u>	<u>(879,436.46)</u>	<u>1,447,997.64</u>	<u>2,692,264.00</u>
<b>TOTAL REVENUE</b>	<b><u>\$19,342,196.87</u></b>	<b><u>\$18,803,509.28</u></b>	<b><u>(\$538,687.59)</u></b>	<b><u>\$18,385,884.34</u></b>	<b><u>\$28,205,264.00</u></b>
<b>EXPENSE</b>					
<b>Provision For Claims:</b>					
New Claims at Average Cost	\$12,873,000.00			\$12,575,500.00	
Actuarial Adjustment to Reserves	71,374.66			664,997.05	
Coverage Opinions	40,623.94			105,687.86	
General Expense	38,310.09			78,091.94	
Less Recoveries & Contributions	(17,738.58)			(4,004.98)	
Budget for Claims Expense		<u>\$13,781,760.00</u>			<u>\$20,672,640.00</u>
<b>Total Provision For Claims</b>	<b><u>\$13,005,570.11</u></b>	<b><u>\$13,781,760.00</u></b>	<b><u>\$776,189.89</u></b>	<b><u>\$13,420,271.87</u></b>	<b><u>\$20,672,640.00</u></b>
<b>Expense from Operations:</b>					
Administrative Department	\$1,566,837.18	\$1,654,914.80	\$88,077.62	\$1,443,524.94	\$2,482,372.00
Accounting Department	411,538.73	425,107.92	13,569.19	515,588.67	637,662.00
Loss Prevention Department	1,214,056.61	1,387,349.36	173,292.75	1,178,688.32	2,081,023.00
Claims Department	1,701,844.22	1,776,311.76	74,467.54	1,712,941.59	2,664,467.00
Allocated to Excess Program	<u>(747,192.64)</u>	<u>(747,192.64)</u>	<u>0.00</u>	<u>(736,736.00)</u>	<u>(1,120,789.00)</u>
<b>Total Expense from Operations</b>	<b><u>\$4,147,084.10</u></b>	<b><u>\$4,496,491.20</u></b>	<b><u>\$349,407.10</u></b>	<b><u>\$4,114,007.52</u></b>	<b><u>\$6,744,735.00</u></b>
Contingency (4% of Operating Exp)	\$0.00	\$209,800.64	\$209,800.64	\$0.00	\$314,701.00
Depreciation and Amortization	\$110,772.84	\$113,200.00	\$2,427.16	\$111,718.55	\$169,800.00
Allocated Depreciation	<u>(16,244.00)</u>	<u>(16,244.00)</u>	<u>0.00</u>	<u>(20,037.36)</u>	<u>(24,366.00)</u>
<b>TOTAL EXPENSE</b>	<b><u>\$17,247,183.05</u></b>	<b><u>\$18,585,007.84</u></b>	<b><u>\$1,337,824.79</u></b>	<b><u>\$17,625,960.58</u></b>	<b><u>\$27,877,510.00</u></b>
<b>NET POSITION - INCOME (LOSS)</b>	<b><u>\$2,095,013.82</u></b>	<b><u>\$217,168.08</u></b>	<b><u>(\$1,877,845.74)</u></b>	<b><u>\$759,923.76</u></b>	<b><u>\$325,754.00</u></b>



**Oregon State Bar  
Professional Liability Fund  
Primary Program  
Statement of Operating Expense  
8 Months Ended 8/31/2014**

	<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>
<b><u>EXPENSE:</u></b>						
Salaries	\$337,248.26	\$2,755,405.39	\$2,888,926.64	\$133,521.25	\$2,721,140.06	\$4,333,390.00
Benefits and Payroll Taxes	122,152.92	1,009,249.18	1,075,684.16	66,434.98	970,940.85	1,613,526.00
Investment Services	0.00	13,839.75	18,666.64	4,826.89	13,884.00	28,000.00
Legal Services	3,182.50	4,658.50	8,666.64	4,008.14	4,919.50	13,000.00
Financial Audit Services	9,800.00	22,800.00	15,866.64	(6,933.36)	22,600.00	23,800.00
Actuarial Services	0.00	11,340.00	14,666.64	3,326.64	6,448.75	22,000.00
Information Services	2,299.45	35,563.99	65,066.72	29,502.73	97,001.34	97,600.00
Document Scanning Services	9,053.47	11,149.95	43,333.36	32,183.41	20,329.02	65,000.00
Other Professional Services	10,705.80	69,079.18	46,820.00	(22,259.18)	34,958.92	70,230.00
Staff Travel	3,648.68	13,495.35	10,033.36	(3,461.99)	10,303.16	15,050.00
Board Travel	6,713.88	23,734.31	25,999.92	2,265.61	13,799.67	39,000.00
NABRICO	1,413.94	6,120.38	7,066.64	946.26	6,039.52	10,600.00
Training	0.00	12,217.14	14,666.64	2,449.50	17,864.34	22,000.00
Rent	42,777.25	341,269.74	353,919.36	12,649.62	352,557.19	530,879.00
Printing and Supplies	5,261.46	42,100.67	40,666.72	(1,433.95)	31,875.86	61,000.00
Postage and Delivery	1,922.50	14,245.60	23,166.72	8,921.12	19,373.46	34,750.00
Equipment Rent & Maintenance	3,862.43	33,761.16	27,000.00	(6,761.16)	31,102.48	40,500.00
Telephone	4,875.02	31,795.59	38,640.00	6,844.41	32,026.39	57,960.00
L P Programs (less Salary & Benefits)	38,290.29	236,498.67	296,530.00	60,031.33	200,959.19	444,794.00
Defense Panel Training	47.42	124.41	1,000.08	875.67	46,461.75	1,500.00
Bar Books Grant	16,666.67	133,333.36	133,333.36	0.00	133,333.36	200,000.00
Insurance	0.00	8,221.00	26,096.64	17,875.64	15,019.00	39,145.00
Library	1,819.40	20,269.99	22,000.00	1,730.01	20,040.99	33,000.00
Subscriptions, Memberships & Other	2,496.10	30,247.27	29,866.64	(380.63)	27,764.72	44,800.00
Allocated to Excess Program	(93,399.08)	(747,192.64)	(747,192.64)	0.00	(736,736.00)	(1,120,789.00)
<b>TOTAL EXPENSE</b>	<b><u>\$530,838.36</u></b>	<b><u>\$4,133,327.94</u></b>	<b><u>\$4,480,490.88</u></b>	<b><u>\$347,162.94</u></b>	<b><u>\$4,114,007.52</u></b>	<b><u>\$6,720,735.00</u></b>

**Oregon State Bar  
Professional Liability Fund  
Excess Program  
Statement of Revenue, Expenses, and Changes in Net Position  
8 Months Ended 8/31/2014**

	<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>
<b><u>REVENUE</u></b>					
Ceding Commission	\$540,325.06	\$506,666.64	(\$33,658.42)	\$495,975.32	\$760,000.00
Prior Year Adj. (Net of Reins.)	3,446.70	1,000.00	(2,446.70)	3,371.55	1,500.00
Installment Service Charge	39,808.00	28,000.00	(11,808.00)	41,433.00	42,000.00
Investment Return	<u>230,952.89</u>	<u>135,095.36</u>	<u>(95,857.53)</u>	<u>168,037.81</u>	<u>202,643.00</u>
<b>TOTAL REVENUE</b>	<b><u>\$814,532.65</u></b>	<b><u>\$670,762.00</u></b>	<b><u>(\$143,770.65)</u></b>	<b><u>\$708,817.68</u></b>	<b><u>\$1,006,143.00</u></b>
<b><u>EXPENSE</u></b>					
Operating Expenses (See Page 6)	\$834,364.22	\$832,467.36	(\$1,896.86)	\$804,190.08	\$1,248,701.00
Allocated Depreciation	<u>\$16,244.00</u>	<u>\$16,244.00</u>	<u>\$0.00</u>	<u>\$20,037.36</u>	<u>\$24,366.00</u>
<b>NET POSITION - INCOME (LOSS)</b>	<b><u>(\$36,075.57)</u></b>	<b><u>(\$177,949.36)</u></b>	<b><u>(\$141,873.79)</u></b>	<b><u>(\$115,409.76)</u></b>	<b><u>(\$266,924.00)</u></b>

**Oregon State Bar  
Professional Liability Fund  
Excess Program  
Statement of Operating Expense  
8 Months Ended 8/31/2014**

	<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>
<b><u>EXPENSE:</u></b>						
Salaries	\$58,191.10	\$465,528.80	\$465,528.64	(\$0.16)	\$447,614.42	\$698,293.00
Benefits and Payroll Taxes	21,551.82	172,416.84	171,334.72	(1,082.12)	167,275.64	257,002.00
Investment Services	0.00	1,160.25	1,666.64	506.39	1,116.00	2,500.00
Office Expense	0.00	0.00	0.00	0.00	0.00	0.00
Allocation of Primary Overhead	22,533.84	180,270.72	180,270.64	(0.08)	185,916.00	270,406.00
Reinsurance Placement & Travel	0.00	10,614.75	3,333.36	(7,281.39)	369.49	5,000.00
Training	0.00	0.00	333.36	333.36	0.00	500.00
Printing and Mailing	322.86	322.86	3,666.64	3,343.78	92.38	5,500.00
Program Promotion	0.00	4,050.00	5,000.00	950.00	1,806.15	7,500.00
Other Professional Services	0.00	0.00	1,333.36	1,333.36	0.00	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>
<b>TOTAL EXPENSE</b>	<b><u>\$102,599.62</u></b>	<b><u>\$834,364.22</u></b>	<b><u>\$832,467.36</u></b>	<b><u>(\$1,896.86)</u></b>	<b><u>\$804,190.08</u></b>	<b><u>\$1,248,701.00</u></b>

**Oregon State Bar  
Professional Liability Fund  
Combined Investment Schedule  
8 Months Ended 8/31/2014**

	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>
<b>Dividends and Interest:</b>				
Short Term Bond Fund	\$5,661.53	\$83,998.20	\$4,923.74	\$124,949.37
Intermediate Term Bond Funds	8,987.12	162,115.21	9,821.34	137,885.85
Domestic Common Stock Funds	0.00	158,733.23	0.00	82,719.02
International Equity Fund	0.00	0.00	0.00	0.00
Real Estate	0.00	72,494.95	0.00	90,808.77
Hedge Fund of Funds	0.00	0.00	0.00	0.00
Real Return Strategy	<u>0.00</u>	<u>160,695.86</u>	<u>0.00</u>	<u>68,496.13</u>
<b>Total Dividends and Interest</b>	<b><u>\$14,648.65</u></b>	<b><u>\$638,037.45</u></b>	<b><u>\$14,745.08</u></b>	<b><u>\$504,859.14</u></b>
<b>Gain (Loss) in Fair Value:</b>				
Short Term Bond Fund	\$16,665.90	\$45,611.38	(\$21,886.34)	(\$157,578.34)
Intermediate Term Bond Funds	93,686.15	294,355.29	(109,619.86)	(424,850.77)
Domestic Common Stock Funds	403,719.29	649,743.17	(233,882.81)	1,228,906.26
International Equity Fund	133,308.34	503,068.42	(179,493.71)	503,868.81
Real Estate	0.00	124,276.08	0.00	134,418.43
Hedge Fund of Funds	0.00	0.00	(17,937.46)	229,152.27
Real Return Strategy	<u>58,531.79</u>	<u>650,140.20</u>	<u>(80,318.64)</u>	<u>(402,740.35)</u>
<b>Total Gain (Loss) in Fair Value</b>	<b><u>\$705,911.47</u></b>	<b><u>\$2,267,194.54</u></b>	<b><u>(\$643,138.82)</u></b>	<b><u>\$1,111,176.31</u></b>
<b>TOTAL RETURN</b>	<b><u>\$720,560.12</u></b>	<b><u>\$2,905,231.99</u></b>	<b><u>(\$628,393.74)</u></b>	<b><u>\$1,616,035.45</u></b>
<b>Portions Allocated to Excess Program:</b>				
Dividends and Interest	\$722.18	\$52,078.34	\$880.28	\$43,027.74
Gain (Loss) in Fair Value	<u>34,801.44</u>	<u>178,874.55</u>	<u>(38,395.39)</u>	<u>125,010.07</u>
<b>TOTAL ALLOCATED TO EXCESS PROGRAM</b>	<b><u>\$35,523.62</u></b>	<b><u>\$230,952.89</u></b>	<b><u>(\$37,515.11)</u></b>	<b><u>\$168,037.81</u></b>

**Oregon State Bar  
Professional Liability Fund  
Excess Program  
Balance Sheet  
8/31/2014**

**ASSETS**

	<b><u>THIS YEAR</u></b>	<b><u>LAST YEAR</u></b>
Cash	\$390,827.49	\$624,488.50
Assessment Installment Receivable	172,050.99	94,298.00
Due from Reinsurers	159,324.19	18,751.69
Investments at Fair Value	<u>2,638,566.14</u>	<u>2,577,733.43</u>
<b>TOTAL ASSETS</b>	<b><u>\$3,360,768.81</u></b>	<b><u>\$3,315,271.62</u></b>

**LIABILITIES AND FUND EQUITY**

	<b><u>THIS YEAR</u></b>	<b><u>LAST YEAR</u></b>
<b>Liabilities:</b>		
Accounts Payable & Refunds Payable	\$2,342.46	\$1,151.66
Due to Primary Fund	\$13,725.36	\$6,908.90
Due to Reinsurers	402,042.56	383,154.46
Ceding Commision Allocated for Remainder of Year	<u>270,162.53</u>	<u>247,987.66</u>
<b>Total Liabilities</b>	<b><u>\$688,272.91</u></b>	<b><u>\$639,202.68</u></b>
<b>Fund Equity:</b>		
Retained Earnings (Deficit) Beginning of Year	\$2,708,571.47	\$2,791,478.70
Year to Date Net Income (Loss)	<u>(36,075.57)</u>	<u>(115,409.76)</u>
<b>Total Fund Equity</b>	<b><u>\$2,672,495.90</u></b>	<b><u>\$2,676,068.94</u></b>
<b>TOTAL LIABILITIES AND FUND EQUITY</b>	<b><u>\$3,360,768.81</u></b>	<b><u>\$3,315,271.62</u></b>

**Oregon State Bar  
Professional Liability Fund  
Primary Program  
Balance Sheet  
8/31/2014**

**ASSETS**

	<b><u>THIS YEAR</u></b>	<b><u>LAST YEAR</u></b>
Cash	\$1,799,285.18	\$226,332.77
Investments at Fair Value	45,732,644.88	40,459,306.88
Assessment Installment Receivable	2,620,623.84	2,652,304.00
Due From Excess Fund	13,725.36	6,908.90
Other Current Assets	61,860.45	87,789.20
Net Fixed Assets	861,181.41	896,201.42
Claim Receivables	72,088.15	56,176.92
Other Long Term Assets	<u>7,890.50</u>	<u>9,825.00</u>
<b>TOTAL ASSETS</b>	<b><u>\$51,169,299.77</u></b>	<b><u>\$44,394,845.09</u></b>

**LIABILITIES AND FUND EQUITY**

	<b><u>THIS YEAR</u></b>	<b><u>LAST YEAR</u></b>
<b>Liabilities:</b>		
Accounts Payable and Other Current Liabilities	\$122,685.85	\$187,987.98
Liability for Compensated Absences	370,817.99	445,620.51
Liability for Indemnity	12,688,319.22	13,058,171.80
Liability for Claim Expense	14,817,326.52	13,736,418.04
Liability for Future ERC Claims	2,400,000.00	2,700,000.00
Liability for Suspense Files	1,500,000.00	1,400,000.00
Liability for Future Claims Administration (ULAE)	2,300,000.00	2,400,000.00
Assessment and Installment Service Charge Allocated for Remainder of Year	<u>8,313,420.23</u>	<u>8,450,946.59</u>
<b>Total Liabilities</b>	<b><u>\$42,512,569.81</u></b>	<b><u>\$42,379,144.92</u></b>
<b>Fund Equity:</b>		
Retained Earnings (Deficit) Beginning of the Year	\$6,561,716.14	\$1,255,776.41
Year to Date Net Income (Loss)	<u>2,095,013.82</u>	<u>759,923.76</u>
<b>Total Fund Equity</b>	<b><u>\$8,656,729.96</u></b>	<b><u>\$2,015,700.17</u></b>
<b>TOTAL LIABILITIES AND FUND EQUITY</b>	<b><u>\$51,169,299.77</u></b>	<b><u>\$44,394,845.09</u></b>

# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** November 13, 2014  
**From:** MCLE Committee  
**Re:** Request for amendments to MCLE Regulations 3.300 and 6.100

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### Action Recommended

The MCLE Committee recommends amending MCLE Regulations 3.300(c), 3.300(d) and 6.100 regarding application and carryover of excess child abuse reporting and elder abuse reporting credits.

### Background

Earlier this year, the Oregon Supreme Court and Board of Governors approved the following amendments to Rule 3.2(b) and Regulation 3.300(d) regarding the new elder abuse reporting credit requirement. These amendments are effective January 1, 2015.

**Rule 3.2 (b) Ethics.** At least six of the required hours shall be in subjects relating to ethics in programs accredited pursuant to Rule 5.5(a), including one hour on the subject of a lawyer's statutory duty to report child abuse ~~(see ORS 9.114)~~ or one hour on the subject of a lawyer's statutory duty to report elder abuse (see ORS 9.114). MCLE Regulation 3.300(d) specifies the reporting periods in which the child abuse or elder abuse reporting credit is required.

**Regulation 3.300(d)** Members in a three-year reporting period are required to have 3.0 access to justice credits and 1.0 child abuse reporting credit in reporting periods ending 12/31/2012 through 12/31/2014, 12/31/2018 through 12/31/2020 and in alternate three-year periods thereafter. ~~Access to Justice credits earned in a non-required reporting period will be credited as general credits.~~ Members in a three-year reporting period ending 12/31/2015 through 12/31/2017, 12/31/2021 through 12/31/2023 and in alternate three-year periods thereafter are required to have 1.0 elder abuse reporting credit. Access to Justice, child abuse reporting and elder abuse reporting credits earned in a non-required reporting period will be credited as general credits.

Upon further study of the MCLE Rules and Regulations, the MCLE Committee recommends amending Regulations 3.300(c), 3.300(d) and 6.100 as proposed below in order to clarify the application and carryover of child abuse and elder abuse reporting credits.

**Regulation 3.300(c)** ~~No more than two child abuse credits can be applied to the ethics requirement, and then only for a single two-hour program.~~ For members in a three-year reporting period, one child abuse or elder abuse reporting credit earned in a non-required reporting period may be applied to the ethics credit requirement. Additional child-abuse and elder abuse reporting credits will ~~can~~ be applied to the general or practical skills requirement. For members in a shorter reporting period, child abuse and elder abuse reporting credits will be applied as general or practical skills credit. Access to Justice credits

earned in a non-required reporting period will be credited as general credits.

**Regulation 3.300(d)** Members in a three-year reporting period are required to have 3.0 access to justice credits and 1.0 child abuse reporting credit in reporting periods ending 12/31/2012 through 12/31/2014, 12/31/2018 through 12/31/2020 and in alternate three-year periods thereafter. Members in a three-year reporting period ending 12/31/2015 through 12/31/2017, 12/31/2021 through 12/31/2023 and in alternate three-year periods thereafter are required to have 1.0 elder abuse reporting credit. ~~Access to justice, child abuse reporting and elder abuse reporting credits earned in a non-required reporting period will be credited as general credits.~~

**Regulation 6.100 Carry Over Credit.** No more than six ethics credits can be carried over for application to the subsequent reporting period requirement. Ethics credits in excess of the carry over limit may be carried over as general credits. Child abuse and elder abuse reporting education credits earned in excess of the reporting period requirement may be carried over as general credits, but a new child abuse or elder abuse reporting education credit must be earned in each reporting period in which the credit is required. Access to justice credits may be carried over as general credits, but new credits must be earned in the reporting period in which they are required. Carry over credits from a reporting period in which the credits were completed by the member may not be carried forward more than one reporting period.



# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** November 15, 2014  
**Memo Date:** November 4, 2014  
**From:** Helen M. Hirschbiel, General Counsel  
**Re:** Amend Bylaw Subsections 24.201, 24.300, and 24.301 on SLAC and PLF-PPMAC

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### Issue

OSB Bylaw Subsection 24.300 restricts the number of members the Board of Governors can appoint to the State Lawyers Assistance Committee (SLAC) and outlines the term length for members and officers. SLAC is requesting the addition of three member seats to the committee.

Additionally, a portion of the language provided in Subsection 24.301 speaks to the PLF's authority over the PLF Personal and Practice Management Assistance Committee (PLF-PPMAC), rather than the composition, and should be relocated to Subsection 24.201 which outlines the authority for attorney assistance programs.

### Options

1. Determine if OSB Bylaw Subsection 24.300 should be revised to allow the BOG the same flexibility with member appointments for SLAC as it has for other bar committees.
2. Decide if the language from Subsection 24.301 regarding the PLF's authority over the PLF-PPMAC should be relocated to 24.201.
3. Decide whether the one meeting notice requirement for bylaw revisions should be waived.

### Discussion

#### Revision of Bylaw Subsection 24.300

Currently OSB Bylaw Subsection 24.300 provides the BOG authority to appoint up to 12 members to SLAC and outlines the term length for members and officers. In order to accommodate the SLAC caseload the committee requests an increase from 12 to 15 members. SLAC routinely has nearly 30 ongoing cases requiring some of its members to assume a heavier burden by handling more than two open cases at any given period.

Article 14 of the bylaws gives the BOG authority to make appointments to all bar committees as it deems appropriate. Subsection 24.300 is the only bylaw providing composition requirements for a bar committee. Staff recommends this the language of this subsection be changed to allow the BOG the same flexibility with regard to SLAC appointments that it has for all other bar committees.

#### Section 24.3 Composition

##### Subsection 24.300 State Lawyers Assistance Committee

~~SLAC will be comprised of not more than 12 members, including two public members, appointed by the Board of Governors. Terms will be for four years or as otherwise deemed necessary by the Board to maintain staggered terms and to fill vacancies. The lawyer members of SLAC will be active members of the Bar reflecting as closely as possible the geographic distribution of bar members. The Board of Governors will designate one of the lawyer members as chair and one to serve as secretary, each to serve a term of two years. The underlying terms of either secretary or chair will be extended for one additional year so as to coincide with the underlying terms of office, if~~

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~~necessary. Rules for the provision of assistance by SLAC will be as set forth in this bylaw. The board may appoint members and public members as it deems appropriate.~~

### **Revision of Bylaw Subsection 24.201 and 24.301**

During a review of the bylaws relating to SLAC composition, staff realized a portion of the language found in Subsection 24.301 relates to the PLF's authority over PLF-PPMAC's provisions for attorney assistance rather than the composition of the PLF-PPMAC. As a housekeeping issue, staff recommends the BOG move the second sentence of the bylaw to a more appropriate location in Subsection 24.201 which relates to the authority for attorney assistance programs.

#### **Section 24.3 Composition**

**Subsection 24.301** Professional Liability Fund Personal and Practice Management Assistance Committee

~~The PLF-PPMAC consists of the members of the PLF's Board of Directors. The PLF will have authority to promulgate rules concerning the provision of assistance by the PLF-PPMAC which, on approval by the Board of Governors, will govern its activities.~~

#### **Section 24.2 Authority**

**Subsection 24.201** Professional Liability Fund Personal and Practice Management Assistance Committee

The Professional Liability Fund Personal and Practice Management Assistance Committee ("PLF-PPMAC ") has the authority to provide assistance to lawyers and judges who are suffering from impairment or other circumstances that may adversely affect professional competence or conduct and may also provide advice and training in law practice management. The PLF-PPMAC may provide this assistance through the PLF's Oregon Attorney Assistance Program and the Practice Management Advisor Program and by the use of the PLF staff and volunteers. The PLF will have authority to promulgate rules concerning the provision of assistance by the PLF-PPMAC which, on approval by the Board of Governors, will govern its activities.

### **Meeting Notice Requirement**

If the BOG approves the bylaw revisions recommended above, waiving the one meeting notice requirement will immediately remove the 12 member limit on SLAC and allow three additional appointment to be made with terms beginning January 1, 2015. The Board Development Committee will make recommendations to the BOG for these new members in accordance with the usual appointments process used for all bar committees.

If the meeting notice requirement is not waived the three new member appointments will be delayed until the BOG meets in February 2015.

# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** November 15, 2014  
**From:** Sylvia E. Stevens, Executive Director  
**Re:** CSF Claim No. 2014-07 FOSTER (Wong/Bernath) Request for BOG Review

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### Action Recommended

Consider the request of claimant Martha Wong for BOG review of the CSF Committee's denial of her claim for reimbursement.

### Background

Martha Wong submitted a claim for reimbursement with the Client Security Fund, seeking \$20,000 from attorney Rosemary Foster.<sup>1</sup> Wong' husband, Daniel Bernath, is a California-licensed lawyer whose practice in Oregon at relevant times was limited to Social Security disability cases.<sup>2</sup> Since 2005, Wong and Bernath have operated under the assumed business name "Northwest Disability Advocates" (NDA).

Sometime in 2010, both Wong and Bernath became temporarily ineligible to provide services to clients. (Bernath claims to have retired in 2010; also, the SSA changed its rules regarding representation by non-lawyers such as Wong.)

In January 28, 2011, Wong and Bernath entered into an Agreement with Rosemary Foster. Their CSF application alleges that Wong and Bernath engaged Foster to "act as [their] legal representative, lawyer before the Social Security Administration" and "[a]s our attorney" regarding the structure of the Agreement.

The Agreement itself characterizes Foster as a "Consultant Independent Contractor," a "Hearing judge advocate independent contractor," and a "Holding attorney." Under the agreement, Wong and Bernath's clients would be "turned over" to Foster as a "certified person for direct payments" until Wong was able to be certified by SSA for that purpose. All payments from the SSA were to go into Wong and Bernath's bank account. Foster was to be paid \$1000/month for her services.

Foster represented NDA clients until June 2011, at which time she terminated her relationship with Wong and Bernath and opened her own firm. Several of NDA clients followed Foster to her new firm. Wong claims that Foster "embezzled" NDA's money by stopping the SSA payments from going into the NDA account and instead diverting the payments to Foster's own account.

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<sup>1</sup> The claim form lists both Ms. Wong and her husband, Daniel Bernath, as claimants, but Mr. Bernath didn't sign the application nor did he sign the request for review.

<sup>2</sup> Bernath applied for but was denied admission to the OSB in 1998. Wong is not believed to be a lawyer in any jurisdiction.

The CSF claim does not explain how Wong and Bernath calculated their \$20,000 loss. Wong and Bernath sued Foster in Washington County in October 2011 and obtained a default judgment for \$271,000. They claim that the judgment was for conversion, but the complaint does not contain a claim for conversion. Subsequently, on Foster's motion and after a hearing, the judgment was reduced to \$10,745 in a Corrected General Judgment issued in February 2013. The Corrected Judgment sheds no light on the basis for the reduction or the calculation of the reduced amount. Michael Stone, the lawyer who represented Foster in challenging the judgment, was unable to provide much help. He reports that the judge chastised Foster for ignoring the lawsuit, but made no specific findings of dishonesty or anything else. Stone's feeling is that the judge wanted to punish Foster for allowing the entry of default and then taking up the court's time trying to get it set aside.

When the Application for Reimbursement was first received, Ms. Wong was asked to provide further information about the relationship between the parties. In her response, Wong reiterated her contention that Foster provided legal advice about the formation and operation of Wong's business.<sup>3</sup> She also argued that the civil judgment is *res judicata* and that the CSF cannot make an independent determination.

After carefully considering all the evidence available, the CSF Committee was not persuaded that the claimed loss arose from an attorney-client relationship between Foster and the claimants. Even assuming Foster provided legal advice about the structure of their arrangement, the Committee concluded that the claimed loss was not of funds received by Foster from her representation of them as clients.

Perhaps more importantly, the Committee found insufficient evidence of dishonesty. Rather, the Committee concluded that the dispute was of the type that often arises when a lawyer leaves a firm and there is disagreement about how fees earned and received afterwards should be divided between the lawyer and her old firm. Finally, the Committee disagreed with Wong's contention that the CSF is bound by the trial court judgment. Both the statute and rules governing the CSF are clear that awards from the Fund are discretionary and no claimant has an absolute right to an award.

Attachments: Application for Reimbursement  
Committee Investigator's Report  
Wong's Request for BOG Review

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<sup>3</sup> Wong refers to her "Disability Law Office" business; it is not clear whether that is the same as NDA. There is no official filing for Disability Law Office; the business name Northwest Disability Advocates was registered by Wong on June 7, 2011 and cancelled on December 6, 2011.

**Martha Wong**

mail to: 10335 sw Hoodview Drive, Tigard Oregon 97224

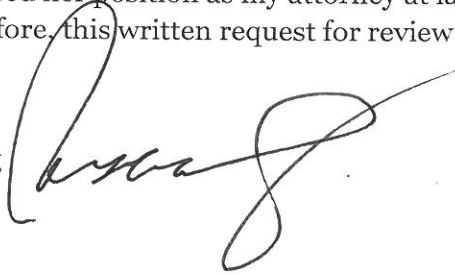
9.17.2014

APPEAL OF DECISION OF CLIENT SECURITY FUND

CLAIM NUMBER 2014-07

1. Rosemary Foster was my attorney at law giving me business advise and my fiduciary.
2. She used her position as my attorney at law to steal my property.
3. Therefore, this written request for review is made this day 9.17.2014.

Martha Wong



Sylvia Stevens  
Executive Director  
Oregon State Bar  
P O Box 231935  
Tigard OR 97281-1935

**RECEIVED**

**SEP 19 2014**

Oregon State Bar  
Executive Director



RECEIVED

Client Security Fund Application for Reimbursement  
Oregon State Bar Executive Director

JAN 17 2014

2014-07

Return completed form to:

Oregon State Bar  
Client Security Fund  
PO Box 231935  
Tigard, OR 97281-1935

Payments from the Client Security Fund are entirely within the discretion of the Oregon State Bar. Submission of this claim does not guarantee payment. The Oregon State Bar is not responsible for the acts of individual lawyers.

Please note that this form and all documents received in connection with your claim are public records. Please attach additional sheets if necessary to give a full explanation.

1. Information about the client(s) making the claim:

- a. Full Name: Martha Wong and Daniel A. Bernath
b. Street Address: 10335 sw Hoodview Drive
c. City, State, Zip: Tigard Oregon 97224
d. Phone: (Home) 503 367 4204 (Cell) (Work) (Other)
e. Email: ussyorktowncvcs10@yahoo.com

2. Information about the lawyer whose conduct caused your claim (also check box 10A on page 3):

- a. Lawyer's Name Rosemary Foster
b. Firm Name
c. Street Address: 825 S 73rd St
d. City, State, Zip: Springfield OR 97478
e. Phone: 541 636 3420
e. Email: famf@gci.net

3. Information about the representation:

- a. When did you hire the lawyer? January 28, 2011
b. What did you hire the lawyer to do? Act as our legal representative, lawyer before the Social Security Admin
As our attorney she advised us to structure the agreement this way.
c. What was your agreement for payment of fees to the lawyer? (attach a copy of any written fee agreement)
\$1,000 per month
d. Did anyone else pay the lawyer to represent you? no
e. If yes, explain the circumstances (and complete item 10B on page 3):
f. How much was actually paid to the lawyer? \$20,000 approx
g. What services did the lawyer perform? Foster represented my clients before the SSA

h. Was there any other relationship (personal, family, business or other) between you and the lawyer?

There was a fiduciary relationship. Bernath is a disabled veteran pursuant to § 646.605 9(d) et seq

4. Information about your loss:

a. When did your loss occur? 2011

b. When did you discover the loss? Thereafter

c. Please describe what the lawyer did that caused your loss Embezzled our money by stopping SSA payments from going to the complainant's bank account and instead having complainant's money paid into Foster's account

d. How did you calculate your loss? As per the attached agreement

5. Information about your efforts to recover your loss:

a. Have you been reimbursed for any part of your loss? If yes, please explain: no

b. Do you have any insurance, indemnity or a bond that might cover your loss? If yes, please explain: no

c. Have you made demand on the lawyer to repay your loss? When? Please attach a copy of any written demand. yes

d. Has the lawyer admitted that he or she owes you money or has he or she agreed to repay you? If yes, please explain: no

e. Have you sued the lawyer or made any other claim? If yes, please provide the name of the court and a copy of the complaint. Lawyer was sued and judgment obtained in Washington Co. Court for \$211,000. It was reduced

f. Have you obtained a judgment? If yes, please provide a copy attached

g. Have you made attempts to locate assets or recover on a judgment? If yes, please explain what you found: Owns real estate in Alaska, a rental house but she has backdated a deed to make it appear that she did not own it at time of judgment

6. Information about where you have reported your loss:

District attorney

Police

Oregon State Bar Professional Liability Fund

*if yes to any of the above, please provide copies of your complaint, if available.*

Oregon State Bar Client Assistance Office or Disciplinary Counsel

7. Did you hire another lawyer to complete any of the work? If yes, please provide the name and telephone number of the new lawyer:

8. Please give the name and the telephone number of any other person who may have information about this claim: \_\_\_\_\_

9. Agreement and Understanding

The claimant agrees that, in exchange for any award from the Oregon State Bar Client Security Fund (OSB CSF), the claimant will:

- a. Transfer to the Oregon State Bar all rights the claimant has against the lawyer or anyone else responsible for the claimant's loss, up to the amount of the CSF award.
- b. Cooperate with the OSB CSF in its efforts to collect from the lawyer, including providing information and testimony in any legal proceeding initiated by the OSB CSF.
- c. Notify the OSB CSF if the claimant receives notice that the lawyer has filed for bankruptcy relief.
- d. Notify the OSB CSF if the claimant receives any payment from or otherwise recovers any portion of the loss from the lawyer or any other person on entity and reimburse the OSB CSF to the extent of such payment.

10. Claimant's Authorization

- a.  Release of Files: I hereby authorize the release to the OSB Client Security Fund, upon request, of any records or files relating to the representation of me by the lawyer named in Question 2.
- b.  Payment to Third Party: I hereby authorize the OSB Client Security Fund to pay all amounts awarded to me to:

Name: \_\_\_\_\_

Address: \_\_\_\_\_

Phone: \_\_\_\_\_

11. Claimant's Signature and Verification

(Each claimant must have a notarized signature page. Please photocopy this page for each person listed in question 1.)

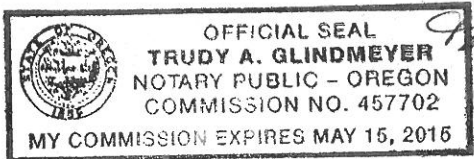
State of OREGON )  
 County of WASHINGTON ) ss

Upon oath or affirmation, I certify the following to be true:

I have reviewed the Rules of the Client Security Fund and the foregoing Application for Reimbursement; and submit this claim subject to the conditions stated therein; and the information which I have provided in this Application is complete and true, to the best of my knowledge and belief.

*[Handwritten Signature]*  
 \_\_\_\_\_  
 Claimant's Signature

Signed and sworn (or affirmed) before me this 11th day of JANUARY 2014



*[Handwritten Signature]*  
 \_\_\_\_\_  
 Notary's Signature  
 Notary Public for STATE OF OREGON  
 My Commission Expires 15 MAY 2015

**Please complete page 4 if an attorney is representing you for this claim.**





## Agreement between Martha Wong, Daniel A. Bernath and Rosemary Foster

**Consultant independent contractor:** Rosemary Foster (hereinafter Foster) shall have a business relationship with Martha Wong to assist advocates in dealing with administrative law judges and other issues at the pleasure of Wong,

**Hearing judge advocate independent contractor:** Foster will appear as an advocate for Martha Wong's (hereinafter Wong) social security practice as *of counsel* or as holding attorney with the cases being in the name of Foster for contractual reasons, as necessary, between 3 to 5 hearings per month at the pleasure of Wong,

**"Holding attorney"** pursuant to agreement between SSA and Daniel A. Bernath (as defined in agreement of November 11.30.2010 whereby clients will be "turned over" to a holding attorney until such time as Martha Wong becomes certified by SSA) for direct payments in which case all clients will be "turned over" to Wong. The clients are not the clients of Foster but as per the SSA and DAB agreement are merely being held by Foster as a certified person for direct payments until such time as the true owner of the cases, Martha Wong, can become certified for direct payments. Payments of SSA for direct payment of attorney fees shall be made in a bank account designated by Wong and Foster shall have no access to that account. It is not anticipated that any direct payment will be made before Wong becomes certified but if a direct payment is made and if appropriate, Wong shall supply Foster with a IRS form 1099 or other such documentation to show that Foster has no interest in any money that is made directly to her for her aid to the Social Security Administration as holding attorney. In the unlikely event that payments are made to Foster for these so called "held" clients, this money is the property of Wong and not Foster. Foster will be compensated as a consultant and hearing judge advocate at the rate of \$1,000 per month until such time as Wong becomes certified and then a new agreement will be required. No other payments from the former clients of Daniel A. Bernath or the clients of Martha Wong (who are being "held" by Foster) shall be made other than the \$1,000 per month.

  
\_\_\_\_\_  
Daniel A. Bernath 1.28.2011

  
\_\_\_\_\_  
Martha M. Wong 1.28.2011

  
\_\_\_\_\_  
Rosemary Foster 1.28.2011

RECORDER RETURN TO:  
Dan Bernath  
15532 SW Pacific  
C1B PMB #404  
Tigard, OR 97224

OREGON JUDICIAL DEPARTMENT  
WASHINGTON COUNTY  
2011 OCT 20 AM 11:38

In the Circuit Court of the State of Oregon

For the County of Washington

MARTHA WONG an individual and  
dba Northwest Disability Advocates,  
DANIEL A. BERNATH, an individual

) No. C113216CV  
) *General*  
) JUDGMENT  
)

plaintiffs,

Lane County Clerk  
Lane County Deeds and Records

2011-049178

-vs.-



\$52.00

ROSEMARY FOSTER, an individual  
JOELLEN SHANNON, an individual

10/31/2011 03:14:45 PM  
RPR-TRAN Cnt=1 Stn=6 CASHIER 01  
\$15.00 \$10.00 \$16.00 \$11.00

defendants:

Based on the motion of plaintiffs and the records and files herein, which reveal that an  
order of default was entered on 10-18-11

and the Court being fully advised in the premises; now therefore it is hereby

ORDERED AND ADJUGED that the plaintiffs shall have judgment against defendants in the  
principle amount of \$ 271,308

Plus ~~prejudgment interest of \$~~ <sup>HAL</sup> on the principal sum and post judgment interest at  
the rate of <sup>9% HAL 10-18-11</sup> ~~12%~~ per annum commencing on the date this judgment is entered unti paid, and  
for plaintiffs' costs and disbursements incurred herein in the sum of 82381;

And for plaintiffs' reasonable attorney fees of \$ 4,375.

And that execution issue for these amounts.

A. **Judgment Creditors:** Martha Wong, 15532 SW Pacific Hwy, C1b, Box 404, Tigard OR 97224

Daniel A. Bernath, 15532 SW Pacific Hwy, C1b, Box 404, Tigard OR 97224

B. **Persons other than Judgment Creditors Entitled to Any Portion of Judgment:** none

C. **Judgment Debtors:** JoEllen Shannon 11549 SW Davies, Apt 2601, Beaverton OR 97007-8323

Rosemary Foster, Attorney at Law, PMB 130, 5729 Main Street, Springfield OR 97478

D. **Judgment Debtors' Lawyer:** none

E. **Judgment Amount:**

F. **Prejudgment Interest:** None

G. **Post judgment Interest:** Simple interest at the rate of <sup>9%~~18%~~</sup> per annum, to be compounded annually from the date of this money judgment until paid.

H. **Prevailing Party Fee:** None

I. **Other Costs:**

J. **Attorney Fees:**

1. **Total Money Judgment:**

January 17, 2014

Martha Wong  
Daniel Bernath  
10335 SW Hoodview Drive  
Tigard, OR 97224

Re: CSF Application for Reimbursement re: Rosemary Foster

Dear Ms. Wong and Mr. Bernath:

We have received your application for reimbursement from the Client Security Fund based on the alleged conduct of Rosemary Foster. I am not opening a file at this time, as on its face it appears the claim is not eligible for reimbursement from the CSF.

ORS 9.625 and CSF Rules are clear that claimants must be clients of the lawyer in question. There must also be evidence that the claimant suffered a loss as a result of the lawyer's dishonesty.

Your application materials indicate that Ms. Foster was an independent contractor engaged to advocate for Ms. Wong's Social Security clients until Ms. Wong was certified to handle the matters herself. Additionally, the money you allege she misappropriated appears to have been SSA awards to the clients, not funds belonging to you.

Accordingly, in the absence of evidence of a lawyer-client relationship between yourselves and Ms. Foster, together with evidence that she engaged in dishonesty with regard to your funds, there is no basis to pursue your application for reimbursement from the CSF. Should you provide additional documents or other evidence to cure those deficiencies, I will reconsider your application.

Sincerely,



Sylvia E. Stevens  
Executive Director  
Ext. 359, Fax: (503) 598-6959  
Email: sstevens@osbar.org

RECEIVED

FEB 06 2014

Martha Wong  
10335 SW Hoodview Drive  
Tigard OR 97224  
503 367 4204

Oregon State Bar  
Executive Director

Tuesday, February 04, 2014

Re: Attorney client relationship- Oregon Bar Member Rosemary Foster and Martha Wong

To: Sylvia E. Stevens

I have received your letter of January 17, 2014 but received this date regarding the conversion of my money from my attorney, active Oregon Bar Member Rosemary Foster.

**Issue: Was Foster the attorney for Wong;**

Foster gave legal advice to the formation and operation of Wong's business. Thereafter she acted as a contractor for Wong.

**Issue: was the money stolen by Oregon State Bar money, money for the client, or attorney fees for the claimant;** The Oregon Circuit Court awarded plaintiffs approximately \$10,000 for the money actually stolen from claimants. Indeed, the lawsuit and judgment is for conversation of claimants' money and the issue is thus *res judicata*.

**Issue: Foster's "dishonest" behavior;** Foster intercepted claimants' money that was being direct deposited into claimants' bank account and instead had that money deposited into her bank account. This issue is *res judicata*.

**Issue: How can an attorney-client relationship, creating attorney's duties to the client, be created without any fee payment or formal agreement.**

An implied-in-fact attorney-client relationship can arise by inference, from the conduct of the parties, based on the facts and circumstances of each case. The parties' intent and conduct are critical to formation of an implied-in-fact attorney-client.

In the instant case, Rosemary Foster was contacted to give business advice to Martha Wong regarding how to structure her Disability Law Office business. Rosemary Foster, represented that she was earlier an administrative law judge for decades, was often the chief administrative law judge and thus had the legal acumen and experience to give legal advice to Martha Wong on how to structure her business with Foster and other members of the Oregon Bar and others.

Foster then gave legal advice to Wong and Bernath and Wong and Bernath thereafter followed her legal advice. Foster, having structured the transactions between herself and Wong and Bernath, signed the attorney fee agreement (attached and containing many violations of Oregon Rules on attorney client agreements) then through deceit, embezzled the fees earned by Wong and Bernath.

**What kinds of factors will be relevant to the creation of an implied-in-fact attorney-client relationship”?** The factors typically considered: (1) whether the attorney volunteered his or her services to the prospective client; (2) whether confidential information has been disclosed by the prospective client; (3) whether the prospective client reasonably believed he or she was consulting the attorney in the attorney’s professional capacity; (4) whether the attorney acted or indicated by statements that he or she was representing the prospective client; (5) the amount of contact between attorney and the prospective client; (6) whether the prospective client sought legal advice from the attorney and whether the attorney provided advice; (7) whether the attorney previously represented the prospective client, particularly where the representation occurred over a period of time or in several matters or without an express agreement; (8) whether the prospective client paid fees or other consideration in the matter in question; and (9) whether the prospective client consulted the attorney in confidence. (Vapnek et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2009) ¶3:43-3:45 (CAPROFR Ch. 3-B); Cal. State Bar Form.Opn. 2003-161.)

**(1) whether the attorney volunteered his or her services to the prospective client;** Rosemary Foster volunteered to become the legal advisor to Wong and Bernath.

**(2) whether confidential information has been disclosed by the prospective client;** Foster was given complete access to claimants’ client names, social security numbers, state of their claim against Social Security Administration and the way that Wong and Bernath’s business was currently operating. Foster, gave legal advice, based on her legal education, Oregon law knowledge and experience in administrative law, on how to set up their business to comply with the requirements of Oregon and the federal agency. All information given to Foster was confidential.

**(3) whether the prospective client reasonably believed he or she was consulting the attorney in the attorney’s professional capacity;** claimants reasonably believed that they were consulting Foster in her professional capacity. The agreement indeed speaks to that in that “Rosemary Foster shall have a business relationship with Martha Wong to assist advocates (such as Wong and Bernath)...and other issues at the pleasure of Wong.”

**(4) whether the attorney acted or indicated by statements that he or she was representing the prospective client;** Foster advised Wong on how to present a case to admin law judges (hearing examiners), which law or regulation was applicable for specific cases, where to reach new clientele, that she stated that would represent claimants in hearings where the SSA agency may require Wong or Bernath to testify in their own defense or other hearings, “at the pleasure of Wong”.

**(5) the amount of contact between attorney and the prospective client;** Foster had daily contact with claimants regarding her legal advice to claimants.

**(6) whether the prospective client sought legal advice from the attorney and whether the attorney provided advice;** claimants sought legal advice from the experienced Foster on the operation of their business before the Social Security Administration and various state Departments of Disability Determination. Rosemary Foster issued such advice to claimants.

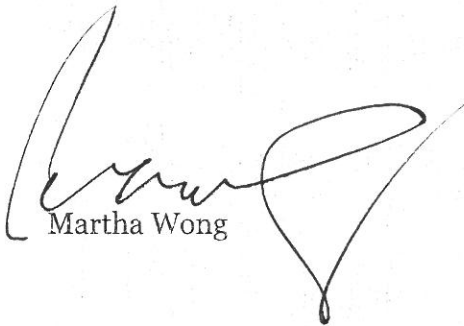
**(7) whether the attorney previously represented the prospective client, particularly where the representation occurred over a period of time or in several matters or without an express agreement;** the attorney client agreement began as Foster examined claimants' business and applied her legal knowledge and admin law judge chief judge experience and other admin law experience and knowledge on how to operate claimants' business and issued her legal advice to claimants. Thereafter claimants and Foster memorialized the agreement with claimants and claimant, through dishonesty and deceit finally stole, embezzled and converted claimants Wong and Bernath's money.

**(8) whether the prospective client paid fees or other consideration in the matter in question;** claimants paid Foster for her legal advice on the business formation and operation, to advise advocates who worked for claimants on how to be more effective and where to find new clientele, among other things-for fees paid to Foster.

and **(9) whether the prospective client consulted the attorney in confidence;** claimants consulted attorney in confidence as all facts of operation and client information is by law confidential.

**Issue: Is Martha Wong a third party beneficiary of the agreement between the Fund and Rosemary Foster?**

The agreement between Foster and the Fund is to protect the public from unethical, criminal attorneys who steal a client's money. As such, Wong and Bernath have standing to file suit as 3<sup>rd</sup> party beneficiaries of the agreement between the Fund and Foster.



Martha Wong

# CLIENT SECURITY FUND INVESTIGATIVE REPORT

**From:** Mark G. Reinecke  
**Date:** September 11, 2014  
**Re:** Client Security Fund Claim No.: 2014-07  
Attorney: Rosemary Foster, OSB No. 103033; Status: Suspended  
Claimant: Martha Wong and Daniel Bernath  
Investigator: Mark G. Reinecke

## Investigator's Recommendations

Claimants Martha Wong and Daniel Bernath request approximately \$20,000. Recommend denying payment of claim for the following reasons:

1. The claim was filed with the CSF more than two years after the claimed loss occurred,
2. Claimant has not sought or obtained a judgment against the attorney for the losses alleged in the claim filed with the CSF, and
3. There is insufficient evidence that the attorney engaged in dishonesty or that claimant suffered any loss payable by the CSF.

## Statement of the Claim

Claimants Martha Wong ("Wong") and Daniel Bernath ("Bernath") operate Northwest Disability Advocates (NDA), a Social Security Insurance and Social Security Disability firm which they created in 2005. After one or both of claimants became temporarily ineligible to provide certain services to their clients, they individually entered into an agreement with Rosemary Foster on January 28, 2011. Wong paid Foster \$1,000 per month for her services. Foster represented Wong's clients until June 2011, at which time she terminated the relationship with Wong and Bernath and opened her own disability firm. Some of Foster's post-termination clients were the same as those she represented on behalf of Wong. Wong and Bernath allege that after she opened her own disability firm, Foster "embezzled" Social Security Administration payments which should have been deposited into their NDA bank account but were, instead, deposited into Foster's own bank account.

## Discussion

The agreement between Wong, Bernath and Foster was memorialized in writing. A copy of the "Agreement between Martha Wong, Daniel A. Bernath and Rosemary Foster" (hereinafter "the Agreement") is attached as Exhibit "1".

The first paragraph of The Agreement states:

Page 1 of 5 - CLIENT SECURITY FUND - INVESTIGATIVE REPORT

{16940009-00422033;1}



**“Consultant independent contractor:** Rosemary Foster (hereinafter Foster) shall have a business relationship with Martha Wong to assist advocates in dealing with administrative law judges and other issues at the pleasure of Wong.”

The second paragraph of The Agreement states:

**“Hearing Judge Advocate independent contractor:** Foster will appear as an advocate for Martha Wong’s (hereinafter Wong) social security practice as *of counsel* or as holding attorney with the cases being in the name of Foster for contractual reasons, as necessary, between 3 to 5 hearings per month at the pleasure of Wong.”

The third paragraph of The Agreement outlines how Foster will serve as a “holding attorney” which would enable Wong and Bernath to continue participation in Social Security Administration (SSA) proceedings, at least until Wong became “certified for direct payments.” The Agreement provides that the clients and SSA direct payments for earned attorney fees belong to Wong and not Foster.

The Agreement provides that Foster will be compensated as a consultant and hearing judge advocate at the rate of \$1,000 per month.

Foster represented NDA clients until June 2011. She then terminated the Agreement with Wong and Bernath and opened her own disability claims processing firm. Foster acknowledges that some of the clients she previously represented through NDA (about 15 - 20) used her services after termination of the Agreement but she denies that she actively solicited those clients. Wong and Bernath assert that Foster actively solicited NDA clients.

Wong and Bernath filed this Application for Reimbursement with the Client Security Fund (“CSF”) on January 17, 2014, approximately two years and six months from when the Agreement was terminated and Foster began her own firm. A copy of the Application is attached as Exhibit “2”. The SSA indicates generally that the cases Foster would have worked on after she terminated the Agreement with Wong and Bernath which involved clients Foster also worked with through NDA would likely have been completed and payments received from the SSA by the end of 2013. However, no documentation evidencing the timing of the payments has been obtained.

Claimants stated in their CSF Application that Foster was hired to “*Act as our legal representative, lawyer before the Social Security Admin.*” It appears that after the auto-fill CSF form was printed, an additional line was added in different type set stating: “*As our attorney she advised us to structure the agreement that way.*”

Foster asserts she was only responsible for assisting other NDA advocates and representing clients before the SSA. Foster claims that Wong and Bernath created the business model and did not receive, nor request, any advice from Foster as to how to structure the relationship or the business. Foster says that she provided no legal advice to Wong and Bernath on any issues and does not believe she had an attorney client relationship with Wong and Bernath.

Claimants indicate in their CSF Application that Foster received \$20,000 and that she “embezzled our money by stopping SSA payments from going to the complainant’s bank account and instead having complainant’s money paid into Foster’s account.” Claimants assert that \$20,000 in SSA payments was diverted by Foster. Claimants were unable to provide evidence to support that amount other than a list of NDA clients that Foster had serviced. The list does not indicate the amount of SSA payments made related to those clients nor the related time frames.

Claimants state in their Application that “*Lawyer was sued and judgment obtained in Washington Co. Court for \$211,000. It was reduced.*” Claimants attached to their CSF Application a copy of a Washington County General Judgment dated October 20, 2011 in the amount of \$271,308.00 plus interest, costs and attorney fees. A copy of that judgment is attached as Exhibit “3”. Claimants assert that “*res judicata*” prevents the CSF from making its own determination of the relevant facts and conclusions. See letter from Martha Wong to this CSF investigator dated March 8, 2014, attached as Exhibit “4”.

Although claimants indicate in their initial Application that the judgment “*was reduced*”, they did not submit to the CSF a copy of the reduced judgment. A check with the Circuit Court in Washington County confirmed that a case was filed in June 2011, a judgment was taken and a “Corrected General Judgment” was issued February 12, 2013 after Foster’s attorney Mike Stone filed a Motion to Set Aside the original Judgment which had previously been entered on October 11, 2011. Attached and marked as Exhibit “5” is a copy of the Corrected Judgment which reflects a reduction of the award down to \$10,745.00, plus interest, costs and disbursements and no award for attorney fees as there was with the original judgment.

The Circuit Court’s Corrected Judgment does not identify the specific basis for the reduced award. Claimants were asked by this investigator the basis for the judgment, particularly in light of the claimants Circuit Court Complaint which does not state any factual allegations relating to the claimed diversion of SSA funds. Claimants originally responded that the Circuit Court judgment was awarded based on the “*Conversion Claim*” they asserted in that case related to the diverted SSA funds. This investigator advised claimants that their Circuit Court Complaint does not include a claim for conversion and the judge’s ruling does not specify which claim she was referring to in the Corrected Judgment making it difficult to correlate this CSF claim to the Corrected Judgment.

The Corrected Judgment includes little indication of what the award amount represents. In support of its case, claimants refer to the original judgment for guidance as it was more comprehensive. Claimants March 8, 2014 letter to this investigator (Exhibit “4”) asserts “*res judicata*” claiming that the original judgment included an award of \$60,000 for “*Professional Negligence*”. As initial considerations, the Client Security Fund does not provide reimbursement for professional negligence, without more and the CSF is not bound by *res judicata*. In any event, there is nothing in the original judgment that indicates that the \$60,000 portion was for “*professional negligence*”. The original judgment includes a notation that \$60,000 of the judgment resulted from damage from “*the loss of your clients at the rate of \$6,000 per client, and ten clients.*” Even if the court had not corrected the judgment, it appears that the \$60,000 portion of the original judgment resulted from one of the other causes of actions; either Breach of

Contract, Breach of Covenant of Good Faith and Fair Dealing, or Tortious Interference with Prospective Business Advantage.

Still, claimants could have a valid CSF claim if there is evidence to support it. Foster claims that no NDA funds were diverted. She asserts that she is only compensated by the SSA for services provided after she advised it that she was representing certain individuals in her own capacity. Wong and Bernath have not provided evidence to suggest otherwise nor any evidence of unpaid amounts. Foster and her attorney assert that NDA should have and potentially still could make claim to any SSA funds for services provided to its clients prior to Foster providing her own disability services. Although this investigator has sent letters and made numerous calls to the SSA, the administration has been generally unhelpful in attempting to determine if any amount of the post-termination payments made by the SSA to Foster were for services Foster provided to NDA clients pre-termination.

### **Findings and Conclusion**

1. Foster was admitted to practice in Oregon in 2010. Thereafter she was an active member of the Bar, maintaining an office in Oregon for the practice of law. She is currently suspended – disciplinary.
2. Wong, Bernath and Foster entered into an agreement on January 28, 2011 whereby Foster was an independent contractor who would assist Wong as an advocate for Wong’s social security practices as *of counsel* at hearings and assist other advocates employed by Wong. Foster was paid \$1,000 per month as an independent contractor.
3. Section 2.5 requires that the loss arise from, and was because of: 2.5.1, an established lawyer-client relationship; or 2.5.2, the failure to account for money or property entrusted to the lawyer in connection with the lawyer’s practice of law or while acting as a fiduciary in a manner related to the lawyer’s practice of law. Although the agreement was far from any ordinary attorney-client situation and the weight of the evidence suggests that Foster provided no “legal advice” to Wong or Bernath, she essentially acted as a fiduciary in a manner related to her practice of law. Therefore, an attorney-client relationship existed.
4. There is insufficient evidence of a loss resulting from dishonesty, failure to perform services for which Foster was paid or failure to account for or misappropriation of client funds. No evidence was provided and no evidence has been located which contradicts Foster’s assertion that she was only compensated directly by the SSA for services provided to clients after she submitted SSA 1696 representation forms in June 2011.
5. Claimants filed this claim on January 17, 2014. Claimants did not file their claim with the CSF within two years of when they knew or should have known of the claimed loss. Claimants assert that their Circuit Court case filed in Washington County in June 2011 included this claim. In addition, Foster’s claim that the SSA payments she received for the clients she represented before and after the termination were completed by the end of 2013 was generally corroborated by the SSA which provided typical timing information for these types of claims.

6. Claimants filed a lawsuit and obtained a judgment against Foster for \$271,308. That award was significantly reduced to approximately \$10,745 after Foster retained an attorney to set aside a previously awarded judgment. The factual and legal basis of the award is not specified but the underlying Circuit Court Complaint does not include a conversion claim nor any specific mention of diverted Social Security Administration funds. Res Judicata does not apply. Further, Claimants have not sought or obtained a judgment against Foster for the acts alleged in this CSF Application for Reimbursement (CSF Section 2.6.3).

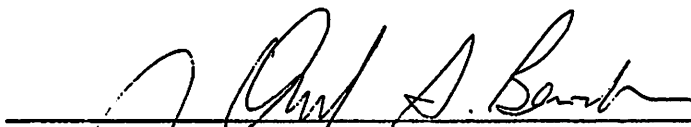
7. Recommend denial of Wong and Bernath's claim of approximately \$20,000.

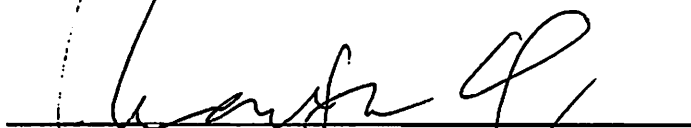
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**"Holding attorney"** pursuant to agreement between SSA and Daniel A. Bernath (as defined in agreement of November 11.30.2010 whereby clients will be "turned over" to a holding attorney until such time as Martha Wong becomes certified by SSA) for direct payments in which case all clients will be "turned over" to Wong. The clients are not the clients of Foster but as per the SSA and DAB agreement are merely being held by Foster as a certified person for direct payments until such time as the true owner of the cases, Martha Wong, can become certified for direct payments. Payments of SSA for direct payment of attorney fees shall be made in a bank account designated by Wong and Foster shall have no access to that account. It is not anticipated that any direct payment will be made before Wong becomes certified but if a direct payment is made and if appropriate, Wong shall supply Foster will a IRS form 1099 or other such documentation to show that Foster has no interest in any money that is made directly to her for her aid to the Social Security Administration as holding attorney. In the unlikely event that payments are made to Foster for these so called "held" clients, this money is the property of Wong and not Foster. Foster will be compensated as a consultant and hearing judge advocate at the rate of \$1,000 per month until such time as Wong becomes certified and then a new agreement will be required. No other payments from the former clients of Daniel A. Bernath or the clients of Martha Wong (who are being "held" by Foster) shall be made other than the \$1,000 per month.

  
\_\_\_\_\_  
Daniel A. Bernath 1.28.2011

  
\_\_\_\_\_  
Martha M. Wong 1.28.2011

  
\_\_\_\_\_  
Rosemary Foster 1.28.2011



RECEIVED

Client Security Fund  
Application for Reimbursement  
2014-07  
Executive Director

JAN 17 2014

Return completed form to:

Oregon State Bar  
Client Security Fund  
PO Box 231935  
Tigard, OR 97281-1935

Payments from the Client Security Fund are entirely within the discretion of the Oregon State Bar. Submission of this claim does not guarantee payment. The Oregon State Bar is not responsible for the acts of individual lawyers.

Please note that this form and all documents received in connection with your claim are public records. Please attach additional sheets if necessary to give a full explanation.

1. Information about the client(s) making the claim.

- a. Full Name: Martha Wong and Daniel A. Barnath
- b. Street Address: 10335 sw Hoodview Drive
- c. City, State, Zip: Tigard Oregon 97224
- d. Phone: (Home) 503 367 4204 (Call) \_\_\_\_\_  
(Work) \_\_\_\_\_ (Other) \_\_\_\_\_
- e. Email: ussyorktowncv10@yahoo.com

2. Information about the lawyer whose conduct caused your claim (also check box 10A on page 3):

- a. Lawyer's Name Rosemary Foster
- b. Firm Name \_\_\_\_\_
- c. Street Address: 825 S 73rd St
- d. City, State, Zip: Springfield OR 97478
- d. Phone: 541 636 3420
- e. Email: famf@gci.net

3. Information about the representation:

- a. When did you hire the lawyer? January 28, 2011
- b. What did you hire the lawyer to do? Act as our legal representative, lawyer before the Social Security Admin  
As our attorney she advised us to structure the agreement this way.
- c. What was your agreement for payment of fees to the lawyer? (attach a copy of any written fee agreement)  
\$1,000 per month
- d. Did anyone else pay the lawyer to represent you? \_\_\_\_\_ no
- e. If yes, explain the circumstances (and complete item 10B on page 3):  
\_\_\_\_\_  
\_\_\_\_\_
- f. How much was actually paid to the lawyer? \$20,000 approx
- g. What services did the lawyer perform? Foster represented my clients before the SSA

h. Was there any other relationship (personal, family, business or other) between you and the lawyer?  
There was a fiduciary relationship. Bernath is a disabled veteran pursuant to § 646.605 9(d) et seq

4. Information about your loss:

- a. When did your loss occur? 2011
- b. When did you discover the loss? Thereafter
- c. Please describe what the lawyer did that caused your loss Embezzled our money by stopping SSA payments from going to the complainant's bank account and instead having complainant's money paid into Foster's account
- d. How did you calculate your loss? As per the attached agreement

5. Information about your efforts to recover your loss:

- a. Have you been reimbursed for any part of your loss? *If yes, please explain:* no
- b. Do you have any insurance, indemnity or a bond that might cover your loss? *If yes, please explain:* no
- c. Have you made demand on the lawyer to repay your loss? When? *Please attach a copy of any written demand.*  
yes
- d. Has the lawyer admitted that he or she owes you money or has he or she agreed to repay you? *If yes, please explain:* no
- e. Have you sued the lawyer or made any other claim? *If yes, please provide the name of the court and a copy of the complaint.* Lawyer was sued and judgment obtained in Washington Co. Court for \$211,000. It was reduced
- f. Have you obtained a judgment? *If yes, please provide a copy* attached
- g. Have you made attempts to locate assets or recover on a judgment? *If yes, please explain what you found:* Owns real estate in Alaska, a rental house but she has backdated a deed to make it appear that she did not own it at time of judgment

6. Information about where you have reported your loss:

- District attorney
- Police
- Oregon State Bar Professional Liability Fund
- If yes to any of the above, please provide copies of your complaint, if available.*
- Oregon State Bar Client Assistance Office or Disciplinary Counsel

7. Did you hire another lawyer to complete any of the work? *If yes, please provide the name and telephone number of the new lawyer:* \_\_\_\_\_

8. Please give the name and the telephone number of any other person who may have information about this claim: \_\_\_\_\_

9. Agreement and Understanding

The claimant agrees that, in exchange for any award from the Oregon State Bar Client Security Fund (OSB CSF), the claimant will:

- a. Transfer to the Oregon State Bar all rights the claimant has against the lawyer or anyone else responsible for the claimant's loss, up to the amount of the CSF award.
- b. Cooperate with the OSB CSF in its efforts to collect from the lawyer, including providing information and testimony in any legal proceeding initiated by the OSB CSF.
- c. Notify the OSB CSF if the claimant receives notice that the lawyer has filed for bankruptcy relief.
- d. Notify the OSB CSF if the claimant receives any payment from or otherwise recovers any portion of the loss from the lawyer or any other person on entity and reimburse the OSB CSF to the extent of such payment.

10. Claimant's Authorization

- a.  Release of Files: I hereby authorize the release to the OSB Client Security Fund, upon request, of any records or files relating to the representation of me by the lawyer named in Question 2.
- b.  Payment to Third Party: I hereby authorize the OSB Client Security Fund to pay all amounts awarded to me to:

Name: \_\_\_\_\_

Address: \_\_\_\_\_

Phone: \_\_\_\_\_

11. Claimant's Signature and Verification

(Each claimant must have a notarized signature page. Please photocopy this page for each person listed in question 1.)

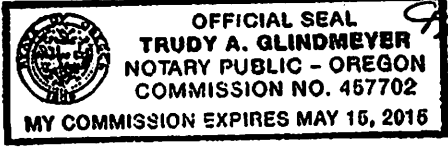
State of OREGON )  
County of WASHINGTON ) ss

Upon oath or affirmation, I certify the following to be true:

I have reviewed the Rules of the Client Security Fund and the foregoing Application for Reimbursement; and submit this claim subject to the conditions stated therein; and the information which I have provided in this Application is complete and true, to the best of my knowledge and belief.

*[Handwritten Signature]*  
\_\_\_\_\_  
Claimant's Signature

Signed and sworn (or affirmed) before me this 11th day of JANUARY 2014



*[Handwritten Signature]*  
\_\_\_\_\_  
Notary's Signature  
Notary Public for STATE OF OREGON  
My Commission Expires 15 MAY 2015

**Please complete page 4 if an attorney is representing you for this claim.**



RECORDER RETURN TO:  
Dan Bernath  
15532 SW Pacific  
C1B PMB #404  
Tigard, OR 97224

OREGON JUDICIAL DEPARTMENT  
WASHINGTON COUNTY  
2011 OCT 20 AM 11:38

In the Circuit Court of the State of Oregon

For the County of Washington

MARTHA WONG an individual and  
dba Northwest Disability Advocates,  
DANIEL A. BERNATH, an individual

) No. C113216CV  
) *General*  
) JUDGMENT  
)

plaintiffs,

Lane County Clerk  
Lane County Deeds and Records

2011-049178

-vs.-



\$52.00

01252782201100491780030038

10/31/2011 03:14:45 PM

ROSEMARY FOSTER, an individual  
JOELLEN SHANNON, an individual

RPR-TRAN Cnt=1 Str=6 CASHIER 01  
\$15.00 \$10.00 \$16.00 \$11.00

defendants.

Based on the motion of plaintiffs and the records and files herein, which reveal that an  
order of default was entered on 10-28-11

and the Court being fully advised in the premises; now therefore it is hereby

ORDERED AND ADJUGED that the plaintiffs shall have judgment against defendants in the  
principle amount of \$ 281,308

Plus ~~prejudgment interest of \$~~ <sup>9%</sup> ~~on the principal sum and post judgment interest at~~  
the rate of 12% per annum commencing on the date this judgment is entered until paid, and

for plaintiffs' costs and disbursements incurred herein in the sum of \$2381;

And for plaintiffs' reasonable attorney fees of \$ 4,380.

And that execution issue for these amounts.

A. **Judgment Creditors:** Martha Wong, 15532 SW Pacific Hwy, C1b, Box 404, Tigard OR 97224

Daniel A. Bernath, 15532 SW Pacific Hwy, C1b, Box 404, Tigard OR 97224

B. **Persons other than Judgment Creditors Entitled to Any Portion of Judgment:** none

C. **Judgment Debtors:** JoEllen Shannon 11549 SW Davies, Apt 2601, Beaverton OR 97007-8323

Rosemary Foster, Attorney at Law, PMB 130, 5729 Main Street, Springfield OR 97478

D. **Judgment Debtors' Lawyer:** none

E. **Judgment Amount:**

F. **Prejudgment Interest:** None

G. **Post judgment Interest:** Simple interest at the rate of <sup>9% u.w.c</sup> ~~18%~~ per annum, to be compounded annually from the date of this money judgment until paid.

H. **Prevailing Party Fee:** None

I. **Other Costs:**

J. **Attorney Fees:**

1. **Total Money Judgment:**

**Martha Wong**

whatthecowsays@yahoo.com

4600 Summerlin

Suite C-2 #249

Ft Myers Florida 33919

AND-10335 SW Hoodview Drive

Tigard OR 97224

503 367 4204

RECEIVED

MAR 11 2014

Saturday, March 08, 2014

**Mark G. Reinecke, Esq.**  
Bryant, Lovlien & Jarvis, PC  
591 SW Mill View Way  
Bend, OR 97702

Re: Oregon State Bar Fund regarding Rosemary Foster

Thank you for working on my application before the Oregon Bar Reimbursement Fund.

### **Res Judicata**

The issue of how much Foster stole from me is \$60,000. Among other causes of action, I sued and was granted a judgment for \$60,000 for "**Professional Negligence**", Fifth Cause of Action, page 9, lines 189 to 201.

Perhaps the copy of the judgment you received did not show the top of page three of **General Judgment** signed by Washington County Oregon Civil Court Judge Letourneau. As such, the Fifth Cause of Action for "professional negligence" is included and I therefore have a judgment against Foster for professional negligence and she is estopped to try to re-litigate and re-litigate these settled facts.

**"Plaintiffs were damaged by the loss of their clients at the rate of \$6,000 per client and ten clients: \$60,000."**

This professional negligence, as well as her theft of my trade secrets and client lists fits squarely within the mandate of Oregon Rule of Professional Conduct 1.8:

Oregon Rule 1.8 Conflict of Interest: Current Clients: Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, confirmed in writing, except as permitted or required under these Rules.

Section 78 cmt. a, in part, reads:

It follows from the nature of the trust relationship that **the trustee stands in a fiduciary relationship** with respect to the beneficiaries as to all matters within the scope of the trust relationship, that is, all matters involving the administration of the trust and its property. The duty of loyalty is, for trustees, particularly strict even by comparison to the standards of other fiduciary relationships.

Lawyers are the fiduciary of their client. (see learned treatise pages attached)

**Restatement (Second) of Trusts Section 203** ("The trustee is accountable for any profit made by him through or arising out of the administration of the trust, although the profit does not result from a breach of trust.")

Section 14-11002(A) provides:

[A] trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of either: 1. The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred. 2. The profit the trustee made by reason of the breach.

Enclosed is a partial client list. Matching this list with the income that Rosemary Foster discloses to you will show you which clients are my clients and how much was converted by her.

Please note that Foster has been suspended from the practice of law in Oregon since June 2013. (attached)

Also, please review the opinion of the Trial Panel of Rosemary Foster:

**"The Accused made numerous inconsistent and contradictory statements in response to inquiries from disciplinary counsel and throughout the hearing before the Trial Panel.**

**From this behavior, and evidence of her behavior during the period in which the Accused was suspended from bar membership, the Panel finds that the Accused was not a credible witness on her own behalf."**

I hired Rosemary Foster because she held herself out as a former administrative law judge, and former chief administrative law judge and the administrative law judges were threatening disciplinary action against me. In the agreement attorney Foster drafted she states; **"Rosemary Foster shall have a business relationship with Martha Wong to assist advocates (such as Wong) in dealing with administrative law judges and other issues at the pleasure of Martha Wong."**

I was wrongfully accused of signing for clients but a licensed investigator contacted each and every relevant client and they all stated that the signatures were the client's signature. If the client was deceased, then the spouse stated that they were very familiar with the spouse's signature and that their spouse had signed it. Furthermore, I was given a power of attorney to sign any and all document on the client's behalf. That was a major portion of retaining Foster, her knowledge on how on "dealing with administrative law judges" during the impending disciplinary action against me.

Furthermore, Foster stated that in her role as my business lawyer she would set up my business, train the other hearing representatives, show me where to advertise and gain new clients (and how I should handle the promised investigation of my by the Social Security Administration A.L.J.)

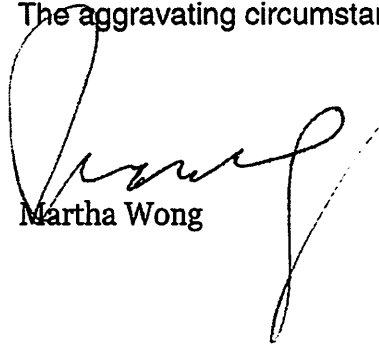
The judgment against Foster by the State Bar Panel also states:

**"Until at least September 24, 2011, she failed to remove a website identifying herself as an (Oregon) attorney offered a wide variety of legal services in Oregon. Beginning sometime in 2012, she authorized the posting of a second website advertising her legal services and specifically identifying Oregon as the issuing state for her license to practice law.**

Conclusion: The Accused practiced law in the State of Oregon and represented that she was qualified to practice law in this state at a time when she was not an active member of the Oregon State Bar...

Aggravating Circumstances: c. a pattern of misconduct, d. multiple offenses, e. substantial experience in the practice of law.

The aggravating circumstances outweigh the mitigating circumstances.”

A handwritten signature in black ink, appearing to read 'Martha Wong', is written over the printed name. The signature is fluid and cursive, with a large initial 'M' and a long, sweeping tail.

Martha Wong

FILED  
OREGON JUDICIAL DEPARTMENT  
WASHINGTON COUNTY

2013 FEB 14 AM 8:42

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IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF WASHINGTON

MARTHA WONG, an individual and dba  
Northwest Disability Advocates, DANIEL A.  
BERNATH, an individual,

Plaintiffs,

v.

ROSEMARY FOSTER, an individual, and  
JOELLEN SHANNON, an individual,

Defendants.

No. C113216CV

**CORRECTED GENERAL JUDGMENT**

Based on the motion of plaintiffs and the records and files herein, which reveal that an order of default was entered on October 20, 2011, and on the Order on Defendant Foster's ORCP 69 and 71 Motions entered herein, and the court being fully advised in the premises, now therefore it is hereby

**ORDERED AND ADJUDGED** that the plaintiffs shall have judgment against defendant Foster in the principal amount of \$10,745.00, and for plaintiffs' costs and disbursements incurred herein in the amount of \$2441.00, plus post-judgment interest at the rate of 9% per annum commencing on the date this judgment is entered until paid.

**Page 1 - CORRECTED GENERAL JUDGMENT**

**Money Award**

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**A. Judgment Creditors:** Martha Wong, 15532 SW Pacific Hwy, C1b, Box 404, Tigard, Oregon 97224; Daniel A. Bernath, 15532 SW Pacific Hwy, C1b, Box 404, Tigard, Oregon 97224

**B. Persons other than Judgment Creditors Entitled to any Portion of Judgment:** none.

**C. Judgment Debtor:** Rosemary Foster, PMB 130, 5729 Main Street, Springfield, OR 97478.

**D. Judgment Debtors' Lawyer:** Michael T. Stone

**E. Principal Amount of Judgment:** \$10,745.00

**F. Prevailing Party Fee:** \$60.00

**G. Other Costs:**

Plaintiffs' filing fee \$ 2,071

Service of Process-2 defendants and one financial institution \$ 300

Audio disk of hearing on temporary restraining order \$ 10

**H. Attorney Fees:** none.

**I. Total Money Judgment:** \$13,186.00

**J. Prejudgment interest:** None


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**K. Post judgment interest: Simple interest at the rate of 9% per annum,  
to be compounded annually from the date of this money judgment until paid.**

**DATED this 12 day of February, 2013.**

  
\_\_\_\_\_  
Donald R. Letourneau  
Circuit Court Judge

**Prepared by:**

**Michael T. Stone, OSB# 935499  
Attorney for Defendant Foster**

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**CERTIFICATE OF SERVICE**


I hereby certify that I served the foregoing **CORRECTED GENERAL JUDGMENT** on the following party(ies):

Martha Wong  
Daniel A. Bernath  
15532 S.W. Pacific Highway  
C-1B PMB# 404  
Tigard, Oregon 97224

Attorney for Plaintiffs Pro Se

by mailing a true and correct copy thereof to said party(ies) on the date stated below.

**DATED** this 30<sup>th</sup> day of January, 2013.

  
\_\_\_\_\_  
Michael T. Stone, OSB #935499  
Attorneys for Defendant Foster

# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** November 15, 2014  
**From:** Sylvia E. Stevens, Executive Director  
**Re:** CSF Claims Recommended for Awards

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### Action Recommended

Consider the recommendation of the Client Security Fund Committee that the BOG make awards in the following matters:

No. 2012-54 GRUETTER (Lupton)	\$21,500.00
No. 2014-12 LANDERS (Austin)	\$7,400.00
TOTAL	\$28,900.00

### Discussion

#### **No. 2012-54 GRUETTER (Lupton) \$21,500**

This claim was submitted by Lance Lupton, as attorney-in-fact for his 90+-year-old mother Lela. Lela had previously submitted an application for reimbursement on her own, but it was denied on the basis that the committee found insufficient evidence of dishonesty. Lance resubmitted the claim in April 2014 with additional information.

In September 2008, Lela hired Bryan Gruetter to take over a civil suit that had been initiated on Lela's behalf by the firm of Bryant, Emerson & Fitch. Lela delivered \$15,000 to Gruetter, presumably as a deposit against his hourly fees; however, Lela had no written fee agreement and there is nothing in Gruetter's file to indicate how he planned to charge for his services.

In December 2008, Gruetter received an additional \$3500 on Lela's behalf from the trust account of Bryant, Emerson & Fitch. In April 2010, Lela gave Gruetter \$6,000 in cash, the receipt for which says "legal fees." In all, then, Gruetter received \$24,500.

The civil suit was the consolidation of three small claims actions originally filed by Lela. In the case, Lela sought \$55,000 from her daughter-in law-Natalia Belenciuc-Lupton for alleged damage to property and unauthorized use of Lela's credit card. At the time, Natalia and Lela's son Lance were going through a messy divorce and custody battle. Natalia was unrepresented in the civil suit, although she had counsel for the divorce.

In October 2008 Gruetter took a default against Natalia and prepared a default judgment. Natalia apparently had the default set aside and a settlement conference was

scheduled for June 2009. OJIN records indicate the settlement conference took place, but the case did not settle. In April 2010, Gruetter prepared a 26-item Request for Admissions.

In February 2012, Lela wrote to Gruetter terminating the representation, demanding the file and return of her money.<sup>1</sup> She retained Andrew Mathers, who was able to retrieve her file from Gruetter but no money was returned to Lela.

On his mother's behalf, Lance alleges that Gruetter did virtually no work on Lela's legal matter other than request set-overs. He also claims that the \$6,000 Lela gave Gruetter in April 2010 was the result of Gruetter picking Lela up at her home, taking her to lunch and then to the ATM to get cash. Lance says that DOJ has informed him Lela was a victim of elder abuse.

According to OJIN, there were numerous set-overs during the pendency of Lela's case, but the principal reason appears to be to defer the trial until the divorce issues were resolved. Mathers reports that the work Gruetter did was of poor quality. Eventually, Mathers took the matter to arbitration but no award was rendered to either party.

After considerable discussion, the CSF Committee concluded that the services Gruetter performed for Lela were *de minimis* and of essentially no value other than to keep the matter alive. The Committee was quite troubled by the idea that Gruetter took his elderly client to lunch as a ruse to get her to give him more money when he had never provided an accounting of how he used the \$18,500 he had received previously. (Even at \$350/hour, he would have to have performed more than 50 hours of work, which clearly didn't happen here.) Nevertheless, the Committee concluded that Gruetter should be credited with a modest amount for his efforts and recommends an award of \$21,500. As with the other Gruetter claims, the Committee recommends that no judgment be required in this case; Gruetter resigned Form B in mid-2013 and was sentenced to 5+ years in federal prison in March 2014.

#### **No. 2014-12 LANDERS (Austin) \$7,400**

In approximately September 2011, at the recommendation of his prior counsel, Claimant retained Mary Landers to represent him in a contentious custody dispute. Claimant alleges he paid Landers \$11,000 in several installments in September and October, although he could produce receipts for only \$9,000. Landers agreed to represent him at a "reduced rate" of \$195/hour.

Landers provided some services for Claimant early on, including filing a response to wife's petition for custody, and a motion for a temporary status quo order. She also attended one hearing and reviewed the form of pleadings drafted by opposing counsel.

Landers became increasingly difficult for Claimant to contact and was rarely in her office; she missed hearings and failed to notify Claimant of them. By March 2012, Landers had

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<sup>1</sup> The bar became custodian of Gruetter's practice in early February 2012.

essentially abandoned the matter, withdrawing from the case without court consent and moving out of town.

In response to the investigator's inquiries, Landers claimed she spent considerable time on Claimant's matter; she says he was very needy and in her office frequently. Although she claims to be owed additional fees, despite promises to provide information verifying her time on the case, Landers has not done so.

After discussion, the Committee voted to recommend an award of \$7,400, giving Landers credit for some work. The Committee also recommends waiving the requirement for a judgment, as Landers is suspended (for unrelated disciplinary matters) but suffers from health issues and from all reports has no assets to satisfy a civil judgment.

Attachments: Applications for Reimbursement  
Investigator's Reports

Return completed form to:

Oregon State Bar  
Client Security Fund  
PO Box 231935  
Tigard, OR 97281-1935

Oregon  
State  
Bar

# Client Security Fund Application for Reimbursement

2012-54

Payments from the Client Security Fund are entirely within the discretion of the Oregon State Bar.  
Submission of this claim does not guarantee payment.  
The Oregon State Bar is not responsible for the acts of individual lawyers.

Please note that this form and all documents received in connection with your claim are public records.  
Please attach additional sheets if necessary to give a full explanation.

RECEIVED

APR 29 2014

Oregon State Bar  
Executive Director

1. Information about the client(s) making the claim:

a. Full Name: Lela Mae Lupton  
b. Street Address: 23388 Butterfield Trail  
c. City, State, Zip: Bella, Oregon 97702  
d. Phone: (Home) 541.330.0450 (Cell) 541.306.7430  
(Work) (Lance) (Other) \_\_\_\_\_  
e. Email: LuptonLP@OL.com

2. Information about the lawyer whose conduct caused your claim (also check box 10A on page 3):

a. Lawyer's Name Brian W. Gruetter  
b. Firm Name Law Offices of Brian W. Gruetter  
c. Street Address: The Scamb Building 300 SW Columbia St. Suite 200  
d. City, State, Zip: Bella, Oregon 97204  
e. Phone: 541.585.1140  
e. Email: unknown website www.gruetterlaw.com

3. Information about the representation:

a. When did you hire the lawyer? September 18, 2008  
b. What did you hire the lawyer to do? Hired to represent Lela M. Lupton  
in a civil matter against Natalia Belenovic  
Deschutes County Circuit Court Case No: 08CV0578ST  
c. What was your agreement for payment of fees to the lawyer? (attach a copy of any written fee agreement)  
Brian Gruetter did not provide a client-fee Agreement.  
d. Did anyone else pay the lawyer to represent you? No  
e. If yes, explain the circumstances (and complete item 10B on page 3):

f. How much was actually paid to the lawyer? 6 payments total = \$22,500.00  
g. What services did the lawyer perform? Almost nothing except filing  
motions to continue the case and hearings with  
Court.

h. Was there any other relationship (personal, family, business or other) between you and the lawyer?

no

4. Information about your loss:

a. When did your loss occur? beginning Sept. 18, 2008 thru 2009

b. When did you discover the loss? Lela Kupton consistently asked Mr Gruebler why case progress was minimal yet so expensive. The

c. Please describe what the lawyer did that caused your loss realization that Ms Kupton was cheated for money was ongoing. Mr. Gruebler simply took money from Ms Kupton and did very little if anything. Ms Kupton was born

d. How did you calculate your loss? March 9, 1924, A clear case of elder Abuse and fraud.

5. Information about your efforts to recover your loss:

a. Have you been reimbursed for any part of your loss? If yes, please explain: no

b. Do you have any insurance, indemnity or a bond that might cover your loss? If yes, please explain: no

c. Have you made demand on the lawyer to repay your loss? When? Please attach a copy of any written demand.

Verbally numerous times, written twice but cannot locate the documents

d. Has the lawyer admitted that he or she owes you money or has he or she agreed to repay you? If yes, please explain: no

e. Have you sued the lawyer or made any other claim? If yes, please provide the name of the court and a copy of the complaint. no

f. Have you obtained a judgment? If yes, please provide a copy. no

g. Have you made attempts to locate assets or recover on a judgment? If yes, please explain what you found: no

6. Information about where you have reported your loss:

- District attorney
- Police
- Oregon State Bar Professional Liability Fund

If yes to any of the above, please provide copies of your complaint, if available.

Oregon State Bar Client Assistance Office or Disciplinary Counsel

7. Did you hire another lawyer to complete any of the work? If yes, please provide the name and telephone number of the new lawyer: no

8. Please give the name and the telephone number of any other person who may have information about this claim: Ray Boyd - Spectrum CPA Group LLC 541 279 5094  
Lance H Lupton 541.306.7420

9. Agreement and Understanding

The claimant agrees that, in exchange for any award from the Oregon State Bar Client Security Fund (OSB CSF), the claimant will:

- a. Transfer to the Oregon State Bar all rights the claimant has against the lawyer or anyone else responsible for the claimant's loss, up to the amount of the CSF award.
- b. Cooperate with the OSB CSF in its efforts to collect from the lawyer, including providing information and testimony in any legal proceeding initiated by the OSB CSF.
- c. Notify the OSB CSF if the claimant receives notice that the lawyer has filed for bankruptcy relief.
- d. Notify the OSB CSF if the claimant receives any payment from or otherwise recovers any portion of the loss from the lawyer or any other person on entity and reimburse the OSB CSF to the extent of such payment.

*Yes to all*

10. Claimant's Authorization

- a.  Release of Files: I hereby authorize the release to the OSB Client Security Fund, upon request, of any records or files relating to the representation of me by the lawyer named in Question 2.
- b.  Payment to Third Party: I hereby authorize the OSB Client Security Fund to pay all amounts awarded to me to:

Name: NOT APPLICABLE  
Address: X  
Phone: \_\_\_\_\_

11. Claimant's Signature and Verification

(Each claimant must have a notarized signature page. Please photocopy this page for each person listed in question 1.)

State of OREGON )  
County of DESCHUTES ) ss

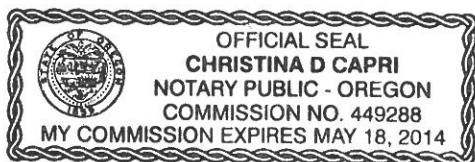
Upon oath or affirmation, I certify the following to be true:

I have reviewed the Rules of the Client Security Fund and the foregoing Application for Reimbursement; and submit this claim subject to the conditions stated therein; and the information which I have provided in this Application is complete and true, to the best of my knowledge and belief.

*Lance M. Lupton*

Claimant's Signature

Signed and sworn (or affirmed) before me this 24th day of APRIL, 2014



Notary's Signature Christina Capri  
Notary Public for STATE OF OREGON  
My Commission Expires 5/18/14

**Please complete page 4 if an attorney is representing you for this claim.**



**You are not required to have an attorney in order to file this claim. The CSF encourages lawyers to assist claimants in presenting their claims without charge. A lawyer may charge a fee for such work only if the following information is provided.**

1. I authorize \_\_\_\_\_ (*print name of attorney*)  
to act as my attorney in presenting my claim.

\_\_\_\_\_  
*Claimant's Signature*

2. I have agreed to act as the claimant's attorney: (*check one below*)

Without charge

Under the attached fee agreement

\_\_\_\_\_  
*Attorney's Signature*

\_\_\_\_\_  
*Attorney's Bar No.*

\_\_\_\_\_  
*Attorney's Phone*

\_\_\_\_\_  
*Attorney's Address*

## CLIENT SECURITY FUND INVESTIGATIVE REPORT

FROM: Lisa Almasy Miller  
DATE: September 13, 2014  
RE: CSF Claim No. 2012-54  
Claimant: Lela Mae Lupton  
Attorney: Bryan Gruetter

### **Investigator's Recommendation**

Recommend paying \$21,500.

### **Statement of the Claim**

This claim was previously investigated and submitted to the CSF Committee on May 11, 2013. At that time, the recommendation was made to deny the claim as insufficient information had been provided to this investigator confirming the amount paid to attorney Bryan Gruetter by Claimant Lela Lupton. The Committee voted in favor of the recommendation and the case was closed until the spring of 2014 when Lela Lupton's son, Lance Lupton, provided additional information.

Lance Lupton has power-of-attorney for his mother, Lela, who is almost 91-years old. On September 10, 2008, Lela paid Bryan Gruetter \$15,000 as a retainer to handle a civil lawsuit against her daughter-in-law, Natalia Belenciuc-Lupton. There is no Retainer Agreement in Gruetter's file, no billing statements, and no information as to the hourly rate quoted by Gruetter (if, indeed, he quoted Lela an hourly rate). On December 23, 2008, Gruetter received an additional \$3500, which was paid out of the trust account at Bryant, Emerson & Fitch (which initially handled Ms. Lupton's case). Lastly, a receipt in Gruetter's file dated April 9, 2010, shows Lela gave him \$6,000 in cash for "legal fees."

According to an affidavit he filed in connection with a Substitution of Attorney, Claimant retained Gruetter on September 23, 2008, after her former attorney, Mike Flinn, moved to Benton County.

Mike Flinn filed a Complaint on Claimant's behalf in which three small claims court actions were consolidated. The circuit court case alleged property damage and unlawful credit card use and sought damages of just under \$55,000. The defendant in the case, Natalia Belenciuc-Lupton, was Claimant's daughter-in-law who was going through a messy divorce and custody battle with Claimant's son, Lance Lupton.

Natalia Lupton represented herself in the civil action handled by the accused, but was represented by counsel in the divorce case.

Greutter's file also contains some references and Court notices regarding a case entitled "Cassie Lupton v. Jim Allyn." Kassie (with a "K") Lupton is the young daughter of Lance and Natalia Lupton. No complaint exists in the file, but there is a letter from Jim Allyn's attorney, Michael Seidl, which refers to his client being falsely accused of abusing Kassie Lupton. That suit was dismissed with prejudice in December 2009.

On October 28, 2008, the accused obtained a default order against Natalia Lupton and subsequently, a default judgment was prepared. Natalia Lupton filed various motions. Although there is no copy of an order in the file, the default order must have been set aside as a settlement conference was set for June 12, 2009. Gruetter prepared a memo for Judge Sullivan on June 11, 2009. A settlement conference apparently took place, but according to OJIN, the case did not settle. Subsequently, on April 6, 2010, Gruetter prepared a 26-item Request for Admissions.

On February 16, 2012, Claimant sent the accused a letter demanding her file and return of her money. She subsequently retained Andrew Mathers, a Bend attorney, who got a copy of the file, but no money was returned to Lela.

On March 29, 2011, Lela Lupton signed a Durable Power of Attorney giving her son, Lance Lupton, the authority to handle all legal matters for her. Lela Lupton is "elderly and infirm" according to Mathers, and has "some memory issues" according to Lance.

Lance Lupton believes Bryan Gruetter is guilty of elder abuse because he took \$24,500 from Lela, and did virtually nothing on her case but request set-overs. On at least one occasion, Lance knows Gruetter picked his mother up from her home, took her to lunch and then took her to the ATM machine to get cash. He has received letters from the Department of Justice informing him his mother was a victim of Bryan Gruetter.

According to OJIN, Attorney Andrew Mathers took over the handling of the case in April 2012. Prior to that time, there were numerous set-overs, but it appears the primary reason for them was to hold the trial after the divorce case was done. Mathers informed this investigator that the work Gruetter did on the file before he took over was "so bad." Ultimately, the parties went to arbitration but no award was rendered to either party.

## Findings and Conclusions

1. Lela Lupton was the client of Bryan Gruetter.
2. The accused was an active attorney and member of the Oregon State Bar at the time of the loss.
3. The accused maintained an office in Bend, Oregon.
4. Gruetter represented Claimant on an hourly basis, yet the hourly rate and number of hours spent on the case is unknown. There is no fee agreement and no accounting of the time spent on the case.
5. Claimant, currently in her 90's, paid Gruetter \$24,500.
6. Both Gruetter's file and the OJIN print-out confirm Gruetter did some work on the case. He prepared a motion and order of default, prepared for and attended a pretrial settlement conference, and prepared requests for admission. The defendant also filed several motions that were set for hearing, and presumably, Gruetter prepared for and attended those.
7. Although Andrew Mathers did not view Gruetter's handling of the case as particularly beneficial, it is clear Gruetter did some work for which attorney fees were legitimately charged.
8. I find that ten (10) hours of work at the rate of \$300 per hour is reasonable and recommend payment to Leah Lupton (in care of Lance Lupton) in the sum of \$21,500.
9. The Application for Reimbursement was timely filed on August 8, 2012, just six months after Lela Lupton terminated Gruetter's services and demanded a refund of unearned fees.
10. There should be no obligation for Claimant to pursue a judgment against Gruetter. He was disbarred and is currently serving a prison sentence.

RECEIVED

Oregon State Bar

Client Security Fund Application for Reimbursement

MAR 24 2014

Oregon State Bar Executive Director

Return completed form to:

Oregon State Bar Client Security Fund PO Box 231935 Tigard, OR 97281-1935

Payments from the Client Security Fund are entirely within the discretion of the Oregon State Bar. Submission of this claim does not guarantee payment. The Oregon State Bar is not responsible for the acts of individual lawyers.

Please note that this form and all documents received in connection with your claim are public records. Please attach additional sheets if necessary to give a full explanation.

1. Information about the client(s) making the claim:

a. Full Name: EVAN ROY AUSTIN
b. Street Address: 1144 WILDERVILLE LN
c. City, State, Zip: GRANTS PASS OR 97527
d. Phone: (Home) 541-955-0363 (Cell) 541-226-7829
e. Email: EVANROYAUSTIN@GMAIL.COM

2. Information about the lawyer whose conduct caused your claim (also check box 10A on page 3):

a. Lawyer's Name: MARY LANDERS
b. Firm Name: NONE
c. Street Address: LAST KNOWN - 115 NW E ST MOVED TO SALEM AREA
d. City, State, Zip: GRANTS PASS OR 97526 2/12
d. Phone: DISCONNECTED
e. Email: UNKNOWN

3. Information about the representation:

a. When did you hire the lawyer? BEGINNING OF SEPT 2011
b. What did you hire the lawyer to do? REPRESENT ME IN A CIVIL CUSTODY CASE

c. What was your agreement for payment of fees to the lawyer? (attach a copy of any written fee agreement) RETAINER PAID PRIOR TO "WORK" \$195/HR BUT NEVER GOT DETAILED BILL SO NO FURTHER
d. Did anyone else pay the lawyer to represent you? NO
e. If yes, explain the circumstances (and complete item 10B on page 3):

f. How much was actually paid to the lawyer? \$11,000.00 HAVE RECEIPTS OF \$9000 OTHER NEWER MARKS
g. What services did the lawyer perform? SHE ONLY WROTE SOME EMAILS, FILED A MOTION, DIDN'T FILE COURT PAPERS BY DEADLINE, WHEN NEW ATTORNEY GOT FILE AFTER 30+ DAYS, IT WAS EMPTY S EXCEPT SOME COURT NOTES, ALL EVIDENCE WAS GONE AS WAS ALL OTHER MISC (LANDERS' DID ACTUALLY DO

h. Was there any other relationship (personal, family, business or other) between you and the lawyer?

NO

4. Information about your loss:

a. When did your loss occur? 9-2011 TO 3-2012 WAS WHEN I RETAINED HER

b. When did you discover the loss? \_\_\_\_\_

c. Please describe what the lawyer did that caused your loss MY LOSS WAS INCURRED DUE TO MS LANDERS NOT DOING MUCH OF ANYTHING ON MY CASE. SHE SENT A FEW EMAILS & DRAFTED A MOTION BUT OTHER THAN THAT, SHE DIDN'T DO ANYTHING.

d. How did you calculate your loss? MY ACTUAL LOSS IS WSN OVER \$50,000 BUT \$11,000 WAS WHAT I PAID HER.

5. Information about your efforts to recover your loss:

a. Have you been reimbursed for any part of your loss? If yes, please explain: NO

b. Do you have any insurance, indemnity or a bond that might cover your loss? If yes, please explain: NO

c. Have you made demand on the lawyer to repay your loss? When? Please attach a copy of any written demand.

HAVE NO INFORMATION ON WHEN MS LANDERS IS.

d. Has the lawyer admitted that he or she owes you money or has he or she agreed to repay you? If yes, please explain:

NO, NEVER RECEIVED ANY BILLING INFO FOR LAST 3 MONTHS SHE "REPRESENTED" ME

e. Have you sued the lawyer or made any other claim? If yes, please provide the name of the court and a copy of the complaint.

ONLY A COMPLAINT FILED w/ PLF.

f. Have you obtained a judgment? If yes, please provide a copy NO

g. Have you made attempts to locate assets or recover on a judgment? If yes, please explain what you found:

DONT BELIEVE MS LANDERS HAS ANY ASSETS, LAST TIME I SAW HER, HER CAR WAS REPOSESED.

6. Information about where you have reported your loss:

District attorney

Police

Oregon State Bar Professional Liability Fund

If yes to any of the above, please provide copies of your complaint, if available.

Oregon State Bar Client Assistance Office or Disciplinary Counsel

7. Did you hire another lawyer to complete any of the work? If yes, please provide the name and telephone number of the new lawyer:

YES MY NEW ATTORNEY IS ANTHONY JAMES OF PENNA & JAMES 503.838.4996

8. Please give the name and the telephone number of any other person who may have information about this claim: \_\_\_\_\_

9. Agreement and Understanding

The claimant agrees that, in exchange for any award from the Oregon State Bar Client Security Fund (OSB CSF), the claimant will:

- a. Transfer to the Oregon State Bar all rights the claimant has against the lawyer or anyone else responsible for the claimant's loss, up to the amount of the CSF award.
- b. Cooperate with the OSB CSF in its efforts to collect from the lawyer, including providing information and testimony in any legal proceeding initiated by the OSB CSF.
- c. Notify the OSB CSF if the claimant receives notice that the lawyer has filed for bankruptcy relief.
- d. Notify the OSB CSF if the claimant receives any payment from or otherwise recovers any portion of the loss from the lawyer or any other person on entity and reimburse the OSB CSF to the extent of such payment.

10. Claimant's Authorization

- a.  Release of Files: I hereby authorize the release to the OSB Client Security Fund, upon request, of any records or files relating to the representation of me by the lawyer named in Question 2.
- b.  Payment to Third Party: I hereby authorize the OSB Client Security Fund to pay all amounts awarded to me to:

Name: \_\_\_\_\_

Address: \_\_\_\_\_

Phone: \_\_\_\_\_

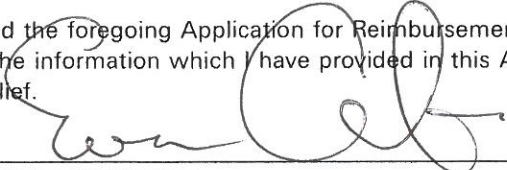
11. Claimant's Signature and Verification

(Each claimant must have a notarized signature page. Please photocopy this page for each person listed in question 1.)

State of OREGON )  
 County of JOSEPHINE ) ss

Upon oath or affirmation, I certify the following to be true:

I have reviewed the Rules of the Client Security Fund and the foregoing Application for Reimbursement; and submit this claim subject to the conditions stated therein; and the information which I have provided in this Application is complete and true, to the best of my knowledge and belief.

  
 \_\_\_\_\_  
 Claimant's Signature

Signed and sworn (or affirmed) before me this 10th day of March, 2014.



Notary's Signature Kathleen M Lawrence  
 Notary Public for Oregon  
 My Commission Expires 5/24/2016

**Please complete page 4 if an attorney is representing you for this claim.**

**You are not required to have an attorney in order to file this claim. The CSF encourages lawyers to assist claimants in presenting their claims without charge. A lawyer may charge a fee for such work only if the following information is provided.**

1. I authorize \_\_\_\_\_ *(print name of attorney)*  
to act as my attorney in presenting my claim.

\_\_\_\_\_  
*Claimant's Signature*

2. I have agreed to act as the claimant's attorney: *(check one below)*

Without charge

Under the attached fee agreement

\_\_\_\_\_  
*Attorney's Signature*

\_\_\_\_\_  
*Attorney's Bar No.*

\_\_\_\_\_  
*Attorney's Phone*

\_\_\_\_\_  
*Attorney's Address*



**RECEIPT** DATE 9/6/11 No. **688016**

RECEIVED FROM Even Roy Austin \$3000<sup>00</sup>

Three Thousand & 00/100 DOLLARS

FOR RENT Returner  
 FOR \_\_\_\_\_

ACCOUNT		<input type="radio"/> CASH					
PAYMENT		<input type="radio"/> CHECK	FROM	<u>Mehul Geyan</u>	TO		
BAL. DUE		<input type="radio"/> MONEY ORDER	BY				
		<input type="radio"/> CREDIT CARD					

**RECEIPT** DATE 9/7/11 No. **688018**

RECEIVED FROM Even Austin \$2000<sup>00</sup>

Two Thousand & 00/100 DOLLARS

FOR RENT Returner  
 FOR \_\_\_\_\_

ACCOUNT		<input type="radio"/> CASH					
PAYMENT		<input type="radio"/> CHECK	FROM	<u>Mehul Gey</u>	TO		
BAL. DUE		<input type="radio"/> MONEY ORDER	BY				
		<input type="radio"/> CREDIT CARD					

**RECEIPT** DATE 10-7-11 No. **688019**

RECEIVED FROM Even Austin \$3000<sup>00</sup>

Three Thousand & 00/100 DOLLARS

FOR RENT Legal Returner  
 FOR \_\_\_\_\_

ACCOUNT		<input type="radio"/> CASH					
PAYMENT		<input type="radio"/> CHECK	FROM	<u>Mehul G</u>	TO		
BAL. DUE		<input type="radio"/> MONEY ORDER	BY				
		<input type="radio"/> CREDIT CARD					

THREE WERE  
OTHER RECEIPTS THAT  
WERE NEVER GIVEN  
TO ME!

**RECEIPT** No. **978284**

DATE 10-29-12

FROM Evan Austin \$1000<sup>00</sup>

One thousand & 00/100 DOLLARS

FOR RENT  
 FOR \_\_\_\_\_

ACCT.		<input checked="" type="radio"/> CASH					
PAID		<input type="radio"/> CHECK	FROM		TO		
DUE		<input type="radio"/> MONEY ORDER	BY	<u>M Geyan</u>			
		<input type="radio"/> CREDIT CARD					

A-1152  
T-4161

CLIENT SECURITY FUND INVESTIGATIVE REPORT

From: J. Andrew Keeler  
Date: September 10, 2014  
RE: CSF 2014-12  
Claimant: Evan Austin  
Attorney: Mary Landers  
Status: Suspended

Recommendation

Recommend payment of \$9,000.

Statement of the Claim

Claimant is in a bitter custody battle that has been continuously ongoing since 2011 with Mother of their child. Claimant hired Mary Landers to represent him in his custody matter in or about September 2011 in Josephine County. The representation ended in March 2012. Claimant was cooperative in my investigation. Attorney Landers was less so.

Just prior to the start of the custody matter, a restraining order was filed by Mother against Claimant. Client hired an attorney to represent him in court. A day before the hearing to contest the restraining order the attorney asked Claimant if Mary Landers could attend the hearing. Claimant, believing Landers would play a role of observer, agreed to her attendance. Both attorneys appeared at the hearing as counsel for Claimant. Ms. Landers presented Claimant's case and provided the examinations and arguments. The other attorney only sat at the desk. Claimant found this to be highly unusual that he was being represented by Landers without any agreement between the two. Claimant was annoyed that he was billed by both attorneys to attend the hearing but was pleased with the outcome and paid for the legal services. Claimant is not requesting reimbursement stemming from the restraining order matter. Claimant's attorney was winding down his practice and recommended Landers represent him in the upcoming custody matter. Claimant agreed.

Claimant hired Landers at a reduced rate of \$195 per hour. Claimant believes he paid \$11,000 in several installments in September and October 2011. He provided copies of 4 receipts signed by Ms. Landers or her staff totaling \$9,000. Claimant claims that he paid an additional \$2000 in cash and requested a receipt that was not provided.

Landers provided some service on behalf of Claimant. She filed a responsive pleading to the Petition for Custody. She also filed a motion for temporary protective order of restraint (status quo order). She attended one hearing.

Landers also approved form of several pleadings drafted by opposing counsel. Landers seemed to join on the work of opposing counsel and was not providing any meaningful representation on these issues.

That is where any meaningful representation stopped. Landers became increasingly difficult to get a hold of and was rarely in her office. Landers did not appear at some hearing dates nor notified Claimant of those hearings. She just abandoned the matter. Claimant sought

the advice of another attorney. To Claimant's surprise, the substitute attorney pulled an OJIN report that showed Claimant had a hearing the very next day.

Landers became fed up with Claimant's constant inquiries about the status of the matter and withdrew from the matter. The court notes in OGIN that Landers' withdrawal was without the consent of the court. Landers also abandoned her practice about the same time she abandoned the case and move out of town.

Claimant is not only displeased that claimant abandoned his matter but is also very unhappy with the quality of services Landers provided. He makes several claims against Ms. Landers. She did not provide him a fee agreement. He claims he was not provided monthly invoices. He claims Landers caused him great harm by allowing opposing counsel to word the custody evaluation order to be non-binding when he specifically requested that it be binding.<sup>1</sup> He also claims that Landers exposed confidential information to opposing counsel.

Landers is currently suspended. Two claims were brought before discipline including a claim by the district attorney's office suggesting inadequate representation of numerous public defendants and a claim by a client in a custody matter that both the facts and allegations are similar.

Landers was not very helpful in my investigation. We had some contact by email. She was very slow to respond and her responses were minimal. She stated that she had billing invoices in storage that would be helpful in my investigation. I have allowed her many months to provide the invoices. She claims that she spent more hours on his matter than any other matter. That Claimant was very needy and that he was in her office very frequently.<sup>2</sup> Landers claims that Claimant even owes her money for work done beyond the funds in retainer. Landers provided no documentation, no invoices, no fee agreements, and no support to her contentions. The record does not support Ms. Landers. The court file and the OJIN report do not suggest more than a small sum of hours was put into the matter.

Some amount of legal services was performed. Therefore fee arbitration may be an appropriate venue. Claimant has been unable to locate Ms. Landers' residence making service difficult. He also believes that she has no assets worth attaching. Landers stated that she makes \$10.00 an hour. I find any award at arbitration to be difficult to collect and ultimately may end up as a CSF matter anyway. It was be prejudicial to the Claimant to require him extend additional time and financial resources to attain an uncollectable judgment.

### Findings and Conclusions

1. Claimant was the client of Mary Landers.
2. Landers was an active member of the Oregon State Bar at the time of the loss.

---

<sup>1</sup> The evaluation was favorable to Claimant but the Mother was able to rebut the findings in court.

<sup>2</sup> Putting both stories together, it is likely that Claimant came to the office often to inquire about the status of the matter and the whereabouts of Ms. Landers. If true, I do not find this to be billable hours.

CLIENT SECURITY FUND INVESTIGATIVE REPORT

3. Claimant paid no less than \$9,000 to retain Landers in his custody matter.
4. Claimant provided minimal services and eventually abandoned the matter and her practice. Attorney did not provide \$9,000 in legal services.
5. Claimant claims he provided an additional \$2,000 in retainer fees paid, although is unable to provide any substantiating evidence. I recommend denying awarding the additional \$2,000.
6. Mary Landers bar license is currently suspended in the state of Oregon.
7. Claimant's claim is within two years of the suspension. Ultimately Claimant's claim is within six years of the date of loss.
8. Claimant would be unfairly prejudiced if he was required to seek a judgment prior to this application.
9. Landers' conduct was dishonest as defined in the rules 2.2.1(i).

October 16, 2014

To: BOG Appointments Committee

From: Carol Bernick, PLF Chief Executive Officer

Re: 2015 Board Appointments

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The Board of Directors of the Professional Liability Fund met on October 10, 2014 to consider potential applicants for the 2015-2019 Board terms. The BOD is required to send a list of nominees equal to or greater than the number of available positions to the OSB BOG.

Article 3.4 provides that:

By October 31 of each year the Board of Directors will forward to the Board of Governors a list of recommended Director nominees equal to or greater than the number of available positions on the Board in the coming year. The Board will seek nominees according to qualifications determined by the PLF Board. **These may include, but are not limited to, consideration of gender, minority status, ability, experience, type of law practice, and region.**

This year, 27 attorneys expressed interest in serving on the PLF Board. (Attorneys express their interest in two ways; either through the OSB Volunteer Preference Form or through direct communication with the PLF in response to articles or notices in *In Brief* or the *OSB Bulletin*.)

This year, there are two attorney board positions to fill. The current Board Chair (Guy Greco) and Board member (Valerie Fisher) have terms that expire on December 31, 2014. Their departure leaves the Board with:

- One member from Eugene;
- One member from Medford;
- Two public members from Salem; and
- Three members from Portland

In terms of firm size, the Board (minus the two departing directors and not counting the public members) has:

- One member from a large firm;
- Three members from smaller firms; and
- One retired lawyer.

The substantive expertise includes commercial litigation, creditors rights, immigration and personal injury.

The BOD chose three candidates from a list of five candidates presented by our nominations committee. Those three candidates are presented in order of preference (resumes attached).

**Frank Langfitt:** OSB #731770  
Portland  
Medium Firm – Ater Wynne

Mr. Langfitt is a partner at the firm of Ater Wynne. He is a well known litigator with experience in commercial litigation, business torts, insurance coverage issues and environmental law. His resume indicates that he also has expertise in D&O coverage as well as risk issues related to e-business, an area of growing concern in the practice of law.

Mr. Langfitt is respected in the legal community for his judgment and legal expertise and has been Statewide Chair of the Campaign for Equal Justice, a member of the Volunteer Lawyers Project, and has also been involved in civic organizations.

**Saville Easley:** OSB #920547  
Portland  
Medium Firm – Gevurtz Menashe

Ms. Easley is a family law attorney and a partner at Gevurtz Menashe. The BOD has not had a family law expert since Laura Rackner left the board in 2013. Family law is a high frequency claim area and substantive expertise in that area is useful.

Ms. Easley is well respected in the family law area. She has been involved in a number of OSB and MBA committees and other law related groups, including OWLs and OTLA. She served three years on the OSB CLE committee which would also bring valuable knowledge to the PMA efforts of the PLF.

**Robert Raschio:** OSB #013864  
Canyon City  
Small Firm - Law office of Robert Raschio, PC

Mr. Raschio is primarily a criminal law attorney. He does private defense and also has an indigent defense contract. In addition, Mr. Raschio handles some general practice matters.

Ira Zarov (former PLF CEO) spoke with Mr. Raschio. Mr. Zarov reports that Mr. Raschio was knowledgeable about the PLF, respected its purpose and had a good overall perspective. His references were very positive as well. He was previously with Morris, Smith, Starns, Raschio & Sullivan in The Dalles and at Mallon Lamborn & Raschio in Burns before opening his own firm in January 2014. His web page is attached.

Although criminal law is not a high frequency area, the PLF has had criminal law attorneys on the board for the majority of the last 15 years. They have uniformly been valuable contributors and criminal law practitioners are an important segment of the bar. Mr. Raschio has good contacts in his practice area and is a two-time President of the Oregon Criminal Defense Association. He also represents a younger demographic which the Board would like to encourage.

The BOD discussed whether having two directors appointed from Portland would undermine our goal of geographic diversity. If the BOD's first two choices are appointed by the BOG, the BOD would have five of nine members from Portland, one of whom is Ira Zarov who was appointed for only a year due to the departure of John Berge to become a member of the PLF staff. There are approximately 7500 covered parties, 5,000 of whom are in the tri-county area. We would also have two members from medium sized firms, something we don't have now.

Attachments (resumes)

Search 

Sul

Client Log In (<http://client.aterwynne.com>)

(/)

WHAT WE DO

WHO WE ARE

RESOURCES

CULTURE

CAREERS

CONTACT

## ATTORNEYS



Download profile  
 (/uploads/team/profiles/1410475589.pdf)  
[fvl@aterwynne.com](mailto:fvl@aterwynne.com)  
 (mailto:fvl@aterwynne.com)  
 503-226-8475

### PRACTICE AREAS

D&O Insurance Coverage (/page/d-o-insurance-coverage)

Directors & Officers Liability  
 (/page/directors-officers-liability)

### OUR TEAM

"Ater Wynne thrives when the people, community and world around us thrive.

We are **ACTIVELY ENGAGED** in the communities in which we live and work, focusing our most significant contributions and volunteer efforts on

### FRANK V. LANGFITT

Partner

Frank Langfitt focuses his practice in a variety of litigation and client consultation areas, including business and commercial disputes, business torts, insurance coverage issues, corporate governance, directors and officers cases and environmental cases. Frank also provides consultation relating to various insurance coverage issues including coverage for intellectual property, directors and officers, casualty, environmental and health insurance. He has provided advice and spoken on risk issues, including those relating to e-business.

Frank has tried many tort and business cases in federal and state courts, representing both plaintiffs and defendants.

Recent matters have included business relationship disputes, including supplier relations in the high tech electronics area; distributor, contract and real estate disputes; and a wide variety of insurance coverage consultation and litigation, including issues relating to environmental claims, punitive damages, contract-tort coverage distinctions, intellectual property, directors and officers, business disputes and health insurance.

Frank has served as Ater Wynne's Administrative Partner, on the firm's Management Committee and as Litigation Department Chair. He is listed in *Best Lawyers in America* for his expertise in Commercial Litigation and Product Liability Litigation, he has been recognized as an *Oregon Super Lawyer* and been listed as a "Litigation Star" in *Benchmark Litigation*.

### Professional Experience

- Ater Wynne LLP, Portland, Oregon, Partner, 1982 to present; Associate, 1979 to 1981
- Sole practitioner, Portland, Oregon, 1978 to 1979
- Fellows, McCarthy, Zikes, Kayser & Langfitt, Partner, 1977; Associate, 1973 to 1976

### Education

- University of Oregon, J.D., 1973
- Stanford University, B.A., 1969

### Admitted to Practice

- Oregon
- District of Columbia Court of Appeals
- Ninth Circuit Court of Appeals



programs for **CHILDREN**, the  
**ARTS, ENTREPRENEURS**  
and the **ENVIRONMENT.**

– Brenda L. Meltebeke, Firm Chair

- U.S. District Court, Oregon

**Professional Activities**

- American Bar Association, Litigation, Alternative Dispute Resolution, and Insurance Litigation Sections
- Oregon State Bar, Litigation Section
- Multnomah Bar Association, Alternative Dispute Resolution Committee, 1994 to 1997
- Oregon Association of Defense Counsel
- Federal Bar Association of Oregon, Board Member, 2008 to 2013

**Community Activities**

- Northwest Business Committee for the Arts, Board Member, 1997 to 2000
- Boys and Girls Aid Society Board of Directors; President, 1996 to 1997
- Volunteer Lawyers Project North/Northeast Legal Clinic
- Campaign for Equal Justice, Board Member, 1997 to present; Large Firm Committee Chair, 1996 and 1997; Board Chair, 2010 to 2012
- Literary Arts, Board Member, 2008 to present

**Representative Matters**

- Favorable judgment obtained for client involved in dispute between conflicting shareholders over control of corporation.
- Successful settlement reached for corporate client facing indemnification claims from former officer/director.
- Successful settlement on behalf of shareholder in lawsuit concerning shareholder oppression.
- Eleven-day federal jury trial to verdict involving fraud and warranty claims relating to computer-controlled tool systems sold internationally. Settled on appeal.
- Successful resolution of federal insurance coverage case for client who was subject to punitive damages judgment from earlier case.
- Eleven-week trial concluding in favorable settlement to clients of environmental insurance coverage action.
- Defense of class action (estimated 400 members) toxic tort, nuisance and trespass claims. Successfully opposed class certification; subsequent favorable settlement of eight related lawsuits filed on behalf of approximately 40 plaintiffs.
- Successful trial to verdict for client facing business tort claims, including conversion, in international shipments, and preservation of award on appeal
- Successful resolution of insurance coverage case for client facing class action claims for product liability and unfair business practices.

**JOIN OUR MAILING LIST**

Sign up for email updates and stay up to date on Ater Wynne news and events.

Your Email  GO

[privacy policy \(/page/privacy-policy\)](#)

**PORTLAND OFFICE**

Lovejoy Building  
1331 NW Lovejoy St, Ste. 900  
Portland, OR 97209-3280

P 503.226.1191  
F 503.226.0079

Directions (<https://maps.google.com/maps?q=1331+NW+Lovejoy+St,+Ste.+900,+Portland,+OR+97209>)

**SEATTLE OFFICE**

Two Union Square  
601 Union St., Ste. 1501  
Seattle, WA 98101-3981

P 206.623.4711  
F 206.467.8406

Directions (<https://maps.google.com/maps?q=601+Union+St,+Ste.+1501,+Seattle,+WA+98101>)

# Saville W. Easley

Shareholder

## Practice Areas

Alternate Dispute, Appeals, Child Support, Contempt, Custody/Parenting Time, Divorce, Domestic Partnerships, Domestic Violence, Grandparent Rights, Guardianship of Minors, High Asset Divorce, Military Divorces, Modification, Paternity, Step-parent/Co-parent, Unbundled Legal Services

## Professional Activities

- \* Member, Multnomah Bar Association, 1992-Present
- \* Member, 'Multnomah County Bar Association, Professionalism Committee', 2013-2015
- \* Master, Gus J. Solomon, American Inns of Court, 2013 to Present
- \* Member, Oregon Women Lawyers
- \* Member, Oregon Trial Lawyers Association (OTLA)
- \* Judicial Selection Committee, Committee member, Multnomah County Bar Association, 2009-2011
- \* Local Professional Responsibility Committee (Multnomah County), Oregon State Bar, 2006-2011
- \* Continuing Legal Education Committee, Oregon State Bar, 2006 to 2009
- \* Campaign for Equal Justice Committee, July 2008-2010
- \* Oregon Lawyers Against Hunger, 2005-2010
- \* Multnomah Bar Association Mentor Program, 2006, 2008, 2010
- \* Multnomah Lawyer Committee, 1992-1995
- \* Multnomah Bar Association, Committee to Advance Equality, 1996-1998
- \* Oregon State Bar, Secretary & Executive Committee Member, Consumer Law Section, 1995-1998

## Education

- \* Bachelor of Arts Degree, Education, University of Alaska, Anchorage , 1986
- \* Juris Doctorate, University of Oregon, 1991

## Civic Activities

- \* Portland Art Museum, Member
- \* Oregon Humane Society, Member
- \* Project HOPE, Member

## Professional Honors

- \* Listed in Super Lawyers Magazine 2014, 2013, 2012, 2011, 2010, 2009

## Publications

## Law Office of Robert Raschio, PC

206 S. Humbolt St. Canyon City, Oregon 97820  
(O) (541) 575-5750/(F) 541-575-5752  
office@rrlaw.biz

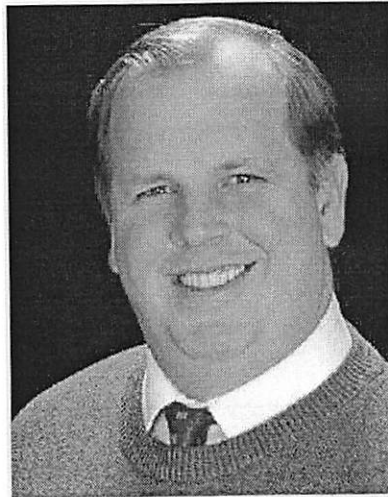
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### Attorneys



#### Robert S. Raschio

Two-time President of the Oregon Criminal Defense Lawyers Association, editor of the OCDLA Trial Notebook (a widely used publication by lawyer throughout Oregon) Robert Raschio is a well regarded defender of the rights of the accused throughout Oregon. Born and raised in Oregon, having graduated from Portland State University and the University of Oregon Law School, he knows this state well.

# Law Office of Robert Raschio, PC

206 S. Humbolt St. Canyon City, Oregon 97820  
(O) (541) 575-5750/(F) 541-575-5752  
office@rrlaw.biz

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## Practice Areas

Our passion is your rights.

---

### Criminal Law

The Constitution protects you from the power of the state. This firm will protect your rights. You have many rights that you should protect when being questioned by law enforcement and when being prosecuted in a court, we can help you protect those rights. Our firm will vigorously represent you no matter the charge. Driving Under the Influence of Intoxicants, allegations of a inappropriate sexual conduct, assaults, homicide, and any other type of criminal allegation, we do not judge you, we protect you.

---

### Family Law

This firm will represent individuals in family law matters. If you are preparing to leave your spouse, challenge custody of your child or need to modify your existing decree, please call 541-575-5750.

---

### Juvenile Law

If your kids have been taken from you, you need to call an attorney immediately. There are many initial steps that must be taken to get your kids returned.

If your child has been accused of activity that would constitute a crime, you should call us immediately. There are long term implications of an allegation against a child that can impact their entire life. Call for a free consultation.

---

### Notary Public

We offer State of Oregon notary services.

---

### Other Legal Matters

Our firm has a background in many areas of the law that we can provide you advise on. If we cannot, we know who can. Call us with your questions and if we cannot help you, we will assist you in finding the attorney who can.

[SCHEDULE A CONSULTATION](#)

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# Law Office of Robert Raschio, PC

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HOME FIRM PRACTICE AREAS CONTACT

## Our Team

Experience Counts. Commitment Counts. The Law Office of Robert Raschio, PC has both. Lead by Robert S. Raschio, two time President of the Oregon Criminal Defense Lawyers Association, editor of the Trial Notebook and noted committed defender of the rights of the accused, we will fight for you.

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## Services

We are a full service law firm. Our primary practice is defending the accused against state. When you are approached by a state official and being asked questions, you should exercise your right to remain silent and call us for advise. If you or a family member have been arrested please call immediately. The sooner you are represented the sooner your rights are being protected against the power of the state!

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## News & Publications



1-2-2014

Open! After over seven years at Morris, Smith, Starns, Raschio, & Sullivan, PC in The Dalles, four years at Mallon, Lamborn & Raschio, PC in Burns, and a year at the Law Office of Markku Sario in Canyon City, Robert Raschio has opened his own firm in Canyon City, Oregon. The firm will offer a full range of legal services but will focus primarily on representation of the accused, both indigent and privately retained. If you are being questioned by the law enforcement, if you or a loved one have been arrested, if you have a court date coming up, call, we can help.

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10-25-2013

The Oregon Public Defense Commission has honored Robert Raschio with a contract to provide indigent defense services to the 24th Judicial District of the State of Oregon. "It is an absolute privilege to be awarded this contract in recognition of the good work on the behalf of so many. My firm will defend the rights of the accused from the power of the state." Mr. Raschio declared.

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## Contact Us

FOR A FREE CONSULTATION

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## Areas of Practice

*Criminal Law*

*Family Law*

*Juvenile Law*

*Notary Public*

*Other Legal Issues*

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# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** November 15, 2014  
**Memo Date:** October 31, 2014  
**From:** Caitlin Mitchel-Markley, Board Development Committee Chair  
**Re:** Appointments to various bar committees, councils, and boards (1 of 2)

---

### Action Recommended

On October 3 the Board Development Committee selected the following members for appointment:

#### **Advisory Committee on Diversity and Inclusion**

Chair: Cynthia Starke  
Secretary: Jackie Alarcon  
Members with terms expiring 12/31/2017:  
Sherisa Davis-Larry  
Connie McKelvey  
David O'Brien  
Jonathan Patterson

#### **Client Security Fund Committee**

Chair: Lisa Miller  
Secretary: Ronald Atwood  
Members with terms expiring 12/31/2017:  
Ronald Atwood  
Karen Park  
Stephen Raheer  
Stephanie Thompson

#### **Legal Ethics Committee**

Chair: Robert G. Burt  
Secretary: Kristin Asai  
Members with terms expiring 12/31/2017:  
Summer Baranko  
David Elkanich  
Samantha Hazel  
Alex Wylie

#### **Legal Heritage Interest Group**

Chair: Rachel Lynn Hull  
Members with terms expiring 12/31/2017:  
Michael T. Harvey  
Elizabeth Jessop  
Katerina Kogan  
Robert Raschio  
Heidi Strauch  
Kirk Wintermute

#### **MCLE Committee**

Chair: Christy King  
Secretary: Allison Banwarth  
Members with terms expiring 12/31/2016:  
John Mellgren  
Members with terms expiring 12/31/2017:  
Adam Adkin  
William Gibson  
Katherine Zerker  
Karen Elliott (public)

#### **Pro Bono Committee**

Chair: Meagan E. Robbins  
Secretary: Christo de Villiers  
Members with terms expiring 12/31/2017:  
R. Brent Berselli  
Sarah Rose Dandurand  
Sara L. Mader  
Alison G.M. Martin  
Gerard P. Rowe  
Peter S. Willcox-Jones  
Maya Crawford (Advisory)

#### **Public Service Advisory Committee**

Chair: Jennifer A. Costa  
Secretary: Debra Cohen  
Members with terms expiring 12/31/2017:  
Steven Bennett  
Sybil Hebb  
Vittal Patel  
Shayna Rogers

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**Quality of Life Committee**

Chair: Amy Saeger Miller  
Secretary: Ruben Medina  
Members with terms expiring 12/31/2017:  
Lori DeDobbelare  
Eva Marcotrigiano  
Michael B. Reid  
Mindy S. Stannard  
Erin O. Sweeney  
Jeremy G. Tolchin  
Michael John Turner

**State Lawyers Assistance Committee**

Chair: Kevin Lucey  
Secretary: Vaden Francisco  
Members with terms expiring 12/31/2017:  
Michael Seidel  
Bryan Welch

**Uniform Civil Jury Instructions Committee**

Chair: John Devlin  
Secretary: Katharine von Ter Stegge  
Members with terms expiring 12/31/2017:  
Hon. Cheryl Albrecht  
Charley Bevens Gee  
Steven Boyd Seal

Jet Harris  
Kimberly Sewell

**Uniform Criminal Jury Instructions Committee**

Chair: Jaime Contreras  
Secretary: Andrew Robinson  
Members with terms expiring 12/31/2017:  
David Amesbury  
Erin Biencourt  
John Hummel  
D. Aaron Jeffers  
Holly Winter

**Unlawful Practice of Law Committee**

Chair: Katharine von Ter Stegge  
Chair-Elect: David Doughman  
Secretary: Erin Fitzgerald  
Members with terms expiring 12/31/2018:  
John Beckfield  
Jay Bodzin  
Saville Easley  
Monica Goracke  
Martie McQuain

**Disciplinary Board**

State Chair and Chair-Elect terms expire 12/31/2015.  
State Chair: Nancy M. Cooper  
State Chair-Elect: Robb Miller

Unless designated otherwise, regional chair positions have terms expiring 12/31/2015 and members have terms expiring 12/31/2017.

**Region 1**

Chair: Carl W. Hopp Jr.  
Members:  
Paul Heatherman  
John Laherty  
Ron Roome  
Steven Bjerke (public)

**Region 2**

Chair: Robert A. Miller  
Members:  
Chas Horner  
Debra Velure  
Meg Kieran

**Region 3**

Chair: John E. Davis  
Members:  
Thomas Pyle (public)  
Josh Soper

**Region 4**

Chair: Kathy Proctor  
Members:  
Bill Blair  
Loni Bramson (public)  
Joe Fabiano (public)

**Region 5**

Chair: Ronald Atwood

Members:

Duane Bosworth  
Lisa Caldwell  
Frank J. Weiss  
Jon Levine (public)  
Rita Cagliostro (public)

**Region 6**

Chair: James C. Edmonds  
Members:  
Paul Gehlar (public)

**Region 7**

Chair: Kelly Harpster  
Members:  
S. Michael Rose

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**State Professional Responsibility Board**

Chair: Whitney Boise, term expires 12/31/2015

Members:

Richard Weil, region 5, term expires 12/31/2015

Elaine D. Smith-Koop, region 6, terms expires 12/31/2018

Ankur Has Mukh Doshi, region 7, terms expires 12/31/2018

Randy Green, public member, terms expires 12/31/2018

**Local Professional Responsibility Committee**

All terms expire 12/31/2015.

**Region 1**

Chair: John Hummel

Members:

Dennis Karnopp

Theodore William Reuter

**Region 2**

Chair: Cynthia Botsios

Danforth

Members:

Marilyn A. Heiken

Susan Ezzy Jordan

**Region 3**

Chair: Bruce Coalwell

Members:

Susan Krant

**Region 4**

Chair: Jessica L. Cousineau

Members:

Scott Lee Sharp

**Region 5**

Chair: Saville W. Easley

Members:

Robert P. Schulhof Jr.

Ryan M. Tarter

**Region 6**

Chair: John Beckfield

Members:

Kara H. Daley

**Region 7**

Chair: Karen J. Park

Members:

Michael John Turner



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# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** November 14-15, 2014  
**Memo Date:** November 5, 2014  
**From:** Rod Wegener, CFO  
**Re:** 2015 OSB Budget Report

---

### **Action Recommended**

Review and approval of the 2015 OSB Budget.

### **Background**

A print copy of the 2015 OSB Budget Report was mailed to all members of the Board of Governors and the new 2015 members. The report also is available at this link. The report is 75 pages of the narrative and line item budget of all bar programs and departments following a summary of the budget. The report contains changes made after the Budget & Finance Committee reviewed the budget at its October 3 meeting.

Highlights of the 2015 budget are:

- A net operating revenue of \$92,270, a decline from the 2014 net operating revenue of \$448,893;
- No change in the active or inactive membership fee,
- As recommended by the Committee, the allocation of an additional \$5.00 from the active Member Fee for additional funding for LRAP
- Total revenue for 2015 is \$53,771 less than the 2014 budget, due in part to only \$1,300 more allocated to general membership fee revenue (after the additional allocation of \$76,800 to LRAP);
- Expenditures are \$302,852 (2.4%) more than 2014;
- No reserve funds are transferred to revenue for operational needs;

# OREGON STATE BAR

## Governance & Strategic Planning Agenda

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**Meeting Date:** June 27, 2014  
**From:** Josh Ross  
**Re:** Preference Polls for Circuit Court Appointments

---

### Discussion

OSB Bylaw Section 2.7 governs judicial selection. Section 2.701 provides that the Bar will conduct preference polls in all statewide and circuit court elections. Section 2.702 provides that the Bar will conduct preference polls for circuit court judicial appointments only at the request of the Governor or the Board. Section 2.703 describes the appellate recommendation process the Bar undertakes to vet candidates for appointment to the Oregon appellate courts. Thus, preference polls for circuit court appointments are required only at the request of the Governor or the Board, while preference polls for statewide or circuit court elections and the appellate recommendation process for appointments to the appellate courts are always conducted.

Section 2.702 dates back to at least 2003. In 2003, the Board changed Board Policy 5.603(C) (now Bylaw section 2.702) to eliminate preference polls for appointment to circuit courts, unless requested by the Governor or the Board. Between April 2003 (when the policy changed) and February 2013 neither the Governor nor the Board requested that the Bar conduct a preference poll for appointments to the circuit courts, and the Bar did not do so.

In November 2012, this Committee reviewed that policy and, specifically, the question of whether the Bar should permanently begin conducting preference polls for circuit court appointments. Sylvia's memo on the subject is attached for your review. Based on a recommendation from this Committee, in February 2013 the BOG unanimously voted to change the long-standing policy and, essentially, instituted a permanent, ongoing request that the Bar conduct preference polls for all circuit court appointments. David Wade's memorandum on the subject is also attached for your review. Since February 2013, the Bar has conducted eight preference polls in contested elections. Here are some statistics from those polls:

- Participation rates in 2013 and 2014 preference polls (by judicial district): 60%, 29%, 24%, 63%, 52%, 18%, 57%, 23% (average: 41%).
- Overall participation rate in 2012 and 2014 primary and general *election* preference polls: 15%, 23%, 14%.
- Attached are statistics showing voter participation in each of the nine appointments in 2013 and 2014. The Governor appointed the person with the most votes in preference polls four times. He appointed two candidates who finished in second place; one candidate who finished in third place; one candidate who finished in fifth place; and one candidate who finished in last place.

The Bar publishes preference poll results on its website but does not distribute them via email or announce them in the Bulletin. The Bar does not issue a press release to announce the results of preference polls in appointment cycles and, of course, it is the Governor (and not the public) that makes the appointment for those positions.

As noted in Sylvia's and David's prior memoranda, there are different views about the value of preference polls and the reasons the Bar should (or should not) conduct them. The policy behind conducting preference polls is found in Bylaws section 2.700:

The Bar plays an important role in state and federal judicial selection by conducting preference polls for contested elections and for circuit court appointments, and by interviewing and evaluating candidates for appellate court appointments. Any poll conducted by the Bar is for informational purposes only and will not constitute an official position of the Bar. Results of evaluations and polls will be made public as soon as practicable to the press, the candidates and the appointing authority.

Thus, the Bylaws imply that the reason for conducting preference polls is twofold: to inform the public and to influence the decision the Governor makes. That "policy" must be viewed in light of the fact that the Bylaws do not require preference polls for circuit court appointments and, rather, expressly require them only when requested.

I asked that this issue be put on the Committee's agenda so that we could begin a discussion about whether the Board's February 2013 change in policy was a useful one. It is unknown whether or not preference polls are useful to the Governor, or in any way influence his/her decision, because no Governor has asked the Bar to conduct a preference poll. Until last year, neither did the Board. I am also not aware of any formal data or information indicating that preference polls are, or are not, useful to the public (which, ultimately, has no say in a judicial appointment and therefore is less likely to have use for those polls) or to the candidates themselves.

Here are some questions I ask the committee to consider:

1. What are the reasons the Bar feels compelled to conduct preference polls?
  - o Is there a public service goal/s in conducting preference polls despite that the public plays no role in judicial appointments?
  - o Does the Bar hope to influence the Governor's decision?
  - o Does the Bar hope to be helpful to the Governor?
  - o Does the Bar hope polls will be useful to candidates?
2. Are preference polls in circuit court appointments currently serving any of these goals/purposes?
3. Is the Committee interested in continuing this discussion? If so, would it be useful to solicit input from stakeholders (such as the Governor's office; candidates who have been through the process; local Bar organizations that otherwise conduct some form of polling/vetting; local Bar organizations that do not do anything; others)?

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# OREGON STATE BAR

## Policy and Governance Committee Agenda

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**Meeting Date:** November 11, 2012  
**From:** Sylvia E. Stevens, Executive Director  
**Re:** Preference Polls for Circuit Court Appointments

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### **Action Recommended**

Consider whether to recommend that the Board resume conducting preference polls for circuit court appointments.

### **Background**

Pursuant to OSB Bylaw 2.701, the bar conducts preference polls of judicial candidates for statewide and circuit court elections. Pursuant to Bylaw 2.702, preference polls for circuit court appointments are conducted only “at the request of the Governors of the State of Oregon or the Board.”

Since about 2005, neither the governor nor the board has requested a poll for a circuit court appointment. Rather, the BOG has encouraged local bars to conduct an interview-based screening process similar to what the board uses for statewide judicial appointments. The Multnomah Bar Association’s judicial screening process is possibly the oldest most structured of the various county bar mechanisms. Many county bars do nothing formal in regard to their circuit court appointments.

Preference polls are disfavored by some as being nothing more than “popularity contests.” Proponents counter that many (if not most) bar members take the polls seriously, making their selections based on their knowledge of the candidates and their assessment of the candidates’ respective qualifications. Particularly in counties that don’t have a screening process (or where the county bar’s screening process is perceived to be flawed), a preference poll can provide valuable information to the governor.

Preference polls are relatively easy and inexpensive for the bar to administer.

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# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** February 22, 2013  
**From:** David Wade, Chair, Governance and Strategic Planning Committee  
**Re:** Preference Polls for Circuit Court Appointments

---

### **Action Recommended**

Approve the Governance and Strategic Planning Committee's recommendation to resume conducting preference polls for circuit court appointments.

### **Background**

Pursuant to OSB Bylaw 2.701, the bar conducts preference polls of judicial candidates for statewide and circuit court *elections*. Pursuant to Bylaw 2.702, preference polls for circuit court *appointments* are conducted only "at the request of the Governor of the State of Oregon or the Board."

Since about 2005, neither the Governor nor the board has requested a poll for a circuit court appointment. Preference polls for appointments were eliminated at the same time that the BOG stopped ranking its recommendations for appellate court appointments, at the request of the then-Governor.

In place of preference polls of bar members in the county/judicial district of the vacancy, the BOG has encouraged local bars to conduct an interview-based screening process similar to what the board uses for statewide judicial appointments. The Multnomah Bar Association's judicial screening process is possibly the oldest most structured of the various county bar mechanisms. Lane and Washington Counties have similar processes, but many county bars do nothing formal in regard to the circuit court appointments.

Preference polls are disfavored by some as being nothing more than "popularity contests." Proponents counter that many (if not most) bar members take the polls seriously, making their selections based on their knowledge of the candidates and their assessment of the candidates' respective qualifications. Particularly in counties that don't have a screening process (or where the county bar's screening process is perceived to be flawed), a preference poll can provide valuable information to the Governor and to the public.

Preference polls are relatively easy and inexpensive for the bar to administer electronically and will not impose a significant burden on staff.

## **2014**

### **Appointment Preference Polls**

**7<sup>th</sup> Judicial District, Position 3** *Hood River, Wasco, Sherman, Gilliam, and Wheeler Counties*

57% overall participation

<b>Karen Ostrye</b>	<b>32 votes</b> (Appointed by Gov. on June 6, 2014)
John T. Sewell	14 votes
Sheri L. Thonstad	5 votes
Timothy Farrell	2 votes
Carrie E. Rasmussen	2 votes

**20<sup>th</sup> Judicial District, Position 12** *Washington County*

23% overall participation

<b>Beth Roberts</b>	<b>48 votes</b> (Appointed by Gov. on March 5, 2014)
John S. Knowles	38 votes
Amy N. Velázquez	30 votes
Erik M. Buchér	23 votes
David G. Gannett	21 votes
Kellie F. Johnson	21 votes
David M. Veverka	16 votes
Mark John Holady	15 votes
Edward A. Kroll	11 votes
Grant Yoakum	10 votes
Theodore E. Sims	9 votes
Chris Burnett	8 votes
Edward S. McGlone	8 votes
Steven C. Burke	7 votes
Daniel E. Russell	5 votes
Brandon M. Thompson	5 votes
Conrad G. Hutterli	4 votes
Christopher A. McCormack	1 vote
Ian Jeffrey Slavin	1 vote

## **2013**

### **Appointment Preference Polls**

**1<sup>st</sup> Judicial District, Positions 2 and 3** *Jackson County*

60% overall participation

<b>Douglas M. McGeary</b>	<b>93 votes</b>
<b>Kelly W. Ravassipour</b>	<b>71 votes</b> (Appointed by Gov. on September 18, 2013)
Christian E. Hearn	53 votes
David G. Hoppe	39 votes
J Adam Peterson	35 votes (Appointed by Gov. on September 18, 2013)
James J. Stout	24 votes
Joseph M. Charter	20 votes
David J. Orr	11 votes
Allan E. Smith	7 votes

Nathan D. Wentz 6 votes

**2<sup>nd</sup> Judicial District, Position 15** *Lane County*

29% overall participation

**John H. Kim 85 votes**

Clara L. Rigmaiden 80 votes (Appointed by Gov. on September 6, 2013)

Megan I. Livermore 42 votes

Debra E. Velure 38 votes

Marshall L. Wilde 13 votes

Robert W. Rainwater 12 votes

**4<sup>th</sup> Judicial District, Position 19** *Multnomah County*

24% overall participation

**Michael A. Greenlick 254 votes** (Appointed by Gov. on September 6, 2013)

Eric L. Dahlin 185 votes

Geoffrey G. Wren 82 votes

Henry H. Lazenby Jr 80 votes

Diane Schwartz Sykes 70 votes

Steven A. Todd 70 votes

Melvin Oden-Orr 56 votes

James Gordon Rice 55 votes

Kellie F. Johnson 45 votes

Michael C. Zusman 42 votes

Sibylle Baer 41 votes

Charles R. Henderson 41 votes

Todd L. Van Rysselberghe 41 votes

Christopher Andrew Ramras 40 votes

Andrea J. Anderly 38 votes

Andrew Morgan Lavin 37 votes

Lissa K. Kaufman 31 votes

Richard A. Weill 29 votes

Christine Mascall 27 votes

Timothy Daly Smith 26 votes

Joshua P. Stump 16 votes

Rodney H. Grafe 11 votes

Jason E. Hirshon 9 votes

Christopher M. Clayhold 7 votes

Christopher A. McCormack 7 votes

Monica M. Smith-Herranz 7 votes

Lynne Dickison 8 votes

Marcia Lynn Ohlemiller 4 votes

Daniel E. Russell 3 votes

**16<sup>th</sup> Judicial District, Position 1** *Douglas County*

63% overall participation

**Ann Marie G. Simmons 24 votes** (Appointed by Gov. November 19, 2013)

Julie A. Zuver 18 votes

Steve H. Huddle 11 votes

Charles F. Lee	12 votes
Nancy E. Howe	4 votes

**19<sup>th</sup> Judicial District, Position 1** *Columbia County*

52% overall participation

<b>Cathleen B. Callahan</b>	<b>8 votes</b>
Jason A. Heym	7 votes
Teri L. Powers	7 votes
John N. Berg	5 votes
Jean M. Martwick	2 votes (Appointed by Gov. on September 30, 2013)

**20<sup>th</sup> Judicial District, Position 8** *Washington County*

18% overall participation

<b>John S. Knowles</b>	<b>34 votes tied for first place</b>
<b>Amy N. Velázquez</b>	<b>34 votes tied for first place</b>
Ricardo J. Menchaca	33 votes (Appointed by Gov. on September 6, 2013)
Michelle R. Burrows	26 votes
Beth L. Roberts	25 votes
Brandon M. Thompson	18 votes
David G. Gannett	15 votes
Mark John Holady	14 votes
Edward S. McGlone	11 votes
John C. Gerhard IV	10 votes
Daniel E. Russell	4 votes
Karen M. Wilson	4 votes



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# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** November 15, 2014  
**From:** Richard G. Spier, President-elect  
**Re:** Executive Director Selection Committee

---

### **Inform**

Based on discussions with the other members of the Executive Director Evaluation Special Committee, other BOG members, and staff, my present thought is that I will appoint an Executive Director Search Committee, effective January 1, 2015, constituted as follows:

- Ray Heysell, Chair
- One or two former OSB Presidents
- Four to six BOG members, one of whom will be appointed Vice-Chair, who will also be members of the 2015 Executive Director Evaluation Special Committee (interest in appointment may be indicated on the BOG assignment preference forms to be distributed at the November meeting)
- One or two director-level OSB employees
- Christine Kennedy, staff to the committee.

### **Discussion**

Accompanying this memo as exhibits to the agenda are the proposed new ED job description and the hiring process schedule. The process will culminate with a candidate recommended to the full BOG for consideration.

I invite your comments and suggestions.

---

# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** November 15, 2014  
**From:** Matt Kehoe, Executive Director Evaluation Special Committee Chair  
**Re:** Review Executive Director Job Description

---

### **Action Recommended**

The Executive Director Evaluation Special Committee recommends the Executive Director job description revised September 9, 2014.

### **Background**

The Committee met over the past few months to develop a timeline and revise the current job description in preparation for the Executive Director search. The revised job description is included for discussion by the full Board of Governors. The Committee recommends approval.

The Committee expects to begin advertising for candidates in February 2015.

## Position Description

Title of Position: <b>Executive Director</b>		Exempt: Yes
Department: Executive Services		Range: NA
Supervisor's Title: Board of Governors		FTE: 1.0

### **Overall Position Objective:**

Serves as the chief executive officer for the Oregon State Bar (OSB). Responsible for the day-to-day administration of the OSB.

### **Essential Duties:**

- Works with the board in articulating and implementing the OSB's mission and goals.
- Creates a strong integrated team environment which results in excellent staff morale.
- Models behavior and provides leadership that recognizes diversity and uses inclusive and culturally competent practices.
- Models behavior and provides leadership that promotes professionalism.
- Oversees implementation of all OSB programs and services, including planning, budgeting, financing, and implementing board directives.
- Develops the board agenda working closely with board officers, committee chairs, and key bar staff. Responsible for accurate board minutes.
- Supervises the election of bar officers, Board of Governors (BOG) members, and other elected bar representatives.
- Formulates and implements internal operating policies and procedures for the bar.
- Evaluates OSB operations, service delivery, and programs on the basis of measurable outcomes and reports the results of the measurement to the board.

- Serves as an official spokesperson for the OSB to the public and the media; oversees all other communication with the bar membership and the public.
- Assists the BOG with the development and implementation of long-term policy and planning.
- Prepares budget for BOG approval and supervises fiscal and budgetary matters of the bar including, but not limited to, negotiating and executing contracts; collecting debts owed to the bar; and acquiring, managing, and disposing of personal property related to the bar's operation.
- Develops and maintains effective communication with a broad constituency, including members of the bar, the Board of Governors, officers, local and specialty bar associations, law schools, the Professional Liability Fund, and other law-related membership entities.
- Creates, organizes, and participates in public speaking and public relations events on a frequent basis.
- Represents the bar and the Board of Governors before bar-related entities, the judicial system, the legislature, the membership, and the community.
- Responsible for the direct supervision of the managers and supervisors of the bar, excluding those staff working for the Professional Liability Fund.
- Directs and supervises management of all bar staff, including without limitation, hiring, training, scheduling, reviewing work, and evaluating performance of professional and non-professional staff.
- Monitors development and implementation of human resources policies assuring compliance with all appropriate laws and regulations.
- Performs other duties as imposed by the Bar Act, the Bar Bylaws, or as otherwise directed by the board.

**Other Duties:**

- Maintains contact with relevant national and state bar associations and professional groups.
- Serves as bar liaison to committees, sections, task forces and other groups.
- Other duties as assigned by the board.

## **Qualifications:**

- Graduation from an accredited law school; admission to the Oregon State Bar; five years of experience practicing in a law-related field in Oregon.
- Five years administration management experience including program planning, administration, evaluation, and budgeting as well as personnel selection, supervision, and evaluation.
- Three years of experience working with a governing body, such as a Board of Directors in a public, private, or non-profit organization.
- Experience representing or working with professionals and outreach to people from a variety of backgrounds.
- Successful experience working with a variety of internal and external groups including obtaining consensus and support for program initiatives and solutions.
- Combination of experience and training that demonstrates knowledge, understanding, and utilization of diversity and its related concepts and practices and cultural competency issues.
- Knowledge and understanding of public sector administrative and regulatory law, and of the legislative process.
- Demonstrated ability to work collaboratively and effectively with difficult issues at various levels of an organization.
- Strong organizational skills.
- Excellent presentation and written and oral communication skills.
- Excellent interpersonal and conflict management skills with strong ability to use tact.
- Evidence of successful use of project management and time management skills.
- Ability to work in a team environment.
- Ability to set priorities and work with various groups or individuals with conflicting demands.
- Ability to exercise professional demeanor and provide a high level of professional customer service for a potentially demanding customer base.

- Ability to exercise sound judgment in keeping with the objectives and policies of the Oregon State Bar.
- Evidence of excellent interpersonal communication, public speaking, public relations, and conflict management skills, including ability to communicate with a broad constituency.
- Any satisfactory equivalent combination of experience and training which ensures the ability to perform the work may be considered for the above.

**Job-Related Physical Characteristics:**

- Ability to communicate in person, in writing, by e-mail, and by telephone.
- Ability to operate a computer for long periods of time.
- Ability to remain in a stationary position for long periods of time.
- Ability to manipulate data for program purposes and typing.
- Ability to use standard office equipment and computer peripherals.
- Ability to travel overnight, inside and outside Oregon, for meetings, seminars, and conferences.
- Ability to work in a moderately noisy, open environment.
- Ability to perform as a public speaker.

**DRAFT**

**LEGAL TECHNICIAN'S TASK FORCE**

**FINAL REPORT TO THE BOARD OF GOVERNORS**

November, 2014

Introduction

In mid-2013, the Board of Governors through the Bar's President, Michael Haglund, established this Task Force to consider the possibility of the Bar's supporting a Limited License for Legal Technicians (LLLT)<sup>1</sup>, and if recommended, to outline the preliminary consideration and factors to be considered.

The task force was composed of 16 members, drawn from a variety of sources, including representatives from Legal Aid providers, young lawyers, the judiciary, Professional Liability Fund, Board of Bar Examiners, paralegal schools, and people with a history of working with and for self-represented litigants. In addition, other interested individuals attended some or all of the task force's meeting, representing various constituencies.

Members of the task force were: Gerald Brask, Hon. Suzanne Bradley Chanti, Michele Grable, Guy B. Greco, William J. Howe III, Bradley D. Maier, John J. Marandas, Hon. Maureen H. McKnight, Mitzi M. Naucler, Hon. Jill A. Tanner, Theresa L. Wright, Joshua L. Ross, Michael E. Haglund, Sylvia E. Stevens, Linda Odermott, and Sean Mazorol.

Executive Summary

At its November meeting, the Task Force determined to submit a proposal to the BOG, recommending the Bar proceed with exploring a plan to develop a Limited Licensed Technician program in Oregon, although not all Task Force members concur with this recommendation.

Should the Board decide to proceed with this concept, the Task Force recommends a new Board or Task Force be established to develop the detailed framework of the program, utilizing the Washington State program as a model.

Methodology

Beginning July 27, 2013, and through the end of the year, the Task Force met six

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<sup>1</sup> The Task Force utilized this name for purposes of discussion only, and recommends that a different permanent title be chosen, as "LLLT" seems a bit cumbersome.

times, approximately once per month for two to three hours each meeting.

Task Force members reviewed significant written material before the first meeting, and additional materials after that. These materials included: Paralegal Regulation by State; The Last Days of the American Lawyer by Thomas D. Morgan; numerous articles from the states of California, New York and Washington, and the country of Canada; OSB 1992 Task Force report; Appendix Apr 28 Regulations of the Apr 28 Limited License Legal Technician Board; WSBA Changing Profession – Challenges and Opportunities; Roadmap for Action – Lessons From the Implementation of Recent Civil Rules Projects; Oregon Family Courts – What’s new What’s to Come by SFLAC; OSB Referral Information Services statistics; a WSBA Webinar that included Regulation of the April 28 LLLT Board, WSBA Pathway to LLT Admission, and Program and Licensing Process; Protecting the Profession of the Public? By D. Rhode & L. Ricca; and The Incidental Lawyer by Jordan Furlong.

The Task Force spent a fair amount of time reviewing and discussing the 1992 Task Force report regarding the same subject and the outcome, and how this result could be different given the years that had passed in the interim. Most notably, the Task Force was cognizant of the fact that there are more people unable or unwilling to afford lawyers now than when the last report was issued, and no adequate solution has been found.

In addition, during the first two meetings, members discussed a variety of matters, including pros and cons of moving forward, access to justice, reasons for creating (or not creating) a Limited License, and other related matters. The October meeting was dedicated to a presentation from Paula Littlewood, Executive Director of the Washington Bar Association, about Washington’s efforts to create a Limited License Legal Technicians program. (See description below.) During the final meeting, the Task Force received reports from various subcommittees (see below), and determined the actions to recommend to the Board.

### Washington Program

Washington spent approximately two years in developing its Licensed Legal Technician’s program, so it is well thought out. The Task Force believes that, should the Board of Governors choose to proceed with the idea of Licensed Legal Technicians, that the plan be modeled after the Washington scheme. This includes educational and training requirements, along with “apprenticing.” Additionally, there are provisions for on-going continuing legal education and malpractice requirements. Their first class of Licensed Legal Technicians is in the area of family law.

In summary, the Washington scheme requires that the applicant be at least 18 years of age with a minimum of an Associate’s Degree. Additionally, applicants must complete 45 quarter



hours (or the equivalent) of legal students core curriculum<sup>2</sup>.

### Subcommittee Recommendations

After discussion, Task Force members determined that there were certain areas of law more conducive to non-attorney representation than others, discussed possible legislative amendments needed, and issues such as Continuing Legal Education and malpractice coverage. As a result, the Task Force formed the following Subcommittees to give close consideration to specific issues presented by the Subcommittee assignments:

The following three Subcommittees focused on implementation issues:

Implementing Legislation  
Client Protection/Ethics/Malpractice  
Education and Licensing

and the following focused on substantive legal issues:

Family Law  
Landlord/Tenant  
Estate Planning

Each of these Subcommittees presented a written report to the Task Force. These written reports are attached to this report as exhibits.

### Issues and Considerations Identified

The Task Force discussed the positives, negatives, and other factors to be considered to determine if Oregon should implement a Licensed Legal Technician program.

The major two factors the Task Force considered is the vast need for legal assistance for the low- to moderate- income populations, and the concern that the Legislature might proceed with proposed legislation if the Bar does not act itself with a preferred program.

Other factors discussed included:

Pro

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<sup>2</sup> Some or all of this educational requirement may be satisfied in the applicant's degree studies, provided the program is certified through the ABA or State Bar.

This is large step forward to providing access to justice for poor to moderate income Oregonians

Con

Legal Technicians could draw work away from new lawyers  
If ongoing legal education and malpractice coverage are required, can Limited License Technicians really charge much less than lawyers?  
How the Bar assure that Legal Technicians stay “within the lines?”

Other

Who pays for the initial implementation of the program?  
If Legal Technicians are required to have malpractice insurance, should it be through the PLF or other entity?  
Bar Act would need to be amended to allow this category of legal practitioner  
Supreme Court approval would also need to be sought  
Should Licensed Legal Technicians be allowed to choose forms for parties?  
Should Licensed Legal Technicians be required to have trust accounts?  
What about a Client Security Fund?  
What requirements should be statutorily imposed, and what left to the discretion of the governing board?  
How many of the above requirements should be statutory v. non?  
Should it matter where the LLLT’s office is located?  
How should Oregon handle LLLT’s working from other states?  
Should Oregon recognize LLLT’s who have obtain licensure from another state having similar requirements to Oregon’s?

There should be clarification as to the different responsibilities LLLT’s would have depending on whether they are under the direction and supervision of an attorney or not.

If the Bar follows the Washington scheme, the Bar/Supreme Court/Legislature should establish an entity separate from the Bar to administer the program.

Conclusions

In short, the Task Force recommends that the Board of Governors create a Licensed Legal Technician’s Board in Oregon similar to Washington’s. It further recommends that the Board begin with the suggestions developed by Task Force Subcommittees in doing its work. The Task Force also suggests that the first area that be licensed is family law, to include Guardianships.

**AMERICAN BAR ASSOCIATION**

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**To: ABA Entities, Courts, Bar Associations (state, local, specialty, and international), Law Schools, Disciplinary Agencies, Individual Clients and Client Entities**

**From: ABA Commission on the Future of Legal Services**

**Date: November 3, 2014**

**Re: Issues Paper on the Future of Legal Services**

## **I. Introduction**

The American Bar Association Commission on the Future of Legal Services is conducting a comprehensive examination of issues related to the delivery of, and the public's access to, legal services in the United States. This issues paper is intended to identify and elicit comments on topics that the Commission is currently exploring.

**The Commission takes no position on the matters addressed in this paper at this time.** Rather, the Commission expects to use any comments and supporting documents that it receives to supplement its research, decide which issues to address, and guide the development of various reports, proposals, and recommendations. Comments received by the Commission may be posted to the Commission's website and should be submitted by **Wednesday, December 10, 2014.**

## **II. Background**

Access to affordable legal services for the public is critical in a society based on the rule of law. The resolution of legal matters is growing more expensive, time-consuming, and complex. Many who need legal advice cannot afford to hire a lawyer and are forced to represent themselves. Even those who can afford legal services often do not use them or turn to less expensive law-related alternatives. For those whose legal problems require entry into the court system, various challenges arise due to serious underfunding of the courts.

At the same time, technology, globalization, economic, and other forces continue to transform how, why, and by whom legal services are accessed and delivered. Familiar and traditional practice structures are giving way in a marketplace that continues to evolve. New providers emerging online and offline offer a range of services in dramatically different ways.

The Commission has created six working groups to study these developments and draft recommendations and related work product for the Commission's consideration and possible approval:

- **Data on Legal Services Delivery.** This working group will assess the availability of current, reliable data on the delivery of legal services, such as data on the public's legal needs, the extent to which those needs are being addressed, and the ways in which legal and law-related services are being delivered; identify areas where additional data would be useful; and make existing data more readily accessible to practitioners, regulators, and the public.
- **Dispute Resolution.** This working group will assess developments, and recommend innovations, in: (a) court processes, such as streamlined procedures for more efficient dispute resolution, the creation of family, drug and other specialized courts, the availability of online filing and video appearances, and the effective and efficient use of interpreters; (b) delivery mechanisms, including kiosks and court information centers; (c) criminal justice, such as veterans' courts and cross-innovations in dispute resolution between civil and criminal courts; (d) alternative dispute resolution, including online dispute resolution services; and (e) administrative and related tribunals.
- **Preventive Law, Transactions, and Other Law-Related Counseling.** This working group will assess developments, and recommend innovations, in delivering legal and law-related services that do not involve courts or other forms of dispute resolution, such as contract drafting, wills, trademarks, and incorporation of businesses.
- **Access Solutions for the Underserved.** This working group will assess developments, and recommend innovations, in facilitating access to legal services for underserved communities.
- **Regulatory Opportunities.** This working group will study existing regulatory innovations, such as [Alternative Business Structures](#) in countries outside of the U.S. and Washington State's [Limited License Legal Technicians](#), as well as related developments, including the recently-released [Canadian Bar Association's Legal Futures Initiative](#) report. The working group will then recommend regulatory innovations that improve the delivery of, and the public's access to, competent and affordable legal services.
- **Blue Sky.** This working group will propose innovations that do not necessarily fit within the other working groups, but could improve how legal services are delivered and accessed, such as innovations developed in other professions to improve effectiveness and efficiency, collaborations with other professions, and leveraging technology to improve the public's access to law-related information.

### III. Issues for Public Input

To guide its work over the coming months, the Commission seeks comments on the following questions:

1. **Better service.**
  - a. **Clients.** How can the legal profession better serve clients of all types, including individuals, governments, corporations, and institutions?
  - b. **Potential clients.** How can the legal profession better serve people who currently cannot afford a lawyer, or who decide to use alternative service providers or go it alone?
2. **Most important problems in delivering legal and law-related services.**
  - a. **Dispute resolution/litigation.**
    - i. What are the most important problems in delivering legal and law-related services in dispute resolution/litigation?
    - ii. How do you think those problems should be addressed?
    - iii. What existing innovations should the Commission study?
    - iv. What ideas for new innovations do you have?
  - b. **Outside of dispute resolution/litigation.**
    - i. What are the most important problems in delivering legal and law-related services outside of dispute resolution/litigation (e.g., wills, contract drafting, trademarks, incorporation of businesses, etc.)?
    - ii. How do you think those problems should be addressed?
    - iii. What existing innovations should the Commission study?
    - iv. What ideas for new innovations do you have?
3. **Alternative providers and regulatory innovations.**
  - a. **No J.D./law license requirement.** Can access to legal services be improved if the pool of available providers is expanded to include people without a J.D. and full law license?
    - i. Will legal services become more affordable if people without a full law school education and law license are authorized to deliver legal services?
    - ii. How can the delivery of legal services be effectively regulated to prevent harm to consumers if the system of providers is expanded in these ways?
  - b. **Ownership interest in law firms.** To what extent should those who are not licensed to practice law be permitted to have an ownership interest in law firms?
  - c. **Other regulatory innovations.** What other kinds of regulatory innovations in the United States or other countries could help to improve the delivery of legal services (e.g., entity regulation and proactive risk-based management/compliance programs, such as those in Australia that have helped foster ethical infrastructures and reduced complaints against regulated firms)?

4. **Underserved communities.**
  - a. **Facilitating access.** How can we better facilitate access to civil and criminal legal services for underserved communities?
    - i. What services are most needed by those who are underserved?
    - ii. What barriers prevent them from accessing such services?
    - iii. What existing models or innovations have had the greatest impact on expanding access to legal services?
    - iv. What further innovations might help to expand access to legal services?
    - v. How can the profession help to educate the underserved about their legal needs and ways to address those needs?
  - b. **Facilitating delivery by small law practices.** How can small law practices (e.g., solo practitioners, lawyers in rural communities, small firm lawyers, etc.) sustainably represent those who do not have access to legal services?
    - i. What specific tools or innovations can lawyers leverage to reach this goal?
    - ii. What kind of new training might lawyers need to meet this goal?
5. **Policy changes.** To what extent should the Commission explore policy changes to improve access to legal services (e.g., recommending that the ABA lobby for changes to government policies that would improve the quality of, or access to, legal services)?
6. **Insights from other fields.** What insights might the legal profession gain from innovations in other professions, industries, or disciplines (e.g., WebMD, IBM Watson, technology advancements, design-thinking, project management, gamification, checklists, organizational psychology, etc.)?
7. **Data.** Significant amounts of data are available on lawyers, the delivery of legal services, and the legal needs of the public. What additional data is needed?
8. **Legal education and training.** In what ways should the profession address the findings of the [ABA Task Force on the Future of Legal Education Report](#)? What competencies and specialized training does the public expect and need from lawyers (problem-solving, familiarity with related disciplines, etc.)?
9. **Diversity and Inclusion.** How can the legal profession address diversity and inclusion in the recruitment and retention of practicing lawyers? What impact do diversity and inclusion have on the public's need for legal services? Would greater diversity and inclusion enhance access?
10. **Other considerations.**
  - a. **Specific issue or challenge.** Is there a specific issue or challenge regarding access to, or delivery of, legal services that has not been addressed by the above questions and that you think needs the Commission's attention? If so, what is the issue and why do you see it as important?

- b. **Other questions.** What other questions should the Commission consider that are not addressed above?

The Commission would particularly appreciate submitted comments with links to relevant resources and citations to specific examples, illustrations, and solutions. Any comments should be submitted by **Wednesday, December 10, 2014** to:

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# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** November 15, 2014  
**Memo Date:** October 31, 2014  
**From:** Rod Wegener, CFO  
**Re:** Revision to 2012-2013 Audit Opinion Letter

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### **Action Recommended**

Acknowledge receipt of the revised 2-page "Report of Independent Auditors" letter from Moss Adams.LLP.

### **Background**

During an internal review by Moss Adams of the bar's audit report for fiscal years 2012-2013, Moss Adams prepared a revised "Report of Independent Auditors" (exhibit following this memo). This 2-page letter is the lead in the audit report the board received at its June 27 meeting.

The only change in the revised letter is the addition of the paragraph under "Emphasis of Matter." This paragraph was included in the 2010-2011 letter, but incorrectly omitted in the 2012-2013 report the bar received. The paragraph states that the audit covers the bar's general fund only and does not include the PLF (although not specifically stated.)



## REPORT OF INDEPENDENT AUDITORS

The Board of Governors  
Oregon State Bar  
Oregon State Bar Fund

### **Report on the Financial Statements**

We have audited the accompanying statements of net position of the Oregon State Bar Fund (the Bar), as of December 31, 2013, and the related statements of revenues, expenses and changes in net position and cash flows for the two-year period then ended, and the related notes to the financial statements, as listed in the table of contents.

### ***Management's Responsibility for the Financial Statements***

Management is responsible for the preparation and fair presentation of these financial statements in accordance with accounting principles generally accepted in the United States of America; this includes the design, implementation, and maintenance of internal control relevant to the preparation and fair presentation of financial statements that are free from material misstatement, whether due to fraud or error.

### ***Auditor's Responsibility***

Our responsibility is to express opinions on these financial statements based on our audit. We conducted our audit in accordance with auditing standards generally accepted in the United States of America and the standards applicable to financial audits contained in *Government Auditing Standards*, issued by the Comptroller General of the United States. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free from material misstatement.

An audit involves performing procedures to obtain audit evidence about the amounts and disclosures in the financial statements. The procedures selected depend on the auditor's judgment, including the assessment of the risks of material misstatement to the financial statements, whether due to fraud or error. In making those risk assessments, the auditor considers internal control relevant to the entity's preparation and fair presentation of the financial statements in order to design audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of the entity's internal control. Accordingly, we express no such opinion. An audit also includes evaluating the appropriateness of accounting policies used and the reasonableness of significant accounting estimates made by management, as well as evaluating the overall presentation of the financial statements.

We believe that the audit evidence we have obtained is sufficient and appropriate to provide a basis for our audit opinion.

## REPORT OF INDEPENDENT AUDITORS (continued)

### ***Opinion***

In our opinion, the financial statements referred to above present fairly, in all material respects, the financial position of the Oregon State Bar Fund as of December 31, 2013, and the respective changes in financial position and cash flows, where applicable thereof for the two-years then ended in conformity with accounting principles generally accepted in the United States of America.

### ***Emphasis of Matter***

As discussed in Note 1, the financial statements present only the Oregon State Bar Fund and do not purport to, and do not, present fairly the financial position of the Oregon State Bar as of December 31, 2013, and the changes in its financial position, or, where applicable, its cash flows for the two-year period ended December 31, 2013 in conformity with accounting principles generally accepted in the United States of America.

### ***Other Matter***

#### *Required Supplementary Information*

Accounting principles generally accepted in the United States of America require that the Management's Discussion and Analysis on pages 3 through 7, and the Schedule of Funding Progress Other Postemployment Benefit Plans on page 28 be presented to supplement the basic financial statements. Such information, although not part of the basic financial statements, is required by Governmental Accounting Standards Board, who considers it to be an essential part of financial reporting for placing the basic financial statements in an appropriate operational, economic, or historical context. We have applied certain limited procedures to the required supplementary information in accordance with auditing standards generally accepted in the United States of America, which consisted of inquiries of management about the methods of preparing the information and comparing the information for consistency with management's responses to our inquiries, the basic financial statements, and other knowledge we obtained during our audit of the basic financial statements. We do not express an opinion or provide any assurance on the information because the limited procedures do not provide us with sufficient evidence to express an opinion or provide any assurance.

### ***Other Reporting Required by Government Auditing Standards***

In accordance with *Government Auditing Standards*, we have also issued our report dated June 12, 2014 on our consideration of the Bar's internal control over financial reporting and on our tests of its compliance with certain provisions of laws, regulations, contracts, and grant agreements and other matters. The purpose of the report is to describe the scope of our testing of internal control over financial reporting and compliance and the results of that testing, and not to provide an opinion on the internal control over financial reporting or on compliance. That report is an integral part of an audit performed in accordance with *Government Auditing Standards* and should be considered in assessing the results of our audit.

*Moss Adams LLP*

Portland, Oregon  
June 12, 2014

**Oregon State Bar**  
**Meeting of the Board of Governors**  
September 5, 2014  
**Open Session Minutes**

The meeting was called to order by President Tom Kranovich at 1:00 p.m. on September 5, 2014. The meeting adjourned at 5:00 p.m. Members present from the Board of Governors were Jenifer Billman, James Chaney, Hunter Emerick, R. Ray Heysell, Matthew Kehoe, Theresa Kohlhoff, John Mansfield, Audrey Matsumonji, Caitlin Mitchel-Markley, Travis Prestwich, Joshua Ross, Richard Spier, Simon Whang, Timothy Williams and Elisabeth Zinser. Not present were Patrick Ehlers and Charles Wilhoite. Staff present were Sylvia Stevens, Helen Hirschbiel, Rod Wegener, Susan Grabe, Kay Pulju, Dawn Evans, Judith Baker, Dani Edwards and Camille Greene. Also present was Ben Eder, ONLD Chair; and Guy Greco, PLF Board of Directors.

**1. Call to Order/Adoption of the Agenda**

**Motion:** Ms. Mitchel-Markley moved, Mr. Kehoe seconded, and the board voted unanimously to accept the agenda as presented.

**2. Report of Officers & Executive Staff**

**A. Report of the President**

Mr. Kranovich reported that he'd had a busy several weeks. He commented specifically on the meetings with the Chief Justice and the Awards Committee. He spoke at OLIO and noted that the criteria for participating in OLIO have expanded. He also gave a speech on professionalism at Willamette Law School's orientation session.

**B. Report of the President-elect**

In writing.

**C. Report of the Executive Director**

In addition to her written report, Ms. Stevens reported on the meeting with attorneys from Ukraine at the Bar Center.

**D. Director of Regulatory Services**

In addition to her written report, Ms. Evans reported that they are making a concerted effort to work on the oldest open cases in her department.

**E. Director of Diversity & Inclusion**

No report.

**F. MBA Liaison Reports**

Mr. Whang reported on the September 3, 2014 MBA board meeting.

## G. Oregon New Lawyers Division Report

Mr. Eder announced the ONLD CLE which will be held in conjunction with the OSB Litigation Section. The ONLD participated in a rafting trip with OLIO. Karen Clevering is the ONLD Chair for 2015.

### 3. Professional Liability Fund [Mr. Zarov]

In Mr. Zarov's absence, Mr. Greco announced that Carol Bernick was hired to replace Mr. Zarov as Chief Executive Officer when he retires at the end of September. Former Board of Directors member John Berge was hired as a claims attorney. Mr. Greco submitted a general update on the PLF's positive financial status and discussed the potential for a pro-rated assessment for part-time lawyers as well as monthly payments.

Mr. Greco asked the board to approve the PLF 2015 budget and assessment. The assessment will remain at \$3500, unchanged from 2014. **[Exhibit A]**

**Motion:** Mr. Kehoe moved, Mr. Prestwich seconded, and the board voted unanimously to approve the PLF 2015 budget and assessment as requested.

**Motion:** Mr. Kehoe amended his motion to include the provision to adjust the PLF budget to reflect the same salary increase in the OSB budget when approved by the BOG at its meeting in November. Mr. Prestwich seconded, and the board voted unanimously to approve the amended motion.

Mr. Greco asked the board to approve the recommended changes to PLF Policy 7.700 which will make excess coverage "continuity credit" discretionary. **[Exhibit B]**

**Motion:** Mr. Mansfield moved, Mr. Spier seconded, and the board voted unanimously to approve the changes to PLF Policy 7.700 as requested.

Mr. Greco asked the board to approve the recommended changes to PLF Policy 3.250 – Step-Rated Assessment. Changes in the step-rated assessment amounts will benefit new attorneys since the economics of law practice have become more problematic. This change will have a cost, but in recent years the PLF balance sheet has been very positive. **[Exhibit C]**

**Motion:** Mr. Emerick moved, Mr. Kehoe seconded, and the board voted unanimously to approve the changes to PLF Policy 3.250 as requested. Mr. Spier abstained.

### 4. OSB Committees, Sections and Councils

#### A. Legal Ethics Committee

Ms. Hirschbiel announced that the committee will have a proposed amendment to RPC 1.2(c) for the board's approval in October. If so, the delegate resolution already submitted asking the BOG to formulate the same amendment will be moot. **[Exhibit D]**

#### B. Legal Services Program Committee

Ms. Baker presented the proposed updates to the Legal Services Program Standards and Guidelines for the board's approval. **[Exhibit E]**

**Motion:** Ms. Zinser moved, Mr. Heysell seconded, and the board voted to approve the committee's requested changes.

**C. Client Security Fund Committee**

Ms. Stevens asked the board to consider the claimant's request for review of the CSF Committee's denial of CSF claim CONNALL(Briggs)2014-11. **[Exhibit F]**

**Motion:** Mr. Williams moved, Mr. Kehoe seconded, and the board voted to uphold the committee's denial of the claim.

Ms. Stevens asked the board to approve the committee's claims recommended for payment. **[Exhibit G]**

**Motion:** Mr. Emerick moved, Mr. Kehoe seconded, and the board voted to approve payment of claim 2013-48 BERTONI (Monroy) in the amount of \$5000.00.

**Motion:** Ms. Matsumonji moved, Mr. Chaney seconded, and the board voted to deny payment of claim 2014-01 McCARTHY (Snellings) in the amount of \$7000.00. Ms. Mitchel-Markley, Mr. Prestwich, Mr. Ross and Ms. Billman voted no. Mr. Emerick, Mr. Kehoe, and Mr. Williams abstained. All others voted in favor of the motion.

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

**A. Board Development Committee**

Ms. Mitchel-Markley updated the board on the committee's actions and asked for approval of the 2015 BOG Public Member appointment of Kerry L. Sharp. **[Exhibit H]**

**Motion:** The board approved the committee motion on a unanimous vote.

**B. Budget and Finance Committee**

Mr. Emerick informed the board on bar-related financial matters.

**C. Governance and Strategic Planning Committee**

Mr. Spier asked the board to consider the Committee's recommendation to sunset the OSB Federal Practice and Procedure Committee.

**Motion:** The board approved the committee motion on a unanimous vote.

Mr. Spier asked the board to pursue legislation that will create an out-of-state region for the Board of Governors, represented on the board by one lawyer-member. **[Exhibit I]**

**Motion:** The board approved the committee motion. Mr. Kehoe, Ms. Kohlhoff and Ms. Zinser were opposed. All others voted in favor of the motion.

**D. Public Affairs Committee**

Mr. Prestwich updated the board on the latest legislative activity, the status of the bar's list of law improvement proposals, and the upcoming election. He updated the board on the request by the Legal Services Corporation (LSC) to support proposed legislation in the U.S. Senate to give the Federal Deposit Insurance Corporation (FDIC) protection to IOLTA accounts held in credit unions.

**E. Executive Director Selection Special Committee**

Mr. Kehoe and Ms. Billman discussed the process for selecting a new executive director and for drafting the job description. Materials will be sent to board members for input.

**F. International Trade in Legal Services Task Force**

Ms. Hirschbiel explained that this is the first piece of the task force's recommendations and is presented now to be in time for the November HOD agenda. She explained the committee's analysis and recommendation to expand RPC 5.5 to allow for temporary practice by lawyers trained outside the US. . **[Exhibit J]**

**Motion:** Mr. Whang moved, Mr. Spier seconded, and the board voted to adopt the task force's recommendation to amend RPC 5.5(c) and to put it on the 2014 HOD agenda. Mr. Kehoe, Mr. Heysell, Ms. Mitchel-Markley and Ms. Kohlhoff were opposed. All others voted in favor of the motion.

**G. OSB Awards Nominations Committee**

Ms. Pulju asked the board to approve the committee's nominations. Mr. Kranovich nominated Judge Alfred Goodwin for a second Wallace P. Carson, Jr. Award. **[Exhibit K]**

**Motion:** The board voted unanimously to accept the committee's nominations with Mr. Kranovich's additional nominee.

**6. Other Action Items**

Ms. Edwards asked the board to approve the appointments to various bar committees and boards. **[Exhibit L]**

**Motion:** Ms. Matsumonji moved, Mr. Whang seconded, and the board voted unanimously to approve the various appointments.

Mr. Spier informed the board of the status and procedure for ongoing strategic planning by this board and future boards.

Ms. Kohlhoff asked the board to endorse Ballot Measure 89. After discussion, the matter died for lack of a motion.

Ms. Pulju asked the board to approve the four recommendations in the proposed CLE Seminars business model. **[Exhibit M]**

**Motion:** Mr. Spier moved, Mr. Williams seconded, and the board voted to approve and direct staff to carryout recommendation #1 in the proposed business model.

The board agreed to have the OSB Accounting department carryout recommendation #2 in the proposed business model.

**Motion:** Ms. Mitchel-Markley moved, Mr. Prestwich seconded, and the board voted to send recommendations #3 & #4 in the proposed business model to the MCLE committee for further review.

Mr. Spier informed the board that the nominating committee had interviewed the two candidates for 2015 President-elect and would be following up to confer with the remaining

board members. He expects the committee's selection will be announced by the end of September.

**7. Consent Agenda**

**Motion:** Mr. Spier moved, Mr. Chaney seconded, and the board voted unanimously to approve the consent agenda of past meeting minutes and a section's name change request. **[Exhibit N]**

**8. Closed Sessions – see CLOSED Minutes**

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

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

Ms. Stevens reported on Lewis & Clark Law School's announcement that it will be closing its low-income legal services clinic in May 2015.

DRAFT

**Oregon State Bar  
Board of Governors Meeting  
September 5, 2014  
Executive Session Minutes**

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

A. Pending or Threatened Non-Disciplinary Litigation

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

B. Other Matters

The BOG discussed the Executive Director Evaluation. No action taken.

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# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** September 5, 2014  
**Memo Date:** August 20, 2014  
**From:** Ira Zarov – PLF CEO  
**Re:** 2015 PLF Assessment and Budget

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### **Action Recommended**

Approve the 2015 Budget and Assessment.

### **Background**

On an annual basis, the Board of Governors approves the PLF budget and assessment for the coming year. The Board of Directors proposes that the assessment remain at \$3500 (unchanged from 2014). The attached materials contain the proposed budget and recommendations concerning the assessment.

The highlights of the budget include a 3% salary pool, a \$200,000 contribution to the OSB for BarBooks and a new Practice Management Advisor position. The overall increase to the 2015 budget is 3.31 percent higher than the 2014 budget. The main reasons for the increases are the 3% salary increase and related benefits costs, new loss prevention position, the E&O premium, employee training and travel, scanning of old claims, and the ongoing update of the PLF website.

Attachments

August 12, 2014

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

From: Ira Zarov, Chief Executive Officer  
Betty Lou Morrow, Chief Financial Officer

Re: 2015 PLF Budget and 2015 PLF Primary Assessment

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### **I. Recommended Action**

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

1. Approve the 2015 PLF budget as attached. This budget uses a 2015 salary pool recommendation of **3.0%**. This recommendation has been made after consultation with Sylvia Stevens.
2. Make a recommendation to the Board of Governors concerning the appropriate 2015 PLF Primary Program assessment. We recommend that the 2015 assessment be \$3,500, which is the same amount as the past four years.

### **II. Executive Summary**

1. In addition to the aforementioned 3% salary pool, the medical benefits have increased by 1.09%, as a percentage of total salaries. One (1) FTE claims attorney position was eliminated through attrition. The OAAP PMA staffing was increased by 1 FTE.
2. The actuarial 2015 Assessment study estimates a cost of \$2,731 per lawyer for new 2015 claims. This budget also includes a margin of \$150 per lawyer for adverse development of pending claims.

### **III. 2015 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 7,064 full-pay attorneys for 2014. For the past five years, the average annual growth of full-pay attorneys has been .92 percent. We have chosen to use the growth rate of 1% for 2015 which translates to 7135 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. Covered attorneys dropped 5.2% from 2012 to 2013, and 3.1% year to date 2013 to 2014. For those reasons we have chosen a decline of 3% from 2014 levels to 2015. This will translate to a total of 2110 covered attorneys through our Excess program in 2015.

#### **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:

	<b><u>2014 Projections</u></b>	<b><u>2015 Budget</u></b>
Administration	9.00 FTE	9.00 FTE
Claims	19.75 FTE	18.75 FTE
Loss Prevention (includes OAAP)	13.58 FTE	14.58 FTE
Accounting	7.95 FTE	7.95 FTE
<b>Total</b>	<b>50.28 FTE</b>	<b>50.28 FTE</b>

We continue to have some permanent positions staffed at less than full-time levels for both 2014 and 2015. 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.

During the first half 2014, two Claims Attorneys, and a Claims Secretary retired. One of the attorneys and the claims secretary will be replaced. An additional OAAP attorney has been hired and will start in the fall of 2014.

The Accounting Supervisor will retire in August of 2014. Her position will be filled at a full time equivalent but the duties will be reduced and the salary will reduce accordingly.

The two IT staff that had previously been budgeted in Administration are now included in the Accounting budget to follow their line of supervision.

The CEO announced his retirement and will be finished at the PLF in September of 2014. His replacement has been hired and will start in October of 2014.

#### **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 2015 allocation of salary, benefits and overhead is about 15.73 percent of total administrative operating expense. This is HIGHER than the percentage used in the 2014 budget (14.35 percent).

### **Primary Program Revenue**

Projected assessment revenue for 2014 is based upon the \$3,500 basic assessment paid by an estimated 7,064 attorneys. The budget for assessment revenue for 2015 is based upon a \$3,500 assessment and 7,135 full-pay attorneys.

Investment returns were better than expected for the first six months of 2014. However, in doing the 2014 full year projections we used the more conservative rolling seven year return at March 31, 2014. That provided an overall rate of 6.11%. Our investment consultants recommended 6% for 2015 so we used the 6.11% for 2015 as well. While the percentage chosen is significantly lower than nearer term results (i.e. a period shorter than seven years) it reflects the ongoing conservative expectations of our investment consultants.

### **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.

The 2014 budget included \$1,076,700 (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, 2014 actuarial review of claim liabilities recommended an increase of about \$71,375 as a result of adverse development of pending claims. This amount is so small as to be immaterial so we have let the budgeted number stand as is.

Primary Program new claims expense for 2015 was calculated using figures from the actuarial rate study. The study assumed a frequency rate of 13 percent, 7,135 covered attorneys and an average claim cost of \$21,000. Multiplying these three numbers together gets a 2015 budget for claims expense of \$19.5 million. This would also translate to about 926 claims at \$21,000 for 2015.

We have added a margin of \$150 per covered lawyer to cover adverse development of claims pending at the start of 2015. 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 \$1,070,250 (\$150 times the estimated 7,135 covered attorneys). The concept of using a margin will be discussed again in the staff recommendation section regarding the 2015 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 three percent salary pool increase is recommended for 2015. 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 \$40,908 in PLF salary expense and \$18,887 in PLF benefit costs. The total cost of the three percent salary pool is less than one half of one percent of total expenses (0.3 percent). Comparing the PLF to local employers, Multnomah County has identified 2.7% as the COLA factor they have used in their 2015 budget. They have also identified 1.5% as an additional merit/step increase pool. (<https://multco.us/file/35347/download>)

Because all salary reclassifications cannot be accomplished within the three percent salary pool allocation, we are also requesting \$35,000 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 are stable in the current biennium which ends July 2015. We are budgeting the rates for the entirety of 2015 however as we will do an adjustment in July

2015 to the projected budget when we know what the change, if any, will be. Best research on the topic currently is revealing nothing around any potential changes. It should be noted however that in 2015 many of the new staff hired in 2014 are now PERS eligible, so that increases the cost of PERS, even in the absence of an overall increase.

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. We have included about a 2 percent increase for the cost of medical and dental insurance.

### **Capital Budget Items**

The two major capital purchases in 2015 will be new servers for our IT infrastructure and new AV equipment for the Boardroom.

There is a three year plan laid out to expand the existing infrastructure creating efficiencies in our data processing and also creating heightened security and crash resistance. The first of the three years is 2014 and we have already purchased servers in this fiscal year. The second and third year in the plan is 2015 and 2016.

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 2015. Historically this equipment has been budgeted at \$25,000 so we have left it at that. However, we will be carefully researching best possible technologies matching our needs without under or over buying.

### **Other Primary Operating Expenses**

**Professional Services** have increased over projected 2014 by about 32%. The majority of this increase is to cover the cost of scanning 2013 claims files, the cost of continuing with the creation of the new PLF website, and a sizeable increase to investment consultant fees (from \$27,000 to \$40,000). The updates to the website in 2015 will include online renewal applications for the Excess program and the development of templates for Universe web interface.

**Auto, Travel, and Training** has increased substantially from 2014 projected due to the addition of new staff in Loss Prevention and the anticipation that new staff members across the organization will require training and offsite travel to bring them up to speed in their positions. Additionally, monies have been allocated for a consultant to provide training to the Claims Attorneys on the Universe database software.

**Defense Panel Program** has increased over 2014 as the bi-annual Defense Panel Conference will be held in 2015. An increase of 10% over 2013 conference costs has been allowed. 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.

**Insurance** expense in the 2015 budget is higher than 2014 as we are actively seeking out E&O coverage for the claims attorneys. This coverage was removed in 2013 as the premiums were deemed to high subsequent to the effect of significant payout on a claim made against the PLF. We are working to find a carrier that will provide adequate coverage at a reasonable premium and deductible. We have budgeted \$55,000 premium for that coverage. We expect to hear back from the broker by the end of August 2014. Note that we do have D&O coverage still in place.

**OSB Bar Books** 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.

Contingency for 2015 has been set at 3%. 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 2014, the contingency budget was raised to 4% of operating costs to cover potential succession costs.

### **Total Operating Expenses and the Assessment Contribution to Operating Expenses**

Page one of the budget shows projected 2014 Primary Program operating costs to be about 5% lower than the budget amount.

The 2015 Primary Program operating budget is 3.31% percent higher than the 2014 budget. The main reasons for the increases are the 3% salary increase and related benefits costs, new LP position, the E&O premium, employee training and travel, scanning of old claims, and the ongoing



update of the PLF website.

### **Excess Program Budget**

The major focus of this process is on the Primary Program and the effects of the budget on the 2015 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. Staff is actively working with AON and the reinsurers to create a more competitive premium structure as well as providing additional claims information at both the primary and excess levels.

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 \$760,000 for 2015. This represents an expectation of the commission remaining flat from expected 2014 levels.

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 2014 projections or 2015 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. For the 2015 budget year we have removed all directly charged Excess staff salaries and benefits. We are now allocating all staff positions related to Excess as no staff person spends 100% of their time involved in Excess related work.

### **IV. Actuarial Assessment Study for 2015**

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 2015 claims. It relies heavily on the analysis contained in the actuaries' claim liability study as of June 30, 2014. The methodology used in that study is discussed by separate memorandum. The rate study only calculates the cost of new 2015 claims. It does not consider adjustments to pending claims, investment results, or administrative operating costs.

The actuaries estimate the 2015 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 2015 claims frequency rate of 13 percent and \$21,000 as the average cost per claim (severity). We feel the \$21,000 severity factor is appropriate given the increases in claim expense severity since 2008. The actuaries' chosen frequency rate is 13%, the same rate as used in 2014. The actuaries prefer the result found with this second method. Their indicated average claim cost is \$2,731 per attorney, which is \$1 more than 2014. This amount would only cover the estimated funds needed for 2015 new claims.

It is necessary to calculate a provision for operating expenses not covered by assessment revenue. As can be seen in the budget, the estimate of assessment revenue does not cover the budget for operating expenses. The 2015 shortfall is about \$586 per lawyer assuming 7,135 full-pay lawyers. This is an increase of \$11 or 2% from 2014.

In their Year 2015 Assessment report, the actuaries discuss the theoretical and practical considerations of having a margin (additional amount) in the calculated assessment to cover operational shortfalls and adverse claims development. 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 shortfall expense portion of \$586 per lawyer to the actuaries' indicated claim cost of \$2,731, you would have an assessment of \$3,316. We feel that it is appropriate to include a margin of \$150 per attorney for in year adverse development of pending claims. This allows for a budget of about \$1.3 million for adverse development of pending claims. Over the past six years the in year adverse claims development margin has been as low as \$100 (2009) and as high as \$300 (2012).

An assessment of \$3,500 would allow a projected budget profit of about \$245,472.

Because of good financial results for 2013 and the first six months of 2014, the PLF currently has positive combined Primary and Excess retained earnings of about \$11.8 million. The Board of Directors has a long-term goal of \$12 million positive retained earnings. A 2015 assessment with some margin makes it more likely continued 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 2015. Accordingly, we recommend setting the 2015 Primary Program assessment at \$3,500.

The Finance Committee will discuss the actuarial report during its telephone conference meeting at 9:30 a.m. on August 12, 2014 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 August 14, 2014.

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**OREGON STATE BAR  
PROFESSIONAL LIABILITY FUND  
2015 PRIMARY PROGRAM BUDGET  
Presented to PLF Board of Directors on August 14, 2014**

	<u>2012 ACTUAL</u>	<u>2013 ACTUAL</u>	<u>2014 BUDGET</u>	<u>2014 PROJECTIONS</u>	<u>2015 BUDGET</u>
<b><u>Revenue</u></b>					
Assessments	\$24,803,326	\$25,042,533	\$25,123,000	\$24,722,389	\$24,972,500
Installment Service Charge	394,631	391,097	390,000	391,000	335,000
Investments and Other	<u>4,364,988</u>	<u>4,364,988</u>	<u>2,692,264</u>	<u>4,254,239</u>	<u>2,702,765</u>
Total Revenue	<u>\$29,562,945</u>	<u>\$29,798,618</u>	<u>\$28,205,264</u>	<u>\$29,367,628</u>	<u>\$28,010,265</u>
<b><u>Expenses</u></b>					
<b>Provision for Claims</b>					
New Claims	\$20,908,307	\$18,225,493	\$19,595,940	\$19,278,000	\$19,478,550
Pending Claims	<u>(\$2,435,227)</u>	<u>(\$133,446)</u>	<u>\$1,076,700</u>	<u>\$1,076,700</u>	<u>\$1,070,250</u>
Total Provision for Claims	<u>\$18,473,080</u>	<u>\$18,092,047</u>	<u>\$20,672,640</u>	<u>\$20,354,700</u>	<u>\$20,548,800</u>
<b>Expense from Operations</b>					
Administration	\$2,200,578	\$2,482,372	\$2,482,372	\$2,389,557	\$2,552,652
Accounting	748,742	637,662	637,662	785,895	827,287
Loss Prevention	1,824,653	2,070,773	2,070,773	1,911,333	2,139,706
Claims	<u>2,398,157</u>	<u>2,640,466</u>	<u>2,640,466</u>	<u>2,395,228</u>	<u>2,570,768</u>
Total Operating Expense	\$7,172,130	\$7,831,273	\$7,831,273	\$7,482,013	\$8,090,412
Contingency	23,693	0	314,701	0	242,712
Depreciation	175,500	166,575	169,800	168,527	174,800
Allocated to Excess Program	<u>(1,135,822)</u>	<u>(1,135,160)</u>	<u>(1,145,155)</u>	<u>(1,121,002)</u>	<u>(1,291,933)</u>
Total Expenses	<u>\$24,708,581</u>	<u>\$24,954,735</u>	<u>\$27,843,259</u>	<u>\$26,884,238</u>	<u>\$27,764,791</u>
Net Income (Loss)	<u>\$4,854,364</u>	<u>\$4,843,883</u>	<u>\$362,005</u>	<u>\$2,483,390</u>	<u>\$245,474</u>
Number of Full Pay Attorneys	7,030	7,093	7,104	7,064	7,135

**CHANGE IN OPERATING EXPENSES:**

Increase from 2014 Budget	3.31%
Increase from 2014 Projections	8.13%

**OREGON STATE BAR  
PROFESSIONAL LIABILITY FUND  
2015 PRIMARY PROGRAM BUDGET  
CONDENSED STATEMENT OF OPERATING EXPENSE  
Presented to PLF Board of Directors on August 14, 2014**

<u>Expenses</u>	<u>2012 ACTUAL</u>	<u>2013 ACTUAL</u>	<u>2014 BUDGET</u>	<u>2014 PROJECTIONS</u>	<u>2015 BUDGET</u>
Salaries	\$3,984,100	\$4,145,086	\$4,333,390	\$4,137,733	\$4,279,989
Benefits and Payroll Taxes	1,395,115	1,457,187	1,613,525	1,469,131	1,630,430
Professional Services	289,644	331,128	319,630	337,261	410,092
Auto, Travel & Training	95,137	92,557	96,650	99,350	178,225
Office Rent	511,782	521,138	530,879	512,379	520,065
Office Expense	136,526	133,569	136,250	143,250	146,250
Telephone (Administration)	36,564	48,675	57,960	47,000	49,560
L P Programs	389,839	373,908	434,544	417,719	485,394
OSB Bar Books	200,000	200,000	200,000	200,000	200,000
Defense Panel Program	0	9,970	1,500	2,000	11,979
Insurance	70,793	71,471	39,145	36,340	94,928
Library	31,047	32,659	33,000	39,000	39,000
Memberships & Subscriptions	20,512	21,458	22,200	35,000	35,000
Interest & Bank Charges	11,071	5,213	12,600	9,500	9,500
<b>Total Operating Expenses</b>	<b><u>\$7,172,130</u></b>	<b><u>\$7,444,018</u></b>	<b><u>\$7,831,273</u></b>	<b><u>\$7,485,663</u></b>	<b><u>\$8,090,412</u></b>
Allocated to Excess Program	<u>(\$1,099,826)</u>	<u>(\$1,105,104)</u>	<u>(\$1,120,789)</u>	<u>(\$1,096,636)</u>	<u>(\$1,264,472)</u>
<b>Full Time Employees (See Explanation)</b>	<b>44.56</b>	<b>43.88</b>	<b>45.88</b>	<b>50.86</b>	<b>51.28</b>
<b>Number of Full Pay Attorneys</b>	<b>7,030</b>	<b>7,093</b>	<b>7,104</b>	<b>7,064</b>	<b>7,135</b>
<b>Non-personnel Expenses</b>	<b>\$1,792,915</b>	<b>\$1,841,746</b>	<b>\$1,884,358</b>	<b>\$1,878,799</b>	<b>\$2,179,993</b>
Allocated to Excess Program	<u>(\$275,635)</u>	<u>(\$278,874)</u>	<u>(\$270,406)</u>	<u>(\$270,406)</u>	<u>(\$338,705)</u>
<b>Total Non-personnel Expenses</b>	<b><u>1,517,280</u></b>	<b><u>1,562,872</u></b>	<b><u>1,613,952</u></b>	<b><u>1,608,393</u></b>	<b><u>1,841,288</u></b>

**CHANGE IN OPERATING EXPENSES:**

Increase from 2014 Budget	3.31%
Increase from 2014 Projections	8.08%

**OREGON STATE BAR  
PROFESSIONAL LIABILITY FUND  
2015 PRIMARY PROGRAM BUDGET  
ADMINISTRATION**

**Presented to PLF Board of Directors on August 14, 2014**

<u>Expenses</u>	<u>2012 ACTUAL</u>	<u>2013 ACTUAL</u>	<u>2014 BUDGET</u>	<u>2014 PROJECTIONS</u>	<u>2015 BUDGET</u>
Salaries	\$632,504	\$641,274	\$807,152	\$755,854	\$733,389
Benefits and Payroll Taxes	231,342	238,566	296,206	254,723	269,643
Staff Travel	23,832	21,363	19,550	19,250	23,050
Board of Directors Travel	38,011	35,514	39,000	39,000	40,000
Training	9,701	8,947	15,000	12,000	20,000
Investment Services	27,719	28,018	28,000	28,000	40,000
Legal Services	13,251	13,738	13,000	12,000	3,500
Actuarial Services	18,900	19,731	22,000	19,000	25,000
Information Services	86,814	136,221	97,600	134,705	111,000
Offsite System Backup	0	0	0	0	0
Electronic Record Scanning	52,035	47,086	65,000	60,000	65,000
Other Professional Services	65,375	63,734	70,230	60,956	139,592
Pro Services - Medicare Reporting	3,850	0	0	0	0
OSB Bar Books	200,000	200,000	200,000	200,000	200,000
Office Rent	511,782	521,138	530,879	512,379	520,065
Equipment Rent & Maint.	36,000	38,672	39,000	44,000	44,000
Dues and Memberships	20,512	21,458	22,200	35,000	35,000
Office Supplies	51,613	51,661	52,000	69,000	70,000
Insurance	70,793	71,471	39,145	36,340	94,928
Telephone	36,564	48,675	57,960	47,000	49,560
Printing	8,573	7,629	9,000	3,000	5,000
Postage & Delivery	37,715	33,400	34,750	25,750	25,750
NABRICO - Assoc. of Bar Co.s	9,996	10,959	10,600	10,600	27,175
Bank Charges & Interest	11,071	5,213	12,600	9,500	9,500
Repairs	2,625	2,207	1,500	1,500	1,500
Miscellaneous	<u>0</u>	<u>0</u>	<u>0</u>	<u>0</u>	<u>0</u>
<b>Total Operating Expenses</b>	<b><u>\$2,200,578</u></b>	<b><u>\$2,266,674</u></b>	<b><u>\$2,482,372</u></b>	<b><u>\$2,389,557</u></b>	<b><u>\$2,552,652</u></b>
 Allocated to Excess Program	 <u>(\$430,118)</u>	 <u>(\$430,857)</u>	 <u>(\$461,595)</u>	 <u>(\$426,696)</u>	 <u>(\$563,239)</u>
 <b>Administration Full Time Employees</b>	 8.75	 8.00	 10.00	 9.00	 9.00
 <b>CHANGE IN OPERATING EXPENSES:</b>					
Increase from 2014 Budget			2.83%		
Increase from 2014 Projections			6.83%		

**OREGON STATE BAR  
PROFESSIONAL LIABILITY FUND  
2015 PRIMARY PROGRAM BUDGET  
ACCOUNTING**

**Presented to PLF Board of Directors on August 14, 2014**

	<u>2012</u> <u>ACTUAL</u>	<u>2013</u> <u>ACTUAL</u>	<u>2014</u> <u>BUDGET</u>	<u>2014</u> <u>PROJECTIONS</u>	<u>2015</u> <u>BUDGET</u>
<b><u>Expenses</u></b>					
Salaries	\$542,180	\$584,637	\$445,453	\$554,768	\$566,781
Benefits and Payroll Taxes	183,646	199,808	162,909	206,027	222,006
Travel	178	544	1,500	500	5,000
Financial Audit	21,700	22,600	23,800	22,600	26,000
Training	<u>1,038</u>	<u>1,687</u>	<u>4,000</u>	<u>2,000</u>	<u>7,500</u>
 Total Operating Expenses	 <u>\$748,742</u>	 <u>\$809,276</u>	 <u>\$637,662</u>	 <u>\$785,895</u>	 <u>\$827,287</u>
 Allocated to Excess Program	 <u>(\$128,721)</u>	 <u>(\$111,674)</u>	 <u>(\$90,264)</u>	 <u>(\$112,050)</u>	 <u>(\$119,057)</u>
 <b>Accounting Full Time Employees</b>	 6.10	 5.95	 5.95	 7.95	 7.95
 <b>CHANGE IN OPERATING EXPENSES:</b>					
Decrease from 2014 Budget			29.74%		
Decrease from 2014 Projections			5.27%		

**OREGON STATE BAR  
PROFESSIONAL LIABILITY FUND  
2015 PRIMARY PROGRAM BUDGET  
LOSS PREVENTION (Includes OAAP)  
Presented to PLF Board of Directors on August 14, 2014**

	<u>2012 ACTUAL</u>	<u>2013 ACTUAL</u>	<u>2014 BUDGET</u>	<u>2014 PROJECTIONS</u>	<u>2015 BUDGET</u>
<b><u>Expenses</u></b>					
Salaries	\$1,053,974	\$1,065,411	\$1,189,806	\$1,094,563	\$1,194,861
Benefits and Payroll Taxes	380,840	390,424	446,423	402,701	459,451
In Brief	44,854	46,731	62,000	71,782	70,000
PLF Handbooks	5,872	4,949	6,000	6,000	6,000
Library	436	389	500	400	5,000
Video and Audio Tapes	35,454	44,382	35,000	30,000	32,000
Mail Distribution of Video and Audiotape	11,949	14,607	12,000	14,000	14,000
Web Distribution of Programs	24,180	25,215	18,000	25,000	20,000
Program Promotion	28,664	16,863	20,000	18,000	22,000
Expense of Closing Offices	15,861	3,691	10,500	4,000	10,500
Facilities	47,282	42,828	47,000	45,000	47,000
Speaker Expense	(1,311)	4,466	5,000	2,500	5,000
Accreditation Fees	1,632	1,205	1,600	1,000	1,600
Beeepers & Confidential Phone	4,107	5,110	5,000	5,210	5,300
Expert Assistance	300	0	5,000	2,000	5,000
Bad Debts from Loans	0	0	0	0	0
Memberships & Subscriptions	11,053	10,517	11,400	10,623	14,150
Travel	36,171	26,541	34,500	23,860	43,600
Training	25,038	25,420	41,300	24,250	42,500
Downtown Office	98,297	100,992	119,744	130,444	141,744
Miscellaneous	<u>0</u>	<u>0</u>	<u>0</u>	<u>0</u>	<u>0</u>
<b>Total Operating Expenses</b>	<b><u>\$1,824,653</u></b>	<b><u>\$1,829,743</u></b>	<b><u>\$2,070,773</u></b>	<b><u>\$1,911,333</u></b>	<b><u>\$2,139,706</u></b>
<b>Allocated to Excess Program</b>	<b><u>(\$202,122)</u></b>	<b><u>(\$209,540)</u></b>	<b><u>(\$225,930)</u></b>	<b><u>(\$209,248)</u></b>	<b><u>(\$241,636)</u></b>
<b>L P Depart Full Time Employees (Includes OAAP)</b>	<b>11.83</b>	<b>11.83</b>	<b>13.58</b>	<b>14.58</b>	<b>14.58</b>
<b>CHANGE IN OPERATING EXPENSES:</b>					
			<b>3.33%</b>		
			<b>11.95%</b>		



**OREGON STATE BAR  
PROFESSIONAL LIABILITY FUND  
2015 PRIMARY PROGRAM BUDGET  
CLAIMS DEPARTMENT**

Presented to PLF Board of Directors on August 14, 2014

	2012	2013	2014	2014	2015
	<u>ACTUAL</u>	<u>ACTUAL</u>	<u>BUDGET</u>	<u>PROJECTIONS</u>	<u>BUDGET</u>
<b><u>Expenses</u></b>					
Salaries	\$1,755,442	\$1,853,764	\$1,890,979	\$1,732,548	\$1,784,958
Benefits and Payroll Taxes	599,287	628,388	707,987	605,680	679,331
Claims Audit	0	0	0	0	0
Training	9,758	8,577	3,000	12,000	49,000
Travel	2,623	4,966	4,000	4,000	6,500
Library & Information Systems	31,047	32,659	33,000	39,000	39,000
Defense Panel Program	<u>0</u>	<u>9,970</u>	<u>1,500</u>	<u>2,000</u>	<u>11,979</u>
Total Operating Expenses	<u>\$2,398,157</u>	<u>\$2,538,325</u>	<u>\$2,640,466</u>	<u>\$2,395,228</u>	<u>\$2,570,768</u>
Allocated to Excess Program	<u>(\$338,865)</u>	<u>(\$353,033)</u>	<u>(\$343,000)</u>	<u>(\$348,642)</u>	<u>(\$340,540)</u>
Claims Depart Full Time Employees	17.88	18.10	20.33	19.75	18.75
<b>CHANGE IN OPERATING EXPENSES:</b>					
Decrease from 2014 Budget			-2.64%		
Increase from 2014 Projections			7.33%		

**OREGON STATE BAR  
PROFESSIONAL LIABILITY FUND  
2015 PRIMARY PROGRAM BUDGET  
CAPITAL BUDGET**

**Presented to PLF Board of Directors on August 14, 2014**

	<u>2012 ACTUAL</u>	<u>2013 ACTUAL</u>	<u>2014 BUDGET</u>	<u>2014 PROJECTIONS</u>	<u>2015 BUDGET</u>
<b><u>Capital Items</u></b>					
Furniture and Equipment	\$21,188	\$0	\$10,000	\$8,000	\$7,000
Telephone	0	0	5,000	0	0
Copiers / Scanners	71,253	0	8,500	2,500	5,000
Audiovisual Equipment	0	0	25,000	0	25,000
Data Processing					
Hardware	9,434	0	12,000	12,000	22,000
Software	5,574	0	6,000	4,000	6,000
PCs, Ipads and Printers	27,077	0	7,500	7,500	7,500
Leasehold Improvements	<u>1,700</u>	<u>0</u>	<u>5,000</u>	<u>15,000</u>	<u>5,000</u>
Total Capital Budget	<u>\$136,226</u>	<u>\$0</u>	<u>\$79,000</u>	<u>\$49,000</u>	<u>\$77,500</u>

**Increase from 2014 Budget -1.90%**

**Increase from 2014 Projections 58.16%**

**OREGON STATE BAR  
PROFESSIONAL LIABILITY FUND  
2015 EXCESS PROGRAM BUDGET**  
Presented to PLF Board of Directors on August 14, 2014

	<u>2012 ACTUAL</u>	<u>2013 ACTUAL</u>	<u>2014 BUDGET</u>	<u>2014 PROJECTIONS</u>	<u>2015 BUDGET</u>
<b><u>Revenue</u></b>					
Ceding Commission	733,700	747,993	760,000	675,000	760,000
Profit Commission	32,599	32,069	0	0	0
Installment Service Charge	37,180	41,433	42,000	41,500	42,000
Other	1,478	7,913	1,500	6,900	69,001
Investment Earnings	<u>429,191</u>	<u>330,352</u>	<u>202,643</u>	<u>355,101</u>	<u>203,434</u>
Total Revenue	<u>\$1,234,148</u>	<u>\$1,159,760</u>	<u>\$1,006,143</u>	<u>\$1,078,501</u>	<u>\$1,074,435</u>
<b><u>Expenses</u></b>					
Allocated Salaries	\$608,431	\$599,356	\$621,781	\$621,781	\$672,520
Direct Salaries	66,984	73,078	76,512	0	0
Allocated Benefits	215,760	226,874	228,602	228,602	253,247
Direct Benefits	23,050	24,120	28,400	27,684	0
Program Promotion	6,070	3,922	7,500	7,500	7,500
Investment Services	2,282	1,982	2,500	2,500	2,500
Allocation of Primary Overhead	275,635	278,874	270,406	278,874	338,705
Reinsurance Placement Travel	3,933	369	5,000	500	5,000
Training	0	0	500	500	500
Printing and Mailing	5,301	4,035	5,500	5,500	5,500
Other Professional Services	1,345	0	2,000	2,000	2,000
Software Development	0	0	0	0	0
Total Expense	<u>\$1,208,791</u>	<u>\$1,212,611</u>	<u>\$1,248,701</u>	<u>\$1,175,441</u>	<u>\$1,287,472</u>
Allocated Depreciation	<u>\$35,996</u>	<u>\$30,056</u>	<u>\$24,366</u>	<u>\$30,056</u>	<u>\$27,461</u>
Net Income	<u>(\$10,639)</u>	<u>(\$82,907)</u>	<u>(\$266,924)</u>	<u>(\$126,996)</u>	<u>(\$240,498)</u>
Full Time Employees	1.00	1.00	1.00	0.00	0.00
Number of Covered Attorneys	2,313	2,193	2,395	2,175	2,140

**CHANGE IN OPERATING EXPENSES:**

Increase from 2014 Budget	3.10%
Increase from 2014 Projections	9.53%

# Rudd and Wisdom, Inc.

## CONSULTING ACTUARIES

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Philip J. Ellis, A.S.A.  
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August 6, 2014

Mr. Ira Zarov  
Ms. Betty Lou Morrow  
Oregon State Bar Professional  
Liability Fund  
Post Office Box 1600  
Lake Oswego, Oregon 97035-0889

Re: Year 2015 Assessment

Dear Ira and Betty Lou:

At your request, we have analyzed the PLF Primary Fund's historical claims data available through June 30, 2014. Based on this analysis, we have projected the expected claim cost for the Primary Fund for the Calendar Year 2015 (CY 2015) and developed recommendations concerning the CY 2015 assessment for the Primary Fund.

Our assignment for this study was to focus on a projection of the Primary Fund's projected claim cost for CY 2015. We have not attempted to address the impact of investment income, installment surcharges, underwriting expenses or unallocated loss adjustment expenses. Based on our analysis we estimate that the PLF Primary Fund's CY 2015 average claim cost per attorney will lie in a range of \$2,100 to \$3,190 (see table on page 7 of this report) with an indicated average claim cost of \$2,730 per attorney.

At June 30, 2014, the PLF Primary Fund has retained earnings (the equivalent of surplus for an insurance company) of approximately \$11.8 million. The Primary Program had net income of approximately \$2.5 million for the first six months of 2014. At June 30, 2000, the PLF Primary Fund had retained earnings in excess of \$7 million. Shortly after that, a combination of claims experience and investment results eliminated the Primary Fund's surplus. With a recent history of negative retained earnings, it is important that the PLF Primary Fund charge an adequate rate and add a

margin to regenerate surplus. Net investment income and installment surcharges offset part of the PLF's operating expenses. A supplement to provide for operating expenses is also appropriate. As stated above, a pure premium in the neighborhood of \$2,730 per attorney for the 2015 claim year is reasonably likely to cover the Primary Fund's claim costs. If the Primary Fund covers approximately 7,100 full pay attorneys in CY 2015, then the Primary Fund should expect to increase its surplus by approximately \$710,000 for each \$100 that the assessment rate exceeds the Fund's claim and administrative costs on a per-attorney basis.

In our claim reserve report dated August 5, 2014 we recommended that the Primary Fund keep at least \$5 million of surplus to be able to absorb adverse claim or investment experience which may occur in the future. We also described an approach for quantifying desired surplus levels using statistical confidence levels. In prior studies, we have noted the need for caution in establishing assessment rates for the PLF Primary Fund. This has not changed, and there are several reasons for the Board to exercise caution in setting the rate at this time.

1. The Fund's frequency has been volatile varying from a low rate of 11.4% in 1990 to a high rate of 14.7% in 2004. It has also varied significantly from year to year. This volatility makes it difficult to predict the Fund's frequency for a given year.
2. The Fund's claim costs have had a moderately positive trend since 1993, indicating that claim costs are increasing. Since 1999, the average claim cost per attorney has hovered in a range of \$2,300 to \$3,000 after being in the \$1,800 to \$2,000 range for most of the 1990's. The 2000 and 2001 claim years are the exceptions, as the average claim cost in 2000 spiked to \$3,214 and the claim cost in 2001 dropped to \$1,958.
3. The market value of the Fund's assets has been volatile, producing large gains in some years and losses in others during the past 20 years.
4. The Fund currently has a surplus position of approximately \$8.5 million. This is a good position for the Fund. It must be noted, however, that the Primary Fund had accumulated a \$10 million surplus at the end of 1999 that evaporated rather quickly due to bad investment and claim experience. Volatile asset values tend to exacerbate a low or negative surplus position. Surplus enables an insurance company or fund to withstand adverse experience (whether it is due to claims or asset values) without having to take drastic measures.

## **Data and Methodology**

The analysis utilizes case incurred amounts for indemnity and expense as of June 30, 2014, provided by the PLF staff. The term "case incurred" is used herein to describe the estimated value placed on a claim by the PLF staff. The value includes both the paid and unpaid portions of the claim. The indemnity and expense components of incurred claims for each semiannual reporting period are reviewed separately. These amounts have been developed based on actuarial development factors, which are used to estimate the amount by which ultimate losses can be expected to differ from the case incurred amounts established by the PLF. We make this determination by analyzing the actual periodic changes (measured at semiannual intervals) in case incurred amounts. The purpose of this approach is to adjust for any pattern of over or under-reserving by the PLF staff that may have appeared in the experience data.

The methodology and judgment utilized in selecting the actuarial development factors for this review are consistent with that utilized in our determination of reserves for unpaid losses as of June 30, 2014. While the development factors used in this analysis represent our best judgment concerning future development patterns, it should be noted that attorneys professional liability insurance is a volatile line of business that is affected by legislation, judicial interpretation and the economy. This may cause future development patterns to differ from those exhibited in the claim data at June 30, 2014.

The PLF has provided information concerning the historical and estimated future number of full pay equivalent attorneys. This has provided the basis for the exposure data used in our analysis. The number of full pay attorneys is determined as the total assessment for a given year divided by the assessment rate for the year. Effective with the 2006 plan year, the PLF reduced the discounts given to attorneys with limited prior PLF coverage ("step rating"). This distorts the calculation of the number of full pay attorneys as the same number and distribution of attorneys will now generate more assessment dollars. Based on data from 2001 through 2005, this change generates approximately 2% more assessment dollars and therefore 2% more full pay equivalent attorneys. Seven years ago, we adjusted the number of full pay attorneys for 2006 and 2007 to get the exposure data on a basis consistent with prior years. For this analysis the change in the number of full pay equivalent attorneys does not appear to have a material impact on the results. For that reason we have used the unadjusted number of full pay equivalent attorneys as provided.

In this analysis, we have concentrated only on the claim costs. We have made no calculations of 2015 investment income or operating expenses. It is our understanding that the PLF staff will include a discussion of those factors in their recommendations regarding the 2015 assessment.

### **Provision for Claims**

The foundation for the determination of a provision for claims is the expected claim cost for the assessment period. This analysis anticipates a calendar year 2015 assessment period with the bulk of the policies written January 1, 2015. To determine the expected claim cost for this period, we used the following approach:

1. Claims experience was analyzed for calendar years 1983 through 2013. The ultimate incurred claims used in this analysis are the same as those determined in connection with our estimate of PLF Primary Fund reserves as of June 30, 2014. We have described the methodology used in that determination in separate correspondence.

Exhibit 1 presents a summary of this analysis, including ultimate incurred claims, number of claims, frequency, severity, and claim cost for calendar years 1983 through 2013. The average claim cost per attorney for calendar years 1983 through 2013 is displayed in the column captioned "Untrended Claim Cost." The untrended claim cost is determined by dividing (a) the ultimate incurred claim amounts reported during each calendar year by (b) the attorney exposure for that year. Therefore, the claim cost represents the average incurred claims for an average attorney insured for the full calendar year. The values described above are also displayed for the first six months of 2014.

There is a special claim situation for this study. In 2012 and 2013, 160 claims were reported from a single attorney. The aggregate limit for these claims is \$350,000. We have valued those claims at \$220,000 for indemnity and \$130,000 for expense. For claim count and frequency purposes, these claims were treated as a single claim. To do otherwise would distort our results.

2. The current coverage limits (\$300,000 per claim) have been in place since 1987. We have focused our analysis on the experience period, which includes calendar years 2004 through 2013. We note that a \$25,000 claim expense allowance was implemented in 1995 and an additional \$25,000 claim expense allowance (for a total of \$50,000) was added in 2005. The experience for periods since 1995

reflects the first allowance. Only the 2005 through 2013 experience reflects the second expense allowance. We do not believe that the impact of the second allowance on claims expense is significant enough to invalidate the use of data from previous periods in our analysis. We have omitted the 2014 claims from the experience period because these claims are new, and there is only six months of data. Each calendar year claim cost is trended to the middle of CY 2015, the approximate midpoint of the exposure to be incurred during the assessment period. The purpose of trending is to recognize the tendency of claim costs to increase over time.

3. Selecting an appropriate trend rate is an important step in applying the methodology described above. The 1996 - 2013 experience period indicates a trend of approximately 2.0%. Between 1992 and 1998, claim costs were flat (i.e., no measurable trend) with values in a range of \$1,800 to \$2,000 per attorney. The 1999 and later claim years give the trend line an upward slope because average claim cost increased by approximately \$560 per attorney in 1999 and the average cost has been in the mid to high \$2,000 range since that time. The net effect of this experience is that it is difficult to select a specific trend. However, we note that the Primary Fund's claim cost trend has generally been in the 1% to 3% range.
4. Having established a framework for reviewing the claims experience, we must develop a method for determining the expected cost of claims to be reported in CY 2015. For this purpose, we have employed two different approaches:
  - a. Based on the analysis described in (1) through (3) above we have selected a range of claim cost trends that we believe to be appropriate. These trends are applied to each calendar year's untrended claim cost to produce for each calendar year a range of claim costs trended to July 1, 2015. The averages of these trended claim costs provide a range of expected claim costs for claims to be reported in 2015. These calculations are displayed in Exhibit 1.
  - b. As an alternative to the approach described above we have used the claims data and professional judgment to select a range of claim frequencies and a range of average claim severities. Multiplying the claim frequencies by the average severities also produces a range of expected claim costs. This approach is displayed in Exhibit 2.



5. For each of the methods described above parameters representing expected future claim experience must be selected. The following paragraphs describe our rationale for the parameters we have selected.
- a. As stated above, the first method requires the selection of appropriate trend rates for annual claim costs. In Exhibit 1, we have selected 1.00%, 2.00%, and 3.00% trends for our range of values. As we noted in the reserve report, the selection of beginning and ending points can have a significant impact on the conclusions about average trend rates. Depending on the period selected, the PLF Primary Fund has had claim cost trends in the 1% to 3% range.
  - b. To implement the second method, selection of appropriate claim frequency and claim severity parameters is required. At the low end, we have selected a 12% frequency and a \$17,500 average severity. Since 1995, there have been only five years with claim frequencies less than 13%. It should be noted that the frequency since 2012 (including the first six months of 2014) has been less than 13%. The average claim size has been at or below \$17,500 in four of the past 13 years. Even so, these parameters would be characterized as optimistic.

The indicated estimate is based on 13.00% frequency and \$21,000 severity. These are the same parameters we employed in the assessment study we performed last year. The PLF Primary Fund's average frequency since 2003 is 13.1% if we ignore the 160 claims generated by the one attorney in 2012 and 2013. The average frequency since 2003 is 13.3% if we include those claims. The claim frequency for 2012 and 2013 is less than 13% without the 160 claims. The Primary Fund experienced claim frequency of 13% or higher every year between 1997 and 2005. The frequency for 2008 through the 2011 averaged 13.60% after two years at 11.90%. We believe that we should pick parameters that give the program a good chance to be adequate.

The Primary Fund's average claim size (i.e., severity) is a more difficult selection. Between 1993 and 1998, the average severity never exceeded \$14,500, falling in a range of \$12,600 to \$14,500. In 1999, severity jumped to \$16,530 and spiked to \$23,593 in 2000. The average claim severity for the last 10 years is \$19,411 without the 160 claims and \$19,066 with those claims. Over the past five years it has been \$20,077 without the 160 claims and \$19,403 with those claims. Based on recent experience, we believe that \$21,000 will prove to be an adequate severity estimate for 2015 claims.

With a surplus of approximately \$11.8 million, we believe that the Board should set the assessment rate for 2014 to cover the claim cost and operating expenses. At the current surplus level, the need to increase the Primary Fund's retained earnings is not as important as it has been in prior years.

At the upper end of the range, we have selected a 14.5% frequency and a \$22,000 average severity. The PLF Primary Fund has experienced frequency in excess of 14% in 1995, 1999, 2004, and 2009. Two of the ten full years since 2004 have produced an average severity at or above \$21,000. The first half of 2014 is also above \$21,000. The average severity for claim year 2000 (\$23,593) is the largest in the Fund's history.

- c. We have noted in the past that attorneys professional liability insurance is a volatile line of business. It is reasonable to expect that there will be years in the future that will have significantly higher than expected claim costs. Years with lower than expected claim costs are also to be expected. This uncertainty with regard to future experience suggests the need for caution in rating.
6. The table below summarizes our estimates of the CY 2015 expected claim cost.

<i>Estimate</i>	<i>Method 1 Average Trended Claim Cost</i>	<i>Method 2 Frequency x Severity</i>
Low	\$ 2,719	\$ 2,100
Indicated	2,899	2,730
High	3,093	3,190

These results are not significantly different from the analysis we did last year. The results from Method 1 are slightly lower in this year's analysis than the corresponding values from last year's study. The results from Method 2 are identical to the results from last year because we used the same parameters. As a check on the reasonableness of the results from Method 2, we have determined the trend rates applied to the average trended claim costs over the 2004 – 2013 period, which produce expected claim costs approximately the same as the three estimates. A negative 2.20% trend reproduces the low estimate, while a 0.90% trend produces the indicated estimate and a 2.75% trend is needed for the high estimate. These determinations were made to provide additional perspective to the analysis. The Method 1 calculations are presented in Exhibit 1. The Method 2 calculations are presented in Exhibit 2.

### **Rating Margin: Theoretical Considerations**

Generally, it is appropriate to include in an insurance rate a provision for adverse deviation from expected experience. The purpose of this rating margin is to increase the insurance organization's chances for rating adequacy by making a reasonable provision for adverse fluctuation in claims experience.

Because this methodology utilizes the average trended claim cost from the experience period, statistically, there is a 50% probability that actual results will be better than expected and a 50% probability that actual results will be worse than expected, assuming the trend factor provides an appropriate basis for projection. The typical insurance organization considers it prudent to increase its probability of success substantially above the 50/50 position. This is accomplished by establishing a rating margin either statistically, based on the observed fluctuations in the experience data, or subjectively, based on actuarial and management judgment.

It is sometimes appealing to establish the margin based on a mathematical measure of the statistical fluctuation observed in the experience data, e.g., the standard deviation. Frequently, however, the data is not sufficiently credible for such a purpose and, in any event, the approach may be too esoteric. As a result, it is often convenient and equally effective to establish the margin based on a subjectively chosen percentage of the expected claim cost. The selection of the percentage margin requires management to exercise judgment based on the organization's willingness to accept risk, its ability to withstand adverse experience, its position in the competitive market, etc.

The ability of the typical insurance organization to withstand adverse experience depends in part on the adequacy of its surplus (the equivalent of the PLF Primary Fund's retained earnings). A strong surplus position permits a lower rating margin, while a weaker surplus position would require a larger margin. Likewise, an organization's surplus relative to its surplus goal might also influence management's judgment regarding the margin to be included in its rates.

The PLF's unique circumstances allow it to be significantly less conservative than a commercial insurer in establishing its rates. The mandatory participation requirement and PLF's ability to establish future assessments to fund prior deficits provide at least as much protection against adverse experience as a strong surplus position provides to the typical commercial insurer. As a result, a rating margin is not nearly as important to the PLF Primary Fund as it is to the typical insurer and management has more

discretion in the judgment it exercises in this regard. While there is certainly an argument to be made that under normal circumstances the PLF Primary Fund should incorporate no margin in its rating, some consideration may be in order concerning minimizing the frequency of rate adjustments, retained earnings position and goals, etc.

### **Rating Margin: Practical Considerations**

The PLF's unique circumstances allow it to be significantly less conservative than a commercial insurer in establishing rates. Nevertheless, there are several considerations, which indicate that under certain conditions some additional margin in the rate may be appropriate:

1. The Primary Fund presently has a reasonable amount of positive retained earnings. A margin in the assessment rate would enable the Primary Fund to increase its retained earnings and provide a better cushion to absorb adverse claim experience, such as a higher than expected number of reported claims or adverse development on existing and future claims. This point is not as important as it has been in past years. However, the Primary Fund's current surplus should not be considered excessive.
2. The Primary Fund's assets are reported at market value, and investment results vary from year to year. The PLF uses asset allocation to limit volatility but investment income can not be predicted precisely for rating purposes. Thus, investment risk, as well as claim risk, becomes an important consideration in the rating process.

In spite of the considerations listed above, there are also factors, which indicate that an additional margin in the rate may not be needed at this time:

1. Attorneys are required to participate in the PLF's Primary Fund, and the PLF has the ability to set future rates at whatever level it deems necessary to maintain the financial soundness of the Fund.
2. The PLF also operates an Excess Fund to provide attorneys with coverage in excess of \$300,000. The Excess Fund currently (through May 31, 2014) has retained earnings of approximately \$2.7 million. While the accounting on the two Funds is separate and it is not the goal of the PLF staff for the Excess Fund to subsidize the Primary Fund, the assets of the two Funds are commingled, and nothing prevents the two Funds from supporting each other financially.

3. Unlike other members of NABRICO, the PLF’s Primary Fund is not constrained by competition. Since the coverage is mandatory, the PLF has the ability to assess policyholders to meet the Primary Fund’s financial needs without fear of losing market share. The staff and Board of Directors of the PLF believe that they have an obligation to the attorneys of the state of Oregon not to abuse this privilege. Thus, they are reluctant to overreact to adverse experience. They will implement rate increases when experience clearly dictates that increases are required.

For your consideration, we have developed expected CY 2015 claim costs without a margin and with 10% and 15% margins. A 10% margin is subjective and is a commonly used level in much of our rate work with other insurance entities. For the values displayed in Exhibit 1, one standard deviation is approximately 15% of the expected claim cost. The table below summarizes our estimates of the CY 2015 claim costs:

<i>Claim Cost Estimates</i>	<i>Expected CY 2015 Average Claim Cost</i>					
	<i>Average Trended Claim Cost Method</i>			<i>Frequency x Severity Method</i>		
	<i>No Margin</i>	<i>10% Margin</i>	<i>15% Margin</i>	<i>No Margin</i>	<i>10% Margin</i>	<i>15% Margin</i>
Low	\$2,719	\$2,991	\$3,127	\$2,100	\$2,310	\$2,415
Indicated	2,899	3,189	3,334	2,730	3,003	3,140
High	3,093	3,402	3,557	3,190	3,509	3,669

Prior to 1999, we had recommended rates that proved (with the benefit of hindsight) to be too high. The rates proposed for the 2000 through 2004 rate studies have proven to be inadequate. For the 2000 through 2014 policy years, we have projected pure premiums (i.e., claim costs) between \$1,958 and \$2,768. At this point, we believe that the actual claim costs for those years will be between \$1,843 and \$3,214. The table below summarizes these results:

<i>Policy Year</i>	<i>Expected Claim Cost at Time of Study</i>	<i>Estimated Claim Cost at 6/30/2014</i>
2000	\$ 1,958	\$ 3,214
2001	1,980	1,958

<i>Policy Year</i>	<i>Expected Claim Cost at Time of Study</i>	<i>Estimated Claim Cost at 6/30/2014</i>
2002	2,160	2,338
2003	2,236	2,623
2004	2,228	2,542
2005	2,520	2,556
2006	2,538	2,204
2007	2,544	1,869
2008	2,470	3,015
2009	2,527	3,067
2010	2,633	2,538
2011	2,730	2,574
2012	2,700	2,571
2013	2,768	2,558
2014	2,730	2,569

We believe that \$2,730 per attorney is reasonably likely to cover the cost of 2015 claims. This is identical to the claim cost we proposed in the analysis we performed last year. This value reflects the same frequency (13.00%) and claim severity (\$21,000) that we used last year. Please note that this rate is based on professional judgment and a focus on recent claim experience.

### **Important Considerations**

#### ***Credibility***

Attorneys professional liability insurance is a low frequency, high severity exposure. Accordingly, a block of attorneys professional liability insurance policies generates lower credibility than a similar-sized block of a high frequency, low severity exposure like automobile insurance. Due to its size and nature, the PLF Primary Fund's block of business does not possess as much credibility as an actuary would prefer in developing rates. While one would prefer to enhance the predictability of

experience by relying upon an outside source of data to compliment PLF Primary Fund's actual experience, we do not believe that any reasonably comparable body of data exists. This is the result of the lack of industry loss data for this line of coverage and the tremendous variations in risk among jurisdictions. We believe that the economic and judicial climate that exists in Oregon is substantially different from that of other jurisdictions. In addition, due to its mandatory nature, the PLF Primary Fund claim experience can be expected to be substantially different from that of other jurisdictions. This difference renders loss data developed in other jurisdictions inapplicable for the purpose of establishing rates for Oregon attorneys. Accordingly, despite expected weaknesses in the credibility of the historical data, we believe it is the best basis for establishing PLF Primary Fund rates.

### ***Retained Earnings***

We understand that the PLF Primary Fund has a goal of maintaining a level of retained earnings (surplus) sufficient to stabilize assessments. The question of how much surplus the PLF Primary Fund should maintain has been considered. In our reserve report dated August 5, 2014, we have discussed an approach that may help the PLF Primary Fund quantify its desired surplus level. It is clear to us that it is beneficial for the Primary Fund to have some surplus. It is also clear that the PLF was not established for the purpose of making a profit. The mandatory nature of the PLF Primary Fund and its ability to assess covered attorneys suggests a significantly smaller amount of surplus than would be appropriate for a commercial insurer or for one of the PLF's sister organizations in other states.

### ***Miscellaneous Issues***

Attorneys professional liability insurance has been a volatile line of coverage subject to sudden adverse change. To the extent that unexpected adverse occurrences influence the PLF Primary Fund's experience, projections of expected claim cost and the assessment based on these conclusions could prove inadequate. Significant upward trends in the claim cost of attorneys professional liability insurance have occurred in some jurisdictions. The potential for change makes periodic rate analyses necessary. We suggest that these analyses continue to be performed on an annual basis.

While the PLF must cope with the uncertainty and volatility associated with the attorneys professional liability line of coverage, it has significant advantages over other organizations. These advantages enhance the PLF's chances for appropriately establishing the assessment. The mandatory nature of the program avoids the

Mr. Ira Zarov  
Ms. Betty Lou Morrow  
Page 13  
August 6, 2014

disruption that occurs in a commercial company's block of business that results from consumer response to the competitive market. The PLF is not required to make assumptions regarding its exposure base for the period for which the assessment is to be established. Also, writing one policy form with uniform coverage features and limits and a common renewal date greatly strengthens the rating process. Because of these attributes, the PLF does not have to "aim at a moving target," as do its sister organizations in other states. While periodic analyses are important to the PLF's success, the resulting revisions are more likely to be refinements than sudden large increases.

As in the past, we have enjoyed the opportunity to work with you and we look forward to discussing the results of this analysis. If you have any questions, or if there are other issues that should be addressed, please let us know.

Sincerely,



Charles V. Faerber, F.S.A., A.C.A.S

CVF: ms  
Enclosure

cc: Mr. Philip S. Dial  
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# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** September 5, 2014  
**Memo Date:** July 30, 2014  
**From:** Ira Zarov, PLF CEO  
**Re:** PLF Policy 3.250 – Step-Rated Assessment

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### Action Recommended

Please approve the recommended changes to PLF Policy 3.250. These revisions were approved by the PLF Board of Directors at its August 14, 2014 board meeting.

### Background

Prior to 2005, the Step-Rated Assessment policy was more generous than the current policy. The former policy provided a 50% credit in the first year, 30% in year two, and 15% in year three. The change was made for purely economic reasons as the PLF's fiscal experience had recently been negative. The relevant Board minutes stated:

The step-rated discounts cost about \$1.1 million with the current assessment. The staff and Finance Committee recommend reducing the discount by modifying the existing policy. This change would increase revenue approximately \$349,000. Staff hopes that this change would increase the chances that the Primary Program assessment would remain at \$3,000 for 2007.

Circumstances have changed in several ways. First, in recent years the PLF balance sheet has been very positive. Second, the economics of law practice have become more problematic, especially for new attorneys (the group who benefit most from the step-rated credits).

The suggested change (see PLF Policy 3.250 attached) has a cost. The cost, however, is estimated to be at the high end, \$350,000 per year and at the lower end, \$210,000. This range is a reflection of how many individuals would make use of the credit.

Attachment:  
PLF Policy 3.250 – tracked.

**3.250 STEP-RATED ASSESSMENT**

(A) Attorneys will receive a discount on the cost of their PLF coverage during their first periods of coverage as provided in this policy. The annual assessment rate for an attorney's PLF coverage will be determined as of January 1 of each year, and the rate will apply to all periods of coverage obtained by the attorney during the year. The PLF will calculate the total number of full or partial months of PLF coverage which the attorney has maintained in all prior years as of January 1 of the current year (the "Prior Coverage Period Total"). Each partial month of coverage will be counted as a full month. The attorney will then be entitled to a Step Rating Credit in calculation of the attorney's annual assessment rate as stated in the following table:

<u>Prior Coverage Period Total</u>	<u>Step Rating Credit</u>
0 months to 12 months	40 percent
Over 12 months to 24 months	20 percent
Over 24 months <u>to 36 months</u>	<u>20</u> percent
<u>Over 36 months</u>	<u>0 percent</u>

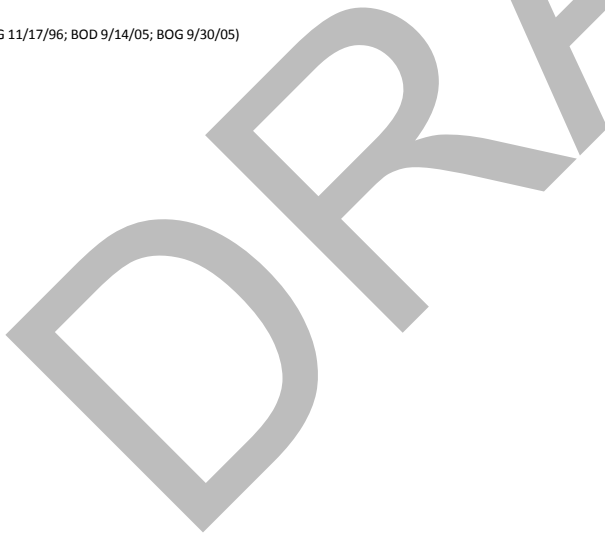
The Step Rating Credit will be applied as a reduction only to the regular assessment established for the year by the Board of Governors.

(B) The Step Rating Credit will not apply to any ~~Special Underwriting Assessment~~, installment service charge, late payment charge, or any other charge.

(BOD 9/25/96; BOG 11/17/96; BOD 9/14/05; BOG 9/30/05)

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# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** September 5, 2014  
**Memo Date:** August 22, 2014  
**From:** Ira Zarov, PLF CEO  
**Re:** Recommended Changes to PLF Policies Section 7

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### Action Recommended

Approve recommended changes to PLF Policy 7.700. These changes were approved by the PLF Board of Directors at its August 14, 2014 board meeting.

### Background

PLF Bylaws and Policies Section 7 sets forth how the PLF Excess Coverage Program is both underwritten and operated. Section 7.200(L)(1) provides for a continuity credit that benefits law firms who maintain continuous excess coverage with the PLF. This continuity credit begins at 2% for the first year of coverage, and builds each year by 2% to provide a maximum credit of 20% after ten years. As Section 7 is currently written, awarding this continuity credit to covered law firms is not optional for the underwriter. This one-size-fits-all approach has the effect of providing a financial benefit to firms with a negative claims history or different level of excess risk. This policy is not consistent with best underwriting practices. Elimination of the "one-size-fits-all," automatic nature of the continuity credit would allow the underwriters increased flexibility to provide this credit to firms that do not pose increased risk.

The changes to PLF Policy 7.700(N) are necessary to make that policy consistent with PLF Policy 7.700(L).

### PLF Policy 7.700(L)(1)

This Policy currently reads:

Continuity Credit: Firms which are offered excess coverage will receive the following continuity credits for the following periods of continuous PLF excess coverage:

Full Years of Continuous PLF Coverage	Continuity Credit (As Percentage of Applicable Firm Assessment)
10 or more	20%
9	18%
8	16%
7	14%
6	12%
5	10%

Full Years of Continuous PLF Coverage	Continuity Credit (As Percentage of Applicable Firm Assessment)
4	8%
3	6%
2	4%
1	2%

The PLF Board of Directors proposes changing PLF Policy 7.700(L)(1) to the following:

Discretionary Continuity Credit: Firms that are offered excess coverage may receive a continuity credit for each year of continuous PLF Excess Coverage (2% for one year, up to a maximum credit of 20% for ten years) at the underwriters discretion if the firm has no negative claims experience, does not practice in a Higher Risk Practice Area, and meets acceptable practice management criteria. See PLF Policy 7.300(A)&(C). A renewing firm currently receiving a continuity credit may see a reduction in that credit if, at the time of renewal, the firm had a negative claims experience, is practicing in a Higher Risk Practice Area, or fails to meet acceptable practice management criteria.

**PLF Policy 7.700(N)**

The last sentence in PLF Policy 7.700(N) reads:

Renewing firms will qualify for continuity credits pursuant to subsection (L) so long as the firm renews its coverage no later than January 31.

If the changes are made to PLF Policy 7.700(L)(1) as proposed above, the PLF Board recommends the following corresponding change to PLF Policy 7.700(N):

Renewing firms may qualify for the discretionary continuity credit pursuant to subsection (L) so long as the firm renews its coverage no later than January 31. Renewal after January 31 will result in the automatic loss of any accumulated discretionary continuity credit.

**RESOLUTION – AMENDMENT TO ORPC 1.2**

Whereas Oregon attorneys wish clarify the ethical duties of Oregon attorneys complying with current Oregon law now therefore be it,

**RESOLVED, THAT** the Board of Governors formulate an amendment and/or subsection to ORCP 1.2(c), for approval by the House of Delegates and adoption by the Supreme Court, that clarifies ORCP 1.2(c) to allow a lawyer to assist a client in conduct that the lawyer reasonably believes is permitted by the Oregon Medical Marijuana Program, the Medical Marijuana Dispensary Program and any other Oregon law (including the 2014 Initiative Measure 91 – The Control, Regulation, and Taxation of Marijuana and Industrial Hemp if it passes) related to the use and regulation of marijuana and/or hemp including regulations, orders, and other state or local provisions implementing those laws. The clarification should also include a provision requiring the lawyer to advise the client regarding conflicting federal law and policy.

Submitted by Delegate: Eddie D. Medina  
OSB Number: 054345

Background Statement: Currently, ORPC 1.2(c) states that “[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal 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.”

ORPC 1.2(c) is vague regarding the scope of counsel and assistance an Oregon attorney may give to clients wishing to conduct business under Oregon’s Medical Marijuana Program, the Medical Marijuana Dispensary Program and the imminent legalization of recreational marijuana and hemp. This amendment would merely clarify that an attorney is not in violation of the ORPC’s by working with businesses complying with Oregon law.

Clarification of ORCP 1.2 is necessary because the Colorado Bar Assoc. Ethics Committee recently interpreted a nearly identical rule (Colo. RPC 1.2(d)) to prohibit lawyers from (1) drafting or negotiating contracts to facilitate the purchase and sale of marijuana between businesses and/or (2) drafting or negotiating leases for properties or facilities, or contracts for resources or supplies, that clients intended to use to cultivate, manufacture, distribute, or sell marijuana. In addition, the Committee interpreted the rule to prohibit a lawyer from representing the lessor or supplier in such a transaction if the lawyer knew the client’s intended uses of the property, facilities or supplies was related to marijuana. The Committee found that violation of the ethics rule occurred even though those transactions complied with Colorado law. Colo. Bar Assoc., *Formal Opinion 125 – The Extent to Which Lawyers May Represent Clients Regarding Marijuana-Related Activities*, 42 The Colo. Lawyer 19 (2013), [http://www.cobar.org/tcl/tcl\\_articles.cfm?articleid=8370](http://www.cobar.org/tcl/tcl_articles.cfm?articleid=8370).

In direct response to the Committee’s findings, the Colorado Supreme Court clarified Colo. RPC 1.2(d) and stated that it was not a violation of the Colo. RPC’s for a lawyer to

“counsel a client regarding the validity, scope, and meaning of Colorado constitution article XVIII, secs. 14 & 16, and [a lawyer] may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and the statutes, regulations, orders, and other state or local provisions implementing them. In these circumstances, the lawyer shall also advise the client regarding related federal law and policy.” Colo. Rules of Prof.’l Conduct, Rule. 1.2[14].

In conclusion, without additional clarification of ORPC 1.2(c), Oregon attorneys run the risk of a violating the ORPC’s by merely drafting or negotiating a contract on behalf of a business participating in Oregon’s legal marijuana/hemp marketplace. The fact that no disciplinary action has been taken to date against any Oregon lawyer regarding this specific ethical issue does not provide sufficient guidance or assurances to Oregon lawyers that wish to provide valuable and needed legal services to clients in this highly regulated industry.

Financial Impact: None.

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# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** September 5, 2014  
**Memo Date:** August 25, 2014  
**From:** Judith Baker Legal Services Program Committee  
**Re:** Updates to Legal Services Program Standards and Guidelines

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### **Action Recommended**

The Legal Services Program (LSP) Committee is recommending that the BOG approve the revisions to the LSP Standards and Guidelines.

### **Background**

The Legal Services Program Standards and Guidelines (Standards and Guidelines) were developed in 1998 and apply to all programs providing civil legal aid services in Oregon who receive funding from the OSB Legal Services Program (LSP). The Standards and Guidelines outline the OSB's governing structure and oversight authority as well as provider structure and use of fund requirements.

The LSP Committee is charged with reviewing and making recommendations to the BOG on the Standards and Guidelines and their periodic review. The LSP Committee has reviewed and is recommending approval of the revisions to the Standards and Guidelines (see attached). The revisions are mostly updates to the following: statutory authority; provider structure; additional standards.

Oregon State Bar Legal Services Program  
Standards & Guidelines

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Appendices

- A. Statutory Authority
  - A1 ORS 9.572 et seq.
  - A2 Ors 21.480
- B. Oregon State Bar Board of Governor’s Policies Section 15.300 et seq.
- C. “Standards for Providers of Civil Legal Services to the Poor,” as approved by the ABA House of Delegates, August, 1996
- D. “Standards for Programs Providing Civil Pro Bono Legal Services to Persons of Limited Means,” adopted by the American Bar Association House of Delegates, February 1996.
- E. OSB Civil Legal Services Task Force Final Report, May, 1996
- F. Selected Legal Services Corporation Performance Criteria, 1996
- G. Declaration of Angel Lopez and Charles Williamson

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## I. Mission Statement

It is the mission of the Oregon State Bar Legal Services Program:

To use the filing fee revenue to fund an integrated, statewide system of legal services centered on the needs of the client community as identified in the Mission Statement of the OSB Civil Legal Services Task Force Final Report, May 1996; and

To use its oversight authority to work with Providers to insure that the delivery of services is efficient and effective in providing a full spectrum of high quality legal services to low-income Oregonians.

To work to eliminate barriers to the efficient and effective delivery of legal services caused by maintaining legal and physical separation between providers of general legal services to low-income Oregonians in the same geographical area, while maintaining Providers' ability to offer the broadest range of legal services required to serve the needs of clients.

*OSB Civil Legal Services Task Force Final Report, May 1996  
Appendix I, Page 1 & 2*

*“Legal services programs exist to ensure that institutions and organizations created to serve public interests and needs, particularly governmental and civic institutions, treat individuals equally no matter what their economic situation. This is not a radical notion; it is the cornerstone of American concepts of justice and fair play.*

*The mission of Oregon’s statewide legal services delivery system should continue to be centered on the needs of its client community. It should be expansive, recognizing that equal justice contemplates more than simply providing a lawyer in every family law or unlawful detainer case (though it certainly includes this goal as well). This mission must contemplate lawyering in its broadest sense, acknowledging that the interests of low income clients can only be served if the delivery system is dedicated to providing full and complete access to the civil justice system in a way that empowers this segment of the population to define, promote, and protect its legitimate interests. As such, the mission must be to:*

- \* *Protect the individual rights of low income clients;*
- \* *Promote the interest of low income individuals and groups in the development and implementation of laws, regulations, policies and practices that directly affect their quality of life;*
- \* *Employ a broad range of legal advocacy approaches to expand the legal rights of low income individuals and groups where to do so is consistent with considerations of fundamental fairness and dignity; and*
- \* *Empower low income individuals and groups to understand and effectively assert their legal rights and interests within the civil justice system, with or without the assistance of legal counsel.”*

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## II. Governing Structure

### A. Statutory Authority

On September 24, 1997, the Oregon State Bar Legal Services Program (OSB LSP) was established by the Board of Bar Governors as directed by ORS 9.572 to 9.578 (Appendix A1). The OSB LSP is charged with: the administration of ~~filing fee~~ funds appropriated to the OSB by ORS ~~21.480-9.577 (Appendix A2)~~ ORS 98.386 (2) and ORS 9.241 (3) for funding legal services programs; the establishment of standards and guidelines for the funded legal services programs (Providers); and the development of evaluation methods to provide oversight of the Providers.

### B. Governing Committee

1. **Purpose:** The Governing Committee (OSB LSP Committee) is charged with oversight of the OSB LSP and the funds appropriated to the Bar by the Oregon Legislature under ORS 9.572. The OSB LSP Committee will receive direction from the Board of Governors.

2. **Duties to the OSB Board of Governors:** The OSB LSP Committee will be responsible for reviewing and reporting to or making recommendations to the OSB Board of Governors on the following:

The Standards and Guidelines for the OSB LSP and their periodic review  
Applications for funding to the OSB LSP  
Disbursement of funds and annual OSB LSP budget  
Assessment of Provider Programs  
Annual reporting by the Providers  
Legislative issues involving the legal aid filing fee funds  
Complaints and grievances about Providers  
Additional work of the OSB LSP

### 3. Membership

a. **Appointment:** Appointment of members to the OSB LSP Committee shall be made by the Oregon State Bar Board of Governors.

- b. Membership:** The OSB LSP Committee will consist of 9 members: 7 members, in good standing, of the Oregon State Bar; and 2 public members. The membership should be representative of the statewide aspect of the OSB LSP and should reflect the diversity of the service areas. No more than 3 attorney members should be from the Portland metropolitan area. The following criteria should be considered in selecting members:
- (1) Commitment to the basic principles of access to justice
  - (2) Ability to advance the mission of the OSB LSP
  - (3) Knowledge and understanding of providing quality legal services to low-income people.
  - (4) History of support for legal services providers
  - (5) Representation of a geographic area with special attention given to practice area specialties.
4. **Term of Appointment:** Appointments will be made for 3 year terms with the exception of the initial attorney appointments. To stagger vacancies on the OSB LSP Committee and to provide continuity, the initial appointments will be: 3 attorneys appointed for 3 years; 2 attorneys appointed for 2 years, and 2 attorneys appointed for 1 year.
5. **Liaisons to Committee:** The Oregon Law Foundation and the Campaign for Equal Justice are invited and encouraged to each have a liaison to the OSB LSP.
6. **Meetings:** The OSB LSP Committee will meet quarterly. The Chair can call Special Meetings as needed. Meeting notices and agendas will be sent out according to public meeting law. Members can participate by telephone.
7. **Quorum:** Five members constitute a quorum for voting purposes.
8. **Subcommittees:** The OSB LSP Committee Chair has the authority to appoint additional subcommittees to make recommendations on specific issues as needed.

## C. Program Staff

1. **Director of Legal Services Program:** The OSB will hire a Director of Legal Services Program (OSB LSP Director) who will be supervised by the Executive Director of the Oregon State Bar. The OSB LSP Director will staff the OSB LSP Committee and be responsible for supporting its work and for the effective administration of all aspects of the LSP.

a. The LSP Director will be responsible for monitoring, reviewing, reporting and making recommendations to the OSB LSP Committee on the following:

These Standards and Guidelines and their periodic review  
Applications for funding  
Disbursement of funds and Annual OSB LSP budget  
Assessment of Provider Programs  
Annual Reporting by the Providers  
Legislative Issues regarding the filing fee funds  
Complaints and grievances about Providers  
Additional work of the OSB LSP

b. The LSP Director will be responsible for providing technical assistance to Providers to ensure compliance with these Standards and Guidelines.

### III. Standards and Guidelines for Providers

The following standards and guidelines shall apply to all programs providing civil legal services in Oregon who receive, or who may apply to receive, funding from the Oregon State Bar Legal Services Program (OSB LSP) pursuant to ORS 9.572 *et seq.* These Standards and Guidelines apply only to services funded by filing fees received from the OSB LSP.

#### A. Statement of Goal

It is the goal of the OSB LSP that all Providers shall be an integral part of an integrated delivery system for civil legal services which incorporates the Mission, Values and Core Capacities set forth in the OSB Civil Legal Services Task Force Final Report, May 1996, (Appendix E). The filing fee money should be used to fund providers in an integrated system designed to provide relatively equal levels of high quality client representation throughout the state of Oregon and designed to address the core capacities identified in the OSB Legal Services Task Force Report. The integrated delivery system should be structured to eliminate the legal and physical separation of offices serving the same geographical area, avoid duplication of administrative functions and costs, reduce the burdens on staff and clients, and minimize other barriers to the efficient delivery of legal services described in the Declaration of Angel Lopez and Charles Williamson authorized by the Board of Bar Governors in January 2002 (Appendix G), while maintaining the Provider's ability to offer a broad array of high quality legal services consistent with the Mission Statement.

#### B. Provider Structure

- 1. Non Profit:** A Provider shall be an Oregon nonprofit corporation, incorporated as a public benefit corporation under ORS Chapter 65, and be recognized as tax exempt under section 501(c)(3) of the Internal Revenue Code.
- 2. Board of Directors:** A Provider shall have a Board of Directors which reasonably reflects the interests of the eligible clients in the area served, and which consists of members, each of whom has an interest in, and knowledge of, the delivery of quality legal services to the poor. Appointments to the Board of Directors shall be made so as to ensure that the members reasonably reflect the diversity of the legal community and the population of



the areas served by the Provider including race, ethnicity, gender and similar factors.

- a. A majority of the directors should be active or active emeritus members of the Oregon State Bar, appointed by the county bar association(s) in the Provider's service area, or by the Oregon State Bar.
  - b. At least one-third of the directors should be persons who are eligible to be clients, but are not current clients, when appointed. The directors who are eligible clients should be appointed by a variety of appropriate groups designated by the program that may include, but are not limited to, client and neighborhood associations and community based organizations which advocate for or deliver services or resources to the client community served by the Provider.
3. **Staff Attorney Model:** A Provider shall have at least one active member of the Oregon State Bar on staff.
4. **Pro Bono Program:** A Provider shall maintain a Pro Bono Program, certified by the Oregon State Bar pursuant to section 15.300 *et seq.* of the Oregon State Bar Board of Governors' Policies (Attachment B), as a part of its system of delivery of legal services.
5. **Efficient Use of Resources:** A provider should, to the maximum extent practicable, integrate its operations and staff into existing programs that provide general legal services to low-income Oregonians in the same geographical area and meet the criteria set out in paragraphs B.1 – B.4, rather than maintain organizations that are legally and physically separate. If separate organizations currently exist, the Provider should take whatever actions are required to achieve program integration that will eliminate unnecessary, costly, and inefficient duplication without compromising the Provider's ability to offer the full range of legal services contemplated by these Standards and Guidelines including, but not limited to, challenging federal restrictions that impede such integration.

### C. **Provider Use of Funds and Eligibility Guidelines**

1. **Use of Funds:** A Provider shall use funds received pursuant to ORS 9.572 *et seq.* only for the provision of civil legal services to the poor.

The use of funds from the OSB LSP or compliance with these Standards and Guidelines is a matter between the Provider and the OSB. Nothing in these rules shall be construed to provide a basis to challenge the representation of a client. The sole remedy for non-compliance with these Standards and Guidelines is found in the procedures under non-compliance in ORS 9.572 and in these rules, Section V.E. & F.

2. **Eligibility Guidelines:** The Board of Directors of a Provider shall adopt income and asset guidelines, indexed to the Federal poverty guidelines, for determining the eligibility of individuals seeking legal assistance from the program. A copy of the income and asset guidelines shall be provided as a part of the application for these funds and shall be consistent with the Provider's mission and written priorities.
3. **Payment of Costs:** Eligible clients shall not be charged fees for legal services provided by a Provider with funds pursuant to ORS 9.572 *et seq.* However, a Provider may require clients to pay court filing fees or similar administrative costs associated with legal representation.
4. **Recovery of Attorney Fees:** A Provider may also recover and retain attorney fees from opposing parties as permitted by law.

**D. Procedures for Priorities and Policy for Avoiding Competition with Private Bar**

1. **Procedures for Establishing Priorities:** A Provider shall adopt procedures for establishing priorities for the use of all of its resources, including funds from the OSB LSP. The Board of Directors shall adopt a written statement of priorities, pursuant to those procedures, that determines cases and matters which may be undertaken by the Provider. The statement of priorities shall be reviewed annually by the Board.
  - a. The procedures adopted shall include an effective appraisal of the needs of eligible clients in the geographic area served by the recipient, and their relative importance, based on information received from potential or current eligible clients that is solicited in a manner reasonably calculated to obtain the views of all significant segments of the client population. The appraisal shall also include and be based on information from the Provider's employees, Board of Directors, local bar, and other interested persons. The appraisal should address the

need for outreach, training of the program's employees, and support services.

b. In addition to the appraisal described in paragraph a, of this section, the following factors shall be among those considered by the Provider in establishing priorities.

- (1) The population of eligible clients in the geographic area served by the Provider, including all segments of that population with special legal problems or special difficulties of access to legal services;
- (2) The resources of the Provider;
- (3) The availability of free or low-cost legal assistance in a particular category of cases or matters;
- (4) The availability of other sources of training, support, and outreach services;
- (5) The relative importance of particular legal problems to the individual clients of the Provider;
- (6) The susceptibility of particular problems to solution through legal processes;
- (7) Whether legal efforts by the Provider will complement other efforts to solve particular problems in the areas served;
- (8) Whether legal efforts will result in efficient and economic delivery of legal services; and
- (9) Whether there is a need to establish different priorities in different parts of the Provider's service area.

2. **Avoidance of Competition with Private Bar:** The Board of Directors of a Provider shall adopt a written policy to avoid using funds received from the OSB LSP to provide representation in the types of cases where private attorneys will provide representation to low-income clients without charge in advance as with contingency fee cases. A copy of the policy shall be provided

as a part of the application for these funds and shall be consistent with the Provider's mission and written priorities.

#### E. **Provider Grievance Committee and Process**

1. **Grievance Committee:** The Board of Directors of a Provider shall establish a grievance committee, composed of lawyer and client members in approximately the same proportion as the makeup of the Board.
2. **Grievance Process:** The Provider shall establish procedures for determining the validity of a complaint about the manner or quality of legal assistance that has been rendered, or about the denial of legal assistance due to a determination that a potential client is financially ineligible.
  - a. The procedures shall minimally provide:
    - (1) Information to a client at the time of the initial visit about how to make a complaint;
    - (2) Prompt consideration of each complaint by the director of the program, or the director's designee; and
    - (3) If the director is unable to resolve the matter, an opportunity for a complainant to submit an oral and written statement to the grievance committee.

#### F. **Additional Standards for Providers**

A Provider shall conduct all of its operations, including provision of legal services, law office management, and operation of the pro bono program in conformity with the following recognized standards, as applicable:

1. ~~“Standards for Providers of Civil Legal Services to the Poor,” as approved by the American Bar Association House of Delegates, August, 1986. (Appendix C)~~
  1. American Bar Association Standards for the Provision of Civil Legal Aid, August, 2006 (Appendix C)
2. “Standards for Programs Providing Civil Pro Bono Legal Services to Persons of Limited Means,” as adopted by the American Bar Association House of Delegates, August, 2013 ~~February, 1996~~. (Appendix D)

3. Legal Services Corporation Performance Criteria, ~~1996~~ 2007. (Appendix F)
4. Oregon Rules of Professional Conduct Code of Professional Responsibility.

G. ~~Columbia County Exception~~

~~The Columbia County Legal Aid program is a Pro Bono Program, which currently does not have an attorney on staff as required by B.3. of this section. However, the Columbia County Legal Aid program shall make efforts over the next four (4) years to comply with B.3. of this section. In addition, the Columbia County Legal Aid program shall comply with the ABA Standards for Programs Providing Civil Pro Bono Services to Persons of Limited Means, February 1996, Standard 4.8, (Appendix D) requiring appropriate attorney supervision of its non-attorney staff. Finally, the Columbia County Legal Aid program shall take steps to comply with all other Standards.~~

~~This exception is based on the fact that since the early 1980s the Columbia County Legal Aid program has been a successful Pro Bono program. Over the years the program received filing fees.~~

~~The program does not currently have a staff attorney due to the lack of financial resources. The program has been able to provide pro bono legal services without a staff attorney. Based on this history, the Columbia County Legal Aid program is granted an exception to B.3. of this section for no more than four (4) years.~~

## IV. Cooperative Collaboration by Providers

A. **Mechanism for Cooperation:** Providers will create a mechanism for cooperation among themselves and other programs providing services to low-income Oregonians:

To facilitate additional communication between organizations;

To coordinate and integrate key functions across program lines;

To create a forum for identifying client needs;

To collaborate and strategize how best to meet the needs of the client community;

To discuss funding needs and potential funding mechanisms;

To work with the court system, the legislature, the OSB, local bars, and members of the private bar to create a broad network to develop better access to the justice system.

To eliminate the legal and physical separation among the programs in order to minimize the duplication of administrative and other costs of delivering legal services to low-income Oregonians.

## V. Oversight by OSB Legal Services Program

The filing fees collected for legal services by the OSB LSP will continue to be used to support programs providing basic civil legal assistance to low-income Oregonians. The increase in court fees was calculated to replace decreased funding by other sources to legal services in Oregon and to enhance the broad based, full range of advocacy approaches and services to clients.

### A. Funding of Providers

1. **Presumptive funding:** To maintain the current statewide level of service the OSB LSP will continue to fund those legal services providers receiving filing fees at the enactment of 1997 Oregon Laws Chapter 801 Section 73 and the 2003 legislative increase in filing fee funds. These providers will receive the funds from the OSB LSP after administrative fees, up to 5.1 million dollars (2003 filing fee level adjusted for inflation increased by the 1.6 million dollar gap to meet the legal needs of the poor assessed in 2003) with an annual cost-of-living increase. The increase in the presumptive funding level meets the 1997 and 2003 legislative intent to provide additional funding for legal services to the poor at the same time continuing the approach adopted by the Interim Civil Legal Services Task Force who developed the Standards and Guidelines in 1998.

- a. **Initial Funding:** Providers will be required to complete the Initial Compliance Determination Application. Providers must complete the application and demonstrate compliance with these Standards and Guidelines within two months after this document becomes effective to qualify for funding under the OSB LSP beginning September, 1998.

Funding will continue under presumptive funding until:

1. Provider is found not in compliance at which point Section V.F. will be implemented;
2. Provider discontinues provision of services at which point Section V. F. 5. will be implemented;
- or 3. OSB LSP no longer receives funding under ORS 9.572 *et seq.*

- b. **Distribution of Funds:** Presumptive funding will be based on the same distribution formula that was in effect at the enactment of 1997 Oregon Laws Chapter 801 Section 73. The Providers will be encouraged to utilize provisions **c.** and **d.** of this Section to modify

grants and subcontract to meet unmet needs, to provide services to the under-served populations and to encourage a full range of services throughout Oregon.

- c. **Modification of Grants:** A Provider receiving presumptive funding may request that the OSB LSP transfer funds allocated to it to another Provider receiving presumptive funding in order to maintain the existing statewide level of service or to improve the statewide availability of services. The OSB LSP will consider the request and submit its recommendation to the BOG.
- d. **Subcontracting of Funds:** Providers may subcontract with others to provide specific services or to enhance services under the following conditions:
  - (1) The subcontract is for no more than one year;
  - (2) All subcontracts must be approved by the OSB when the aggregate total of the subcontracts for the year or when any one subcontract equals or exceeds \$50,000 or is greater than 25% of the Provider's annualized grant;
  - (3) The subcontract is for services within the parameters of these Standards and Guidelines;
  - (4) The subcontract includes language insuring compliance with Sections III. C. 1, 3, 4 and III. F. of these Standards and Guidelines if the subcontract is with an organization, other than a current Provider, providing legal services to low-income people, or with a law firm or attorney;
  - (5) The Provider must include provisions to obtain the needed information on the services performed by subcontract for inclusion in its annual report; and
  - (6) For all subcontracts, the Provider must give the OSB LSP 30 days notice of intent to subcontract along with a copy of the proposed subcontract.

- 2. **Additional Funds:** If there are funds over those allocated for presumptive



funding, the OSB LSP may award those funds to current Providers or applicants who demonstrate the ability to provide services that address the unmet needs and emerging needs of low-income Oregonians and the needs of the uncounted and under-served, low-income populations. The OSB LSP will determine the process for application for those funds.

## **B. Performance Evaluation of Providers**

The OSB LSP has the responsibility to ensure that filing fees funds are effectively being used to provide high quality legal services to low-income Oregonians. The Annual Reporting Requirements and the Accountability Process are designed to provide the OSB LSP with the information necessary for the oversight required by Statute and not to be unduly burdensome on Providers.

All oversight activities shall be conducted in accordance with the American Bar Association's Standards for Monitoring and Oversight of Civil Legal Services Programs.

## **C. Annual Reporting Requirements**

- 1. Annual Audit:** All Providers shall annually undergo a financial audit by an independent auditor, which meets generally acceptable accounting practices. A copy of the final audit report shall be submitted to the OSB LSP.
- 2. Annual Report:** Each Provider shall annually file with the OSB LSP a report detailing its activities in the previous year. The report will be due by the first day of October and needs to contain the following information in the requested format:
  - a.** The numbers and types of cases and matters in which legal services were delivered;
  - b.** A listing of the Provider's staff and Governing Body;
  - c.** A copy of its budget;
  - d.** A narrative description of the Provider's operations, including a description of its needs assessment, priority setting, and grievance

processes, which is sufficient to demonstrate that the Provider is in compliance with these Standards and Guidelines.

A Provider may comply with this requirement by submitting copies of reports or applications to the Legal Services Corporation, the Oregon Law Foundation or other funding agencies that provide the requested information.

#### **D. ACCOUNTABILITY PROCESS**

**1. Process:** The process will focus on the effectiveness of the providers in meeting the needs of individual clients and the larger client community, and in the development and use of resources. The goals of the review are to assure compliance with OSB LSP Standards and Guidelines; assure accountability to clients, the public and funders; and to assist with provider's self-assessment and improvement.

The process has three components:

1. A periodic self assessment report submitted by providers, including a narrative portion and a statistical/financial portion;
2. A periodic accountability report provided by the OSB LSP to the OSB Board of Governors and other stakeholders summarizing the information from the providers' self assessment reports and other information including ongoing contacts with providers by OSB LSP staff and annual program financial audits; and
3. Ongoing evaluation activities by the OSB LSP including peer reviews, desk reviews, ongoing contacts and other evaluation activities consistent with the OSB LSP Standards and Guidelines.

#### **E. Complaint Procedure**

##### **1. Complaints about Legal Services Providers:**

- a. Each Provider under the OSB LSP is required to have a written internal grievance procedure to address complaints about the manner or quality of legal assistance provided in individual cases or about the denial of legal assistance in individual cases. Any such complaint received by the OSB LSP will be directed to the Providers' internal process except when there appears to be a pattern to the complaints or when the complaint falls into one of the categories listed below.

Providers will furnish the OSB LSP with the resolutions to the referred complaints.

- b. Ethics complaints and malpractice claims will be referred to the appropriate department of the Bar.
- c. Complaints that Providers are acting outside the scope of the statute, ORS 9.574, not in compliance with these Standards and Guidelines, or misusing funds will be addressed by the OSB LSP's Committee or Grievance Committee through the Director of the OSB LSP.
- d. Complaints regarding the overall quality of legal assistance or the performance of the Provider will be addressed by the OSB LSP Committee or Grievance Committee through the Director of the OSB LSP.
- e. The OSB LSP Committee, the Executive Director of the Bar, and the General Counsel of the Bar will be notified of the complaints against Providers. A listing of all complaints, which will include synopses and resolutions, will be kept by the OSB LSP Program Director.
- f. Each complaint will be investigated (except ethics and malpractice complaints which will be referred to the appropriate body) and responded to timely. If a Provider is found not to be in compliance with these Standards and Guidelines, the procedure under Non-Compliance by Provider (F of this section) will be implemented.

## 2. **Complaints from Applicants to the OSB LSP**

Applicants who are not granted funds by the OSB LSP may make a written presentation to the Board of Governors during the OSB LSP Committee's funding recommendation.

## F. **Non-Compliance by Provider**

- 1. **Informal Negotiation:** When it is found that a Provider is not in substantial compliance with these Standards and Guidelines, the OSB LSP Director (the Director) will negotiate and work with the Provider to assist it in coming into compliance. This period of negotiation will last no more than 60 days and no less than 15 days.

The Director will notify the OSB LSP Committee and the OSB Executive Director that the Provider is out of compliance prior to formal notice being given.

2. **Formal 30 Day Notice:** If the Provider continues to be out of substantial compliance, the Provider and the Provider's Board Chair will be given a formal 30 day written notice that details how it is out of compliance and the steps necessary to achieve compliance. The Director will continue to assist the Provider in resolving the problem.
3. **Mediation:** If after 30 days from the receipt of the formal notice, the Provider still has not demonstrated compliance, the Director will immediately send a second notice to the Provider and the Provider's Board Chair. The second notice will list three names of mediators and give the Provider 15 days from receipt of the second notice to agree to one of the mediators or suggest another mediator. If the Provider and the Director cannot agree on a mediator within the 15 day period, the Director will petition the presiding judge for a judicial district to appoint a mediator.

In the mediation, the OSB LSP will be represented by the Director or by the Chair of the OSB LSP Committee. The Provider will be represented by its Executive Director or Board Chair. Within one week of the mediation, a written decision will be forwarded to the OSB LSP Committee, the OSB Executive Director, the OSB Board of Governors and the Provider's Board Chair.

4. **Hearing:** If the mediation fails to produce a resolution in the matter, the Director shall give the Provider and Provider's Board Chair a written notice of hearing. The hearing will be held no sooner than 30 days after Provider's receipt of notice of hearing.

The Provider will have the opportunity to present evidence that it has come into compliance or is making satisfactory progress towards compliance. The OSB LSP Committee will make up the hearing panel. Prior to suspension of funding, a written report will be presented to the OSB Board of Governors and OSB Executive Director within 5 days after the hearing is held which outlines the facts and decision.

5. **Suspension of Funding:** If the report indicates that the Provider is still not in compliance and is not making satisfactory progress towards compliance based on the decision of the hearing, the Director shall suspend funding until

the Provider is able to demonstrate compliance. Notice of suspension shall be served on the Provider in person or by certified mail and will be effective immediately upon service.

The OSB LSP Committee, in consultation with the OSB Executive Director and the OSB General Counsel, will determine if during the suspension all or part of the suspended funds should be used to contract with another Provider for legal services. If the Provider continues to provide legal services as defined under the funding agreement during the suspension, any unused funds accrued during the suspension will be paid to the Provider.

6. **Termination of Services:** If the Provider terminates its provision of legal services as defined under these Standards and Guidelines, funding will cease and all unexpended funds shall revert back to the OSB LSP. The OSB LSP Committee will meet to determine the reallocation of those funds to other Providers or to new applicants.

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AFTER SIX YEARS THEY HAVE NOT FIXED ANY TEETH, WHICH WERE KNOCKED OUT AND DAMAGED DUE TO BEING IN PRISON. IN THIS DAY AND AGE, HOW CAN IT BE POSSIBLE, THAT SOMEONE HAS TO ENDURE SUCH INHUMANE TREATMENT, AND YOU HAVE THE AUDACITY TO TELL ME THE CONNALLS DID NO WRONG. THE CONNALLS WERE NOT HELD ACCOUNTABLE FOR THEIR ACTIONS. I THOUGHT THE BAR ASSOCIATION HELD THE ATTORNEYS TO A HIGHER STANDARD AND BEING LICENSED HELD THEM TO CERTAIN STANDARDS OF CONDUCT. I HIRED SHANNON AND I KNOW THE BAR IS AWARE OF HER ADDICTION AND ALSO OF HER ACTIONS, WHICH WERE CRIMINAL, NOT WITHSTANDING HER CONDUCT AS AN ATTORNEY. AS FOR DES CONNALL I DO NOT KNOW WHAT HIS EXCUSE IS OR WAS. OTHER THAN HE THOUGHT HE WAS ABOVE THE LAW, AND EVERYONE WAS SUPPOSE TO WORSHIP HIM AND NOT QUESTION ANY OF HIS ACTIONS. HE WAS A SENILE OLD MAN WHO SHOULD HAVE STOPPED PRACTICING LAW YEARS AGO, NOT TO MENTION HE WAS RUDE AND DID NOT KNOW THE TRUTH OR SEEK TO FIND THE TRUTH. OUR JUSTICE SYSTEM IS IN A SAD STATE, DUE TO PEOPLE LIKE THE CONNALLS, AND THE FACT THAT ATTORNEYS ARE NOT HELD ACCOUNTABLE FOR THEIR ACTIONS. THAT IS THE REASON ALL THE JOKES ABOUT LAWYERS. THE PUBLIC KNOWS THAT THE BAR AND THE CLIENT SECURITY FUND COMMITTEE AND ALL THE ATTORNEYS ARE PROTECTING EACH OTHER SO THAT IF YOU ARE A LAWYER YOU CAN DO AS YOU DAM WELL PLEASE.

OUR JUSTICE SYSTEM IS IN A HORRIBLE STATE AND THERE IS NO JUSTICE, IT IS JUST A MONEY THING, I E PROBATION, FINES, TREATMENT, IMPRISONMENT SO THAT YOU CAN'T EVEN GET A PHONE CALL UNLESS YOU HAVE MONEY, AND A LOT OF IT. JOB SECURITY FOR ATTORNEYS, JUDGES, CORRECTIONAL OFFICERS, PROBATION OFFICERS, TREATMENT PERSONNEL, AND ALL OF THESE PEOPLE JUDGE AND TREAT THE PUBLIC AS GARBAGE BECAUSE THEY DON'T HAVE TO GO BY OUR RULES. THEY ARE ABOVE THE LAW

WHAT HAPPENED TO JUSTICE, WHERE SOMEONE PAID FOR THEIR WRONG DOING AND THEN WERE ABLE TO GET ON WITH THEIR LIFE, NO THEY PAY FOR THE REST OF THEIR LIFE AND THERE IS NOT CHANCE TO START OVER, BECAUSE THE SYSTEM WILL NOT LET THEM.

I DID NOT HIRE DES CONNALL, I HIRED SHANNON CONNALL, I DID NOT KNOW SHANNAN WAS AN ADDICT AND THAT SHE WAS NOT COMPETENT. I WAS TRYING TO TAKE CARE OF A VERY SICK HUSBAND, THAT IS WHY I HIRED SHANNON CONNALL. MY HUSBAND IS A TRANSPLANT PATIENT, HAS A HEART CONDITION (8 HEART ATTACKS) DIABETIC, AND HAS CANCER FROM THE IMMUNE SUPPRESSANT DRUGS. SO HE WAS NOT IN ANY CONDITION TO HELP CLAYTON. I HAD TO PAY THE ATTORNEY FEES WITH A CREDIT CARD, AND HAD TO PAY INTEREST FOR A YEAR BEFORE I COULD PAY IT OFF, BUT I KNOW IT WAS A SMALL AMOUNT TO THE CONNALLS, CLAYTON'S TRIAL WAS FEBRUARY 9, 2010, AND MY MOTHER PASSED AWAY ON FEBRUARY 1<sup>ST</sup> AND MY SISTER ON FEBRUARY 14<sup>TH</sup>. THIS WAS A VERY STRESSFUL TIME FOR ME AND I DEPENDED ON THE CONNALLS TO DO WHAT I HAD RETAINED THEM TO DO.

CLAYTON HAS SERVED SIX YEARS FOR BEING STUPID AND HAS SUFFERED A BROKEN ARM, WHICH WAS NOT EVEN SET FOR THREE MONTHS, AND HAD TO UNDERGO SURGERY TO REPAIR, AND STILL IS NOT RIGHT. A PUNCTURED LUNG,

July 29, 2014

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WHICH THEY MADE HIM RETURN TO HIS CELL AND SUFFER ALL NIGHT TRYING TO BREATHE, AND THEY GAVE HIM A GERD COCKTAIL FOR A PUNCTURED LUNG, IT IS A MIRACLE HE IS ALIVE. .INSECT BITES, LOSS OF HIS TEETH, UNABLE TO EVEN EAT SOLID FOODS. I EVEN FOUND A DENTIST WHO WOULD FIX HIS TEETH, AND THE PRISON IN SALEM AGREED TO TRANSPORT HIM FOR THE DENTAL WORK, BUT HE WAS MOVED FOR NO REASON TO ONTARIO. WHERE I HAVE NOT EVEN BEEN ABLE TO VISIT HIM FOR FOUR YEARS, BECAUSE OF HIS FATHER'S HEALTH. WE HAD DOCTOR'S LETTERS AND THE DA SAID HE COULD BE KEPT IN SALEM, BECAUSE OF HIS FATHERS' HEALTH, BUT SOMEONE CHANGED THAT. NO MATTER WHAT I TRY TO DO TO GET PROPER CARE, A PROPER DEFENSE NOTHING WORKS RIGHT IN THE SYSTEM. I GUESS IT IS ALRIGHT SINCE CLAYTON HAS ADS AND DIDN'T DO WELL IN WELL IN SCHOOL, HE IS NOT SMART ENOUGH TO CARE SO WE CAN JUST LOCK HIM UP AND FORGET HIM.

SO YOU THINK YOUR DECISION IS RIGHT, WELL I DO NOT HAVE TO JUDGE YOU, SHANNON OR DES CONNALL, THEY HAVE TO ANSWER TO A HIGHER POWER. I HOPE HE IS AS UNDERSTANDING AS YOU ARE.

SINCERELY



LAGALE BRIGGGS



# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** September 5, 2014  
**From:** Sylvia E. Stevens, Executive Director  
**Re:** CSF Claims Recommended for Awards

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### Action Recommended

Consider the recommendation of the Client Security Fund Committee to make awards in the following cases:

No. 2013-48 BERTONI (Monroy)	\$5,000.00
No. 2014-01 McCARTHY (Snellings)	\$7,000.00

### Discussion

#### No. 2013-48 BERTONI (Monroy) \$5,000

Anna Monroy consulted with Gary Bertoni in August 2011 regarding representation in a post-conviction proceeding.<sup>1</sup> Monroy claims that Bertoni agreed to take the case for a fixed fee of \$5,000; she acknowledges that the written fee agreement is inconsistent (it provides for a non-refundable fee of \$2,000 to be applied against his fees of \$300/hour), but claims she signed the agreement in September on Bertoni's assurance that he would adhere to the fixed fee. Monroy paid \$2,000 at or near the time of signing the fee agreement; a second payment of \$3,000 was made in February 2012.<sup>2</sup> Bertoni asserts he was handling the case on an hourly basis and earned more than he was paid.

Monroy and Bertoni have very different versions of what occurred after Bertoni was retained. Monroy says he did virtually nothing on her case and didn't tell her that he was going to be suspended for five months beginning on March 26, 2012. When she learned about it, Bertoni assured her that he had arranged for attorney Kliewer to assume his responsibilities in the post-conviction case. Kliewer contends that her role was very limited by Bertoni and that she was instructed not to take some actions that she believed were necessary for Monroy. It was Kliewer who informed Monroy that Bertoni hadn't done anything on her case.

After the initial consultation, Bertoni claims he reviewed the discovery and the transcript from Monroy's criminal trial and participated in a telephone status conference. He also claims that he worked as Kliewer's "legal intern" during his suspension, arranging scheduling, performing legal research, and attempting unsuccessfully to attend a meeting in

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<sup>1</sup> Shortly after retaining Bertoni on the post-conviction matter, Monroy retained him to defend her in civil action arising out of the same conduct as the criminal conviction, for which she paid him \$1,300. She does not seek an award in the civil matter, as Bertoni eventually delivered the funds to another attorney who handled the case.

<sup>2</sup> Monroy was incarcerated during all relevant times and the fees were paid by her sister, Teresa.

Monroy's case as a legal assistant. Bertoni was reinstated in late August, 2012. A few days later, Monroy terminated his services. Bertoni doesn't deny that he hadn't filed Monroy's post-conviction petition by the time she terminated the representation in August 2012.

Monroy says Bertoni visited her in September 2012, trying to convince her to rescind the termination. In the course of that conversation Bertoni apologized for mishandling her case and said he would discuss reimbursement with her "in the future." By contrast (in a letter responding to DCO's inquiries about his representation of Monroy), Bertoni denies Monroy's claims and characterizes himself as diligent, generous, conscientious, sincere, and completely innocent of any wrongdoing.

At a meeting in March 2014, the CSF Committee concluded that Bertoni was dishonest in retaining funds for which no services of any value were received and recommended an award of the full \$5,000 paid for the post-conviction matter. (The committee also believed that Bertoni had failed to retain the funds in trust until earned.) Additionally, the committee recommended waiving the requirement for a civil judgment because there is no reason to believe Bertoni has any assets. Moreover, he is likely to be disciplined in connection with his representation of Monroy, making the need for a judgment moot under the rules.

When Bertoni was informed of the Committee's recommendation, he asked to present additional information in support of his position. The Committee reviewed Bertoni's submission at its meeting on July 12, 2014 and voted unanimously to affirm its earlier recommendations.

*Attachments: Application for Reimbursement  
Committee Investigator's Report  
Bertoni Letter to Investigator*

#### **No. 2014-01 McCARTHY (Snellings) \$7,000**

Claimant seeks an award of his portion of the proceeds of a personal injury claim handled by Steven McCarthy.

Beginning at least in March 2012, Snellings was in a joint venture ("7777 Quarter Horses") with Vicky McCarthy and her son Scott Newman. At the time, Vicky McCarthy was Steven McCarthy's wife. Snellings lived on property owned by Steve and Vicky McCarthy and apparently received room and board in exchange for services he contributed to the venture.

On August 18, 2012, Snellings was involved in a motor vehicle accident and hired McCarthy to pursue a claim for injuries sustained in the accident. The fee agreement provided for a standard 1/3 fee to McCarthy, but according to Snellings, McCarthy subsequently agreed to take a fee of only \$3,000, with the balance going to Snellings.

On October 3, 2012, State Farm issued a check for \$10,000 to Snellings and McCarthy. The check was endorsed "In Trust for Calvin Snellings by Trustee" by Steven McCarthy.

According to Snellings, upon receipt of the settlement check, McCarthy told Snellings he was in temporary financial trouble, needed to borrow Snellings' portion of the settlement, and would repay it as soon as received the proceeds of another case that was close to completion. Snellings claims he was unwilling to make the loan, but felt he couldn't object since McCarthy had possession of the funds. Despite numerous demands, McCarthy has never delivered Snellings' funds.

Although McCarthy did not respond to the investigator's inquiries, he provided the OSB with a copy of a civil complaint he drafted (but apparently never filed) alleging that beginning in early 2012, the joint venturers conspired and acted in concert to deprive him of his property and cause the dissolution of his marriage. He also alleges having been told by Vicky and the others that Snelling had donated his share of the insurance settlement to the venture as working capital. (In response to inquiries from DCO,<sup>3</sup> Vicky denied that Snellings donated his settlement to the joint venture and says she never received any such sum.)

The CSF Committee had a spirited discussion of the claim and was not unanimous in its decision. The majority believed that McCarthy was dishonest in "luring" Snellings into letting McCarthy keep the funds and also believed that McCarthy took advantage of Snellings by essentially "requesting" the loan while he was in possession of Snellings' funds. The majority noted that Snellings has limited education and little knowledge of the legal system and they believed that McCarthy used his influence as a lawyer to discourage Snellings from refusing the loan or making a fuss when McCarthy refused to repay him. The majority was also suspicious about McCarthy's conflicting descriptions of what the funds were ultimately used for.

In contrast, a minority of the committee found no evidence of dishonesty, only a loan gone bad. They also were not persuaded that "but for" the lawyer-client relationship, Snellings would not have made the loan to McCarthy. They also pointed out that Snellings made no apparent effort to collect the loan from McCarthy prior to making a claim with the CSF. (To the best of staff's knowledge, based on information provided by Snellings, McCarthy has relocated to Florida.)

Ultimately, the Committee voted 9-2 to award Snellings \$7,000 (and, implicitly, to waive the requirement that he first obtain a judgment against McCarthy).

*Attachments: Application for Reimbursement  
Committee Investigator's Report*

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<sup>3</sup> DCO recommends that the SPRB authorize formal charges against McCarthy for failing to secure proper consent to a business transaction with his client and for failure to respond to disciplinary inquiries; DCO does not believe there is probable cause to charge McCarthy with dishonesty in connection with the loan.

# Oregon State Bar Public Member Application

Oregon  
State  
Bar

Name: (First, Middle, Last) <b>Kerry L. Sharp</b>	
Residence Address: (number, street, city, state, zip) <b>3827 Bass Lane Lake Oswego, OR 97034</b> County: USA	Residence Phone:
	Office Phone: 503.784.9278
Office Address: (number, street, city, state, zip) <b>3827 Bass Lane Lake Oswego, OR 97034</b> County: USA	E-Mail Address: <b>kerrysharp@earthlink.net</b>
Office Mailing Address: (if different)  County:	Occupation: (and job title, if any) <b>Management Consultant</b>

**College and Post-Graduate Education:**

School	Location	Dates	Degrees
Michigan State University	East Lansing, MI	1966-1971	BS Civil Engineering
Harvard Business School	Boston, MA	1975-1977	MBA

**Employment:** *List major paid employment chronologically beginning with most recent experiences.*

Dates (from/to)	Employer and Position Held	City/State
2011-present	Niobrara Holding Company - Principal	Lake Oswego, OR
2007-present	Portland State University - Adjunct Instructor	Portland, OR
2007-2011	Point B, Inc - Senior Associate	Portland, OR
2002-2006	Stancorp Financial Group - AVP	Portland, OR
1999-2001	Louisiana-Pacific Corp - Director of Marketing	Portland, OR

**Community/Volunteer Services:** *List significant volunteer activities chronologically beginning with most recent services.*

Dates (from/to)	Organization and Position Held	City/State
2010-2011	Urban League - ProBono Strategy Lead	Portland, OR
1990-1994	Oregon National Guard Assn - Board President	Salem, OR
1989-1990	PACC Health Plans - Board of Trustees Member	Clackamas, OR
1987-1988	Lake Oswego Chamber of Commerce - Leadership LO	Lake Oswego, OR

**Statement:** Describe why you are interested in serving as a public member of the Oregon State Bar. Include information not already mentioned about yourself and your experiences and background that supports your interests.

I know from personal experience that effective legal services can be critical in time of need. I believe service as a public member of the OSB board offers a unique opportunity to help influence and ensure accessibility of essential legal services, and to help promote public trust and credibility. I see this as an opportunity to work closely with fellow board members to help ensure organizational priorities are appropriate, and that key initiatives and programs are well-defined and prioritized. And, just as importantly, to help ensure that actions and messages are appropriately focused, balanced and effectively communicated. I recognize the need to continually ensure that OSB is best serving the needs of its stakeholders - not only members of the bar, but also all Oregonians.

My professional focus is on working closely with leadership teams to help them develop clear strategic priorities, define and prioritize key imperatives, and ensure focus on execution and results. I believe effective boards are those that value questions, challenge assumptions and seek clarity. I feel that my professional experience has helped me develop perspective that will enable me to contribute effectively to the workings of the board.

My background includes leadership roles in corporate, consulting, military, educational and nonprofit organizations. I've worked with senior leadership as well as front-line employees. I have followed the emergence of military and veterans law initiatives and would like to help ensure these get the emphasis and attention they deserve.

On a personal note, I enjoy opportunities to learn new things, particularly learning from and working around people that are making a difference. In this sense, I think service on the OSB board would be a lot of "fun". I'm excited.

**Miscellaneous:**

Have you ever been convicted or have you pleaded guilty to any crime?  Yes  No  
Have you ever been the subject of any professional disciplinary proceeding or had any professional license or permit revoked, suspended or restricted?  Yes  No  
If your answer to either of these questions is "yes," please give full details on a separate sheet of paper.

**Opportunities:** If you have a particular interest in a committee or board, please indicate your preference. A brief description of OSB public member opportunities is included with this application.

- Board of Governors  Disciplinary Board  Fee Arbitration and Mediation  House of Delegates  
 Professional Liability Fund  State Professional Responsibility Board

**Committees:**

- Advisory Committee on Diversity and Inclusion  Client Security Fund  Judicial Administration  
 Legal Services  Minimum Continuing Legal Education  Professionalism Commission  
 Public Service Advisory  Quality of Life  State Lawyers Assistance  Unlawful Practice of Law

**References:** List names and contact information of three people who may be contacted as references.

Name	Address
Peter Engel	President, Fred Meyer Jewelers
Phone	Email Address
(503) 797-5550	peter.engel@fredmeyer.com
Name	Address
Joanne Warner	Dean, School of Nursing, University of Portland
Phone	Email Address
(503) 943-8045	warner@up.edu
Name	Address
Jim Pittman	President, Insurance Consulting Services, Inc.
Phone	Email Address
(503) 542-4085	jim@icspdx.com
Applicant's Signature	Date



July 29, 2013

Where did you learn about the public member opportunities available at the Oregon State Bar?

Current Board of Governors public member Maureen O'Connor has spoken highly of this opportunity to serve.

Application deadline is August 2, 2013. Return applications to:

• Danielle Edwards, Oregon State Bar, 16037 SW Upper Boones Ferry Rd, PO Box 231935, Tigard, OR 97281-1935 •  
• dedwards@osbar.org • 503-598-6994 (fax) •

**9.025 Board of governors; number; eligibility; term; effect of membership.** (1) The Oregon State Bar shall be governed by a board of governors consisting of ~~18-19~~ members. ~~Fourteen~~ Fifteen of the members shall be active members of the Oregon State Bar, ~~who at the time of appointment, at the time of filing a statement of candidacy, at the time of election, and during the full term for which the member was appointed or elected, maintain the principal office of law practice in the region of this state in which the active members of the Oregon State Bar eligible to vote in the election at which the member was elected maintain their principal offices.~~ Four of the members shall be appointed by the board of governors from among the public. ~~Who~~ They shall at all time throughout their full term be residents of this state and may not be active or inactive members of the Oregon State Bar. A person charged with official duties under the executive and legislative departments of state government, including but not limited to elected officers of state government, may not serve on the board of governors. Any other person in the executive or legislative department of state government who is otherwise qualified may serve on the board of governors.

(2) The board of governors shall divide the State of Oregon into regions for election of fourteen of the board members. ~~the purpose of determining eligibility to be a candidate for the board of governors, eligibility to be elected or appointed to the board of governors, and eligibility to vote in board of governors elections.~~ The regions shall be based on the number of attorneys who have their principal offices in the region. To the extent that it is reasonably possible, the regions shall be configured by the board so that the representation of board members to attorney population in each region is equal to the representation provided in other regions. At least once every 10 years the board shall review the number of attorneys in the regions and shall alter or add regions as the board determines is appropriate in seeking to attain the goal of equal representation. There shall also be an out-of-state region comprised of the active members who maintain their principal office outside of the State of Oregon, and which shall have one representative on the board regardless of the number of members in the region.

(3) Attorney candidates for the board of governors shall at all times during their candidacy and throughout their full term maintain the principal office for the practice of law in the region for which they seek election or appointment. Members of the board of governors may be elected only by the active members of the Oregon State Bar who maintain their principal offices in the regions established by the board. The regular term of a member of the board is four years. The board may establish special terms for positions that are shorter than four years for the purpose of staggering the terms of members of the board. The board must identify a position with a special term before accepting statements of candidacy for the region in which the position is located. The board shall establish rules for determining which of the elected members for a region is assigned to the position with a special term.

\* \* \*

**PROPOSED AMENDMENT TO RPC 5.5(C)**

**RULE 5.5 UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE**

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

- (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
- (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another ~~United States~~ jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

- (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
- (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
- (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternate dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission;
- (4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice; or
- (5) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission.

(d) A lawyer admitted in another ~~United States~~ jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

(e) A lawyer who provides legal services in connection with a pending or potential arbitration proceeding to be held in his jurisdiction under paragraph (c)(3) of this rule must, upon engagement by the client, certify to the Oregon State Bar that:

- (1) the lawyer is in good standing in every jurisdiction in which the lawyer is admitted to practice; and
- (2) unless the lawyer is in-house counsel or an employee of a government client in the matter, that the lawyer
  - (i) carries professional liability insurance substantially equivalent to that required of Oregon lawyers, or
  - (ii) has notified the lawyer's client in writing that the lawyer does not have such insurance and that Oregon law requires Oregon lawyers to have such insurance.

The certificate must be accompanied by the administrative fee for the appearance established by the Oregon State Bar and proof of service on the arbitrator and other parties to the proceeding.

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# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** September 5, 2014  
**Memo Date:** August 22, 2014  
**From:** Tom Kranovich, OSB President  
**Re:** Award recommendations for 2014

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### 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:

President's Membership Service Award:	Edward J. Harri, Renee E. Rothauge
President's Public Service Award:	Hong Kim Thi Dao, Stephen L. Griffith, Lake James H. Perriguy
President's Diversity & Inclusion Award:	Liani JH Reeves, Kim Sugawa-Fujinaga
President's Sustainability Award:	Steven R. Schell
Wallace P. Carson, Jr., Award:	Hon. Alfred T. Goodwin, Hon. Nan Waller
OSB Award of Merit:	Ira Zarov

### Background

At its July meeting the BOG formed a special committee to review award nominations and submit recommendations to the full board. Committee members Tom Kranovich, Matt Kehoe, Simon Whang, Tim Williams, Caitlin Mitchel-Markley, Rich Spier, Jim Chaney and John Mansfield met by conference call on August 13 to discuss the nominations, resulting in the recommendations listed above.

The awards will be presented at a luncheon on December 4 at the Sentinel Hotel (formerly Governor Hotel) in Portland.

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# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** September 5, 2014  
**Memo Date:** August 21, 2014  
**From:** Danielle Edwards, Director of Member Services  
**Re:** Committee Appointment

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### Action Recommended

Consider an appointment to the Uniform Criminal Jury Instructions Committee as requested by the committee officers and staff liaison.

### Background

#### Uniform Criminal Jury Instructions Committee

Due to the resignation of one committee member the officers and staff liaison recommend the appointment of **Paul L. Smith** (001870). He has practiced at DOJ since 2002 and indicated this committee has his first choice for appointment through the volunteer preference survey.

**Recommendation:** Paul L. Smith, member, term expires 12/31/2016

# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** September 5, 2013  
**Memo Date:** August 25, 2014  
**From:** Kay Pulju  
**Re:** CLE Seminars

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### Action Recommended

Set policy direction for CLE Seminars as detailed below.

### Background

At its July 25 meeting the BOG requested a staff recommendation on policy changes to improve the financial position of the OSB CLE Seminars Department, as well as a list of all CLE-related policy issues previously discussed in the program review process.

### Recommendations

1. Require all bar sections, committees and the ONLD to work with the OSB CLE Seminars Department. For programs that offer fewer than three MCLE credits only registration services would be required, with event services optional; programs that offer three or more MCLE credits would need to be co-sponsored.

The estimated budget impact of this change is \$120,000 annually, a combination of new revenue to the CLE Seminars Department and decreased expenses in other areas of the bar. It would also offer other benefits: coordinated scheduling, increased marketing opportunities, improved customer service for program registrants, consistent MCLE reporting and more effective use of the bar's conference center.

The new requirements would be implemented in stages, with registration services on board in 2016 followed by co-sponsorship requirements in 2017. This will allow time for the board and staff to discuss the policy changes with stakeholders, explaining the financial background, benefits to both the OSB and member groups, and gathering feedback and suggestions on service enhancements and implementation details. A staged implementation also allows time for staff to build capacity to take on additional co-sponsored programs. New software, processes and procedures will be introduced in 2016, which will build the department's capacity to take on new co-sponsored programs in 2017.

Before the communications phase begins, the board should consider whether any other section-related policy matters should be broached at the same time, e.g., independent section websites and development of online directories.

2. Provide a budget offset to CLE Seminars for the cost of complimentary registrations.

Current board policy grants free registration for OSB CLE Seminars programs to judges and their attorney staff, 50-year members, and active pro bono members. The retail value of these

complementary registrations has averaged \$29,000 annually over the last three years. If the board wishes to retain the complimentary registration policy for broader policy reasons, an offset would provide a more accurate reflection of the department's financial performance.

3. Reinstate MCLE sponsor accreditation fees for local bar programs.

By board policy, local bar associations are not required to pay an accreditation fee, and at least one specialty bar has requested a future waiver of accreditation fees. In 2013 the value of fee waivers to local bars was approximately \$6,720 (a total of 168 programs at an average cost of \$40 each). Eliminating the waiver would impact the MCLE program budget only, but would put local bars on an equal footing with other providers, including specialty bars, bar sections and committees and OSB CLE Seminars. Staff recommends that the board develop an accreditation fee policy that applies equally to all applicants.

4. Monitor MCLE developments.

At least two other states are considering amending their MCLE rules to require some level of participation in a seminar to claim MCLE credit. The OSB should monitor progress in those states before considering any similar changes to Oregon's MCLE rules. Also, the installation of new association management software should give opportunities to streamline the MCLE reporting process, including self-reported credits, providing a better picture of the impact of product-sharing on CLE Seminars revenue.

**OSB Policies that negatively affect profitability of the OSB CLE Seminars Department**

MCLE-related:

- Relatively simple and inexpensive accreditation process encourages national providers
- No restrictions on who can claim credit so hard and electronic media products are easily shared and self reported
- Self-reported credits are not tracked
- No requirements for Oregon-specific law (other than child abuse and elder abuse reporting)
- No requirements for interactive/participatory programs (majority of states require)
- Accreditation fees are waived for all local and county bars (not OSB, bar groups or specialty bars)

Leadership and program support for "free" CLE:

- Free CLE at HOD meeting and other events
- Free CLE to advance priority issues, e.g., Law Practice Transitions
- Free CLE/MCLE credit as volunteer recruitment, e.g. Disciplinary Board conference and NLMP
- Complimentary registration (OSB CLE only) for judges and their attorney staff, 50-year members and Active Pro Bono members.

#### Internal Competition

- Multiple affiliate groups encouraged to provide CLE, including Sections, ONLD and PLF
- No requirement to cosponsor with CLE Seminars
- No requirement to use registration or event services
- No charge for use of conference facilities, including room sets and a/v support
- No charge for email marketing assistance
- Staff expected to assist groups with “independent” CLEs

DRAFT

# SWIDER | HAVER

ATTORNEYS AT LAW

1420 American Bank Building  
621 S.W. Morrison Street  
Portland, Oregon 97205-3897

Robert A. Swider  
Telephone (503) 226-8122  
Direct Line (503) 241-9577  
robert@swiderhaver.com

July 3, 2014

Oregon State Bar  
Board of Governors  
P.O. Box 231935  
Tigard, OR 97281

Attn: Sylvia Stevens

**Re: Changing the Name of the Computer and Internet Law Section**

Dear Board of Governors:


I am the chair of the Executive Committee of the Computer and Internet Law Section. I am writing to request your approval to change the name of the section to the Technology Law Section. The Executive Committee discussed this name change during the last several monthly meetings and unanimously approved a motion to change the name at our June 5, 2014 meeting.

The name change request is the result of a realization that computers have become ubiquitous and that many of us are connected to the Internet through our cell phones and other electronic devices most of the time. This prompted us to discuss our mission, the attendant legal issues and how our program offerings have and will continue to expand to encompass broader technology issues in addition to the issues reflected by our present name.

We request your approval of the name change and look forward to the renamed Section being able to better serve the membership of the OSB.

Very truly yours,

Swider Haver



by Robert Swider

RECEIVED

JUL 07 2014

Oregon State Bar  
Executive Director

**Oregon State Bar**  
**Special Open Session of the Board of Governors**  
**October 3, 2014**  
**Minutes**

The meeting was called to order by President Tom Kranovich at 11:48 a.m. on October 3, 2014. The meeting adjourned at 1:10 p.m. Members present from the Board of Governors were Jenifer Billman, Jim Chaney, Patrick Ehlers, Hunter Emerick, Ray Heysell, Theresa Kohlhoff, John Mansfield, Audrey Matsumonji, Caitlin Mitchel-Markley, Josh Ross, Richard Spier, Simon Whang, Charles Wilhoite, Timothy Williams and Elisabeth Zinser. Not present were Matthew Kehoe and Travis Prestwich. Staff present were Sylvia Stevens, Helen Hirschbiel, Rod Wegener, Susan Grabe, Dawn Evans, Kay Pulju, Mariann Hyland, Dani Edwards and Camille Greene. In addition, present was Carol Bernick, PLF CEO; Bonnie Richardson, David Elkanich, Michael Levelle, and Judge David Schuman from the RPC 8.4 Task Force.

**1. Call to Order**

Mr. Kranovich asked whether there were any changes to the agenda.

**Motion:** Mr. Chaney moved, Ms. Zinser seconded, and the board voted to accept the agenda as submitted.

**2. Legal Ethics Committee Proposal for Amending RPC 1.2**

Ms. Hirschbiel presented the committee's proposed HOD resolution to amend RPC 1.2. She also reported that if the BOG adopts the committee's recommendation, his resolution should be considered withdrawn. Three possible substitutions for "conduct regarding Oregon's marijuana-related laws" were discussed: "conduct permitted by," "conduct not prohibited by," and "conduct in compliance with." **[Exhibit A]**

**Motion:** Mr. Ehlers moved, Mr. Spier seconded, and the board voted to accept the committee's recommendation and add it to the HOD agenda. Mr. Mansfield and Ms. Matsumonji were opposed. All others were in favor.

**3. Approve HOD Agenda**

Mr. Kranovich presented the preliminary HOD agenda. Before the BOG vote to approve it, Mr. Kranovich asked to address the concerns that had been raised about the BOG's RPC 8.4 resolution. **[Exhibit B]**

Ms. Richardson and Mr. Elkanich reiterated that the RPC 8.4 Task Force limited its role to drafting language that would meet the Supreme Court's constitutional concerns and took no position on the policy behind the rule. The Task Force voted unanimously to submit the language that is the BOG resolution. Judge Schuman stated that, while it is impossible to predict how the court might rule on the question, the Task Force was confident that the proposed language is constitutionally valid. Mr. Levelle confirmed that the rule was accurately

represented to the board at its June 2014 meeting. Mr. Kranovich commented that Mr. Ford's objections are for the HOD to debate, not the BOG.

Mr. Ehlers reported that he had been contacted by a delegate who had intended to submit a resolution supporting adequate funding for indigent defense, but missed the deadline.

**Motion:** Mr. Ehlers moved, Ms. Kohlhoff seconded, and the board voted unanimously to approve adding to the HOD agenda a BOG resolution supporting indigent defense, similar to the language used in the 2008 resolution.

Ms. Billman volunteered to present the In Memoriam resolution.

Mr. Kranovich then asked for BOG positions on the two delegate resolutions.

Ms. Billman moved, Mr. Heysell seconded, and the board unanimously voted to oppose Delegate Resolution #3 re: OSB logo. Mr. Emerick volunteered to present the reasoning for the board's opposition.

**Motion:** Mr. Spier moved, Mr. Chaney seconded, and the board voted unanimously to oppose HOD Resolution #4 re: HOD agenda items. Mr. Williams volunteered to present the board's position.

**Motion:** Mr. Spier moved, Mr. Chaney seconded, and the board voted unanimously to adopt the HOD agenda. **[Exhibit C]**

#### **4. NBLSA Sponsorship Request**

Ms. Hyland presented the request of the National Black Law Student Association for sponsorship of its 2015 conference in Portland, and recommended the \$5000 Silver level. Mr. Levelle explained his personal experience and his opinion that supporting the event would help attract law students of color to Oregon law schools. Mr. Chaney agreed. **[Exhibit D]**

**Motion:** Ms. Zinser moved, Mr. Ross seconded, and the board voted unanimously to sponsor the NBLSA at the \$5000 Silver level.

**Motion:** Mr. Ehlers moved, Mr. Whang seconded, and the board voted unanimously to send a subgroup of the board to the Hilton to encourage them to sponsor at the \$15,000 Platinum level.

#### **5. PLF Board of Directors Vacancy Appointment**

Ms. Bernick asked the board to approve the PLF Board of Directors appointment recommendation of Ira Zarov to immediately fill the vacant BOD position that resulted from board member John Berge's resignation.

**Motion:** Mr. Chaney moved, Mr. Spier seconded, and the board voted unanimously to approve the appointment of Ira Zarov to fill the vacant seat.

#### **6. Closed Sessions – see CLOSED Minutes**



**Oregon State Bar  
Board of Governors Meeting  
October 3, 2014  
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, to consult with counsel, and per executive Session per ORS 192.660(2)(i) – E.D. Evaluation. 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. Other Matters

Motion: To adopt the draft of the Executive Director Annual Performance Appraisal – Summary of Reports evaluation handed out at this meeting. [Tim moved (Simon seconded). All in favor: *unanimous*, All opposed: *None*, Abstentions: *None*. (John and Matt were not present) Submitted by Caitlin Mitchell-Markley, October 30, 2014.

## LEC Proposed Amendment to RPC 1.2

### **Rule 1.2 Scope of Representation and allocation of authority between client and lawyer**

(a) Subject to paragraphs (b) and (c), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal 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.

**(d) Notwithstanding paragraph (c), a lawyer may counsel and assist a client regarding Oregon's marijuana-related laws. In the event Oregon law conflicts with federal law, the lawyer shall also advise the client regarding related federal law and policy.**

*Executive Board*  
Christopher Ling, Co-Chair  
Chase Morinaka, Co-Chair  
Adam Gamboa, Treasurer  
Daniel Simon, Secretary



*Board Members at Large*  
Samantha Copeland  
Louise Hansen  
Toni Kelich  
Sujata Patel  
Suzanne Trujillo

*Honorary Board Members*  
Ernest Estes  
Anastasia Yu Meisner  
Hon. Adrienne Nelson

October 3, 2014

Board of Governors  
Oregon State Bar  
16036 SW Upper Boones Ferry Rd  
Tigard, Oregon 97224

Re: June 2, 2014 Proposed Amendment to Rule 8.4 of the Oregon Professional Rules of Conduct

Dear Board of Governors:

The Oregon Minority Lawyers Association (OMLA) recently received a copy of a September 11, 2014 letter written by a fellow attorney and colleague, Kelly Ford regarding the most recent proposed revisions to Rule 8.4 of the Oregon Rules of Professional Conduct. In his letter, Mr. Ford raises several constitutional and policy related concerns in opposition to the adoption of this amendment into our professional rules. We respectfully submit the following response in support of the Rule 8.4 amendment.

**A. Current RPC 8.4 Drafting Committee proposed amendment.**

On June 2, 2014, the RPC 8.4 Drafting Committee adopted the following proposed amendment to Rule 8.4:

“RULE 8.4 MISCONDUCT

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

\* \* \* \* \*

(7) in the course of representing a client, knowingly intimidate or harass a person because of that person’s race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation, marital status, or disability.

\* \* \* \* \*

(c) Notwithstanding paragraph (a)(7), a lawyer shall not be prohibited from engaging in legitimate advocacy with respect to the bases set forth therein.”

**B. The cases cited by Mr. Ford are distinguishable.**

*State v. Robertson*, 293 Or 402 (1982), is the seminal case on free speech under Article I, section 8, of the Oregon Constitution. *State v. Babson*, 355 Or 383, 390-391 (2014), summarizes a three-category framework established by *Robertson* and its progeny to evaluate constitutional free speech challenges:

“Under the first category, the court begins by determining whether a law is “written in terms directed to the substance of any ‘opinion’ or any ‘subject’ of communication.” [ ] If it is, then the law is unconstitutional, unless the scope of the restraint is “wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach.” [ ] If the law survives that inquiry, then the court determines whether the law focuses on forbidden effects and “the proscribed means [of causing those effects] include speech or writing,” or whether it is “directed only against causing the forbidden effects.” [ ] If the law focuses on forbidden effects, and the proscribed means of causing those effects include expression, then the law is analyzed under the second Robertson category. Under that category, the court determines whether the law is overbroad, and, if so, whether it is capable of being narrowed. [ ] ***If, on the other hand, the law focuses only on forbidden effects, then the law is in the third Robertson category, and an individual can challenge the law as applied to that individual's circumstances.*** [ ]”

(*emphasis* added) (internal citations omitted)

Mr. Ford’s September 11, 2014 letter cites *State v. Johnson*, 345 Or 190 (2008)<sup>1</sup> in support of his concern that the Rule 8.4 amendment, as currently proposed, is unconstitutional. The statute in *Johnson*, ORS 166.065(1)(a)(B), fell under the second *Robertson* category; in other words, it was a statute that “focuses on effects the legislature wishes to forbid\* \* \* [by] expressly prohibit[ing] the use of particular forms of expression.” *Id.* at 195. In reaching that conclusion, the court focused on the following prohibition within ORS 166.065(1)(a)(B):

“A person commits the crime of harassment if the person intentionally:

“(a) Harasses or annoys another person by:

“ \* \* \* \* \*

“(B) ***Publicly insulting such other person by abusive words or gestures*** in a manner intended and likely to provoke a violent response[.]”

(*emphasis* added)

The Oregon Supreme Court invalidated that statute as “overbroad on its face.” *Id.* at 197. By contrast, an analysis of the proposed amendment to Rule 8.4 under the framework established by *Robertson* and its progeny reveal that *Johnson* and the other cases Mr. Ford cites—*State v.*

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<sup>1</sup> Cited as *Oregon v. Johnson*, 191 P3d 665 (2008).

*Harrington*, 67 Or App 608 (1984)<sup>2</sup> and *State v. Blair*, 287 Or 519 (1979)<sup>3</sup>—are inapplicable.<sup>4</sup>

The proposed amendment does not fall under the first *Robertson* category because it is not written in terms directed to the substance of any opinion or any subject of communication. *Babson*, 355 Or at 393-394; *see also City of Hillsboro v. Purcell*, 306 Or 547, 554-555. Neither does it fall under the second *Robertson* category because, while it identifies forbidden effects (intimidation and harassment), the proposed rule does not “expressly or obviously restrain expression.” *Babson*, 355 Or at 403; *see also id.* (when law does not refer to expression, enacting body “is not required to consider all apparent applications of that law to protected expression and narrow the law to eliminate them”; statutes “by their terms, [must] expressly or obviously refer to protected expression” to fall within *Robertson’s* second category).

Instead, the proposed Rule 8.4 amendment falls under the third *Robertson* category because it “focus[es] on proscribing the pursuit or accomplishment of forbidden results without referencing expression at all.” *State v. Koenig*, 238 Or App 297, 303 (2010). Thus, under this category, any constitutional challenges under Article I, Section 8, are limited to “as-applied” challenges based on the particular circumstances of an individual’s case.

Ultimately, despite Mr. Ford’s constitutional concerns, the proposed amendment to Rule 8.4 is not facially invalid under Article I, section 8, and should be adopted.

### **C. The proposed amendment to Rule 8.4 is entirely necessary and appropriate in scope.**

Mr. Ford’s letter also raises several policy-based concerns for the proposed amendment to Rule 8.4. They are each addressed in turn below.

#### *1. Concerns over necessity are unwarranted.*

Mr. Ford argues that the existence of Rules 8.4(a)(2) and 4.4(a) make the proposed amendment to Rule 8.4 duplicative and unnecessary. That is simply untrue.

Rule 8.4(a)(2), as Mr. Ford correctly notes, is directed toward “a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” However, this rule’s specific focus on “a criminal act” was the primary reason why the Board of Governors (BOG) and the Legal Ethics Committee (LEC) were first charged with developing this amendment. As you know, in 2010, a Portland attorney filed an ethics complaint against another attorney under Rule 8.4(a)(2) for sexual harassment related to pending litigation involving both attorneys. Initially, the complainant wished to file a bar complaint without also filing a criminal complaint against the other attorney due to personal and professional reasons. However, the Client Assistance Office (CAO) advised the complainant that criminal charges had

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<sup>2</sup> Cited as *Oregon v. Harrington*, 680 P2d 666 (OR 1984).

<sup>3</sup> Cited as *Oregon v. Blair*, 601 P2d 766 (OR 1979).

<sup>4</sup> *Harrington* and *Blair* mirror the overbroad language used in *Johnson* and were both invalidated as facially unconstitutional under Article I, section 8 of the Oregon Constitution.

to be filed to sustain the bar complaint, forcing the complainant to undergo further undue stress, embarrassment, and public exposure before the other attorney was disciplined.

Recognizing the restrictiveness of limiting discipline against harassment to “a criminal act,” the Oregon Women Lawyers (OWLS), Oregon Chapter of the National Bar Association (OC-NBA), OMLA, and Oregon Asian Pacific American Bar Association (OAPABA) submitted a March 18, 2011 open letter to the BOG requesting that the LEC establish a task force to amend the Oregon Rules of Professional Conduct to decisively address intimidation and harassment. Since then, the LEC and the BOG have dedicated substantial time and effort to crafting a rule that reflects our commitment to professionalism and our adherence to the rule of law.

Similarly, Rule 4.4(a) would insufficiently address the types of intimidation and harassment covered by the proposed amendment to Rule 8.4. That rule states:

“(a) In representing a client or the lawyer’s own interests, a lawyer shall not use means *that have no substantial purpose* other than to embarrass, delay, harass or burden a third person, or knowingly use methods of obtaining evidence that violate the legal rights of such a person.”

*(emphasis added)*

The proposed amendment to Rule 8.4 is substantially different because it has no such “no substantial purpose” language of limitation, only a limitation as to “legitimate advocacy.” In that regard, the interplay between Rule 4.4(a) and the proposed amendment to Rule 8.4 functions along similar lines as our federal jurisprudence on the Fourteenth Amendment, specifically with regard to concepts of strict scrutiny, intermediate level scrutiny, and rational basis review. In other words, the public policy behind the proposed amendment to Rule 8.4 is that intimidation and harassment that is based off of “race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation, marital status, or disability” is so fundamentally improper that it should never be tolerated, outside of “legitimate advocacy,” particularly when these protected classes are at issue in a case.

On the other hand, Rule 4.4 should be viewed more along the lines of a general limit on the zealotry of a lawyer’s advocacy with respect to third persons. If an attorney uses means that may also “embarrass, delay, harass, or burden” a third party but also has a “substantial purpose” in negotiating settlement or advocating for their client at trial, then the attorney has not violated such Rule.<sup>5</sup>

2. *The amendments are appropriately broad in whom they protect.*

The September 11, 2014 letter inaccurately characterizes the public policy behind this proposed amendment to Rule 8.4. The underlying public policy is not to generally avoid the

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<sup>5</sup> As a side note, because the text of Rule 4.4(a) specifically makes reference to “means” (a form of conduct), it would be more likely to be subject to facial challenges to free speech under *Robertson* and its progeny, as compared to the proposed amendment to Rule 8.4(a).

forbidden effects of intimidation and harassment, but is targeted toward intimidation and harassment based on “race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation, marital status, or disability,” historically and legally recognized protected classes on either the federal or state level. Thus, in response to the comparison Mr. Ford raises regarding political speech versus race or religion, the proposed amendment to Rule 8.4 was never intended and is not required to be a panacea toward all intimidation and harassment. It instead reflects the evolution of our federal and state jurisprudence regarding the guarantees of equal rights under the federal and state constitutions, while being precisely crafted to address our constitutional rights to free speech.

As mentioned previously, the catalyst for drafting of the proposed amendment to Rule 8.4 was a specific and perceived failure by the Oregon Rules of Professional Conduct to protect third parties from intimidation and harassment based on federal and state-recognized protected classes of individuals. The LEC has spent years crafting a rule that adheres to the free speech guarantees under Article I, Section 8 of the Oregon Constitution, while reflecting the growing view in our state bar that attorneys should be held to a higher standard of ethics and professionalism regarding intimidation and harassment beyond simple conformity with criminal statutes. This proposed amendment to Rule 8.4 is appropriate, necessary, and should be adopted.

Sincerely,

A handwritten signature in black ink, appearing to read "Christopher Ling". The signature is fluid and cursive, with a large initial "C" and a long, sweeping tail.

Christopher Ling  
Co-Chair, Oregon Minority Lawyers Association

**KELLY E. FORD, P.C.**

KELLY FORD, ATTORNEY AT LAW  
4800 Southwest Griffith Drive, Suite 320  
Beaverton, Oregon 97005-8716

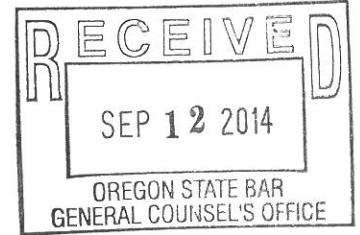
Facsimile (503) 828-9515

Telephone (503) 641-3044

kelly@kellyfordpc.com

September 11, 2014

Helen M Hirschbiel, General Counsel  
Oregon State Bar  
16037 SW Upper Boones Ferry Rd  
PO Box 231935  
Tigard OR 97281



Re: Comments for HOD's consideration of proposed revisions to RPC 8.4

Dear Helen,

You requested I join the ad hoc committee formed early this year for the purpose of editing the proposed revisions to RPC 8.4. The previous work on that rule had been approved by the BOG and by the HOD in its November, 2013 meeting, but were referred by the Supreme Court for reconsideration at its December, 2013 public meeting. I was a coauthor of comments to the Supreme Court concerning the 2013 version, containing constitutional and public policy concerns to the proposed amendments pending in 2013. Following the Court's rejection of the 2013 proposed amendments, BOG's charge to the ad hoc committee was to address the Court's constitutional concerns with the 2013 version, but not to revisit policy considerations to the rule's adoption. We followed that charge. I voted in favor of the new proposed amendments strictly in view of that limited charge, because I believe the new version is more likely to survive constitutional challenge than its predecessor. However, I do not agree the amendments should be enacted into the RPC.

These comments, which I ask you to include in the HOD members' package for the November 14<sup>th</sup> meeting, are directed to my continuing constitutional concerns, as well as to the advisability and necessity of enacting the amendments as now constituted.

Continuing Constitutional Concerns.

The committee struggled mightily to craft wording that would meet the stringent standard for protection of speech under the Oregon Constitution, Article I, Section 8. After several hours of attempting, unsuccessfully, to reach an agreed statement of attorney misconduct that results in listed proscribed effects, the committee defaulted to the "intimidate or harass" language contained in the current draft rule. This language, while not as patently unconstitutional as its predecessor, will still prove problematic, at least until tested under fire.

In *Oregon v. Johnson*,, 191 P3d 665 (2008), the Oregon Supreme Court said this when it struck down a criminal harassment statute as a violation of Article I, Section 8 of the Oregon Constitution:



Harassment and annoyance are among common reactions to seeing or hearing gestures or words that one finds unpleasant. Words or gestures that cause only that kind of reaction, however, cannot be prohibited in a free society, even if the words or gestures occur publicly and are insulting, abusive, or both.

*See also Oregon v. Harrington*, 680 P2d 666 (OR 1984) and *Oregon v. Blair*, 601 P2d 766 (OR 1979). In *Oregon v. Hendrix*, 813 P2d 1115 (Or App 1991), the Court of Appeals upheld the constitutionality of Oregon's criminal racial intimidation statute against an Article I, Section 8 challenge because the statute prohibited inflicting physical injury on a victim, whereas in *Harrington, supra*, the court struck down a harassment statute under Article I Section 8 that provided

A person commits the crime of harassment if, with intent to harass, annoy or alarm another person, the actor . . . (b) publicly insults another by abusive or obscene words or gestures in a manner likely to provoke a violent or disorderly response.

Rejecting the state's argument the statute was directed at preventing violence, the court found the statute impermissibly punishes insulting language regardless of the effect upon the listener. Obviously, there is no element of physical injury or even threatened physical injury, to save our work from an Article I, Section 8 challenge.

It is impossible to know in advance whether the Supreme Court will afford attorneys in a disciplinary context the same speech protections as it does criminal defendants. The Court could extend the "incompatibility exception" developed in *In re Laswell*, 673 P.2d 855 (OR 1983) and *In re Fadeley* 802 P2d 31 (OR 1990) to this context and find the new rule facially constitutional, or, in light of the importance of zealous advocacy as a core principal of legal representation, it could apply a constitutional standard as rigorous as in *Johnson, supra* to protect attorneys acting on behalf of their clients. If it does, the committee's efforts will have failed.

#### Policy Considerations.

1. The amendments are largely unnecessary.

If a lawyer is guilty of criminal intimidation based on a protected category, the lawyer undoubtedly has committed a crime that "reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects: ORPC 8.4 (a)(2). *See, e.g.*, ORS 166.065; 166.155. So, the amendments to Rule 8.4 are unnecessary to apply discipline to such criminal conduct.

RPC 4.4(a) provides that "in representing a client or the lawyer's own interests, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, harass, or burden a third person . . ." In one respect this prohibition is *broader* than the proposed Rule 8.4

amendments, in that it is not restricted to conduct based on the third person's membership in a protected class. I criticized the committee's work in that respect, requesting to the group that the amendments be made generally applicable to all third persons, but I received no support in the committee for that position.

Existing RPC 4.4(a) in my opinion, adequately synthesizes the conduct that could be prohibited under the amendments to Rule 8.4, including its "legitimate advocacy" exception. In other words, in my opinion, Rule 4.4(a) already prohibits all the conduct that I believe should or would be prohibited by proposed Rule 8.4, as protected by the legitimate advocacy exception. If so, the amendments are redundant and should be rejected for that reason alone.

At best, the new rule would add a layer of uncertainty and confusion concerning how it could be constitutionally applied to conduct not already prohibited by ORPC 8.4(a)(2) and 4.4(a). I have heard no convincing explanation why the proposed rule is needed in the form we have written, insofar as punishing categories of behavior that should be, can be, but are not already punishable.

2. The amendments are under broad in who they protect.

The public policy underlying creating a prohibition on attorney speech that is intimidating or harassing is that the behavior causes undesirable effects - feelings of intimidation or harassment - in third parties under circumstances where the behavior is not part of the advocacy process. Due to attorneys' unique role in society, the argument goes, such conduct should not be permitted. But that public policy is not dependent upon - indeed, is completely unrelated to - the characteristics of the third party victims, insofar as I can discern. I know of no reason why an attorney should, for example, escape discipline for harassing behavior directed to a person's political beliefs if the same type of behavior is punishable when directed to the person's race or religion. Indeed, a complainant - based - on - politics could make out a violation of RPC 4.4(a) while being excluded from protection under Rule 8.4. This makes no sense to me. Whether or not this "under inclusiveness" survives constitutional concerns, a matter not researched by the committee, it is bad public policy in my view.

For the preceding reasons, my view is that the proposed amendments to RPC 8.4 are ill advised and should be rejected.

Thank you.

Very truly yours,



Kelly E. Ford

**Oregon State Bar**  
**2014 House of Delegates Meeting**

*Oregon State Bar Center*  
*16037 SW Upper Boones Ferry Road*  
*Tigard, Oregon 97224*  
*503.620.0222*  
*Friday, November 7, 2014*  
*10:00 a.m.*

Oregon State Bar

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Dear Oregon State Bar Member:

I am pleased to invite you to the 2014 OSB House of Delegates meeting, which will begin at **10:00 a.m.** on **Friday, November 7, 2014**, at the Oregon State Bar Center.

The preliminary agenda for the meeting includes proposed amendments to the Oregon Rules of Professional Conduct, a resolution supporting adequate funding for low-income legal services, and two delegate resolutions seeking input from the membership regarding the OSB logo and the nature of appropriate matters for HOD consideration. The agenda also includes a notice of the annual membership fees and assessments for 2015, which will remain unchanged from 2014.

All bar members are welcome and encouraged to participate in the discussion and debate of HOD agenda items, 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](http://www.osbar.org/docs/leadership/hod/hodroster.pdf).

If you have questions concerning the House of Delegates meeting, please contact Camille Greene, Executive Assistant, by phone at 503-431-6386, by e-mail at [cgreene@osbar.org](mailto:cgreene@osbar.org), or toll free inside Oregon at 800-452-8260 ext 386. Remember that delegates are eligible for reimbursement of round-trip mileage to and from the HOD meeting. Reimbursement is limited to 400 miles and expense reimbursement forms must be submitted within 30 days after the meeting.

I look forward to seeing you at the HOD Meeting on November 7, and I thank you in advance for your thoughtful consideration and debate of these items.

I hope you will also join us following the HOD meeting for the 2:00 p.m. unveiling of the Diversity Story Wall. The Story Wall is a museum-quality informational display highlighting diversity in the legal profession in Oregon together with major milestones that have advanced diversity and access to justice in Oregon and across the U.S. It is a significant addition to the OSB Center that evidences the Bar's commitment to diversity, inclusion and access to justice for all.



Tom Kranovich, OSB President

# OREGON STATE BAR

## 2014 House of Delegates Meeting AGENDA

Oregon State Bar Center, 16037 SW Upper Boones Ferry Road, Tigard, Oregon 97224

10:00 a.m., Friday, November 7, 2014

Presiding Officer: Tom Kranovich, OSB President

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### Reports

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| 1. Call to Order<br><i>Tom Kranovich</i><br><i>OSB President</i>                    | 4. Comments from the Chief Justice of the Oregon Supreme Court<br><i>Thomas A. Balmer, Chief Justice</i><br><i>Oregon Supreme Court</i>        |
| 2. Adoption of Final Meeting Agenda<br><i>Tom Kranovich</i><br><i>OSB President</i> | 5. Report of the Board of Governors Budget and Finance Committee<br><i>Hunter B. Emerick, Chair</i><br><i>BOG Budget and Finance Committee</i> |
| 3. Report of the President<br><i>Tom Kranovich</i><br><i>OSB President</i>          | 6. Overview of Parliamentary Procedure<br><i>Alice M. Bartelt, Parliamentarian</i>   |

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### Resolutions

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| 7. In Memoriam<br>(Board of Governors Resolution No. 1)<br><i>Presenter: Tom Kranovich, OSB President</i>  | 12. Amendment of Oregon Rule of Professional Conduct 1.2<br>(Delegate Resolution No. 1)<br><i>Presenter: Eddie D. Medina, HOD, Region 4</i>   |
| 8. Amendment of Oregon Rule of Professional Conduct 8.4<br>(Board of Governors Resolution No. 2)<br><i>Presenter: David Elkanich?</i>                    | 13. Support for Adequate Funding for Legal Services to Low-Income Oregonians<br>(Delegate Resolution No. 2)<br><i>Presenters:</i><br><i>Kathleen Evans, HOD, Region 6</i><br><i>Gerry Gaydos, HOD, Region 2</i><br><i>Ed Harnden, HOD, Region 5</i> |
| 9. Amendment of Oregon Rule of Professional Conduct 5.5<br>(Board of Governors Resolution No. 3)<br><i>Presenter: Helen Hirschbiel, General Counsel</i>  | 14. Investigation Regarding Change to Oregon State Bar Logo<br>(Delegate Resolution No. 3)<br><i>Presenter: David Seulean, HOD, Region 3</i>  |
| 10. Veterans Day Remembrance<br>(Board of Governors Resolution No. 4)<br><i>Presenter: Richard Spier, BOG, Region 5</i>                                  | 15. HOD Agenda Items<br>(Delegate Resolution No. 4)<br><i>Presenter: Danny Lang, Douglas Co. Bar</i>  |
| 11. Amendment of Oregon Rule of Professional Conduct 1.2<br>(Board of Governors Resolution No. 5)<br><i>Presenter: Helen Hirschbiel, General Counsel</i> |   |

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### Resolutions

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#### 7. In Memoriam

##### (Board of Governors Resolution No. 1)

Hon T. Abraham	Joseph A. Brislin Jr	David F. Cargo	Shannon K. Connall
Richard H. Allen	James W. Britt III	Richard R. Carney	Des Connall
Arthur R. Barrows	Nancy Elizabeth Brown	Robert R. Carney	Debra Deem
David S. Barrows	Franklyn N. Brown	Lawrence Lee Carter	Michael J. Dooney
William R. Barrows	Ellen P. Bump	James Casby	Edward Ray Fechtel
William O. Bassett	John H. Buttler	Kelly WG Clark	Douglas M. Fellows
Marc D. Blackman	Victor Calzaretta	Lynda A. Clark	Barbara H. Fredericks

George C. Fulton	Thomas A. Kennedy	C Richard Neely	Herman F. Smith
Joel A. Gallob	Peter R. Knipe	Robert J. Neuberger	Monica A. Smith
Caroline D. Glassman	James P. Leahy	Gregory A. Nielson	Scott D. Sonju
James B. Griswold	Hon Winfrid K.F. Liepe	Hon Albin W. Norblad	Harvard P. Spigal
Hon Harl H. Haas	Margaret M. Maginnis	Hon Jack F. Olsen	Garth F. Steltenpohl
Samuel A. Hall Sr	Michael V. Mahoney	James P. O'Neal	Sharon C. Stevens
Lloyd G. Hammel	Lisa A. Maybee	Michelle I. Pauly	Randolph J. Stevens
John N. Harp Jr	Daniel T. McCarthy	Walter H. Pendergrass	Robert H. Thomson
Eric Haws	William S. McDonald	Lester L. Rawls	Harold Uney
Donald E. Heisler	Lee J. McFarland	Steve Rissberger	Hon Darrell J. Williams
Loren D. Hicks	Rodney W. Miller	John Leslie Roe	Gerald Williams
Hon Ralph M. Holman	Robert Mix	Matthew C. Runkle	M Keith Wilson
James H. Huston	Richard H. Muller	William A. Sabel	
Hon Robert E. Jones	Stephen B. Murdock	Ross M. Shepard	

*Presenter: Tom Kranovich  
OSB President*

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**8. Amendment of Oregon Rule of Professional Conduct 8.4  
(Board of Governors Resolution No. 2)**

*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 shall 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 intimidate or harass a person because of that person's race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation, marital status, or disability.**

(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.**

### **Background**

In November 2013, the OSB House of Delegates approved an amendment to Oregon RPC 8.4 that would have prohibited a lawyer, in the course of representing a client, from knowingly manifesting bias or prejudice on a variety of bases. The HOD amendment was presented to the Supreme Court in accordance with ORS 9.490, but the Court deferred action on the proposal and asked the bar to consider changes that would address the Court's concerns that the RPC 8.4 amendment as drafted would impermissibly restrict the speech of OSB members.

Because of the strong HOD support for an anti-bias rule, the OSB Board of Governors decided to convene a special committee (the RPC 8.4 Drafting Committee) to develop a revised proposal that would satisfy the Court's concerns.

The Drafting Committee was comprised of nine individuals: two who had personally appeared and presented written objections to the HOD proposal at the Supreme Court public meeting in December 2013; three representatives of the Legal Ethics Committee who had participated in the development of the HOD proposal; two representatives of specialty bars who had also been involved in the development of the HOD proposal, and; two recommendations from the Court as having some expertise in Oregon free speech jurisprudence. There were also two non-voting BOG liaisons.

In its charge from the BOG, the Committee was asked to leave to the BOG and HOD the policy question of whether the bar should have any rule on the issue, and to only recommend language that will not impermissibly restrict lawyer speech, while at the same time establishing a standard for appropriate professional conduct.

The Committee met four times during the spring of 2014. The agendas, minutes, and materials considered during the meetings, were all posted on the OSB website. As instructed, the Committee focused its efforts on developing a rule that would both address conduct the HOD

proposal was trying to reach and pass constitutional muster by focusing on harmful effects, rather than expression. During the first two meetings, the Committee struggled with articulating harmful effects within the construct of the HOD proposal. Unable to make any headway using this approach, the Committee abandoned the prohibition against “manifesting bias or prejudice” and instead returned to the original purpose behind the development of the rule, which was to prohibit harassment, intimidation and discrimination.

Thereafter, the Committee considered what class or classes of individuals to protect. The Committee discussed at length whether to keep the original list contained in the HOD proposal, whether to limit the list to immutable characteristics, or whether to omit select classes of individuals. In particular, the question of whether to include socio-economic status, gender identity and gender expression generated considerable controversy. The list included in the HOD proposal had derived from a suggestion made to the Legal Ethics Committee in April 2013 that the list mirror those classes of individuals that are protected under Oregon law. With this in mind the Committee decided to omit socio-economic status and retain the remaining classes listed in the HOD proposal.

The Committee also discussed whether to apply the rule only to the lawyer “in the course of representing a client” or whether to expand its application to a lawyer representing himself or herself. In deference to the HOD rule, the Committee decided that the proposed rule should apply only to a lawyer acting “in the course of representing a client.”

Finally, the Committee discussed whether to retain the exception for legitimate advocacy, contained in the HOD-approved Rule 8.4(c). While some members of the Committee doubted the need for it, everyone agreed that there was no harm in retaining the exception for legitimate advocacy. On the other hand, the Committee also unanimously agreed that the second clause of the paragraph in HOD rule 8.4(c) should be omitted. It provided that a lawyer shall not be prohibited from “declining, accepting, or withdrawing from representation of a client in accordance with Rule 1.16.” Three reasons came out. First, there is already a rule governing withdrawal, which would apply regardless of the inclusion of RPC 8.4(c). Second, the second clause makes little sense in light of the changes to the substance of Rule 8.4(a)(7). Third, the clause may conflict with lawyers’ obligations under the public accommodation laws.

The Committee recommended that the language set forth above be presented to the Board of Governors for its consideration. At its meeting on June 27, 2014, the BOG considered the Committee’s proposal and voted unanimously to recommend it to the HOD.

*Presenter: David Elkanich  
RPC 8.4 Drafting Committee Member*

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## **9. Amendment of Oregon Rule of Professional Conduct 5.5 (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 5.5 as set forth below is approved and shall be submitted to the Oregon Supreme Court for adoption:

**RULE 5.5 UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE**

- (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
- (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
  - (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
  - (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.
- (c) A lawyer admitted in another [*United States*] jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
  - (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
  - (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
  - (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternate dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission;
  - (4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice; or
  - (5) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission.
- (d) A lawyer admitted in another [*United States*] jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.
- (e) A lawyer who provides legal services in connection with a pending or potential arbitration proceeding to be held in his jurisdiction under paragraph (c)(3) of this rule must, upon engagement by the client, certify to the Oregon State Bar that:



- (1) the lawyer is in good standing in every jurisdiction in which the lawyer is admitted to practice; and
- (2) unless the lawyer is in-house counsel or an employee of a government client in the matter, that the lawyer
  - (i) carries professional liability insurance substantially equivalent to that required of Oregon lawyers, or
  - (ii) has notified the lawyer's client in writing that the lawyer does not have such insurance and that Oregon law requires Oregon lawyers to have such insurance.

The certificate must be accompanied by the administrative fee for the appearance established by the Oregon State Bar and proof of service on the arbitrator and other parties to the proceeding.

### **Background**

In May 2013, the BOG appointed the Task Force on International Trade in Legal Services to study the effect of free trade agreements and the regulatory framework for lawyers practicing law in Oregon on the delivery of legal services across international borders.

The reasons for the Task Force were two-fold. First, international trade is increasingly important in Oregon. It supports nearly 490,000 jobs, and Oregon exports billions of dollars in goods and services annually to customers in 203 countries around the globe. Foreign-owned companies invest in Oregon and employ more than 40,000 Oregonians. Thus, Oregon lawyers are more often serving clients who have legal needs that cross international borders.

Second, in addition to the General Agreement on Trade in Services (GATS) and the North American Free Trade Agreement (NAFTA), the United States has negotiated 15 other international trade agreements all of which contain a common clause requiring that parties to the treaty ensure that domestic regulation measures do not create unnecessary barriers to trade. Lawyer regulation is no exception, and the federal government arguably has the power to compel states to ensure that their lawyer regulations do not unreasonably interfere with trade agreement obligations. Therefore, many jurisdictions are recognizing that reviewing regulations relating to the practice of law for "unnecessary barriers to trade" is a prudent undertaking.

The Task Force has studied issues relating to both permanent and temporary practice in Oregon by foreign-licensed lawyers and continues to work on its final report and recommendations. This proposal relates only to the Task Force's findings and recommendations relating to temporary practice by foreign-licensed lawyers.

#### *A. Barriers to Trade*

Oregon RPC 5.5(c) allows lawyers licensed in another U.S. jurisdiction to provide legal services in Oregon on a temporary basis under certain circumstances. In addition, Oregon RPC 5.5(d) allows lawyers licensed in other U.S. jurisdictions to provide legal services in Oregon when federal law specifically authorizes them to do so. Out-of-state lawyers may not establish a "systematic or continuous presence" within Oregon, nor hold themselves out to the public as admitted to practice in Oregon unless that is, in fact, the case.

Notably, RPC 5.5(c) and (d) do not apply to or otherwise address temporary law practice by lawyers licensed outside of the United States. In fact, unless they are also licensed in Oregon, lawyers licensed outside of the United States are not authorized to provide any legal services within the state of Oregon under any circumstances.

There are problems with the current approach. Given the pervasive expansion of international business transactions noted above, and lawyers' interests in supporting and advancing their clients' objectives in such matters, the Task Force assumed that more lawyers from outside the United States will seek to visit Oregon to provide legal services to their clients and that Oregon lawyers have an interest in encouraging such visits for the benefit of their clients. Although the Task Force found no empirical evidence for this conclusion, its members recounted numerous examples from their own experiences of needing or wanting foreign lawyers to provide legal services on a temporary basis to their clients. The rules of professional conduct as currently written, however, stand as a barrier to the provision of such services. The Task Force then asked whether the barrier is necessary. Laws prohibiting the practice of law without a license are consumer protection measures, the purpose of which are to protect the public from the consequences that flow from efforts to provide services by those who are neither trained nor qualified to do so. The Task Force expressed concern that precluding foreign lawyers from providing legal services on a temporary basis in Oregon—under the same terms and conditions that lawyers licensed in other U.S. jurisdictions do—is not necessary in order to protect the public and therefore constitutes an unnecessary barrier to trade. Specifically, the Task Force could not find any basis to conclude that a foreign-licensed lawyer would pose any more of a risk to consumers than an out-of-state lawyer would when providing services on a temporary basis as allowed under RPC 5.5(c) and (d). This conclusion is based in large part on the restrictions that currently exist within the rule that serve to protect the consumer.

#### *B. Existing Rule and Effect of Changes*

The proposed amendment would allow lawyers licensed to practice law outside of the United States to provide legal services on a temporary basis in Oregon to the same extent as lawyers who are licensed in other U.S. jurisdictions are currently allowed to do.

Currently, under RPC 5.5(c)(1) an out-of-state lawyer may provide legal services on a temporary basis in Oregon as long as undertaken in association with a lawyer admitted to practice in Oregon. The consumer is protected because services provided under this provision are undertaken in association with an Oregon lawyer.

Under the existing RPC 5.5(c)(2), an out of state lawyer may appear in Oregon courts as long as the lawyer complies with the *pro hac vice* admission requirements, including, associating with an Oregon lawyer who participates substantially in the matter, certifying that he or she will comply with all Oregon laws, and carrying professional liability insurance coverage substantially equivalent to that required of Oregon lawyers. See UTCR 3.170. Most importantly, the court in which the lawyer will be appearing has to approve *pro hac vice* admission and has continued oversight and ability to revoke the *pro hac vice* admission. Again, the consumer is protected by the strict requirements of *pro hac vice* admission and the oversight of the courts.

Currently, under RPC 5.5(c)(3) and (4), an out-of-state lawyer may provide legal services on a temporary basis in Oregon without association of local counsel so long as they arise out of or are reasonably related to the lawyer's practice in the jurisdiction in which the lawyer is licensed. Although this phrase has not been interpreted in Oregon, the ABA Model Rule 5.5, Comment [14] offers examples of how such a relationship might be determined:

*The lawyer's client may have been previously represented by the lawyer or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.*

The underlying premise of RPC 5.5(c)(3) and (4) is that clients are protected either by virtue of having a past relationship with the lawyer or because the lawyer has some expertise in the area of law at issue. In addition, when an out-of-state lawyer provides legal services in connection with a mediation or arbitration in Oregon, the lawyer must complete the certification requirements set forth in RPC 5.5(e), which provide additional protections to the consumer.

Under current RPC 5.5(c)(5) an out of state lawyer may provide legal services to the lawyer's employer or its organizational affiliates. As noted by the ABA Model Rule commentary, provision of services in this context generally serves the interest of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

Finally, RPC 5.5(d) recognizes that federal law preempts state licensing requirements to the extent that the requirements hinder or obstruct the goals of the federal law. See *Sperry v. Florida ex rel. Florida Bar*, 373 US 379 (1963). Thus, where federal law allows foreign lawyers to practice, Oregon could not prohibit it, notwithstanding the current rule.

The proposed amendment would allow a foreign-licensed lawyer to provide legal services in Oregon on a temporary basis under the same conditions as set forth above. The same consumer protection measures that currently exist would be equally applicable to foreign lawyers. Furthermore, just like out-of-state lawyers, foreign lawyers would not be allowed to establish a "systematic or continuous presence" within Oregon, nor hold themselves out to the public as admitted to practice in Oregon unless that is, in fact, the case.

### *C. Comparison to ABA Model Rule*

ABA Model Rule 5.5 takes a narrower approach than what is proposed here, permitting foreign-licensed lawyers to practice temporarily in a U.S. jurisdiction only as house counsel on foreign law issues or as otherwise authorized by federal law.

Connecticut, Indiana, Kansas and Wisconsin have adopted rules that are the same or similar to the ABA rule. Arizona and Alabama allow practice by foreign lawyers only when authorized by federal law. Ten jurisdictions (Colorado, Delaware, the District of Columbia, Florida, Georgia, Idaho, New Hampshire, North Carolina, Pennsylvania, and Virginia) have amended their Rule 5.5 in the same manner as proposed here.

*D. Conclusion*

Because of the potential problems with the current rule, the BOG concurs with the Task Force recommendation that RPC 5.5(c) and (d) be amended to allow the temporary practice of law in Oregon by lawyers licensed in jurisdictions outside of the United States. This can be accomplished simply by deleting the words "United States" from RPC 5.5(c) and (d).

*Presenter: Helen Hierschbiel  
OSB General Counsel*

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**10. Veterans Day Remembrance  
(Board of Governors Resolution No. 4)**

*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*

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**11. Amendment of Oregon Rule of Professional Conduct 1.2  
(Board of Governors Resolution No. 5)**

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

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

*Resolved*, That the amendment of Oregon Rule of Professional Conduct 1.2 as set forth below is approved and shall be submitted to the Oregon Supreme Court for adoption:

**Rule 1.2 Scope of Representation and  
allocation of authority between client and lawyer**

(a) Subject to paragraphs (b) and (c), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall

consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal 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.

**(d) Notwithstanding paragraph (c), a lawyer may counsel and assist a client regarding Oregon's marijuana-related laws. In the event Oregon law conflicts with federal law, the lawyer shall also advise the client regarding related federal law and policy.**

### Background

In November 1998, Oregon voters approved the Oregon Medical Marijuana Act (OMMA). The state implemented a registration program the following year and, early this year, a medical marijuana dispensary program. In November 2014, Oregon voters will decide whether to legalize and regulate the recreational use of marijuana.

Currently, lawyers are being asked to assist clients with various legal matters relating to the medical marijuana industry, such as: real estate transactions where use of the property will involve the cultivation, dispensation, sale or use of marijuana; entity formation for the purpose of operating a marijuana business authorized by OMMA; and, regulatory compliance with OMMA. If recreational use of marijuana is legalized in Oregon, the need for legal counsel will likely expand further.

While users, growers and dispensaries who comply with OMMA requirements are protected from state criminal prosecution for production, possession or delivery of marijuana, OMMA does not protect individuals from federal prosecution under the Federal Controlled Substances Act or related federal statutes. In other words, while the client's conduct may be legal under state law, it remains illegal under federal law. Thus, lawyers who assist their clients with such conduct, arguably violate Oregon RPC 1.2(c) as written.

Other states that have legalized the medical or recreational use of marijuana have encountered similar questions about the limitations imposed by Rule 1.2. The bars and courts in these other jurisdictions have responded in differing ways. The State Bar of Arizona adopted a formal ethics opinion that allows lawyers to counsel or assist clients in legal matters permitted under the Arizona Medical Marijuana Act as long as: (1) the Act has not been held to be preempted, void or invalid; (2) the lawyer reasonably believes the client's conduct is allowed under the Act; and

(3) the lawyer advises the client about the federal law implications. See State Bar of Arizona Ethics Op No 11-01.

By contrast, the Colorado Bar Association concluded in its formal ethics opinion that “a lawyer cannot advise a client regarding the full panoply of conduct permitted by” Colorado’s marijuana laws. Specifically, the Colorado Bar Association determined that the plain language of Rule 1.2 would prohibit lawyers from assisting clients in structuring or implementing transactions in furtherance of a marijuana business, because the client’s conduct would violate federal law. See Colorado Bar Association Formal Op No 125. Subsequently, the Colorado Supreme Court adopted commentary to its Rule 1.2 which clarifies that lawyers may counsel and assist clients regarding their state’s medical marijuana laws. To the extent that such laws conflict with federal law, the commentary also requires that lawyers advise the client regarding related federal law and policy. The Nevada Supreme Court followed suit, adopting commentary to its Rule 1.2, and the Washington Supreme Court is also considering adopting commentary to its Rule 1.2.

The Oregon Supreme Court has thus far declined to add commentary to the Oregon Rules of Professional Conduct, so the Colorado approach is not an option in Oregon. To resolve the uncertainty surrounding this issue, the OSB Board of Governors asked the OSB Legal Ethics Committee to either draft a formal ethics opinion or an amendment to the rules that would clarify that lawyers may provide legal counsel and assistance to clients with medical marijuana businesses without running afoul of their professional responsibilities.

A majority of the Legal Ethics Committee determined that any opinion they would draft would likely reach a conclusion similar to that reached by the Colorado Bar Association. Moreover, the LEC felt that an amendment to RPC 1.2 would provide greater clarification and assurance to lawyers about the propriety of advising and assisting clients with their marijuana-related businesses. Therefore, the LEC drafted and recommended adoption of the proposed amendment.

In order to avoid the unintended consequences of a very broadly worded exception to RPC 1.2(c), the LEC proposal limits the exception to marijuana-related laws. On the other hand, the proposal does not refer specifically to OMMA so that it would cover any issues that might similarly arise from the legalization of recreational marijuana. Given the continued existence of conflicting federal law, the LEC felt it important to require lawyers to advise clients about federal law and policy related to marijuana. This requirement is similar to language included both in the commentary adopted by the Colorado and Nevada Supreme Court, and in the Arizona Formal Ethics Opinion.

*Presenter: Helen Hierschbiel  
OSB General Counsel*

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## **12. Amendment of Oregon Rule of Professional Conduct 1.2 (Delegate Resolution No. 1)**

*Whereas*, Oregon attorneys wish clarify the ethical duties of Oregon attorneys complying with current Oregon law; now, therefore, be it,

*Resolved*, That the Board of Governors formulate an amendment and/or subsection to ORPC 1.2(c), for approval by the House of Delegates and adoption by the Supreme Court, that clarifies ORPC 1.2(c) to allow a lawyer to assist a client in conduct that the lawyer reasonably believes is permitted by the Oregon Medical Marijuana Program, the Medical Marijuana Dispensary Program and any other Oregon law (including the 2014 Initiative Measure 91 – The Control, Regulation, and Taxation of Marijuana and Industrial Hemp if it passes) related to the use and regulation of marijuana and/or hemp including regulations, orders, and other state or local provisions implementing those laws. The clarification should also include a provision requiring the lawyer to advise the client regarding conflicting federal law and policy.

### **Background**

Currently, ORPC 1.2(c) states that “[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal 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.”

ORPC 1.2(c) is vague regarding the scope of counsel and assistance an Oregon attorney may give to clients wishing to conduct business under Oregon’s Medical Marijuana Program, the Medical Marijuana Dispensary Program and the imminent legalization of recreational marijuana and hemp. This amendment would merely clarify that an attorney is not in violation of the ORPC’s by working with businesses complying with Oregon law.

Clarification of ORPC 1.2 is necessary because the Colorado Bar Assoc. Ethics Committee recently interpreted a nearly identical rule (Colo. RPC 1.2(d)) to prohibit lawyers from (1) drafting or negotiating contracts to facilitate the purchase and sale of marijuana between businesses and/or (2) drafting or negotiating leases for properties or facilities, or contracts for resources or supplies, that clients intended to use to cultivate, manufacture, distribute, or sell marijuana. In addition, the Committee interpreted the rule to prohibit a lawyer from representing the lessor or supplier in such a transaction if the lawyer knew the client’s intended uses of the property, facilities or supplies was related to marijuana. The Committee found that violation of the ethics rule occurred even though those transactions complied with Colorado law. Colo. Bar Assoc., *Formal Opinion 125 – The Extent to Which Lawyers May Represent Clients Regarding Marijuana-Related Activities*, 42 The Colo. Lawyer 19 (2013), [http://www.cobar.org/tcl/tcl\\_articles.cfm?articleid=8370](http://www.cobar.org/tcl/tcl_articles.cfm?articleid=8370).

In direct response to the Committee’s findings, the Colorado Supreme Court clarified Colo. RPC 1.2(d) and stated that it was not a violation of the Colo. RPC’s for a lawyer to “counsel a client regarding the validity, scope, and meaning of Colorado constitution article XVIII, secs. 14 & 16, **and [a lawyer] may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and the statutes, regulations, orders, and other state or local provisions implementing them.** In these circumstances, the lawyer shall also advise the client regarding related federal law and policy.” Colo. Rules of Prof.’l Conduct, Rule. 1.2[14].

In conclusion, without additional clarification of ORPC 1.2(c), Oregon attorneys run the risk of a violating the ORPC’s by merely drafting or negotiating a contract on behalf of a business

participating in Oregon’s legal marijuana/hemp marketplace. The fact that no disciplinary action has been taken to date against any Oregon lawyer regarding this specific ethical issue does not provide sufficient guidance or assurances to Oregon lawyers that wish to provide valuable and needed legal services to clients in this highly regulated industry.

Financial Impact: None.

*Presenter: Eddie D. Medina  
House of Delegates, Region 4*

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**13. Support of Adequate Funding for Legal Services for Low-Income Oregonians  
(Delegate Resolution No. 2)**

*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*, Since 1998, pursuant to ORS 9.575, the Oregon State Bar has operated the Legal Services Program to manage and provide oversight for the state statutory allocation for legal aid in accordance with the Bar’s Standards and Guidelines ( which incorporate national standards for operating a statewide legal aid program); and

*Whereas*, Poverty in Oregon increased 61% between 2000 and 2011, the 8<sup>th</sup> largest increase in the nation, and most of Oregon’s poor have nowhere to turn for free legal assistance; and

*Whereas*, During the great recession the staffing for legal aid programs was reduced while the poverty population in Oregon increased dramatically, thus broadening “the justice gap” in Oregon; and

*Whereas*, Oregon’s legal aid program currently has resources to 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*, Oregon currently has 1 legal aid lawyer for every 9,440 low-income Oregonians, but the national standards for a minimally adequately funded legal aid program is 2 legal aid lawyers for every 10,000 low-income Oregonians; 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, which provides federal support for legal aid.

(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 the Oregon legal community, 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.

### **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.” *Id.*

The Board of Governors and the House of Delegates have adopted a series of resolutions supporting adequate funding for civil legal services in Oregon (Delegate Resolutions in 1996, 1997, 2002, 2005–2013). This resolution is similar to the resolution passed in 2013, but specifically provides updates regarding “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 the state statutory allocation for civil legal services and provide methods for evaluating the legal services programs. The Campaign for Equal Justice 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.

Oregon’s legal aid program consists of four separate non-profits that work together as part of an integrated service delivery system designed to provide high priority free civil legal services to

low-income Oregonians in all 36 Oregon counties through offices in 17 communities. There are two statewide programs, Legal Aid Services of Oregon (LASO) and the Oregon Law Center (OLC); and two county wide programs, Lane County Legal Aid and Advocacy Center and the Center for Non-Profit Legal Services (Jackson County). Because the need is great and resources are limited, legal aid offices address high priority civil legal issues such as safety from domestic violence, housing, consumer law, income maintenance (social security, unemployment insurance, and other self-sufficiency benefits), health, employment and individual rights. Over 40% of legal aid's cases are family law cases, usually helping victims of domestic violence. All of these programs work to stretch limited resources through pro bono programs and self help materials. Legal aid's website, oregonlawhelp.com receives about 70,000 unique visitors a year.

Providing access to justice and high quality legal representation to all Oregonians is a central and important mission of the Oregon State Bar. An Oregon study concluded that low-income Oregonians 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: 75% of individuals without access to a lawyer felt very negatively about the legal system, but of those who had access to a legal aid lawyer, 75% had a positive view of the legal system regardless of the outcome of their case. The 2014 Task Force on Legal Aid Funding, which included representatives of the Bar, the Law Foundation, the judiciary, the legislature and private practice concluded that legal aid funding should be doubled over the next 10 years. Because funding for legal aid is a state, federal and private partnership, with about 80 different sources of funding, increases in funding must be made across the board to address the justice gap.

Currently, slightly more than 20% of lawyers contribute to the Campaign for Equal Justice, but in some Oregon regions (Jackson County and Lane County, for example), participation is as high as 40%.

*Presenters:*  
*Kathleen Evans, HOD, Region 6*  
*Gerry Gaydos, HOD, Region 2*  
*Ed Harnden, HOD, Region 5*

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#### **14. Investigation Regarding Change of Oregon State Bar Logo (Delegate Resolution No. 3)**

*Whereas*, The previous Douglas Fir logo of the Oregon State Bar was a beautiful symbolic representation for the Oregon State Bar; and

*Whereas*, The current logo of the Oregon State Bar is a simple block list sets forth no distinguishing characteristic logo for the Oregon State Bar; and

*Whereas*, Certain members of the Oregon State Bar have expressed an interest in changing the logo of the Oregon State Bar back to the Douglas Fir logo; now, therefore, be it

*Resolved*, The administrative staff of the Oregon State Bar shall investigate the costs associated with changing the Oregon State Bar logo back to the Douglas Fir logo and conduct a survey among members of the Oregon State Bar to determine whether or not a majority of the

membership of the Oregon State Bar desires a change back to the Douglas Fir logo and report such findings back to the membership of the Oregon State Bar House of Delegates for considering whether or not to change the logo of the Oregon State Bar back to the Douglas Fir logo at the 2015 Oregon State Bar House of Delegates meeting.

### **Background**

The previous logo of the Oregon State Bar contained emblems of Douglas fir trees and presented a logo that uniquely represented the Oregon State Bar and its membership. The current logo is a simple block that does not make the representation for the bar and its members. A survey of the membership of the Oregon State Bar should be undertaken to determine logo the membership desires.

Financial impact: Financial impact of any change will be determined by its Oregon State Bar administrative staff research. Determination of the desire of the Oregon State Bar membership regarding a change of logo would be minimal.

*Presenter: David P.A. Seulean  
House of Delegates, Region 3*

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### **15. HOD Agenda Items (Delegate Resolution No. 4)**

*Whereas*, Section 1.2 [Purposes] of the By-Laws of the Oregon State Bar includes providing for consideration of Matters relevant to the “Advancement of the Science of Jurisprudence”; and

*Whereas*, Bar members and HOD Delegates have submitted Proposed HOD Agenda Items upon a variety of subjects under the umbrella of pertaining to the “*Advancement of the Science of Jurisprudence*”; and

*Whereas*, examples of subject matter for inclusion may or may not include matter so Public Interest, such as the Oregon Death Penalty, legalization of marijuana, Gay Marriage, Gender and Economic Bias; compared with subjects limited to internal Oregon State Bar Issues such as Admittance, Bar Exam, and Discipline; and

*Whereas*, Issues have arisen among Oregon State Bar Members and within the Board of Governors as to whether or not each such topic qualified for inclusion upon the House of Delegates Agenda; now, therefore, be it

*Resolved*, That the House of Delegates recommends that the Board of Governors undertake a Survey of the Membership to better focus the scope of Matters allowed to be placed upon the House of Delegates Agenda and provide guidance/standards for inclusion or exclusion accordingly.

*Presenter: Danny Lang  
Douglas County Bar Association Alternate for  
Ron Sperry, III  
Douglas County Bar Association President*

## 2014 HOD Resolutions

Item	Sponsor	Description	On HOD Agenda?	Presenter	BOG Position?	Presenter of BOG Position
7	BOG	In Memoriam	Yes	Ms. Billman	n/a	n/a
8	BOG	Amend RPC 8.4	Yes	David Elkanich?	support	
9	BOG	Amend RPC 5.5	Yes	Helen Hierschbiel	support	
10	BOG	Veterans' Day Rememberance	Yes	Rich Spier	support	
11	BOG	Amend RPC 1.2	Yes	Helen Hierschbiel	support	
12	Delegate	Amend RPC 1.2	No	Eddie D. Medina, HOD Reg 4	withdrawn by Mr. Medina	
13	Delegate	Adeq. Funding for Legal Svcs.	Yes	K.Evans/G.Gaydos/E.Harnden	support	
14	Delegate	Change OSB Logo	Yes	David Seulean, HOD Reg 3	Opposed	Hunter Emerick
15	Delegate	HOD Agenda Items	Yes	Danny Lang, Douglas Co Bar	Opposed	Tim Williams
16	BOG	Adeq. Funding for xxx	Yes	Patrick Ehlers	support	



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**ReAzalia Allen**  
NATIONAL DIRECTOR OF COMMUNICATIONS

**Kim Brimm**  
NATIONAL DIRECTOR OF PUBLIC RELATIONS

**Betty Gentle**  
NATIONAL DIRECTOR OF MEMBERSHIP

**Simone Otenaika**  
NATIONAL CONVENTION COORDINATOR

**Royce Williams**  
NATIONAL DIRECTOR  
OF CORPORATE RELATIONS

**Shawn Greene**  
NATIONAL FINANCIAL SECRETARY

**Brandon Hicks**  
NATIONAL SOCIAL ACTION CHAIR

**Julianne Kelly**  
NATIONAL DIRECTOR OF NELSON MANDELA  
INTERNATIONAL NEGOTIATIONS  
COMPETITION

**Kiara Gradney**  
NATIONAL DIRECTOR OF EDUCATION  
AND CAREER DEVELOPMENT

**Cameo-Diamond Joseph**  
NATIONAL DIRECTOR OF INTERNATIONAL  
RELATIONS

**Kenneth Mitchell**  
NATIONAL DIRECTOR OF THE  
PRE-LAW STUDENT DIVISION

**Belashia Wallace**  
NATIONAL DIRECTOR OF ALUMNI AFFAIRS &  
DEVELOPMENT

**Donald Cooley**  
NATIONAL PARLIAMENTARIAN

**Dania Lofton**  
NATIONAL HISTORIAN

**A.J. Cooper, Esq.**  
IN-HOUSE COUNSEL

Dear Sir or Madam:

I bring you greetings on behalf of the National Black Law Students Association (NBLSA). It is my sincerest desire that this letter finds you well. NBLSA is a 501(c)(3) corporation and the nation's largest student-run organization representing nearly 6,000 minority law students from over 200 chapters and affiliates throughout the United States and six other countries. NBLSA will host its 47th annual convention in Portland, Oregon from March 11 -15, 2015. This is a three-day convention beginning with a reception Thursday and full day activities and seminars Friday and Saturday, culminating in a black tie banquet Saturday evening, and we invite you to join us.

The theme for the 2014-2015 term of NBLSA is *Igniting the Spirit of NBLSA on the Road to 50*. As we approach NBLSA's 50th Anniversary, we must press forward doing the great work of our organization and return to its mission to improve the relationship between Black law students, Black attorneys, and the American legal structure. In the 2014-2015 term, we will further our mission by strengthening our partnership with organizations like yours that increase our outreach for minority law students and align with our mission of increasing the diversity within the legal profession through academic and professional preparation. In addition to our national presence, NBLSA has overseas chapters in six different countries, including affiliates in Nigeria and South Africa. NBLSA has readily championed diversity in all its forms, and assisted with the formation of the National Latino/Latina Law Students Association ("NLLSA"), the National Association of Law Students with Disabilities ("NALSD"), and the National Asian Pacific American Law Student Association ("NAPALSA").

Our success greatly depends on the generosity of corporate sponsors. Serving as an official sponsor is an opportunity for your organization to become an active participant in NBLSA. Moreover, your sponsorship highlights your ongoing commitment to diversity in the legal profession and advances your company as an industry leader and agent of positive social change.

NBLSA members are not only talented law students, but also involved community advocates. Our alumni are among the most talented and respected legal practitioners and are active and influential community leaders. NBLSA remains committed to helping minority law students think intensively and critically to foster positive change in the world.

NBLSA's success greatly depends on the generosity of corporate sponsors and partners. Serving as an official sponsor for NBLSA's Annual National Convention is a great opportunity for your organization to become an active participant with NBLSA. Moreover, your sponsorship highlights your ongoing commitment to diversity in the legal profession and advances your company as an industry leader and agent of positive social change.

Attached to this cover letter are the levels of sponsorship that are available and the opportunities and benefits for each of the sponsorship levels. We truly hope that you will consider being a Silver Sponsor, \$5,000, or higher for our convention.

Thank you for your support,

Royce Williams

Lewis and Clark Law School | Juris Doctor Candidate 2015  
National Director of Corporate Relations, 2014-2015  
National Black Law Students Association

## MEMBER DEMOGRAPHICS

NBLSA members are not only talented law students, but also involved community advocates. Our alumni are among the most talented and respected legal practitioners and are active and influential community leaders

Last year, over 200 schools were represented in our membership, including:

- The George Washington University
- John Marshall
- American University
- Columbia University
- Cornell University
- Duke University
- Emory University
- Florida A&M
- Georgia State University
- Georgetown University
- Harvard University
- Howard University
- Lewis and Clark
- Loyola University Chicago
- New York University
- North Carolina Central University
- Northwestern University
- Stanford University
- Southern University
- Southern Methodist University
- Texas Southern University
- Tulane University
- UCLA
- University of Missouri
- University of Pennsylvania
- University of Texas at Austin
- University of South Carolina
- University of Virginia
- University of Wisconsin
- Vermont
- Yale University

Last year NBLSA rose  
A total in cash donation amount of  
\$118,650  
And  
A total in-kind donation of \$83,750

**This year our goal with your  
help is to raise \$500,000!**

## CONVENTION SPONSORSHIP OPPORTUNITIES & BENEFITS

### PLATINUM SPONSOR (15,000)

- Opportunity to deliver greetings/remarks Reception
- Seven all-access Convention passes \*\*
- One reserved table at gala
- Table at Career Fair Expo
- Promotional item/material in all convention bags
- Recognition on NBLSA official signage
- Logo/link placement on website
- Recognition in NBLSA Magazine and Annual Report
- 2 page ad in Convention Guide to include but not limited to the back cover of the Convention Guide
- Recognition in Luncheon Programs
- Access to NBLSA Resume Book
- High visibility for logo on all Convention marketing materials
- Recognition as Platinum Sponsor in Convention Program included in Convention bag

### GOLD SPONSOR (10,000)

- Opportunity to deliver greetings/remarks at an appropriate event
- Three all-access Convention passes \*\*
- Table at Career Fair Expo
- Workshop panelist opportunities
- Logo on Convention materials and website
- Recognition as Gold Sponsor in Convention Program
- Recognition in NBLSA Magazine and Annual Report
- 1 page ad in Convention Guide
- Ability to provide marketing materials for Convention attendees
- Access to Resume Book

## SILVER SPONSOR (5,000)

- Two all-access Convention passes \*\*
- Table at Career Fair Expo
- Workshop panelist opportunities
- Logo/link placement on website
- Recognition in NBLSA Magazine
- 1/2 page ad in Convention Guide
- Recognition as Silver Sponsor in Convention Program
- Opportunity to have 2 representatives judge both the Thurgood Marshal Mock Trial Competition and the Fredrick Douglas Moot Court Competition

## BRONZE SPONSOR (3,000)

- Recognition as Bronze Sponsor in Convention Program
- 1/4 page ad in Convention Guide
- One all-access Convention pass \*\*
- Opportunity to have 1 representative judge both the Thurgood Marshal Mock Trial Competition and the Fredrick Douglas Moot Court Competition

## COPPER SPONSOR (2,000)

- Recognition as Copper Sponsor in Convention Program
- One all-access Convention pass \*\*
- Opportunity to have 1 representative judge either the Thurgood Marshal Mock Trial Competition, the Fredrick Douglas Moot Court Competition, or the Nelson Mandela International Negotiations Competition

## CHROME SPONSOR (1,000)

- Recognition as Chrome Sponsor in Convention Program
- One all-access Convention pass\*\*

**SPECIAL PACKAGES ARE AVAILABLE UPON REQUEST  
ALL SPONSORSHIP LEVEL PRICING IS SUGGESTED**

\*\*All-Access Convention pass includes tickets to all luncheons, receptions and gala in addition to the panels and networking opportunities during the convention.



## *Additional Convention Sponsorships and Benefits*

### EVENT PROGRAM ADVERTISEMENT \$250-\$750

Place your advertisement in the 47th Annual National Convention Program  
The Event Program allows you to:

- Promote your organization's services, products, and career opportunities;
- Celebrate your NBLSA chapter's extraordinary accomplishments;
- Show support of a local, regional, or national NBLSA member; and
- Join us in celebrating 47 years of service to our communities. Highlight your moment with an:
  - Quarter-page advertisement - \$250
  - Half-page advertisement - \$500
  - Full-page advertisement. - \$750

### VENDOR'S EXHIBITOR SPACE \$325

Exhibitor space allows you to showcase your services, products and distribute marketing materials to attendees throughout the 47th Annual National Convention.

### T-Shirt sponsor \$3,500

Logo prominently displayed on official convention T-shirt

### Bags \$3,500

Logo prominently displayed on outside of convention bag

### Bag inserts \$2,500

Promotional item/material in all convention bags

### Workshop sponsor \$2,000

Opportunity to pick topic and panelists for convention workshop

### Convention Breakfast \$4,000

The Convention Breakfast will take place on

## **SPECIAL SPONSORSHIP OPPORTUNITIES 2015**

### CHAMPION CIRCLE (500)

- Recognition as a Champion of NBLSA in the Convention Program
- A Legacy of NBLSA Reception Sponsor

### ADVOCATE CIRCLE (400)

- Recognition as an Advocate of NBLSA in the Convention Program
- A Legacy of NBLSA Reception Sponsor

### SUPPORTER CIRCLE (300)

- Recognition as a
- Reception Sponsor
- Supporter of NBLSA in the Convention Program
- A Legacy of NBLSA

## *Competition Sponsorship Opportunities and Benefits*

### **MOOT COURT COMPETITION SPONSOR \$10,000**

**The Moot Court Competition will be held from March 11-14, 2015**

- Company logo on all NBLSA Moot Court Competition Materials
- Exclusive official NBLSA Moot Court Competition signage
- Recognition during gala
- Presentation of NBLSA Moot Court Awards at gala
- 5 all-access Convention passes
- Logo/link placement on website
- 1/2 page ad in Convention Guide
- Recognition in NBLSA Magazine and Annual Report

### **MOCK TRIAL COMPETITION SPONSOR \$10,000**

**The Mock Trial Competition will be held from March 11-14, 2015**

- Company logo on all NBLSA Mock Trial Competition Materials
- Exclusive official NBLSA Mock Trial Competition signage
- Recognition during gala Presentation of NBLSA Mock Trial Awards at gala
- 5 all-access Convention passes
- Logo/link placement on website
- 1/2 page ad in Convention Guide
- Recognition in NBLSA Magazine and Annual Report

### **NEGOTIATIONS COMPETITION SPONSOR \$10,000**

**The Negotiations Competition will be held from March 11-14, 2015**

- Company logo on all NBLSA Negotiations Competition Materials
- Exclusive official NBLSA Competition signage
- Recognition during gala Presentation of NBLSA Negotiations Awards at gala
- 5 all-access Convention passes
- Logo/link placement on website
- 1/4 page ad in Convention Guide
- Recognition in NBLSA Magazine and Annual Report



**Oregon State Bar**  
**Special Open Session of the Board of Governors**  
**November 7, 2014**  
**Minutes**

President Tom Kranovich called the meeting to order at 9:30 a.m. on November 7, 2014. The meeting adjourned at 9:45 a.m. Members present from the Board of Governors were Jenifer Billman, Patrick Ehlers, Hunter Emerick, Ray Heysell, Theresa Kohlhoff, Audrey Matsumonji, Caitlin Mitchel-Markley, Josh Ross, Richard Spier, Simon Whang, and Tim Williams. Staff present were Sylvia Stevens, Susan Grabe, and Dani Edwards.

**1. Call to Order**

Mr. Kranovich asked for BOG approval of outreach by Tom and Rich Spier to the dean of the Lewis & Clark Law School to express dismay at the impending closure of the low-income legal services clinic. Tom suggested an in-person visit as well as a letter. After discussion, CMM moved, seconded by PE that Tom and Rich write a letter and request a meeting with Dean Johnson to encourage reinstatement of the clinic.

**Motion:** The board approved the motion unanimously.

**OREGON STATE BAR**  
**Client Security - 113**  
**For the Nine Months Ending September 30, 2014**

Description	September 2014	YTD 2014	Budget 2014	% of Budget	September Prior Year	YTD Prior Year	Change v Pr Yr
<b>REVENUE</b>							
Interest	\$247	\$1,768	\$3,300	53.6%	\$97	\$1,722	2.6%
Judgments	100	750	1,000	75.0%	100	17,481	-95.7%
Membership Fees	2,115	661,244	684,400	96.6%	2,025	657,795	0.5%
<b>TOTAL REVENUE</b>	<b>2,462</b>	<b>663,762</b>	<b>688,700</b>	<b>96.4%</b>	<b>2,222</b>	<b>676,998</b>	<b>-2.0%</b>
<b>EXPENSES</b>							
<b>SALARIES &amp; BENEFITS</b>							
Employee Salaries - Regular	2,433	22,662	30,800	73.6%	2,229	22,036	2.8%
Employee Taxes & Benefits - Reg	644	8,292	11,700	70.9%	748	7,828	5.9%
<b>TOTAL SALARIES &amp; BENEFITS</b>	<b>3,077</b>	<b>30,953</b>	<b>42,500</b>	<b>72.8%</b>	<b>2,977</b>	<b>29,863</b>	<b>3.7%</b>
<b>DIRECT PROGRAM</b>							
Claims	5,000	23,044	250,000	9.2%	20,565	549,880	-95.8%
Collection Fees	30	1,057	2,000	52.8%		9,362	-88.7%
Committees			250				
Travel & Expense		1,123	1,400	80.2%		1,203	-6.7%
<b>TOTAL DIRECT PROGRAM EXPENSE</b>	<b>5,030</b>	<b>25,223</b>	<b>253,650</b>	<b>9.9%</b>	<b>20,565</b>	<b>560,446</b>	<b>-95.5%</b>
<b>GENERAL &amp; ADMINISTRATIVE</b>							
Office Supplies			150				
Photocopying		34	150	22.8%			
Postage	35	269	500	53.9%	27	299	-10.0%
Professional Dues		200	200	100.0%		300	-33.3%
Telephone		50	150	33.2%	30	56	-10.6%
Training & Education			600			425	-100.0%
Staff Travel & Expense		478	874	54.7%		60	696.2%
<b>TOTAL G &amp; A</b>	<b>35</b>	<b>1,031</b>	<b>2,624</b>	<b>39.3%</b>	<b>57</b>	<b>1,140</b>	<b>-9.6%</b>
<b>TOTAL EXPENSE</b>	<b>8,142</b>	<b>57,208</b>	<b>298,774</b>	<b>19.1%</b>	<b>23,599</b>	<b>591,449</b>	<b>-90.3%</b>
<b>NET REVENUE (EXPENSE)</b>	<b>(5,680)</b>	<b>606,554</b>	<b>389,926</b>		<b>(21,377)</b>	<b>85,549</b>	<b>609.0%</b>
Indirect Cost Allocation	1,357	12,213	16,279		1,219	10,971	11.3%
<b>NET REV (EXP) AFTER ICA</b>	<b>(7,037)</b>	<b>594,341</b>	<b>373,647</b>		<b>(22,596)</b>	<b>74,578</b>	<b>696.9%</b>
Fund Balance beginning of year		50,801					
<b>Ending Fund Balance</b>		<b>645,142</b>					
<b>Staff - FTE count</b>		<b>.00</b>	<b>.00</b>			<b>.35</b>	

CLAIM year	CLAIM No.	CLAIMANT	LAWYER	CLAIM AMT	PENDING	INVESTIGATOR	STATUS
2009	39	Pottle, John	Ryan, T. Michael	\$ 500.00	\$ 200.00	Franco	CSF Approved 07.20.2013
2012	54	Lupton, Lela Mae	Gruetter, Bryan W	\$ 22,500.00	\$ 21,500.00	Miller	CSF yes 21.5K. To BOG 11/15
2013	24	Mantell, Elliott J	Goff, Daniel	\$ 47,609.00	\$ 47,609.00	Davis	CSF Denied 11.16.13 Appeal?
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
2013	42	Meier-Smith, Mary	Hall, C. David	\$ 27,500.00	\$ 27,500.00	Brown	
2013	45	Canenguez, Jorge Adalberto	McBride, Jason	\$ 3,500.00	\$ 2,000.00	Atwood	CSF Approved 11.16.2013
2014	1	Snellings, Calvin James	McCarthy, Steven M.	\$ 7,000.00	\$ -	Butterfield	9/5 BOG denied
2014	2	Kitchen, Kimberly A.	Wood, Alan K.	\$ 3,000.00	\$ 3,000.00	Dougherty	
2014	7	Wong, Martha and Bernath, Daniel A.	Foster, Rosemary	\$ 20,000.00	\$ -	Reinecke	9/13 CSF denied. 9/19 appealed
2014	11	Briggs, Lagale for Clayton Briggs	Connall, Des & Shannon	\$ 10,000.00	\$ -	Naucler	9/5 BOG denied
2014	12	Austin, Evan Roy	Landers, Mary	\$ 11,000.00	\$ 7,400.00	Keeler	CSF yes 7.4K. To BOG 11/15
2014	14	Plancarte, Gladys for Pedro Lagunas Do	McBride, Jason	\$ 1,300.00	\$ 1,300.00	Franco	
2014	15	Soto-Santos, Armando	McBride, Jason	\$ 5,000.00	\$ 5,000.00	Atwood	9/13 still investigating
2014	16	Dickinson, Bruce	Stevens, Randolph J.	\$ 1,500.00	\$ 1,500.00	Timmons	
2014	17	Henbest, Debra Lynn	Bosse, Eric M.	\$ 3,000.00	\$ 3,000.00	Atwood	
2014	18	Crocker, Suzanne	McCarthy, Steven M.	\$ 1,500.00	\$ 1,500.00	Butterfield	
2014	19	Asgari, Ali Reza	McLean, Clifford Michael	\$ 600.00	\$ 600.00	Bennett	
2014	20	Pettingill, Lori Lynn	Wood, Alan K.	\$ 4,000.00	\$ 4,000.00	Naucler	
2014	21	Behn, Jennifer	Keeler, J. Andrew	\$ 4,600.00	\$ 4,600.00	Bennett	
2014	23	Perez-Paredes, Javier	McBride, Jason	\$ 2,500.00	\$ 2,500.00	Atwood	
2014	24	Valdez-Flores, Maria	McBride, Jason	\$ 5,000.00	\$ 5,000.00	Atwood	
2014	25	Hassel, Stacey Lee	Wood, Alan K.	\$ 1,000.00	\$ 1,000.00	Naucler	
2014	26	Waller, Tiffany M	Wood, Alan K.	\$ 525.00	\$ 525.00	Naucler	
2014	27	Gowan, Valerie	Schannauer, Peter M	\$ 1,240.00	\$ 1,240.00	Davis	
2014	28	Marquardt, Christina Louise	Segarra, Francisco	\$ 1,449.14	\$ 1,449.14	Dougherty	
2014	29	Madera, Benjamin and Irene	Roller, Dale Maximiliano	\$ 1,500.00	\$ 1,500.00	Reinecke	
					\$ 145,223.14		
		Funds available for claims and indirect costs allocation as of September 2014		Total in CSF Account	\$ 645,142.00		
				<b>Fund Excess</b>	<b>\$ 499,918.86</b>		

## MEMORANDUM

**TO:** Oregon State Bar Board of Governors and Sylvia Stevens, OSB Executive Director

**FROM:** Hon. Adrienne Nelson, Ben Eder, Marilyn Harbur and Christine Meadows  
OSB Delegates to the American Bar Association House of Delegates

**SUBJECT:** 2014 Annual Meeting of the ABA and Meeting of the House of Delegates

**DATE:** September 9, 2014

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### REPORT ON THE ABA ANNUAL MEETING

The 136<sup>th</sup> Annual Meeting of the American Bar Association (the “ABA” or the “Association”) was held August 6-12, 2014, at the Hynes Convention Center in Boston, Massachusetts. Wide varieties of programs were sponsored by committees, sections, divisions, forums and affiliated organizations. The House of Delegates met for one and a half days. The Nominating Committee also met.

The Nominating Committee sponsored a “Coffee with the Candidate” Forum on Sunday, August 10, 2014. Linda A. Klein of Georgia, candidate for President-elect seeking nomination at the 2015 Midyear Meeting, gave a speech to the Nominating Committee and to the members of the Association present and responded to questions.

### THE HOUSE OF DELEGATES

The House of Delegates of the American Bar Association (the “House”) met on Monday, August 11, and Tuesday, August 12, 2014. Robert M. Carlson of Montana presided as Chair of the House.

The Boston Police Department Honor Guard presented the colors. The invocation for the House was delivered by Damon L. Gannett of Montana. The Chair of the House Committee on Credentials and Admissions, Reginald M. Turner of Michigan, welcomed the new members of the House and moved that the signed roster be approved as the permanent roster for this meeting of the House. The motion was **approved**.

Hilarie Bass of Florida, Chair of the Committee on Rules and Calendar, provided a report on the Final Calendar for the House, including recently filed reports. She moved to consider the late-filed reports, adopt the final calendar and approve the list of individuals who sought privileges of the floor. All three motions were **approved**. Ms. Bass noted that the deadline for submission of Resolutions with Reports for the 2015 Midyear Meeting is Wednesday, November 19, 2014, while the deadline for Informational Reports is Friday, December 5, 2014. She also referred to the consent calendar, noting the deadline for removing an item from the consent calendar or from the list of resolutions to be archived. Ms. Bass also reminded the House of the treatment of Reports 400A and 400B regarding the archiving of policies and that 48 policies were identified as appropriate for archiving. Ms. Bass also moved that special rules for debate apply to Resolutions 103A and 103B

and portions severed therefrom. That motion was **approved**.

Later in the day, Ms. Bass moved the items remaining on the consent calendar. The motion was **approved**.

Deceased members of the House were named and remembered by a moment of silence. Chair Carlson recognized Linda Klein of Georgia to speak in honor of Randolph Thrower, an ABA Medal recipient and longtime House member. Chair Carlson then recognized Mark Johnson Roberts of Oregon to speak in honor of Sharon Stevens, the first woman chair of the Solo, Small Firm and General Practice Division and member of the Board of Governors. Chair Carlson recognized Jimmy Goodman of Oklahoma to speak in honor of former ABA President Lawrence E. Walsh. Chair Carlson also noted that former Board of Governors member Blake Tartt, who had recently passed away, would be recognized by the Texas delegation at the 2015 Midyear Meeting in Houston, Texas.

Chair Carlson also asked for recognition of those who had given their lives in defense of our freedom.

For more details of the House meeting, see the following two-part report of the House session. The first part of the report provides a synopsis of the speeches and reports made to the House. The second part provides a summary of the action on the resolutions presented to the House.

## **I. SPEECHES AND REPORTS MADE TO THE HOUSE OF DELEGATES**

### **Statement by the Chair of the House of Delegates**

Robert M. Carlson of Montana, Chair of the House of Delegates, welcomed the delegates in the House and thanked the ABA Communications and Media Relations Division for informing ABA members, the legal community and the general public about developments in the House. Chair Carlson thanked the House Committee on Technology and Communications for summarizing the House proceedings on Twitter and specifically thanked the Tweeters, Daniel Schwartz, Thomas Grella, Lisa Dickinson and Herbert Dixon, Jr. for providing the Twitter summaries. Chair Carlson also recognized members of the various House committees.

After the presentation of colors by the Boston Police Honor Guard and the recitation of the Pledge of Allegiance, Chair Carlson recognized Damon Gannett to deliver the Invocation.

Chair Carlson extended a special welcome to new members of the House and recognized those delegates who have served the House for 25 years or longer. He also personally recognized General Earl Anderson, the 2014 ABA Medal Recipient.

In his statement to the House, Chair Carlson discussed the procedure for addressing the business and calendar of the House. He recognized and thanked the Committee on Rules and Calendar, chaired by Hilarie Bass and comprised of members Deborah Enix-Ross, Alan O. Olson, Christina Plum, and David K.Y. Tang and Committee staff, Marina Jacks, Alpha Brady and Rochelle Evans.

Chair Carlson recognized the Fund for Justice and Education as the ABA's charitable arm and urged member support of FJE. He also recognized the importance of



the ABA Legal Opportunity Scholarship Fund, which is an FJE project.

Chair Carlson highlighted the important policy role of the House, identifying recent successes where the ABA urged Congress to support the Legal Services Corporation and reauthorization of the Violence Against Women Act. He encouraged all members to be active in the ABA Grassroots Action Team and participate in ABA Day in Washington, D.C. The next ABA Day will be April 14-16, 2015.

### **Statement by the Secretary**

Secretary Cara Lee T. Neville of Minnesota moved that the proposed Summary of Action for the House for the 2014 Chicago Midyear Meeting be adopted as the official record of the House. The motion was **approved**. Secretary Neville later moved the House to adopt the recommendations for the continuation of certain special committees (Report 177A). The motion was **approved**.

Later in the meeting, Secretary Neville thanked the officers, the Board of Governors, the House of Delegates and ABA staff for their support during her term as Secretary of the Association.

### **Remarks by The Chief Justice of the United States**

The Honorable John G. Roberts, Jr., Chief Justice of the United States, thanked the Association for the opportunity to assist in celebrating the 800<sup>th</sup> anniversary of the sealing of the Magna Carta at Runnymede, England. He recounted the facts underlying the dispute leading to the Magna Carta. The Chief Justice then highlighted the most significant chapters of the Magna Carta which presaged elements of modern concepts of due process and civil justice. He stated that the Magna Carta summoned national unity to consolidate support within England for the crown. He went on to show how Magna Carta promoted the concept of representative government. The Chief Justice also posited that Magna Carta played a seminal role in the development of our own Declaration of Independence. The Chief Justice challenged lawyers to play a positive role in political discourse in our country in furtherance of the rule of law. The Chief Justice concluded by thanking the Association for its work on behalf of our country.

### **Statement by the ABA President**

ABA President James R. Silkenat of New York thanked the House for the honor of serving as ABA President. He also expressed gratitude to his family, law firm and the ABA officers and staff for their support and assistance. President Silkenat noted the Association had successfully defended attorneys seeking public office from being attacked merely for discharging their responsibilities to clients. He remarked that the ABA has led efforts to protect the attorney-client privilege from intrusion by the National Security Agency. He stated that the ABA had also advocated to Congress on the preservation of cash basis accounting for law firms. He reminded the House as to theme for the 2014 National Law Day and the Association's efforts over the past year to protect voting rights. President Silkenat took special care to underscore the Association's commitment to respond to the child immigration crisis with due process as its touchstone. He then catalogued the mass shootings our country has suffered over the past several years and displayed to the House the numerous events which have occurred after the Newtown Tragedy. He called on the House to act as lawyers to do something in response.

President Silkenat focused the House on the struggles of recent law students and law graduates to deal with unemployment, underemployment and debt. He then paired that issue with the legal underservicing of rural and underprivileged Americans. President Silkenat then presented a video on this issue highlighting the achievements of the Legal Access Job Corps.

### **Statement by the Treasurer**

The Treasurer, Lucian T. Pera of Tennessee, addressed the House and referred the House to his written report which reflected the performance of the Association through June 30, 2014. He stated that the finances of the ABA are sound.

Mr. Pera noted that through June 30, the revenues of the Association were \$172M, which was \$1.9M better than budget and that expenses were \$164.1M, which was \$7.8M less than budget. As a result, revenues have exceeded expense by \$7.9M, which was \$9.7M better than budget. He went on to note for the House that the current projection is that dues revenue would be approximately \$58.1M, which is \$500,000 less than budget and around \$900,000 less than FY 2013.

As to the ABA's cash position, Mr. Pera noted that the annual "cash crunch" was avoided in FY2014.

Mr. Pera then took a look back over the progress of the Association's finances for his three years as Treasurer. The value of the Association's net assets has increased by \$100M. The Association's unfunded pension liability has increased \$10.3M over those same years, but it has varied widely from one year to the next. He also remarked that the Association's financial processes and infrastructure had become more accurate, timely and understandable.

Mr. Pera noted that the ABA's unfunded pension liability increased by \$4.1M. He went on to say legislation recently passed by Congress is projected to reduce the Association's funding requirements.

Mr. Pera concluded by reviewing his three year term as Treasurer and heralded his successor, Nicholas Casey of West Virginia. Finally, he thanked his firm, Adams Reese, for its support and thanked his wife for her support. He thanked the officers and staff with whom he worked over the years.

### **Presentation by the American Bar Endowment**

Chair Carlson recognized J. Anthony Patterson, Vice President of the American Bar Endowment. Mr. Patterson presented a check in the amount of \$3,012,372.50 to Treasurer Pera and Palmer Gene Vance II, Chair of the Council of the ABA Fund for Justice and Education. Hon. Lee Edmon, President of American Bar Insurance then presented a second check in the amount of \$3,012,372.50 to the Honorable Bernice Donald, President of the American Bar Foundation.

## Remarks by Legal Services Corporation Member

Chair Carlson recognized Robert J. Grey, Jr., Past President of the Association, who was appointed as a member of the Legal Services Corporation (“LSC”) by President Obama. He told the House that this year marks the fortieth anniversary of the LSC. He thanked the Standing Committees on Pro Bono and Public Service and Legal Aid for Indigent Defendants for the support for LSC. Past President Grey passed along that the Association had been invited to meet with the President, Vice President and Attorney General to discuss LSC and that President-Elect Hubbard would attend on behalf of the ABA.

## Passing of the President’s Gavel and Statement by President-Elect

ABA President Silkenat introduced President-Elect William C. Hubbard of South Carolina. President-Elect Hubbard then took an oath of office from Hon. Jean Hoefer Toal, Chief Justice of the South Carolina Supreme Court. He thanked his family and friends from South Carolina, and then moved on to thank his fellow officers and ABA staff. He made special effort to thank the service of President Silkenat. He committed the Association to redouble its efforts to “establish justice” as laid out in the preamble to the United States Constitution. Mr. Hubbard highlighted the courageous achievements of several outstanding members of the Association accomplished over the last seven decades: Mortimer Caplin, William T. Coleman, Vernon Jordan and Marcia Greenberger. President-elect Hubbard then posed the question of whether any of the members of the House would be remembered for courageous achievements fifty years from now. He noted the problems caused by the over-population of the nation’s prisons, the underservicing of indigent criminal defendants, domestic violence, gun violence and cybersecurity.

Mr. Hubbard renewed the Association’s commitment to delivering legal services to those in need. He noted that technological advances will be utilized to help close the justice gap in the United States. He announced that the Commission on the Future of Legal Services, chaired by Judy Perry Martinez of Louisiana, would spearhead that effort. A national convocation on creating new pathways to justice will be held. The Legal Access Job Corps will be continued. Criminal justice reforms targeting sentencing, collateral consequences of incarceration, and treatment of the mentally ill were also previewed. Mr. Hubbard pledged that the Association’s lawyers will redouble efforts to address the immigration crisis by identifying and training pro bono lawyers to represent minor children. He also recognized that more pro bono lawyers are needed to help domestic violence victims. Law school student debt and the pipeline and advancement of diverse lawyers are also challenges that confront the profession.

He concluded by declaring that now is the time for lawyers to lead and to have courage in establishing, preserving, and promoting justice for all.

## **Statement by the Executive Director**

ABA Executive Director Jack L. Rives of Illinois reported that the Association faces a range of significant challenges, but we have plans to meet those challenges, and the plans are working. In 2010, membership was down to 386,000. The Association's budgeting process was broken and it faced serious financial concerns. The number of dues-paying members has declined since 2005. In response to these issues, he noted that expenses have been cut, and that membership and non-dues revenue initiatives through ABA Action! have already achieved broad success. He observed that long-term investments have doubled in the four years since 2010 from \$162M to \$324M. One sample noted is the ABA's partnership with the AARP to develop a "Blue Box" to store critical documents safely. Mr. Rives praised the achievements of several individuals as examples of superb staff efforts. Susan Wright worked on full firm memberships, which added over 4,000 new members over the past year. Christina Gazos improved our budgeting process through such programs as training ABA staff members in budgeting basics. He noted that as of June 2014, the Association's revenue is \$1.9M above budget and \$7.8M under budget in expenses. Mr. Rives also praised the work of Pamela McDevitt for developing non-dues revenue efforts with the Law Practice Division. He noted that our staff is the Association's competitive advantage.

## **Election of Officers and Members of the Board of Governors**

On behalf of the Nominating Committee, Beverly J. Quail of Colorado, Chair of the Steering Committee of the Nominating Committee, reported on the nominations for officers of the Association and members of the Board of Governors. The House of Delegates elected the following persons for the terms noted:

### **OFFICERS OF THE ASSOCIATION**

#### **President-Elect for 2014-2015**

Paulette Brown of New Jersey

#### **Chair of the House of Delegates for 2014-2016 term**

Patricia Lee Refo of Arizona

### **MEMBERS OF THE BOARD OF GOVERNORS (2014-2017)**

#### **District Members**

District 1: Wendell G. Large of Maine

District 2: Alice A. Bruno of Connecticut

District 4: Herbert B. Dixon, Jr. of the District of Columbia

District 6: David F. Bienvenu of Louisiana

District 12: Harry Truman Moore of Arkansas

**Section Members-at-Large**

Section of Intellectual Property Law

Donald R. Dunner of the District of Columbia

Section of Litigation

William R. Bay of Missouri

**Law Student Member-at-Large (2014-2015)**

Chloe R. Woods of Missouri

**Minority Member-at-Large**

Ruthe C. Ashley of California

**Woman Member-at-Large**

Pamela A. Bresnahan of Maryland

**Young Lawyer Member-at-Large**

Min K. Cho of Florida

It was noted that the Association's Constitution provides that the President-Elect automatically becomes the President at the conclusion of the Annual Meeting and William C. Hubbard of South Carolina will assume that office. In addition, Mary T. Torres of New Mexico and G. Nicholas Casey, Jr. of West Virginia will assume the offices of Secretary and Treasurer, respectfully.

**Remarks by President-Elect Nominee**

President-Elect Nominee Paulette Brown of New Jersey was warmly welcomed by the House after her election. She thanked President Silkenat for his years of leadership and her firm, Edwards Wildman Palmer, for its support. She asked the House to keep true to the goals of the Association to serve its members, improve the profession, eliminate bias and enhance diversity and insure the rule of law. She stated that she believed the Association, everyone working together can give all of our goals the attention they require.

Ms. Brown related that her firm makes a special effort to hire veterans to expedite their return to civilian life and asked if that could be replicated by the Association.

Ms. Brown will serve as the Board of Governors liaison to President-Elect Hubbard's Commission on the Future of the Legal Profession.

Ms. Brown stated the American Bar Association sets the standard for excellence

and that she wanted to make the Association the “go to” organization for lawyers

### **Panel Presentation Regarding Legal Education**

Chair Carlson recognized Patricia Lee Refo, Chair of the Committee on Issues of Concern to the Legal Profession, to present a panel discussion regarding legal education moderated by Robert Hirshon. Jonathan Lippman, Chief Judge of the New York Court of Appeals, Former Chief Justice Rebecca White Berch of the Arizona Supreme Court and Mathew Kerbis, Chair of the ABA Law Student Division participated. Judge Lippman discussed New York’s fifty hour pro bono and two legal ethic credits requirements for law students. Chief Justice Berch highlighted the declining law school enrollments and rising legal education costs. She noted that Arizona has accelerated bar examination schedules, portable ethics scores via the Uniform Bar Examiners, relaxed admission on motion practice and a program whereby one may obtain continuing legal education credit in exchange for pro bono legal services at the rate of one CLE hour per every five hours of pro bono work. Chief Justice Berch also observed that mentorship and apprenticeship programs have begun to take root in other jurisdictions. Finally, Mr. Kerbis commented on the law student perspective on these initiatives.

### **Scope Nominating Committee**

Estelle Rogers of the District of Columbia, Chair of the Committee on Scope and Correlation of Work, nominated Thomas M. Fitzpatrick of Washington, to serve on the Committee on Scope for a 5-year term beginning at the conclusion of the 2014 Annual Meeting. Chair Rogers then moved to close the nominations. The motion was **approved**. Chair Carlson later moved the election of Mr. Fitzpatrick. The motion was **approved**.

### **Report of Resolution and Impact Review Committee**

Jose Feliciano of Ohio, Chair of the Resolution and Impact Review Committee, made a report on behalf of this committee. He referred the House to a written report distributed to the delegates at their desks which reviewed the impact of the 69 Resolutions adopted by the House in 2010. Chair Feliciano also reported that the Committee had produced two videos reflecting resolutions adopted by the House, one concerning [Veteran’s Courts](#) and the other related to the [Violence Against Women Act](#). The videos were then presented to the House and roundly applauded.

### **Delegate-at-Large Election Results**

Chair Carlson announced the election of the following members to three-year terms as Delegates-at-Large: Mark D. Agrast of the District of Columbia, Myles V. Lynk of Arizona, Judy Perry Martinez of Louisiana, Barbara Mendel Mayden of Tennessee, Pamela J. Roberts of South Carolina, and David B. Wolfe of New Jersey. Chair Carlson also announced that Michael H. Byowitz of New York was elected to a one-year term.

## **II. RESOLUTIONS VOTED ON BY THE HOUSE**

A brief summary of the action taken on resolutions brought before the House follows. The resolutions are categorized by topic areas and the number of the resolution is noted in brackets.

## ARCHIVING

**[400A]** The House **approved by consent** Revised Resolution 400A recommending that certain Association policies that pertain to public issues and are 10 years old or older be archived. Items 17 and 31 in the materials distributed to the House were removed from the archival list.

**[400B]** The House **approved by consent** Revised Resolution 400B recommending that certain Association policies that pertain to public issues that were adopted through 1994 be archived. Items 76, 84, 135, 136, 205, 367 and 373 in the materials distributed to the House were removed from the archival list.

## ASSOCIATION'S ARTICLES OF INCORPORATION

**[177B]** The House **approved by consent** Report 177B amending the ABA's Articles of Incorporation to align the membership qualifications of the American Bar Association with those set forth in its Constitution and Bylaws.

## ASSOCIATION'S CONSTITUTION, BYLAWS AND HOUSE RULES OF PROCEDURE

**[11-1]** Association Member Edward Jacobs of the Virgin Islands presented and the Secretary moved Report 11-1 amending §1.2 of the Constitution to include the following language as one of the purposes of the Association: "to defend the right to life of all innocent human beings, including all those conceived but not yet born." Mary L. Smith of Illinois, Chair of the Standing Committee on Constitution and Bylaws, reported the action of the standing committee. Mark I. Schickman of California moved to postpone indefinitely consideration of the proposal. Neal R. Sonnett of Florida spoke in support of the motion. Steven K. Hazen of California spoke in opposition to the motion to postpone indefinitely. The proposal was **postponed indefinitely**.

**[11-2]** The House **approved by consent** Report 11-2 amending §10.3 of the Association's Constitution, and §32.1(d) of the Bylaws to change the name of the "Forum Committee on the Construction Industry" to the "Forum on Construction Law."

**[11-3]** The House **approved by consent** Report 11-3 amending §10.3 and §13.1(c) of the Constitution, and Article 32 of the Bylaws to change all references from "forum committee(s)" to "forum(s)" and to amend the names of each of the six ABA Forums by deleting the word "Committee" therefrom.

**[11-4]** Daniel W. Van Horn of Tennessee moved Report 11-4 amending §3.1 and §3.3 of the Constitution to include individuals in good standing of a tribal court of any federally recognized tribe as members of the Association." Michael G. Bergmann of Illinois, Member of the Standing Committee on Constitution and Bylaws, reported the action of the standing committee. Mary L. Smith of Illinois spoke in support of the proposal. The proposal was **approved**.

**[11-5]** Daniel W. Van Horn of Tennessee **withdrew** Report 11-5 which would have amended Article 3 and §6.6 of the Constitution, and Article 21 and §30.5 of the Bylaws to create a new lawyer member category for international lawyers. The report will be

subjected to further discussion and redrafting.

**[11-6]** Daniel W. Van Horn of Tennessee moved Report 11-6 amending §21.6 of the Bylaws to eliminate paragraph (b), thus removing the Disability Waiver Program. Mary L. Smith of Illinois, Chair of the Standing Committee on Constitution and Bylaws, reported the action of the standing committee. Mark D. Agrast of the District of Columbia spoke in support of the proposal. The proposal was **approved**.

**[11-7]** The House **approved by consent** Report 11-7 amending §30.5 of the Association's Bylaws, to allow non-U.S. lawyer associates to serve on the Council and in the leadership of the Section of Antitrust Law in accordance with their respective bylaws.

**[11-8]** The House **approved by consent** Report 11-8 amending §30.5 of the Association's Bylaws, to allow non-U.S. lawyer associates to serve on the Council and in the leadership of the Section of Environment, Energy and Resources in accordance with their respective bylaws.

**[11-9]** The House **approved by consent** Report 11-9 amending §30.5 of the Association's Bylaws, to allow non-U.S. lawyer associates to serve on the Council and in the leadership of the Section of Labor and Employment Law in accordance with their respective bylaws.

**[11-10]** Michael H. Reed of Pennsylvania moved Report 11-10 amending §31.7 of the Association's Bylaws to eliminate the Standing Committee on Federal Judicial Improvements and the Standing Committee on Judicial Independence and create one entity, the Standing Committee on the American Judicial System. Mary L. Smith of Illinois, Chair of the Standing Committee on Constitution and Bylaws, reported the action of the standing committee. Peter Bennett of Maine, Sharon Stern Gerstman of New York and Estelle H. Rogers of the District of Columbia spoke in support of the proposal. The proposal was **approved**.

**[11-11]** The House **approved by consent** Report 11-11 amending §31.7 of the Association's Bylaws to reconstitute the Special Committee on Disaster Response and Preparedness to the Standing Committee on Disaster Response and Preparedness.

**[11-12]** Association member William M. Hill of Massachusetts presented and the Secretary moved Report 11-12 amending §32.1(c) of the Association's Bylaws to eliminate the requirement that to become a member of a forum requires membership in at least one section. Mary L. Smith of Illinois, Chair of the Standing Committee on Constitution and Bylaws, reported the action of the standing committee. Darcee S. Siegal of Florida moved to postpone indefinitely consideration of the proposal. Jennifer Ginger Busby of Alabama and Dennis J. Drasco of New Jersey spoke in support of the motion. Daniel W. Van Horn of Tennessee, Benjamin E. Griffith of Mississippi, Min K. Cho of Florida and Laurel G. Bellows of Illinois spoke in opposition to the motion to postpone. The motion to postpone indefinitely was not approved. Laura V. Farber of California, Robert J. Grey, Jr. of Virginia and Michael E. Flowers of Ohio spoke in support of the proposal. Robert L. Rothman of Georgia, Dennis J. Drasco of New Jersey, Richard Lipton of Illinois and Marshall Wolf of Ohio spoke in opposition to the proposal. The proposal was **approved**.

**[11-13]** Mary L. Smith of Illinois **withdrew** Report 11-13 amending §2.1 and §6.3 of the Association's Constitution to define "accredited" and to clarify that the person elected as State Delegate must be accredited to the state for which elected. The proposal was



withdrawn to accommodate further discussion and redrafting.

**[11-14]** The House **approved by consent** Report 11-14 amending §4.1 of the Association's Constitution to require that notice of the annual meeting shall be given to members of the Association 60 days in advance rather than six months.

**[11-15]** The House **approved by consent** Report 11-15 amending the Association's Constitution and Bylaws as follows: (a) §10.1(b) to authorize the Board of Governors to consider any requests regarding bylaw amendments of sections and divisions; (b) §30.6 to authorize the Board of Governors to consider any requests of sections and divisions to modify their dues structures; and (c) §30.7 to clarify that the Board of Governors no longer considers and approves the times and locations of meetings of sections and divisions.

## COURTS

**[10A]** On behalf of the Virgin Islands Bar Association, Adriane J. Dudley of the Virgin Islands moved Resolution 10A urging Congress to amend 28 U.S.C. § 44(c) to insert the phrase "and territory" after the phrase "each state", so that all states and territories within the jurisdiction of the federal courts of appeal may be represented on its bench. Tom Bolt of the Virgin Islands spoke in support of the resolution. The resolution was **approved**.

**[105A]** On behalf of the Tort Trial and Insurance Practice Section, Robert S. Peck of the District of Columbia moved Revised Resolution 105A opposing the suspension or delay of the fundamental right to a civil jury trial in the face of difficult fiscal circumstances. The resolution was **approved as revised**.

**[105B]** On behalf of the Tort Trial and Insurance Practice Section, Robert S. Peck of the District of Columbia moved Revised Resolution 105B commending the American Civil Trial Bar Roundtable for its undertaking the publication of *A White Paper on Increasing the Professionalism of American Lawyers*, and recommending that bar organizations and others study the existing efforts in the White Paper to enhance their efforts to improve professionalism. The resolution was **approved as revised**.

**[105C]** On behalf of the Tort Trial and Insurance Practice Section, Robert S. Peck of the District of Columbia, moved Resolution 105C urging states and territories to adopt clearly articulated, transparent and timely procedures to ensure that judges disqualify or recuse themselves in instances where conflict or bias or other grounds exist to warrant recusal in order to assure fair and impartial judicial proceedings. The resolution was **approved**.

## CRIMINAL JUSTICE

**[110A]** On behalf of the Criminal Justice Section, Stephen A. Saltzburg of the District of Columbia moved Revised Resolution 110A urging jurisdictions where capital punishment is permitted to adopt a statute or rule providing an appropriate judicial procedure whereby successors or a legal entity on behalf of an executed individual, may bring and litigate a claim that the individual executed was in fact innocent of the capital offense. Robert L. Weinberg and Estelle H. Rogers of the District of Columbia spoke in support of the resolution. The resolution was **approved as revised**.

**[110B]** On behalf of the Criminal Justice Section, Neal R. Sonnett of Florida **withdrew** Resolution 110B adopting the black letter of the *ABA Criminal Justice Standards on The Prosecution Function and The Defense Function* dated August 2014, to supplant the Third Edition of the (1993) *ABA Criminal Justice Standards on The Prosecution Function and The Defense Function*. The report will be subjected to additional discussion and redrafting.

### **CYBERSECURITY**

**[109]** On behalf of the Cybersecurity Legal Task Force, Neal R. Sonnett of Florida, moved Revised Resolution 109 encouraging private and public sector organizations to develop, implement, and maintain an appropriate cybersecurity program that complies with applicable ethical and legal obligations. The resolution was **approved as revised**.

### **DISABILITY RIGHTS**

**[100]** On behalf of the Commission on Disability Rights, Mark D. Agrast of the District of Columbia, moved Resolution 100 supporting prompt ratification by the United States and other nations, of the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print-Disabled*. Susan B. Montgomery of Massachusetts spoke in support of the resolution. The resolution was **approved**.

### **DOMESTIC VIOLENCE**

**[112A]** On behalf of the Commission on Domestic and Sexual Violence, Mark I. Schickman of California moved Revised Resolution 112A adopting the *Model Workplace Policy on Employer Responses to Domestic Violence, Sexual Violence, Dating Violence and Stalking* (“Model Policy”) and encouraging all employers, public and private, including governments, law schools and the legal profession, to enact formal policies on the workplace responses to domestic violence, dating violence, sexual violence, and/or stalking violence that address prevention and remedies, provide assistance to employees who experience violence, and which hold accountable employees who perpetrate violence. Pamila J. Brown of Maryland and Adriane J. Dudley of the Virgin Islands spoke in support of the resolution. The resolution was **approved as revised**.

**[112B]** On behalf of the Commission on Domestic and Sexual Violence, Jimmy Goodman of Oklahoma moved Resolution 112B condemning forced marriage as a fundamental human rights violation and form of family violence and of violence against women and urging governments to amend existing laws or enact new laws to prevent, protect and support individuals threatened by forced marriages. The resolution was **approved**.

### **ELECTION LAW**

**[113A]** On behalf of the Standing Committee on Election Law, John H. Young of South Carolina moved Resolution 113A urging states, localities and territories to develop written contingency plans detailing what should be done to preserve the election process in the event of an emergency. Benjamin E. Griffith of Mississippi spoke in support of the resolution. The resolution was **approved**.

**[113B]** On behalf of the Standing Committee on Election Law, John H. Young of South Carolina moved Revised Resolution 113B urging governments to use all appropriate means to improve enforcement of voting rights for persons with disabilities, including by monitoring elections, and urging election officials to ensure that election personnel and volunteers receive accessibility training. Pamela J. Brown of Maryland spoke in support of the resolution. The resolution was **approved as revised**.

### **HUMAN RIGHTS**

**[300]** On behalf of the Center for Human Rights, Michael S. Greco of Massachusetts, moved Resolution 300 urging Congress to enact legislation to prevent and punish crimes against humanity and urging the United States government to take an active role in the negotiation and adoption of a new global convention for the prevention and punishment of crimes against humanity. The resolution was **approved**.

### **IMMIGRATION**

**[111]** On behalf of the Commission on Immigration, Christina A. Fiftlis of Colorado moved Resolution 111 adopting amendments to the 2012 *ABA Civil Immigration Detention Standards*, to encourage Congress and the Department of Homeland Security and Immigration and Customs Enforcement to use segregation for immigration detention only as a last resort for a limited time period and in compliance with other limitations. The resolution was **approved**.

### **INTERNATIONAL LAW**

**[114A]** On behalf of the Section of International Law, Glenn P. Hendrix of Georgia moved Resolution 114A supporting modernization and simplification of the requirements, procedures, laws and regulations to verification of signatures in cross-border contexts in order to increase reciprocal recognition among jurisdictions. The resolution was **approved**.

**[114B]** On behalf of the Section of International Law, Glenn P. Hendrix of Georgia moved Resolution 114B recognizing the rights of individuals who are lesbian, gay, bisexual or transgender (“LGBT”) as basic human rights and condemning laws, regulations, rules and practices that discriminate against them on the basis of their LGBT status. The resolution was **approved**.

### **LAW AND AGING**

**[115]** The House **approved by consent** Resolution 115 as submitted by the Commission on Law and Aging urging Congress to reallocate payroll tax revenues between the Old-Age and Survivors Insurance Trust Fund (OASI) and the Disability Insurance Trust Fund (DI) as needed to prevent depletion of the reserves of either Trust Fund.

### **LAW PRACTICE**

**[106]** On behalf of the Law Practice Division, Tom Bolt of the Virgin Islands moved Resolution 106 urging state and territorial continuing legal education accrediting agencies to approve for mandatory continuing legal education, law practice skills program and training, including the use of technology, law practice management and client relations and not restrict the maximum number of credit hours that can be earned for such programs.

The resolution was **approved**.

### LEGAL EDUCATION

**[103A]** On behalf of the Section of Legal Education and Admissions to the Bar, Ruth V. McGregor of Arizona moved Resolution 103A concurring in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated August 2014 to the *ABA Standards for Approval of Law Schools*. Standard 206 and Interpretation 305-2 were severed from Resolution 103A. Pauline A. Schneider of the District of Columbia spoke in support of the resolution. The House **concurred** in the action of the Section.

**[103A - Standard 206]** On behalf of the Section of Legal Education and Admissions to the Bar, Solomon Oliver, Jr. of Ohio moved Resolution 103A-Standard 206 concurring in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated August 2014 to the *ABA Standards for Approval of Law Schools* related to diversity and inclusion standards. Mark D. Agrast of the District of Columbia spoke in support of the resolution. The House **concurred** in the action of the Section.

**[103A – Interpretation 305-2]** On behalf of the Section of Legal Education and Admissions to the Bar, Pauline A. Schneider of the District of Columbia moved Resolution 103A-Interpretation 305-2 concurring in the action of the Council of the Section of Legal Education and Admissions to the Bar in making no amendment to Interpretation 305-2 of the *ABA Standards for Approval of Law Schools* relating to standards for students earning educational credit during paid field placements. Lauren Robel of Indiana, Tracy A. Giles of Virginia and Myles V. Lynk of Arizona spoke in support of the resolution. Joseph Zeidner of Pennsylvania, Tremaine Teddy Reese of Georgia, Lisa J. Dickinson of Washington and Susan B. Montgomery of Massachusetts spoke in opposition. The House **did not concur in the action of the Section of Legal Education and Admissions to the Bar and Interpretation 305-2 was referred back to the Section**.

**[103B]** On behalf of the Section of Legal Education and Admissions to the Bar, Pauline A. Schneider of the District of Columbia moved Resolution 103B concurring in the action of the Council of the Section of Legal Education and Admissions to the Bar to supplant the 2013 *ABA Rules of Procedure for Approval of Law Schools*. The House **concurred** in the action of the Section.

### LEGAL SERVICES/PRO BONO

**[104A]** On behalf of the Young Lawyers Division, Christopher A. Rogers of Texas moved Resolution 104A encouraging law schools to create veterans law clinics to ensure that all veterans who cannot afford legal services can access them. Gregory L. Ulrich of Michigan spoke in support of the resolution. The resolution was **approved**.

**[104B]** On behalf of the Young Lawyers Division Michael G. Bergmann of Illinois moved Revised Resolution 104B urging the appropriate governing bodies of states and territories to adopt a rule permitting and encouraging in-house counsel already authorized to engage in the practice of law to provide pro bono legal services in that jurisdiction. Mary Ryan of Massachusetts spoke in support of the resolution. The resolution was **approved as revised**.

**[107]** On behalf of the Standing Committee on Legal Aid and Indigent Defendants, L. Jonathan Ross of New Hampshire, moved Resolution 107 opposing changes in current educational debt loan forgiveness programs for public service lawyers and urging Congress and the Administration to support and continue public service student loan repayment and forgiveness programs. The resolution was **approved**.

**[108]** On behalf of the Legal Access Job Corps Task Force, Dwight L. Smith of Oklahoma moved Resolution 108 urging all bar associations and foundations, courts, law schools, legal aid organizations and law firms to create and advance initiatives that marshal the resources of newly-admitted lawyers to meet the unmet legal needs of underserved populations in sustainable ways. The resolution was **approved**.

### **PARALEGAL EDUCATION**

**[102]** The House **approved by consent** Report 102 granting approval and reapproval to several paralegal education programs, withdrawing the approval of four programs at the request of the institutions, and extending the term of approval to several paralegal education programs.

### **REAL PROPERTY/HOUSING LAW**

**[10B]** On behalf of the Bar Association of the District of Columbia, Myles V. Lynk of Arizona **withdrew** Report 10B urging governments to continue to enact and enforce rules or legislation that strengthen consumer protections against companies and lawyers engaged in deceptive or fraudulent loan foreclosure rescue practices. The report was withdrawn to allow for input from other entities within the Association.

### **SPECIALIZATION**

**[101A]** The House **approved by consent** Report 101A amending Section 4.06(C) (Certification Requirements) of the *Standards for Accreditation of Specialty Certification Programs for Lawyers* to respond to a need to regulate certifying organizations.

**[101B]** The House **approved by consent** Report 101B granting reaccreditation to six legal specialist certification programs administered by four organizations, and extending the period of accreditation of one program, the Civil Trial Advocacy program of the National Board of Trial Advocacy, until the 2015 Midyear Meeting.

## **Passing of the Chair's Gavel**

At the conclusion of the meeting of the House on Tuesday, August 12, Chair Carlson thanked the staff and the Committees of the House. He also took a moment to thank his fellow Officers. He also expressed his heartfelt thanks to the Delegates themselves. He took special care to thank his wife, Cindy, for her support over his term. He then passed the gavel to Patricia Lee Refo of Arizona.

Chair Refo extended her thanks to Past Presidents Robert J. Grey Jr. of Virginia and H. Thomas Wells Jr. of Alabama for the opportunities to serve the Association. She also thanked Chair Carlson for his leadership and introduced her husband Don Bivens and their son Andrew.

## **Closing Business**

At the conclusion of the meeting of the House, after various expressions of gratitude and recognitions, the Texas delegation was recognized to make a presentation to the Delegates regarding the 2015 Midyear Meeting in Houston.

Deborah Enix-Ross of New York moved a resolution in appreciation of the Massachusetts and Boston Bar Associations and Special Advisors for their efforts in hosting the meeting. The resolution was **approved**.

Chair Refo recognized Hilarie Bass of Florida who then moved that the House adjourn *sine die*. The motion was **approved**.

**From:** Traci Ray [<mailto:tray@barran.com>]  
**Sent:** Monday, October 13, 2014 3:00 PM  
**To:** Tom Kranovich; Sylvia Stevens  
**Cc:** Andrew Schpak; Colin Andries  
**Subject:** Thank you from the ABA YLD!

Sylvia & Tom-

On behalf of the American Bar Association Young Lawyers Division, we wanted to thank you for your support of the 2014 Fall Conference that we held in Portland this past week and weekend. The conference was a huge success – from the education to the networking to the featured presenters. We debuted our new outreach program, Project Street Youth: Young Lawyers Advocating for Homeless Youth, that helps homeless youth with legal issues, and we also introduced a Health & Wellness track that was a huge hit.

Attorney General Ellen Rosenblum, Chief Justice Blamer, Congressman Earl Blumenauer, ABA President William Hubbard, and Judges Aiken, Nelson, and Waller were among our Oregon speakers and made a significant impact on our 350+ attendees from across the country. We proudly displayed banners with the OSB logo and routinely thanked the OSB from the podium for the sponsorship, but we wanted to say it one more time as the success of the conference was made possible with the OSB's direct support – and we cannot thank you enough!





Best-  
Andrew, 2014-15 ABA YLD Chair  
Traci Ray, Portland Host Committee Co-Chair  
Colin Andries, Portland Host Committee Co-Chair

**Traci Ray, Esq. | Executive Director**  
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**SANDRA HANSBERGER**  
424 NE Laurelhurst Place  
Portland, OR 97232  
503.754.1119

October 30, 2014

Dean Jennifer Johnson  
Lewis and Clark Law School  
10015 SW Terwilliger Blvd.  
Portland, OR 97219  
Sent by e-mail

RE: The Justice Gap and Closure of the Legal Clinic

Dear Jennifer:

I am writing about the Law School's distressing decision to close down the Legal Clinic. As you may know, I am currently the Executive Director of the Lawyers' Campaign for Equal Justice, but I am writing to you in my personal capacity and do not speak for the CEJ. I'm writing to you as an alumnus of the Law School (82), a former clinic student, a former Clinic Law Professor, a past and prospective donor, and as a deeply concerned member of the Oregon legal community and the access to justice community. In 2013, when I was awarded with the Law School's 2012 Distinguished Graduate Award, I was proud to be an alumnus and former clinical professor. At this moment, I am no longer sure.

While the Clinic has certainly made a contribution to providing much-needed legal representation to low-income Oregonians, the value of the Clinic has had a much broader impact on students, and indeed the entire legal community. The Clinic is one of the only true hands-on practical skills offerings at the Law School, and of equal importance provided training in those areas where middle and low-income individuals and families actually need legal help and can't get it — family law, housing law and consumer protection. In addition, the Clinic provides one of the only offerings where students learned about the justice gap that exists in our state and in the nation and also learn about the professional responsibility of lawyers to care about access to justice.

At a time when law graduates are scrambling for employment and more and more students are hanging out their own shingle, the Clinic is one of the only real experiences the Law School had to offer for hands-on practical skills training. Yes, you have other "clinical offerings," but nothing that provides the type of structured training in these critical areas currently offered through the Clinic. The Clinic offers practical skills training that takes students through a case from initial interview to problem resolution — offering training and coaching on handling client files, client interviews, negotiation, fact investigation, letter writing, and all aspects of trial skills. Subject areas at the Clinic are carefully selected, and programs are carefully designed, to offer a full array of skills during a single semester.

The skills learned in the Clinic are easily transferrable to other types of cases, but the subject matter of the Clinic's programs parallels the substantive areas where Oregon individuals and families most need legal help — family law, housing, and consumer issues. The ABA and others have recognized that middle income individuals and families are unable to obtain legal assistance in these same areas. In addition,

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the expertise of your clinical law professors in subject areas where low and middle income Oregonians need legal help the most has contributed greatly to the legal services community.

Oregon has a justice crisis. It is being discussed in all corners of our state and by the legal leaders throughout the state — by the Chief Justice of the Oregon Supreme Court, by the Oregon Bar President, by the Legislature, by the Campaign for Equal Justice, and by lawyers in all corners of the state. It should also be discussed and addressed by Oregon's law schools. Because of funding cuts and a dramatic increase in Oregon's poverty (a growth of 61.5% between 2000 and 2011), legal aid has resources to meet only 15% of the civil legal needs of the poor. The Legal Clinic is evidence of the Law School's commitment to being a part of the access to justice community. What's more, the Legal Clinic has trained countless legal aid lawyers and students' experiences at the Clinic have led many more graduates to serve as volunteers through legal aid's programs. Of equal importance, exposing students to the civil legal problems of low-income clients has led many more to become lawyers who donate their time and money to organizations that support access to justice and themselves fulfill a professional responsibility to ensure access to justice, regardless of their ultimate area of law practice.

I understand that the Law School has likely chosen to invest its resources in areas that it believes will attract more students and perhaps grant funding — animal law, victims' rights and small businesses. (Though interestingly, the Legal Clinic existed primarily on grant funding for many years before the ABA and the AALS urged schools to hard fund their clinical offerings.) And while I am certain that those clinics have value, and undoubtedly attract students to your school, I question the practicality of some of these offerings, and their long-term value to students, especially compared with the undeniable value of the Legal Clinic's value to students and the community. When I participated in a Law School orientation this fall, I felt saddened when wide-eyed first year students talked about how they came to the school to pursue a career in animal law. I'm sure that most of them have no idea what that entails, nor do they likely have any real concept of the realities of the job market for law graduates in animal law. I wonder how long it will take them to figure it out.

In a time of budget problems for the Law School, I also thought the choice of showcasing the recent program in Kenya to be an unfortunate reflection of the School's priorities. At a time when you are cutting your support for training future public interest lawyers who can provide access to the justice system now and in the future, I find this to be a sad display of the Law School's values. In this time of scarce resources, I question the messages you are sending to prospective students and the entire community about your priorities---regardless of how that program is funded.

With the decision to close the Clinic, I believe the Law School is turning its back on the community, on your students, and on fundamental principles about fairness and access to justice. This is shameful. I hope that you will rethink your decision. If not, I hope you will consider how the Law School can find some other meaningful way to contribute to the access to justice community.

I recently heard Oregon Supreme Court Justice Thomas Balmer remind a crowd of 200 Oregon lawyers that the motto on the United States Supreme Court building, "Equal Justice Under the Law," is a goal

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all lawyers should support. I hope that under your leadership the Law School can turn the ship around and find a way to once again be a part of the solution to the justice gap both in Oregon and nationally. I think the Law School is better than this. I hope you prove me right.

Sincerely,

SANDRA HANSBERGER

Lewis and Clark Law School '82

c:     Jeremy Sarant  
       Scott Hunt  
       Maya Crawford  
       Tom Kranovich  
       Hon Ann Aiken  
       Hon Maureen McKnight  
       Hon Nan Waller  
       Sylvia Stevens  
       Karen Stolzberg

**L. R. Trackwell**

4830 Woodhaven  
Lincoln, NE 68516  
541-786-0344

Via Fax and U.S. Mail

October 17, 2014

Mr. Tom Kranovich  
President, Oregon State Bar  
4949 Meadows Rd., Ste 630  
Lake Oswego, Or 97031

Mr. Richard Spier  
President Elect, Oregon State Bar  
2538 NE 28<sup>th</sup> Ave.  
Portland, OR 97212

Re: Oregon State Bar Disciplinary Process/Professional Liability Fund

Dear Messrs. Krnoich and Spier:

I understand that Mr. Kranovich's term expires at the end of the year and Mr. Spier will take over as head of the Oregon State Bar Association. I write to you both regarding what I believe is a serious problem that needs to be addressed by the Oregon State Bar. I believe that the present system for enforcing the Oregon ethical rules relating to attorneys is broken. I further believe that a main cause of this problem is the close relationship with the Oregon State Bar and the Oregon Professional Liability Fund.

Failure to Effectively Enforce the Ethical Rules

The laws of the State of Oregon contain many exceptions from statutory requirements/prohibitions for licensed attorneys. Those exceptions are predicated upon the principal that Oregon lawyers are governed by a code of professional conduct and that the code is regularly, effectively and evenhandedly enforced. Unfortunately, it appears that the Oregon State Bar has failed to meet that obligation. There is currently little effective discipline of the conduct of licensed lawyers in the State of Oregon. The impact of this lack of discipline has been especially severe in northeastern Oregon.

I write result of my experiences as a businessman in the State of Oregon since 2005. In 2005 my mother bought a cattle ranch in northeastern Oregon. I won't bore you with a blow by blow description of everything that happened, but something became apparent as my family and I struggled to deal with this situation and became aware of others who had experienced similar problems. We realized that there exists a remarkable level of unethical attorney behavior, particularly in northeastern Oregon, that is tolerated or willfully ignored by the Oregon State Bar Disciplinary Counsel.

The situation is so blatant that the public consensus in northeastern Oregon is that Attorney discipline in the State of Oregon is, quite literally, a bad joke. As a businessman who has done business in many states and has had experience with lawyers from all over the country, I am aware of the stark contrast between attorney conduct tolerated in Oregon and the standard adhered to in other jurisdictions.

Over the last eight years I have filed several ethical complaints against Oregon lawyers—mostly against Attorney D. Rahn Hostetter. I have helped other folks file complaints against lawyers I believed acted unethically. I have been astonished to watch the Oregon Disciplinary Counsel's repeated lack of action on clearly documented complaints.<sup>1</sup> In those rare occasions where the Counsel for Discipline does act, its actions are stunningly ineffective., e.g. the complaints brought by the Wiecks (Greg and Claudette) and the Olsens (Charles and Lucinda) against Attorney D. Rahn Hostetter.

The Wieck/Olsen complaint did result in discipline against Attorney Rahn Hostetter in 2013. The economic impact of Hostetter's actions on these two families was, quite literally, catastrophic. But the discipline by the Bar for this action amounted to little more than a slap on the wrist. It was completely ineffective and did absolutely nothing to protect the public from Mr. Hostetter. Nor am I the only one to voice this opinion. I have attached a copy of J. David Coughlan's March 29, 2013 letter to Susan G. Bischof and Michael Hagland regarding the Hostetter disciplinary decision.

Instead of permanently removing from the practice of law a lawyer who has repeatedly shown that he cannot be trusted in dealing with the public, the Oregon State Bar literally, gave the guy a pass to continue to harm the public, by suspending his license for a brief period. I note that his son is in practice with him and the guy was in the office every day—nothing whatsoever changed for this guy except that he had his son making the phone calls. That happened in his 2010 suspension as well.

In addition, as part of the disciplinary process Hostetter gave a deposition in August of 2012 wherein, at the very end, he admitted to facts that constitute a fraudulent conveyance of property by him at a time when there were multiple lawsuits and claims against him. The significance of this as it affects the Oregon PLF is addressed below, but it is also relevant here to the discussion

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<sup>1</sup> Even complaints where Disciplinary Counsel eventually took action were rejected at least once, e.g. Complaint of Gregory and Claudette Wieck, Complaint of Charles and Lucinda Olsen.

regarding the Oregon Counsel for Discipline in that it represents evidence of yet another ethical breach---yet Bar counsel Stacy Hankin ignored it.<sup>2</sup>

I had many conversations with Mike Haglund about this situation. He told me about the Bar hiring John Gleason to effect changes in the disciplinary system. Gleason fired Stacy Hankin, the person the Bar claims to be responsible for the decision to enter into the stipulation with Hostetter. It is my opinion that Hankin is merely a scapegoat and that she was implementing the policies that have long held sway in the Oregon State Bar. Gleason left shortly thereafter and the Oregon State Bar Disciplinary Counsel continues with "business as usual". I realize that Mr. Haglund had good intentions, but his and the Bar's efforts in bringing in Mr. Gleason in did absolutely nothing to improve the situation.

My own experience with Attorney D. Rahn Hostetter is that he, and now his son, knowingly and routinely file what they know to be false claims. They do so against opponents they know cannot afford lawyers in Wallowa County and they do this for purely economic gain. They get away with it because local attorneys, save for the courageous Mr. Coughlan, do absolutely nothing about it---despite a clear obligation to report such conduct to the bar.

I and others have had several conversations with Sylvia Stevens about the problem with the Hostetters, their targeting of financially impaired individuals with demonstrably false claims, and the lack of action by the bar. Incredibly, Stevens stated on October 30, 2013 that "there is nothing wrong with lawyers who don't believe that the claims they assert for their clients are true."

Certainly lawyers may sometimes privately question the credibility of their clients, but yet be required to represent them zealously. But Stevens statement was flat wrong in that she ignores both the federal and civil rules of procedure which require that lawyers have an objectively reasonable belief that the statements made in their pleadings are true, state and federal statutes and a large body of common law. She also ignores the bar rules that lawyers not make untruthful statements or engage in criminal conduct.

Lawyers have an ethical obligation to advance only those claims they reasonably believe to be true. Where there is proof those claims are false, the lawyer steps over an ethical line.

In Mr. Hostetter's case Disciplinary Counsel was provided abundant evidence demonstrating that Hostetter repeatedly advanced claims he absolutely knew certain claims to be false. Yet Disciplinary Counsel chose to ignore the documentation, claiming the allegations were 'mere conjecture'.

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<sup>2</sup> See the 2012 disciplinary proceeding, In Re Hostetter and the last few pages of the deposition of D. Rahn Hostetter taken in August of 2012 wherein he admits to having other consideration being received in the March 2010 transfer of property that was not reflected on the deed. This was a transaction that occurred at a time when there were multiple claims against Hostetter and he admits transferring the property, admits that there was other consideration received. This other consideration was not reflected on the deed. I am happy to supply you a copy if necessary. Incredibly, Disciplinary Counsel ignored it.. See also the discussion about this matter as it relates to the PLF.

Ms. Stevens' remarkable lack of concern for the truthfulness of lawyers appears to be a large part of the problem.<sup>3</sup>

Certainly the untruthfulness or criminal nature lies in the specific facts of each situation, but I have presented many documented instances of conduct by Attorney D. Rahn Hostetter, and lately D. Zachary Hostetter wherein they have filed pleadings they know to contain statements that are absolutely false. They do so in cases where they know that the other side will be put to huge litigation costs to prove the truth and in doing so, deliberately bankrupt the opposition. Mr. Coughlan's statements about this are absolutely accurate. Yet the Oregon Bar does nothing to stop it and Sylvia Stevens blatantly ignores the code of conduct regarding the honesty of lawyers.

It has been my further observation that the Oregon State Bar Counsel for Discipline exhibits a pattern of selectively pursuing disciplinary action only in cases where it is likely that the discipline will not result in the Oregon Professional Liability Fund being required to pay out claims for attorney malpractice. I note that in both the Wieck and Olsen cases, which eventually resulted in discipline, the office of Disciplinary Counsel initially declined to pursue charges until the complainants reiterated their claims, pointing out in detail the evidence and the specific ethical code violations. Apparently complainants must nearly be lawyers to get Disciplinary Counsel to address their claims.

I believe the reason for this reluctance to discipline Oregon lawyers is the close connection between the Oregon State Bar and Oregon Professional Liability Fund. It appears that relationship unduly affects the Bar's ability and willingness to effectively discipline lawyers.

It also appears that the PLF and the attorneys it hires also deliberately ignore ethical lapses in representing Oregon lawyers in malpractice actions. I cite my experience and knowledge with the situation involving D. Rahn Hostetter. I can provide at least three recent examples where Hostetter has engaged in fraudulent conveyances while PLF lawyers defending him in legal malpractice suits were falsely representing to opposing counsel that Hostetter was insolvent and obtained settlements based upon that false representation.<sup>4</sup>

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<sup>3</sup> My experience with Disciplinary Counsel's reluctance to investigate and bring charges against lawyers is not limited to D. Rahn Hostetter. I and others have filed complaints against Attorney Mona Williams for failure to recuse herself in matters involving a conflict of interest. Again, no action was taken by Disciplinary Counsel.

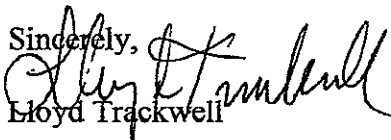
<sup>4</sup> In March of 2010 Rahn Hostetter was the subject of two lawsuits( a suit brought by Attorney Wade Bettis on behalf of Robert and Susan Courtney and another brought by Attorney Justin Burns on behalf of his client) and had knowledge of the Wiecks claim against him. Yet he engaged in what was clearly a \$1.2 million fraudulent conveyance of the real property he had unethically obtained from Greg and Claudette Wieck. On March 10, 2010 Hostetter sold the property to a company owned by his client, John W. "Rocky" Dixon. There are numerous friends and family of Hostetter who flatly state that Hostetter still owns the property and the Hostetters continued to live in the property for three years and make improvements to the property with their own funds. Hostetter's son in law Darrel Brann and also Hostetter's then law partner Rebecca Knapp, told third parties that Dixon was just helping Hostetter hang on to the property. At the time Hostetter's PLF lawyers were representing that Hostetter was insolvent. The PLF and Attorney Gary Johnson were provided information regarding the fraudulent conveyance to avoid creditors. They did nothing and the attorneys hired by the PLF to defend Hostetter continued to assert his insolvency, to the mutual benefit of Hostetter and the PLF and to the detriment of the opposing parties. Counsel for Discipline subsequently declined to take any action on an ethical complaint filed against Attorney Gary Johnson over this matter.

I point this out because in other jurisdictions this conduct is considered racketeering and is illegal.

I have previously called upon Mr. Hagland to initiate some action to deal with this problem. I now ask you. Clearly the present system does not work and it certainly does not serve the best interests of the public. Most importantly, it allows lawyers like Rahn Hostetter to continue to prey on the public and to do so with impunity. The current statutory and legal system can only work if the Oregon State Bar does its job of regulating the conduct of lawyers effectively.

Several years ago the American Bar Association was hit with an antitrust/restraint of trade lawsuit wherein it was sued over its law school accreditation program. It was charged that the ABA monopolized the accreditation process but did nothing to enforce its own rules or stop the flagrantly fraudulent practices of its members. The same can currently be said of the Oregon State Bar with respect to the actions of the Disciplinary Counsel and the Professional Liability Fund. I think this situation renders the Oregon State Bar vulnerable to a similar suit.

I ask that you take decisive action to address the problems with attorney discipline and the dysfunctional relationship between the bar and the PLF. Removing Ms. Stevens and the current Disciplinary Counsel staff would be a good start. I am happy to discuss this matter with either of you, in person or by phone.

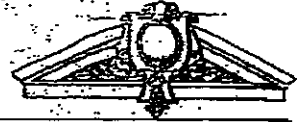
Sincerely,  
  
Lloyd Trackwell

Cc Sen. Lloyd Hansell  
Rep. Bob Jenson  
Sen. Floyd Prozanski, Chairman, Sen. Committee on the Judiciary  
Rep. Jeff Barker, Chairman, House Committee on the Judiciary



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March 29, 2013

Susan G. Bischoff, Chairman  
Oregon State Bar Disciplinary Board  
P.O. Box 231935  
Tigard, OR 97281-1935

Michael Haglund, President  
Oregon State Bar Board of Governors  
P.O. Box 231935  
Tigard, OR 97281-1935

RE: In RE: D. Rahn Hostetter

I have now had a chance to review the disciplinary decision with regard to Mr. Hostetter. Obviously, I was aware of the facts in this case since I was on the panel that was chosen to hear it. Following the decision, I agreed with the findings but, along with other members of the committee and other attorneys in general, strongly disagree with the sanctions imposed.

I am not alone. I have heard from several clients in Wallowa County. Very frankly, they are afraid to even write letters to the Bar complaining about this action because of fear of retaliation from Mr. Hostetter. He has a long history of vindictive litigation which, essentially, breaks people. He has clients who can afford to pay for this type of litigation, and the defendants often cannot afford to defend the claims.

Among others, the supervisor of the Wallowa County Circuit Court, Jani Homan, has voiced her dismay at this decision and questioned how many suspensions an attorney can have. Bill Hopp has also indicated his surprise and disagreement with this action, or lack thereof, as has Max Taggart and others.

As the result of numerous prior actions along this line, people do not want to have anything to do with Mr. Hostetter or for that matter, with the Bar.

It is actions like this that give the Bar and lawyers a bad reputation.

In reviewing the decision, I was especially interested in the handling of the three prior disciplinary offenses. They were all for essentially the same offenses and were brushed aside. He was given the proverbial "slap on the wrist". Mr. Hostetter as the result of his prior disciplinary actions should have known, more than anybody, that his actions violated the enumerated DRs.

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Chairman - Oregon State Bar Disciplinary Board  
President - Oregon State Bar Board of Governors  
RE: In RE: D. Rahn Hostetter  
March 29, 2013

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Very frankly, I think we should all be ashamed of the actions that the Bar has taken, or has not taken, as the case may be. I suspect that if myself or others on the Disciplinary Committee had committed one of these offenses, we would have received a substantially more severe reprimand, especially on the third time around.

In reviewing the decision, in the "mitigating circumstances" section several portions stand out. Under "character or reputation", the decision notes that "members of the legal community are willing to attest to the accused's good character." Very frankly, having been a member of the legal community in this part of the state for 40 years, I do not know a single lawyer who would attest to his good character. If somebody would actually talk to the lawyers over here, this would become clear.

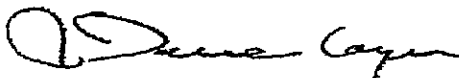
Under the paragraph entitled "remorse" it is indicated that he is remorseful that he and his wife's long-term friendship with the Weicks was destroyed. Obviously, he was the one who caused the loss of that long-term friendship. He apparently is not remorseful that he did anything wrong, only that the friendship was destroyed. He is also apparently not remorseful for all the other acts that he has done in the past because he keeps on doing them. I sincerely doubt whether he is remorseful at all. After all, he got away with it, once again.

As a result of this letter, the Bar may want to remove me from the Disciplinary Committee. So be it. I think I have to stand up and say what I believe in light of this travesty.

I am not sure who Mr. Hostetter's lawyer is but if I ever get in trouble I am going to hire him or her because he sure did a heck of a job on the Bar Counsel.

I would appreciate you not sending this to Mr. Hostetter as, very frankly, I think he could retaliate against me or other members of the Committee and I have no doubt that if he had an opportunity to do so, he would.

Very truly yours,



J. DAVID COUGHLIN  
JDC/me

C: David Baum  
Bill Hopp  
Max Taggart  
Cassandra Stich  
Ann Stephens

# A word in Spanish

By Jordan Furlong

Earlier this summer, I was asked by Mario Ferrer of [Responsea](#), an online lawyer platform in Spain, if I could answer a few questions for their readers, especially those who are just starting off in the law or grappling with the onslaught of technology. My brief replies sound much better and more elegant when translated into Spanish, as [the resulting Responsea post](#) demonstrates. But I thought you might be interested in reading the original English version, especially if you're in the early stages of your legal career.

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## 1. How can a lawyer prepare himself or herself to prepare for the future?

There are three things every lawyer must know as well as possible in order to thrive in the new legal market:

1. *Your clients.* Understand their concerns, walk in their shoes, look at the world through their eyes. Identify their goals and hopes, worries and ambitions, so that you can advise them as well as possible. Help them anticipate problems and opportunities before they arise.

2. *Your competition.* Not all your competitors will be other lawyers: online providers and non-lawyer rivals will become more common in the next several years. But among lawyers, understand clearly who else wants to serve your chosen client group in your chosen area, and what they offer in terms of service and price.

3. *Your business.* Too few law firms have a sufficiently clear picture of how much they spend to provide their legal services. Fewer still have installed tools and procedures to help make their businesses more efficient and productive. Run your legal business to be as cost-effective and quality-controlled as you can manage, and always be aware of your cash flow.

## 2. How can a law firm be competitive nowadays?

You can't be competitive for every client in every market for every type of work. You also can't be competitive for work that just walks in off the street. You can only be truly competitive when you identify the specific type of work you want to do, for the specific type of client you want to serve, to accomplish specific sorts of outcomes or values for those clients. If you know all of these, and if you can explain why you're the right choice in these circumstances, you'll have no difficulty outclassing other firms in these areas.

Evolutionary Road

## 3. Which are the priorities of today's clients? Time, money ...?

Clients want different things in different contexts: the multinational corporation and the single mother are obviously completely different entities. What all clients want, however, is [peace of mind](#). They want a worry resolved, a pain eliminated, an opportunity filled, a step forward taken. How can you give your client peace of mind? Answer that question, and you're well on your way to meeting the client's priorities.

## 4. How can a law firm encourage its workers to adapt to the online environment?

Everyone now searches for everything on the internet. Vast numbers of people buy vast quantities of products

and services on the internet. Having a weak or non-existent internet presence is like moving your law office out of a prime commercial office building in a major city and into an unmarked house on the outskirts of a small town. It's really no more complicated than that.

### **5. Which are the most common errors committed by the legal sector on the Internet?**

The failure of lawyers to offer products and services that are created and delivered partly or entirely through the internet is the error that will cost law firms the most in the years to come. Some legal services can only be delivered face-to-face, hand-in-hand, in person. But many, if not most, can be delivered partly or wholly online. If you believe the internet is useful only for hosting your firm's website, then you're going to miss out on some valuable emerging opportunities in the near future.

### **6. What would you recommend to a lawyer who decides to open an office on his or her own?**

Never assume that the legal market owes you anything. The market asks, of every provider who enters it, "Who are you, and why should I care?" You need to have an answer ready. Create a website that tells your chosen market who you are, what you do, who you do it for, and what results your clients will get from using you. Write posts on your website showing off what you know and giving people information they can use. Speak to gatherings of and in the communities you want to serve. Hang around afterwards to answer questions.

Act like a startup. Even better, act like you're still in law school. Keep your costs under tight control. Be **frugal and innovative**: do more with less. Buy nothing unless it's truly a necessity or truly an investment. Be humble. Be grateful. Be helpful. Be trustworthy. Be the kind of lawyer you'd recommend your parents hire. Be the kind of lawyer your grandchildren will boast about someday. Serve your clients and your community with integrity, class, and grace under pressure. Everything else will fall into place.

***Jordan Furlong** is a lawyer, consultant, and legal industry analyst who forecasts the impact of the changing legal market on lawyers, clients, and legal organizations. He has delivered dozens of addresses to law firms, state bars, law societies, law schools, judges, and many others throughout the United States and Canada on the evolution of the legal services marketplace.*

## ABA Journal Weekly Newsletter

### Are courts for sale? Study sees influence of judicial campaign ads in criminal appeals

Posted Oct 28, 2014 09:14 am CDT

By [Debra Cassens Weiss](#)

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Image from [Shutterstock](#).

Two columnists are blaming *Citizens United* for the influx of outside money into judicial races and are raising questions about the impact. Their question: Are courts for sale?

Columns in the [New York Times](#) and [Mother Jones](#) assert that outside money is pouring into judicial elections since the U.S. Supreme Court in 2010 [struck down a ban](#) on corporate campaign spending on independent ads before an election. While spending overall on judicial races dipped in the next election cycle after the ruling, reported outside spending on judicial races rose to a record-high \$24.9 million, Mother Jones says.

Judges competing with the outside expenditures have to raise more money to compete, and the money may come from people who will appear before them, raising questions about impartiality, the Times column by Joe Nocera says.

This year, overall spending in judicial races is rising in many of the 38 states that hold judicial elections, according to Bert Brandenburg, the executive director of Justice at Stake. "We are seeing money records broken all over the country," he told Nocera. "Right now, we are watching big money being spent in Michigan. We are seeing the same thing in Montana and

Ohio. There is even money going into a district court race in Missouri. ... This is the new normal.”

Both stories cite [a study](#) by Emory University law professor Joanna Shepherd and Michael Kang, who looked at attack ads and state supreme court decisions in criminal appeals in more than 3,000 cases in 32 states. (The New York Times covered the report at its Upshot blog in [this story](#) last week.) The study had two findings:

- The more TV ads aired during state supreme court judicial elections in a state, the less likely justices are to vote in favor of criminal defendants.
- Justices in states whose bans on corporate and union spending on elections were struck down by *Citizens United* were less likely to vote in favor of criminal defendants than they were before the decision.

There are two hypotheses,” Shepherd told Nocera. “Either judges are fearful of making rulings that provide fodder for the ads. Or the TV ads are working and helping get certain judges elected.”

“Either way,” she said, “outcomes are changing.”

## **Adapt or Perish: The Time Is Now for Non-Lawyer Ownership of Law Firms**

**Frederic S. Ury**

*Frederic S. Ury is a founding member of Ury Moskow, LLC, in Fairfield, CT, where he practices civil and criminal litigation. Mr. Ury is Chair of the ABA Standing Committee on Professionalism and former President of the National Conference of Bar Presidents and of the Connecticut Bar Association. Mr. Ury served on the ABA Commission on Ethics 20/20.*

The time is overdue for lawyers to think deeply about what the legal profession will look like in five and ten years. Unfortunately, the fact of the matter is that our present business model is dead or dying. The facts on the ground are telling us what we already know, but don't want to admit because our profession is afraid of disruptive change. Our collective unwillingness to engage on unavoidable issues such as non-lawyer ownership, the inability of much of the population to afford legal representation, and a rapidly changing landscape in the practice of law have made us our own worst enemy.

### **Non-Lawyer Ownership of Firms Is Nothing New**

Consider the controversial question of non-lawyer ownership of law firms. Many if not most lawyers remain staunchly opposed to the concept. But the fact of the matter is that we already have non-lawyer-owned providers of legal services, in open competition with lawyers. Axiom is a 1,000-person firm partially owned by non-lawyers. Note I did not use the term "law firm" — Axiom does not identify itself as such. Yet self-identity aside, in cyberspace Axiom surely is as much a law firm as any firm in the United States.

Similarly, law offices that are captives of the largest insurance companies in the United States are non-lawyer owned. This type of firm has one client, the insurance company it defends in thousands of automobile accident cases. Just one client—but huge access to working capital. The single client controls how the law firm goes about its business. The client tells its lawyers when to settle and when to go to trial. The professional "independence" of lawyers in these captive firms is largely illusory—they either agree to what their single client wants, or look for "greener" pastures.

### **The Profession Must Adapt to the Realities of an Internet-Centered Economy**

While many in a profession conservative by nature may elect to ignore such long-established models of legal practice controlled by non-lawyers, it is harder to ignore the invasion of web-based legal service providers, such as LegalZoom.com and Rocket Lawyer.com, intent on and equipped to take business from lawyers. They have eaten away at our core business because we traditional lawyers created the opportunity for them to do so. They may not be better than the lawyer down the street, but they are

cheaper and faster than most law firms. Legal service providers on the Internet have made themselves accessible and easy to use—which is what consumers in today’s world want. They, too, are owned by non-lawyers.

Moreover, the Internet revolution in legal service providers is not limited to the commoditized part of the practice. Fairoutcomes.com, completecase.com, squaretrade.com, cybersettle.com, virtual court-house.com and many other dispute resolution web sites are all owned by non-lawyers. And they are making a real effort to get as much of the litigation business as they can.

In the face of this onslaught, lawyers are competing with Internet legal service providers with one hand tied behind their backs. We do not have access to venture capital. We are constrained by a myriad of dated rules and regulations developed over the last 100 years that form the rules of professional conduct. Internet providers have unlimited access to capital markets, and they are not regulated. They are not worrying about access to justice for the poor or the administration of justice. They are not concerned with the state of the judiciary or the election and appointment of judges. They do not support bar associations or offer pro bono services. Their narrow, intense focus is to make as much money as they possibly can.

Big Law is coming apart at the seams because the power has shifted to in-house counsel. Over forty years ago, the profession began to abandon its bread and butter, the individual consumer, in favor of representing large corporations, which were willing to pay ever-increasing hourly rates to support hordes of young associates willing to work obscene hours for large salaries. But many corporations have decided they are not going to continue to pay the large fees charged by these firms without getting an equivalent value. They are looking for the same thing as the individual consumer—as much “bang for their buck” as possible. General Counsel have become very sophisticated consumers, with great incentives from their boards of directors to reduce legal costs in any way possible. They may not be looking to the Internet yet, but they are demanding value for their legal dollar, just like the consumers who turn to the Internet for their wills or leases.

### **The Profession Is at Risk of Losing the Right to Self-Regulate**

We are the last of the self-regulated professions. Both the accounting and the medical professions are now for the most part regulated by governmental agencies. Ask doctors and accountants if they are happy with their new governmental regulators. The fact is, over the years they have lost a significant measure of control of the direction of their profession and their destiny.

We lawyers are still in control of our destiny, but that control can easily slip away if we let it. Disruptive change is occurring all around us, and we are not participating. That is not good stewardship. We act as if we are above it all, or that if we look the other way, it will go away. Guess again. Legal sites on the Internet may come and go, but they are not going away. They are only going to become more robust as they add artificial intelligence to their platforms. Not only will these web sites provide you with forms, and resolve your disputes, but they will help you find the correct solution to your legal problem. Sound familiar? Isn’t that what we lawyers have always done?



We need to be part of the solution. If non-lawyer ownership is not one of the answers, then what is? Saying no to change is not a solution. Relying on our 100-year-old business model is not going to work in today's twenty-first century Internet world.

### **Starting the Discussion**

The following suggestions are meant to start the discussion:

1. Change the regulatory system from one that regulates individual lawyers to one that regulates entities. This change will allow the profession to enlarge the tent to include multi-discipline practices, Internet providers, and other innovative entities that will provide legal services on platforms we can only imagine. Obviously this is a significant structural change that will have to be done in conjunction with a myriad of other regulatory and governmental bodies.
2. Allow multi-discipline practice, in order to permit accountants, financial planners, counselors, and attorneys to form new combined entities to allow one-stop shopping for consumers. All employees and shareholders will have to live up to the high standards of the Rules of Professional Conduct, since we will regulate legal service provider entities.
3. Allow non-lawyer ownership in stages over the next five years. This will allow those bright new, young, tech-savvy attorneys to formulate new forms of law firms that, for example, will have computer programmers and social networking experts as owners.
4. License and regulate paralegals/legal technicians so that they can offer commoditized work to consumers at a reasonable cost, independent of attorneys.
5. Offer a two-year master's degree in law that is not a Juris Doctorate, but in between a paralegal degree and a Juris Doctorate. This degree will enable someone who is interested in a specific area of the law to learn, practice, and concentrate in just that area.
6. Modify the ABA/AALS accreditation requirements for law schools so that they can experiment with different programs and differentiate themselves. One size fits all cannot be the model that law schools must operate under in this century.

### **Conclusion**

The legal profession is an important part of the fabric of a democratic society. We have "been there" in this country and around the world for every important event.

We stand ready to protect the weak and at the same time defend the powerful. When our clients are in trouble, they don't call their computer. They call us. We need to be there for all of those people who will need us in the future. We need to be a strong profession with well-trained attorneys willing to take on the unpopular cause.

Let's begin the discussion. The ideas offered above are not the only ones, and they may not even be the right ones. But we need to start talking.

The legal profession is made up of many of the best and the brightest. We should be able to develop a new structure that will allow us to remain independent, relevant, and self-regulated in the twenty-first century.

## ABA Journal October 2014

### Americans don't see their issues as legal matters, study says

POSTED OCT 01, 2014 02:10 AM CDT

BY [JAMES PODGERS](#)



*Photo of Rebecca Sandefur by Kathy Anderson*

An American Bar Foundation study provides additional evidence of a serious gap in access to legal services for many Americans. But its findings also suggest the reasons for the gap can't be blamed entirely on the usual suspects.

Using a list of 12 common types of civil justice issues that people are likely to encounter, including employment disputes, financial and housing matters, relationship breakdowns and their aftermath, and personal injury, the *Community Needs and Services Study* determined that individuals seldom turn to lawyers and courts to help them find solutions.

But despite the common thinking that people don't hire lawyers due to concerns about the cost of legal services, the study findings suggest that "Americans do not take most of their justice situations to lawyers or courts for another very important reason: They do not understand these situations to be legal."

Rebecca L. Sandefur, a faculty fellow at the ABF and a law and sociology professor at the University of Illinois in Champaign-Urbana, presented the [findings](#) (PDF) during a program at the 2014 ABA Annual Meeting. The findings are based on interviews of residents across all economic and demographic spectrums during 2013 in a midsize city in the Midwest, which is not identified in the report. The interviews were a key part of the study, conducted by Sandefur and partially funded by the National Science Foundation.

"A lot of our everyday problems bump up against the law," said Sandefur, but "the law enters people's minds so seldom. They have a significantly different frame for thinking about these issues than we do."

### **DISSATISFYING OUTCOMES**

The study found that the most common method for dealing with civil justice situations is self-help, which was used by 46 percent of the survey participants. Another 16 percent of the survey participants said they do nothing to address the situations they face, and 16 percent said they seek help or advice from family members or friends. Only 15 percent said they seek help from a third-party adviser or representative, which might include clergy members, elected officials, social workers and government agencies, as well as lawyers and courts.

But outcomes were not often satisfying for the random sampling of adults in the study. Sixty-six percent of the participants reported experiencing at least one of the 12 categories of civil justice situations during the 18 months before being interviewed for the study, but 47 percent of the situations they experienced brought negative outcomes, such as adverse effects on their health, loss of income and verbal or physical violence or threats of violence.

ABA President William C. Hubbard, a partner at the Nelson Mullins law firm in Columbia, South Carolina, has made closing the gap in delivering civil legal services his top policy priority for the coming year.

## BigLaw levels up

By [Jordan Furlong](http://www.law21.ca/author/jordan-furlong/) (http://www.law21.ca/author/jordan-furlong/) • September 18th, 2014

My older brother used to give my teenaged self (with some justification) a hard time about playing Dungeons & Dragons. I eventually grew tired of the cracks about wasting time in a fantasy world, though, and I assembled what I considered a strong defence of the game. “D&D helps you build a lot of skills,” I said. “You develop your imagination and creativity; you practise your problem-solving abilities; you learn to collaborate with others and pool your unique resources in working towards solutions.” In retrospect, this triumph of rationalization clearly had “future law student” written all over it.

But here’s something else Dungeons & Dragons pioneered: It was one of the first games to reward a player’s success with greater abilities. You don’t gain powers throughout a game of Monopoly or Risk or Scrabble; you just amass more money or territories or points. But in D&D, every successful venture results in “experience points,” and when you reach a certain amount, your character moves up a level and gains new abilities as a result. Your capability increases as you gain experience — much, ironically enough, as in real life. It’s called “levelling up,” and today, so many games contain some variation on that theme that we take it for granted.

Of course, as you level up, your opponents become stronger and your challenges become greater — again, much as in real life. Large law firms, it seems to me, are now in the process of “levelling up” — through effort and experience, they’re forging successes that are increasing their effectiveness and helping them pull ahead of their peers. But as they do so, newer and tougher challenges are rising up to greet them — and it’s an open question whether the firms will be up to the task.

BigLaw has, in fact, been paying attention to what’s going on around it, and this should not really come across as a surprise. For all the grief that people like me enjoy giving them, large law firms are not actually hapless dullards stumbling backwards towards the edge of the cliff. (Most of them, anyway.) They’re big operations with tons of money and some really smart people high in the org chart, and they’ve noticed that the legal environment is undergoing irreversible change that threatens their business model. Not every firm that recognizes its peril can do something about it; but those that see the challenge, and can execute to meet it, are more numerous than popularly believed.

A raft of examples has emerged just in the last few months to illustrate this. Prof. Bill Henderson [highlights three large firms](http://lawprofessors.typepad.com/legalwhiteboard/2014/08/ahead-of-the-curve-three-big-innovators-in-biglaw.html) (http://lawprofessors.typepad.com/legalwhiteboard/2014/08/ahead-of-the-curve-three-big-innovators-in-biglaw.html) — Bryan Cave, Littler Mendelson, and Seyfarth Shaw — that have made great strides in technology, systematization, and workflow, and are revolutionizing the way they do business and serve clients. *The American Lawyer’s* Aric Press points out [the rapid rise of pricing officers in BigLaw](http://www.americanlawyer.com/id=1202661735831/What-the-Rise-of-Pricing-Officers-Says-About-Big-Laws-Future-?slreturn=20140802111753) (http://www.americanlawyer.com/id=1202661735831/What-the-Rise-of-Pricing-Officers-Says-About-Big-Laws-Future-?slreturn=20140802111753) (76% of large US firms now have one) and its implications for changes to cost and profitability management, value definition, and partners’ pricing discretion. LeClair Ryan teamed up with LPO United Lex to create a [Legal Solutions Center](http://www.leclairryan.com/news/xprNewsDetail.aspx?xpST=NewsDetail&news=1031) (http://www.leclairryan.com/news/xprNewsDetail.aspx?xpST=NewsDetail&news=1031) for doing routine, repeatable work with low costs and high systematization, just the latest in a line of firms to outsource straightforward work to a low-cost provider. Allen & Overy even commissioned and published its own [report into the future of legal service delivery](http://www.allenoverly.com/publications/en-gb/legalservicesmodels/Pages/default.aspx) (http://www.allenoverly.com/publications/en-gb/legalservicesmodels/Pages/default.aspx).

Ron Friedmann argues that far from being disrupted, [BigLaw has begun to adapt](http://prismlegal.com/big-law-changing-disrupted/) (http://prismlegal.com/big-law-changing-disrupted/) to the new forces at work in the market: “Most US large firms continue to perform fairly well. While some firms do suffer, many thrive.” This undoubtedly is true. To a greater or lesser degree, many BigLaw firms have levelled up: they’ve learned, invested time and energy, and made adjustments that helped them improve their productivity and effectiveness. They should be commended for that, because it really is not easy to introduce change of any kind into large organizations with extremely diffuse decision-making authority and a deep ambivalence about innovation.

### Books By Jordan

#### *Your Road Map To The Future of Law*



## **Evolutionary Road**

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But the thing about levelling up, of course, is that as your own powers increase, your quests become tougher too. Intermediate warriors don't take on goblins and orcs anymore; they're up against cave trolls and frost giants. It's great that BigLaw is overcoming its initial challenges, because the next set will not only be tougher, they'll be multi-dimensional. From my perspective, here are four forces with which large law firms will shortly have to contend:

**The exponential growth of technology.** I'm still relatively sanguine about the ultimate impact of technology on the legal sector — mostly because I've never yet had to reboot a lawyer. But it's difficult to ignore the evidence that machines are becoming extraordinarily good at replicating many functions that firms traditionally assigned to their attorneys. Clio's Joshua Lenon provided a useful overview (<https://www.linkedin.com/pulse/article/20140827161718-29065348-four-visions-of-the-future-of-law>) of a panel at the most recent International Legal Technology Association meeting that featured insights from four accomplished legal tech leaders. Lawyerist's Sam Glover explained Fastcase's Bad Law Bot (<http://lawyerist.com/69954/will-computers-become-better-lawyers-humans-cliocloud9/>) and its head-spinning implications for litigation. There are so many new applications now, from Shake (<http://www.shakelaw.com/>) and Fair Outcomes (<http://www.fairoutcomes.com/>) to Neota Logic ([www.neotalogic.com/](http://www.neotalogic.com/)) and Picture It Settled ([www.pictureitsettled.com/](http://www.pictureitsettled.com/)), that it's a matter of when, not if, tech will start seriously infiltrating BigLaw.

One name in particular keeps popping up in these conversations: Watson. The American Lawyer gave us a snapshot (<http://www.americanlawyer.com/id=1202664266769/The-Future-of-Law?mcode=0&curindex=0&curpage=ALL&slreturn=20140728083340>) of what IBM's machine-learning behemoth is now capable of (the version that won *Jeopardy!* could read 200 million pages in three seconds; the current iteration is 24 times faster). IBM's GC, Robert Weber, believes Watson could pass the bar tomorrow. (Interestingly, he also believes non-lawyers shouldn't be allowed to own law firms (<http://www.law21.ca/2012/02/who-should-have-the-right-to-own-a-law-firm/>).) Watson's potential legal applications are already emerging: a version called The Debater assembled arguments for and against banning video games (<http://io9.com/ibms-watson-can-now-debate-its-opponents-1571837847>) based on a lightning-fast survey and analysis of existing content on that topic. Ron Friedmann described some reservations about the outlook for Watson in law; (<http://prismlegal.com/meet-new-lawYER-IBM-WATSON/>) for my part, I think there are many more repositories of useful legal data than large law firms that would be unwilling to help fund a future competitor. And when technology does finally penetrate BigLaw firms, one impact will be felt above all others:

**The collapse of their compensation systems.** Michael Mills of Neota Logic, a speaker on that ILTA panel, wrote an incisive article about legal technology and innovation (<http://blog.neotalogic.com/2014/09/06/technology-the-future-of-law-a-forecast-in-four-acts/>), specifically about the one feature integral to law firms that blocks both these forces: the billable hour. "The elephant in the room is stamping and snorting and must be heard: *Innovation destroys hours*. Now, that's bad wherever the majority of lawyers' revenue is rates x hours. Every hour saved is a dollar lost. But it's especially bad for law firms, and that is almost all of them, whose partner comp schemes set the income of individual partners with a formula that counts the individual partner's hours, or the hours of her team. Because then she knows that she will be *personally* penalized for her own innovations." Innovations reduce law firms' inventory, the billed hours of their lawyers. But equally, innovations are inescapable. You can see where this is heading.

Technological automation, process management, and operational efficiency will all be essential to the ability of large firms to be profitable in the years to come. But virtually every new tool or system that increases a firm's productivity reduces the time spent to complete a task, and "time spent" is the lifeblood of lawyer compensation systems. And as I wrote years ago (<http://www.law21.ca/2012/09/time-out-removing-time-from-pricing-and-compensation/>), the traditional law firm simply can't function without counting and maximizing hours; it's built into their financial and cultural DNA. De-emphasize or remove time as a factor in productivity, and you remove the one card holding up the whole house. So law firms that hope to be both functional and profitable will have to find new, non-hourly ways to remunerate their people. I don't know of a single BigLaw firm that's even close to that point. Something's got to give here — but it's not going to be the market forces driving change. It never is.

**The rise of colossal competitors.** The legal market is at the precipice of unprecedented regulatory upheaval. Most everyone knows about the *Legal Services Act* and the licensing of more than 300 Alternative Business Structures in England & Wales

knows about the legal services market and the necessity of more than 500 alternative business structures in England & Wales over the last couple of years. Not everyone realizes that among the legal entities that have been authorized there are law firm businesses owned by a giant insurance company (<http://www.thelawyer.com/analysis/the-lawyer-management/abs-news-and-analysis/parabis-partner-direct-line-granted-abs-licence/3015673.article>), a telecommunications provider (<http://www.legalweek.com/legal-week/news/2251876/bt-moves-into-legal-services-as-abs-licence-comes-through>), and a financial and consumer services company (<http://www.co-operativelegalservices.co.uk/>). Most significantly, three of the Big 4 accounting firms (<http://www.thelawyer.com/the-accountants-are-coming/3021551.article>) have considered or (in the case of PriceWaterhouseCoopers (<http://www.thelawyer.com/analysis/the-lawyer-management/abs-news-and-analysis/pwc-legal-gains-abs-licence/3015677.article>)) already received an ABS licence. These are all entities that traditionally have retained large law firms or have referred work to them. Non-lawyer law firm ownership, already approved in Australia and Great Britain, has been endorsed by the Canadian Bar Association (<http://www.law21.ca/2014/08/watershed-cba-futures-report/>) and will likely be considered by Canada's largest legal regulator next spring ([http://www.lsuc.on.ca/uploadedFiles/For\\_the\\_Public/About\\_the\\_Law\\_Society/Convocation\\_Decisions/2014/convfeb2014\\_PRC\(1\).pdf](http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2014/convfeb2014_PRC(1).pdf)). Sooner or later, at least one US jurisdiction will follow suit, and the world's largest legal market will be changed forever. This is the future competitive landscape that BigLaw needs to start anticipating today.

Take a closer look at the accounting firms (<http://www.carlyle-executive.com/Insight/Article/8/accounting-firms-make-foray-into-legal-servic>), because if there's any potential new player in the market that should keep BigLaw's managing partners awake, it's this one. "Accountants aren't kidding with ABS this time (<http://www.thelawyer.com/news/leader/accountants-arent-kidding-with-abs-this-time/3016959.article>)," wrote *The Lawyer's* Catrin Griffiths earlier this year, and she zeroes in on exactly why BigLaw should be watching very carefully: "The accountants are after bread-and-butter commercial, employment, mid-level corporate, immigration, outsourcing and IP; it may not be bet-the-company stuff, but they create deep relationships with clients that can be leveraged." It can be argued that the likes of Parabis and Co-Op and Slater & Gordon are focused on the consumer market and therefore safely distant from BigLaw's hunting grounds (although Parabis evidently aims to move into the corporate market (<http://www.legalweek.com/legal-week/news-analysis/2370839/-we-want-to-be-in-the-vanguard-of-change-for-the-profession-an-interview-with-parabis-leaders>)); the same can't be said for "Big4Law." Lawyers struggle with value billing; accountants advise their clients on it (<http://performance.ey.com/2014/03/03/seeking-value-pricing/>). A tiny handful of the world's largest law firms generate \$2 billion in revenue a year; as Catrin points out, PWC alone clocks in at \$32 billion. If a fight does break out in this sector, it won't be a long one or a fair one.

**The emergence of client self-determination.** In some respects, this might be the most significant new challenge for BigLaw to unravel, because it goes to the heart of law firms' work supply chain. Many lawyers have already experienced a reduction in work and revenue from corporate clients, and the biggest reason has been insourcing: clients keeping a growing chunk of work inside the law department. "Over the past decade, the number of in-house lawyers has doubled in the UK. Now, one in five lawyers practises in-house. Over time, private practice has lost up to 20% of its market share to its clients," writes Reena SenGupta in *Legal Business* (<http://www.legalbusiness.co.uk/index.php/lb-blog-view/2507-a-self-deceiving-return-to-business-as-usual-2>). "Few private practice partners can pre-empt problems in the way their in-house counterparts can. ... Where will their value be in the future? Outside of specialist legal knowledge that does not reside in the internal legal team or the ability to marshal bodies for a major matter (and the necessity for the latter is in question), where is their value-add?"

I wrote recently about how clients will become lawyers' biggest competitors (<http://www.law21.ca/2014/08/whos-biggest-competitor/>), and nowhere does this apply more than with corporate, commercial, and institutional clients. They have the unique combination of a strong impetus to manage their legal affairs better and the financial assets with which to make that possible. They are re-positioning themselves in their relationships with outside counsel, viewing BigLaw as just another resource rather than the default sourcing option, and they're placing themselves at the centre of a new risk management ecosystem. Large firms, for the most part, have no idea what to do about this. They find it difficult to look at the world through clients' eyes; they lack the necessary empathy (<http://t.co/AJzPFKr77X>). They know how to receive and perform legal work, not how to develop and manage the complex client relationships that produce work. This is an institutional skill, one that can be learned — but it's much tougher than installing new software or even initiating legal project management.

BigLaw has seen and has begun to respond to shifts in the legal market, and kudos to those firms that have done this the best. But I want to make it clear to them that this process is not over, but rather is just beginning. Fundamental assumptions about their business models, their competitive environments, and their client relationships are all poised to shift dramatically over the next ten years, and it will require extraordinary effort, resilience, and leadership for them to adjust accordingly. Many firms have found it exhausting just to get this far, and I'm not sure how well they'll respond to what's coming.

It would be foolish to write off BigLaw, even given the enormity of these challenges: recall what I said earlier about what size, smarts, and money can accomplish. But, man — this is not going to be easy. Welcome to Level 2.

*Jordan Furlong* (<mailto:jordan@law21.ca>) is a lawyer, consultant, and legal industry analyst who forecasts the impact of the changing legal market on lawyers, clients, and legal organizations. He has delivered dozens of addresses to law firms, state bars, law societies, law schools, judges, and many others throughout the United States and Canada on the evolution of the legal services marketplace.

County	Population (2013)	# of PLF Covered Attys	Ratio	# Under Age 40	% Under Age 40	% Over Age 60	# Over Age 60
Baker	16,134	13	1241:1	5	38%	38%	5
Benton	87,725	71	1236:1	9	13%	28%	20
Clackamas	386,080	646	598:1	163	25%	31%	202
Clatsop	37,270	37	1007:1	9	24%	32%	12
Columbia	49,850	30	1662:1	3	10%	33%	10
Coos	62,860	50	1257:1	6	12%	44%	22
Crook	20,690	10	2069:1	0	0%	50%	5
Curry	22,300	16	1394:1	3	19%	50%	8
Deschutes	162,525	268	606:1	63	24%	25%	68
Douglas	108,850	54	2016:1	18	33%	37%	20
Gilliam	1,945	0	*	*	*	*	*
Grant	7,435	8	929:1	2	25%	38%	3
Harney	7,260	3	2420:1	2	67%	0%	0
Hood River	23,295	35	666:1	7	20%	26%	9
Jackson	206,310	189	1092:1	33	17%	41%	77
Jefferson	22,040	9	2449:1	2	22%	33%	3
Josephine	82,815	47	1762:1	10	21%	43%	20
Klamath	66,810	45	1485:1	14	31%	40%	18
Lake	7,940	8	993:1	2	25%	50%	4
Lane	356,125	543	656:1	110	20%	41%	222
Lincoln	46,560	59	789:1	6	10%	41%	24
Linn	118,665	63	1884:1	13	21%	37%	23
Malheur	31,440	32	983:1	8	25%	34%	11
Marion	322,880	484	667:1	147	30%	32%	153
Morrow	11,425	0	*	*	*	*	*
Multnomah	756,530	3,714	204:1	1,086	29%	26%	970
Polk	77,065	22	3503:1	6	27%	18%	4
Sherman	1,780	0	*	*	*	*	*
Tillamook	25,375	20	1269:1	4	20%	40%	8
Umatilla	77,895	53	1470:1	14	26%	45%	24
Union	26,325	20	1316:1	3	15%	30%	6
Wallowa	7,045	8	881:1	2	25%	25%	2
Wasco	25,810	32	807:1	9	28%	47%	15
Washington	550,990	610	903:1	171	28%	29%	179
Wheeler	1,430	1	1430:1	0	0%	0%	0
Yamhill	101,400	87	1166:1	27	31%	36%	31

## DISSOLUTION PRESS RELEASE

On September 26, 2014, the Board of Directors of the American Judicature Society (AJS) approved a plan to dissolve the Society and wind up its affairs.

AJS was the original “fair courts” citizen organization and, for 101 years, has worked nationally to protect the integrity of the American justice system through research, publications, education and advocacy for judicial selection reform. Among its notable accomplishments are the development of the “Missouri Plan” for judicial selection, the creation of state judicial conduct commissions and judicial nominating committees and publication of its award winning peer-reviewed journal, *Judicature*.

More recently, other entities have joined the American Judicature Society’s mission to ensure that the nation’s justice system is fair, impartial, and effective. In the coming weeks, AJS will reach out to these entities in an effort to ensure the continued operation of its Center for Judicial Ethics and *Judicature*, which serves as a forum regarding all aspects of the administration of justice and its improvement.

Commenting on the Board’s decision, AJS President Tom Leighton said:

A fair and impartial justice system is the foundation of American liberty. The American Judicature Society has fought to improve and preserve the fairness, impartiality, and effectiveness of our justice system for 101 years as a member-based entity. However, in the last several years, the membership model has become more challenging for many nonprofit organizations around the country, including AJS. At the same time, new nonprofit entities with organizational and financial structures more suited to the times have joined AJS in the fight. The American Judicature Society’s Board of Directors decided that rather than operate on a limited scale, and rather than duplicate the excellent work of other similar entities, AJS should find new homes for its core functions. To this end, AJS and the National Center for State Courts (NCSC) have entered into a Memorandum of Understanding that transfers AJS’s Center for Judicial Ethics (the CJE) to NCSC and ensures that the CJE will continue its very important work. AJS is also in the process of finding new homes for *Judicature* and AJS’s internet accessible resource known as Judicial Selection in the States.

Even after the American Judicature Society closes its doors, its legacy will live on as long as Americans recognize and support a fair and impartial justice system as essential to our freedom.



More information on the long and distinguished history of AJS can be found at [www.ajs.org](http://www.ajs.org).

\*\*\* Any inquiries regarding the dissolution of the AJS can be directed to Mr. Leighton at [tom.leighton@thomsonreuters.com](mailto:tom.leighton@thomsonreuters.com)



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 / In rural America, there are job opportunities...

COVER STORY

## In rural America, there are job opportunities and a need for lawyers

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BY LORELEI LAIRD ([HTTP://WWW.ABAJOURNAL.COM/AUTHORS/27616/](http://www.abajournal.com/authors/27616/))



Mary DePuydt and Cody Cooper are married and both lawyers who plan to open separate law offices in Wishek, North Dakota, as well as grow their own food. Photo by Greg Latza.

Wishek, North Dakota, is 90 minutes southeast of Bismarck and roughly six hours from either Minneapolis-Saint Paul or Winnipeg, Manitoba. Settled by ethnic Germans fleeing Russia, it's a farm community on the opposite end of the state from North Dakota's oil boom. As a result, Wishek hasn't seen the influx of people and money causing problems for its northern neighbors. Though it's the biggest city in McIntosh County, it's still pretty small—the 2010 census counted 1,002 people.

But that might change, says Duke Rosendahl, economic development coordinator of Wishek's Job Development Authority. Oil companies were exploring drilling in McIntosh County this past spring.

"If they find what they think they're going to, within five or six years, people are going to need attorneys who are versed in land laws and how they can protect themselves with getting into oil leases," Rosendahl says. "Not to mention general civil attorney needs."

That's a problem because Wishek's only lawyer retired last year. That left residents

without anyone nearby to handle their basic legal needs. "It's always a challenge to get professionals into a rural area," Rosendahl says. "Particularly with the perception that we're not far from the North Pole."

And Rosendahl doesn't think Wishek residents should have to drive all the way to Bismarck for legal help when there is so much work for a local attorney.

"It'd be nice to be able to grab a guy's collar, if you will," he says. "Be close enough to get nose to nose with these people and get a relationship going."

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So Wishek took the unusual step of offering to pay for office space and other business expenses if a young lawyer agreed to move to town. The city got two: Cody Cooper and Mary DePuydt, a married couple who both finished law school in 2013 and moved to Wishek from the Twin Cities in April. They planned to set up separate law offices to avoid potential conflicts of interest.

The two were interested in Wishek because they want to try growing and making much of their own food. They also liked the idea of living in a small community because it provides more opportunities to take on leadership roles. Cooper hopes to eventually run for McIntosh County state's attorney. "That's also a thing that attracted us to Wishek—the possibility that we're going to be able to do good out there," Cooper says. "In a big town like Minneapolis, you feel like there's not so much to do to really make an impact."

## RURAL DEARTH

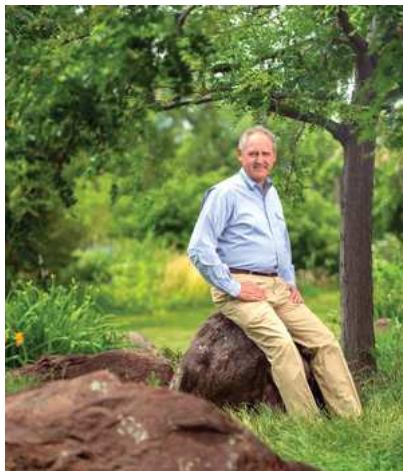
Wishek isn't the only rural place looking to attract new attorneys. Nearly 20 percent of Americans live in rural areas, but the *New York Times* says just 2 percent of small law practices are in those areas. Those still practicing law in small towns are often nearing retirement age, without anyone to take over their practices.

And without an attorney nearby, rural residents may have to drive 100 miles or more to take care of routine matters like child custody, estate planning and taxes. For people of limited means, a long drive is a logistical hardship, requiring gas, a day away from work and sometimes an overnight stay. And census information shows that rural communities are disproportionately poor.

All this creates a "justice gap," with legal needs going unmet because potential clients can't find a lawyer, or they can't afford the lawyers they can find.

"It increases the expense," says Judge Gail Hagerty of the North Dakota Supreme Court, a leader in her state's effort to address the issue. "In some cases, people just don't get the legal services they need."

Pat Goetzinger, the 2011-2012 president of the State Bar of South Dakota, adds that "the strain on local budgets as a result of not having local lawyers is astronomical." That's because local governments have to pay judges, prosecutors and private defenders to drive in and handle local cases. Goetzinger's native Bennett County was forced to do this after its only attorney retired, leaving the closest lawyer more than 120 miles away.



Recognizing these issues, the ABA's House of Delegates passed a 2012 resolution encouraging governments and bar groups to address the loss of lawyers in rural areas and access-to-justice issues in rural America.

Bar leaders, law schools and governments are increasingly taking up the challenge. Particularly in the Midwest and Upper Midwest, programs have sprung up in recent years to encourage law students to start their careers in rural America via clerkships, job opportunities or help setting up new offices.

The problem is not a lack of new attorneys. Law school graduating classes have increased in size over the past 30 years, according to data from the ABA Section of



*Duke Rosendahl, Wishek's economic development coordinator, says, "It's always a challenge to get professionals into a rural area." Photo by Greg Latza.*

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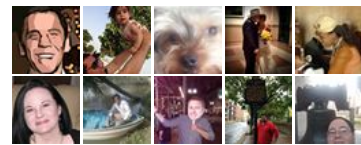
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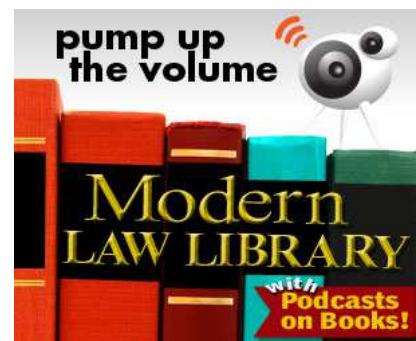
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Pat Goetzinger, president of the South Dakota bar, notes that "the strain on local budgets as a result of not having local lawyers is astronomical." Photo by Greg Latza.

Legal Education and Admissions to the Bar. And those new lawyers are having trouble finding meaningful work. The section found this year that only 57 percent of 2013 law graduates had full-time, nontemporary jobs requiring bar passage. Another 10.1 percent had full-time "law degree preferred" jobs. The remaining graduates, roughly a third, were unemployed or had part-time, temporary or nonlegal work.

At the same time, the legal needs of low- or moderate-income Americans are going unmet because the demand is so much greater than the supply of help. The Legal Services Corp. says one legal aid attorney is available for every 6,415 low-income Americans, which means that as many as four out of five of those people's civil legal problems are not addressed.

The ABA's immediate-past president, James Silkenat, put this paradox front and center with his Legal Access Job Corps ([http://www.americanbar.org/groups/leadership/office\\_of\\_the\\_president/legal\\_access\\_jobs\\_corps.html](http://www.americanbar.org/groups/leadership/office_of_the_president/legal_access_jobs_corps.html)) initiative, which seeks to connect underemployed young lawyers with underserved low- to moderate-income clients. He described it as his biggest priority during his year in office.

"I devoted the largest part of my budget to pursuing this, and it really addresses two issues: not only the unmet legal needs, which are enormous around the country, but the underemployed young lawyers looking for training," he says. It's "matching up those two problems in the same bucket rather than treating them as two separate problems."

That was part of why Bruce Cameron, a solo practitioner in Rochester, Minnesota, wrote *Becoming a Rural Lawyer*. Released in 2013, the book discusses the pros and cons of rural practice and gives practical advice on setting up an office. Cameron came to the law as a second career and found himself less frightened by the prospect of starting his own firm than trying to find an associate job in a competitive market.

"There seemed to be a concentration on one standard career path—practice for a law firm in a metropolitan area," he says. "It seemed to me that there were a lot of small towns out there wanting or needing attorneys. And in 2008, there were a lot of attorneys wanting or needing places to practice."

"[I was] trying to help encourage the idea that there are two needs out there, and perhaps one could help fulfill the other."

## CITY VS. RURAL

New attorneys don't often choose rural law practice after graduation. That mirrors a general trend toward Americans concentrating in cities. In Wishek's McIntosh County, for example, the population has dropped from a high of 9,621 during the 1930 census to 2,809 in 2010.

And with lawyers, there's the added problem of high student loan debt. "I think the biggest inhibitor out there is debt," says Phil Garland, who practices law in Garner, Iowa, and chairs the Iowa Bar Association's Rural Practice Committee. "You have a lot of kids who are carrying \$100,000 or more in debt, and small-town lawyers don't necessarily [get paid] as well."

Debt also prevents brand new lawyers from buying an entire practice outright, one traditional way to get started. And then there's love and marriage.

"They want to be in a place where it's easy to meet people, especially if they're single," says Francy Foral of the State Bar of South Dakota. "Or if they have a significant other or spouse, the other barrier is they're going to make sure they have opportunities for their significant other as well."



*Francy Foral says that nine months after South Dakota became the first state to pay lawyers to move to the rural areas, one had set up shop and others were on the way. Photo by Greg Latza.*

To fight these demographic trends, Foral's state went big. In 2013, South Dakota attracted national attention when it became the first—and so far, only—state to pay young lawyers to relocate permanently to rural areas.

Modeled on similar programs for medical professionals, South Dakota's Rural Attorney Recruitment Program (<http://ujs.sd.gov/Information/rarprogram.aspx>) promises young attorneys \$12,000 a year for five years if they move to a qualifying county of 10,000 or fewer people. The payments are designed to cover 90 percent of the cost of attending the University of South Dakota's School of Law. Before June 30, 2017, the state aims to recruit 16 participating attorneys.

The program was the result of consistent advocacy by South Dakota Supreme Court's Chief Justice David Gilbertson, who gives a yearly state of the judiciary speech for state leaders. Gilbertson included the rural attorney shortage for several years running and won an ally in State Sen. Mike Vehle, R-Mitchell, who drafted legislation in 2013 authorizing the program and its funding.

Goetzinger adds that the direct-payments model was difficult to get through the state legislature because of the financial commitment. To make it acceptable, supporters gave the program an end date and required the state to put up only half of the money. Another 35 percent of payments come from participating counties, and the final 15 percent comes from the state's bar foundation. The program demonstrates the State Bar of South Dakota's commitment, Goetzinger says. The Rural Attorney Recruitment Program took effect in July 2013. Nine months later, in April, the program already had one participant practicing law, two others who were awaiting bar exam results and several interested law students, Foral says.

The response "is beyond, quite frankly, our expectations," Goetzinger says.



*Jake Fischer specializes in agricultural law and is the first participant in South Dakota's program to recruit rural attorneys: "It really is eye-opening to learn how much legal work there is to be done," he says. Photo by Greg Latza.*

## PULLING THEM IN

South Dakota has been a leader among states that are trying to address a lack of attorneys in rural areas. In addition to the Rural Attorney Recruitment Program, it also has Project Rural Practice (<http://sdrurallawyer.com/>), a task force of the state bar that advocates for and supports young attorneys who choose rural South Dakota. Foral says rural recruitment has been a frequent topic of discussion at the Jackrabbit Bar Conference, which brings together bar personnel from eight Mountain and Plains states. And last spring, the University of South Dakota held a rural practice symposium that Goetzinger says attracted visitors from more than 10 states.

The Rural Attorney Recruitment Program has also caught the eye of bar leaders. Silkenat says press coverage for the program helped him integrate rural attorney programs into the Legal Access Job Corps. In July, the corps announced seven "catalyst grants" to innovative programs that address low-income legal needs while also providing training to young lawyers. Two grants, to Legal Aid of Arkansas and the Nebraska State Bar Association, are expressly aimed at enhancing rural access to justice. The Arkansas grant will fund fellowships for new attorneys who will work in rural areas for a year, then with people of modest means for another two years. The Nebraska grant will fund an existing program. Another grant, to the Vermont Bar Association, is not expressly about rural justice but will support new solos and small firms in an overwhelmingly rural state.

And Linda Klein, the only declared candidate for the ABA presidency in 2016-2017 and a former chair of the House of Delegates, got involved in her state after learning about South Dakota's program at the 2012 Jackrabbit Bar Conference.

"I had been president of the State Bar of Georgia in 1997-98, and I knew that 70 percent of our lawyers were in Atlanta," says Klein, managing shareholder of Baker Donelson's Atlanta office. "So I realized that this was a problem not just in South Dakota, but it was a problem everywhere."

But because direct payments are expensive and it's difficult to convince politicians to approve them, most U.S. institutions are not following South Dakota's model.

Garland, the Iowa lawyer who heads that state bar's Rural Practice Committee, says Iowa's program is more typical of state rural-lawyer recruitment programs. His committee matches law students—mostly from the University of Iowa, Drake University in Des Moines and Creighton University in Omaha, Nebraska—with rural lawyers who are looking for summer clerks or new associates. "They need to come and see what we're doing is real law and get used to the community," he says.

The summer clerkships meet an additional goal: giving the established lawyer time to get to know the young lawyer. If it's a good match, Garland says, the established lawyer may be able to offer a higher starting salary to account for the fact that the student already knows the office. And that's important, because he says offers from rural lawyers are competing for "very employable" students with higher offers from city law firms.

To the west, the Nebraska State Bar Association is taking a similar approach. Law students from Creighton and the University of Nebraska at Lincoln, and lawyers with fewer than two full years of practice, can apply to be part of the NSBA Rural Practice Initiative's bus tours. Held annually, these typically bring young lawyers to two small towns each year. The students meet with local leaders, tour the towns' landmarks and, in the evening, do "speed dating" interviews with local attorneys.

The recent ABA grant means the NSBA will be able to sweeten the deal for both sides, expanding the program in 2015. The money will partially fund 15 summer clerks next year.

Sam Clinch, associate executive director of the NSBA, says 12 of Nebraska's 93 counties have no lawyers at all.

"It's interesting, when we go out on this bus tour, every lawyer that meets with a student said if they find the right fit, they would hire that lawyer that day," he says. "So there's a definite need for lawyers."

## MAINE NEEDS

In Maine, former state bar president Bill Robitzek saw the same need in the state's northern counties: Older lawyers were reaching retirement age without successors. The state has one law school, at the University of Maine in Portland, and Robitzek says graduates typically stay in that area. That's the result of a June report from the Maine Board of Overseers of the Bar, which found that 10 percent of the lawyers outside Cumberland County, where Portland is located, are younger than 35. After the job market dried up, that scarcity caused problems.

"If you keep pumping out 80 lawyers a year, you're going to max out opportunities" in Portland, he says. "And many of the young lawyers didn't know of the existence of opportunities outside the Portland area. Basically, what I saw were two problems that might solve each other."

So Robitzek launched an informal matchmaking program—connecting law students with rural attorneys who were looking for successors. As president of the state bar in 2013, he also encouraged the law school to introduce students to rural Maine. This started with a road trip for law students up the coast, toward the less-populated areas of northern Maine. This year, lawyers from Lincoln County returned the favor by visiting the law school. And law student Danylle Carson—Robitzek's former assistant—has co-organized the Maine Law Student/Bar Networking Society, designed to connect law students with rural job opportunities.

Robitzek characterizes the efforts as very informal, but still planned to meet with Maine Chief Justice Leigh I. Saufley to discuss formalizing the process. Meanwhile, the June report (<http://www.mebaroverseers.org/DemographicsTaskForce/Docs/Task%20Force%20Report%20-%206.6.14.pdf>) (PDF) from the Maine Board of Overseers of the Bar made several recommendations for luring more young attorneys into rural Maine, including a "boot camp" teaching skills for solo practitioners, technology grants for new rural lawyers, a solo/small firm email discussion list and recruitment or internship programs like those in other states.

In North Dakota, a rural attorney shortage is complicated by the state's oil boom, which has roughly doubled the population in some areas. Along with all those extra people come extra legal needs—not just oil and gas work, but more ordinary civil and criminal needs. In these regions, says Kathryn Rand, dean of UND's law school, the problem is not finding a private attorney; it's finding one who is available.

"Even in counties that had a small number of attorneys, those attorneys have been so overwhelmed by the amount of work that needs to be done that they are turning away business," Rand says.

Hagerty tackled the issue as 2012-2013 president of the State Bar Association of North Dakota. She worked with Rand and the law school to start a clerkship program for law students, matching them with rural state judges. With funding from the state supreme court, the program offered a summer stipend to two to three students starting in 2014. If the relationship works out, the students and judges may continue working together via phone and the Internet during the school year.

Hagerty describes it as a first step, a program that could be launched quickly while the bench and bar think of more solutions. But interest was so high—even from federal judges and private

attorneys—that there was immediate interest in expanding it.

## CLOSING THE JUSTICE GAP

In Georgia, Klein says, she and other former presidents of the state bar were discussing solutions this past spring. They were examining all kinds of programs in other states, and they have a high-profile champion in the form of Chief Justice Hugh Thompson, who made the rural attorney shortage part of his first state of the judiciary address in February. That speech acknowledged that six of the state's 159 counties have no lawyers at all; another 40 have 10 attorneys or fewer.

Thompson sees the problems firsthand, as a leader in the court system. They include a flood of pro se defendants who slow down the system and rarely win.

"Most people who are not represented have bad results," notes Thompson. "And the truth is, a lot of people who don't have lawyers don't get quote-unquote 'justice.' "

Georgia's not the only state thinking about the rural justice gap. Montana is working on a program, which will in part address the spillover from North Dakota's oil boom. Silkenat mentions that the New York State Bar Association is discussing the issue. The Vermont Bar Association and Vermont Law School are running a new incubator program in 2014-2015, helping three new attorneys set up solo practices for underserved communities, including rural communities. And in New Hampshire, state Bar Association Board of Governors President Lisa Wellman-Ally launched a rural practice program when she started her term in June. She described it as her central issue.

"My goal is to attract attorneys to those more rural areas so the people in the rural areas will have access to justice—they'll have attorneys who are local, part of their communities," says Wellman-Ally, who practices law in Claremont, New Hampshire, "and to show [new attorneys] that there is a quality of life that is different in these rural areas."

### Sidebar

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## City vs. Country

### There's plenty of work to go around, but rural lawyers need to be able to hit the ground running

Even if not many new attorneys are choosing rural law, proponents have plenty of arguments in its favor. Chief among these is lifestyle. Project Rural Practice (<http://sdrurallawyer.com/>) offers testimonies from young attorneys who frequently cite work-life balance or a better environment for children. That's something that might be missing from the stereotypical big-city associate job, and something that surveys say workers born after 1980 want.

Bruce Cameron, author of *Becoming a Rural Lawyer*, says it's not so much about balancing work and life; it's about living in a community that understands you have both constraints.

Clients "understand that there are times when life takes precedence; there are times when work takes precedence," he says. "It's easy to tell a client: 'I'll get to that—but, hey, I have to deal with a sick kid.' "

Jake Fischer, the first participant in South Dakota's Rural Attorney Recruitment Program, made a conscious decision to prioritize lifestyle when he joined the program. Fischer was born and raised in Parkston, South Dakota—population 1,508 in the 2010 census—but attended college and law school at the University of Minnesota. He enjoyed living in the Twin Cities, where he launched his legal career, got married and bought a house.

But after their daughter was born in 2013, Fischer and his wife, Robin, began to think about the time commitment to their jobs and where they'd like to raise a family.

Ultimately, that led Fischer to join the Swier Law Firm, an established firm in South Dakota, and to open its new office in Corsica, population 592.

Fischer specializes in agricultural law, but he also takes whatever comes—a requirement



at a rural firm, he says, and something he enjoys.

"It allows me to take on new projects all the time," he says.

Major issues for his clients include estate planning for transfer of large farms and land sales, which can be high-dollar transactions. But he's also done a bit of litigation and put himself on the public defender list for a few counties near Corsica.

All of this has allowed Fischer to take on responsibility faster than an associate at a big-city firm might.

"If you're a young attorney looking for experience, you're instantly able to get into the courtroom and represent clients in a serious and substantial matter," he says.

And there's plenty of work.

"I've worked in three different legal communities with my firm so far, and there's always people calling," he says. "It's really eye-opening to learn how much legal work there is to be done."

Cody Cooper might agree. As of June, he had a long waiting list of clients ready to use his services—largely for wills and property matters, reflecting the demographics of Wishek. Even though he was admitted to the Minnesota bar, the North Dakota bar needed six to eight months to do his character and fitness check, something he wished he knew before his move. While he waited, he was volunteering, working with another local lawyer and getting to know his neighbors.

The flip side of all the work, says Cameron, is that young attorneys interested in a rural practice have to be ready to hit the ground running. That means getting into the courtroom right away and also knowing how to run an office. Those are skills that students may not have if they planned to become urban law firm associates.

Cameron also warns that rural practice is a long-term commitment. "This is not where you [say]: 'I'm going to put in five years and have the thing on my resumé and move on,'" he says. "It's going to take that five years just to get your practice up and going."

That's because relationships are vital in a small-town practice, Cameron says. A new lawyer has to build trust and a good reputation. Community involvement may be even more important than conventional advertising.

The chance for greater, and more personal, community involvement was another reason Fischer moved back to South Dakota. Like Cooper, he has plans to run for office after he's better established in the area. That's something he says he couldn't have done back in Minneapolis, where the bigger population meant fewer leadership roles per capita.

He sees public service as a more satisfying way to do good than his old job in Minneapolis, working on energy policy.

"It was engaging work, and I enjoyed my work, but you start to wonder: 'How can I effect change more directly?' " he says. "I've come to the conclusion that being able to participate in local government is a way that I feel more fulfilled."

There are also sacrifices when choosing a rural practice. Cameron notes that lawyers with families have to think about the move for the entire family—the logistics of the commute for a spouse, schools for kids and changes in cost of living. The Fischers' move meant a shift to part-time work for Robin, who was the principal of a charter school in Minneapolis. And because she's working less, the move also meant less money—a concern for people with student loans to pay off.

"The money thing was kind of a big issue and it weighed heavily on us, but we also had to re-examine our priorities," attorney Fischer says. "And in the end, we settled on the idea that we're OK with making not quite as much money as a household."

And a rural area might be a bad fit for someone who isn't ready to commit to just one job, Cameron says.

"A small town might have two or three law firms, if it's lucky," he says. "You're looking at a

career someplace, because that lateral move to the other law firm in town may not be possible because you're conflicted out."

But there are advantages, too. Cooper says it's helpful, from a marketing perspective, that everyone in Wishek knows his business. And local stores offer him personal credit rather than run his credit card.

Like Cooper and his wife, Mary, the Fischers are doing some farming. In addition to keeping some chickens, Fischer plans to raise grass-fed cattle with his father.

"I love it. I got into a lot of those things as an adult living in Minneapolis, [where] those things are just on fire right now," he says. "Everybody's about understanding food systems and sustainability, doing things on your own. It's sort of built in here."

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## Correction

Print and initial online versions of "Too Many Lawyers? Not Here ([http://www.abajournal.com/magazine/article/too\\_many\\_lawyers\\_not\\_here\\_in\\_rural\\_america\\_lawyers\\_are\\_few\\_and\\_far\\_between](http://www.abajournal.com/magazine/article/too_many_lawyers_not_here_in_rural_america_lawyers_are_few_and_far_between))," October, should have stated that Wishek, North Dakota, was settled by ethnic Germans fleeing Russia. It also should have reported that the Iowa State Bar Association's Rural Practice Committee matches law students from the University of Iowa—rather than Iowa State—with rural lawyers. The article also misidentified the Down East region of Maine.

The *Journal* regrets the errors.

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## ABA Journal October 2014

### Law school accreditation standards get update after 6 years of effort

POSTED OCT 01, 2014 02:20 AM CDT

BY [JAMES PODGERS](#)



*Photo of Ruth McGregor by Kathy Anderson*

The six-year odyssey of the ABA Section of Legal Education and Admissions to the Bar to revise the standards and procedural rules for accrediting U.S. law schools has finally reached a happy ending. Well, almost. The ABA House of Delegates, voting in August at the association's annual meeting in Boston, concurred in all the revisions to the [ABA Standards and Rules of Procedure for Approval of Law Schools](#) except for one.

During its review, the legal education section's council let stand a comment to [Standard 305](#) (PDF), which says a law school may not grant credit to a student for participation in a field placement program for which the student also receives compensation. But in a voice vote, the House referred the provision back to the section for reconsideration after representatives of the Law Student Division made some very eloquent objections.

Still, considering the delicate issues included in the section's review of the standards—only relative changes were made in the rules of procedure—the revisions breezed through the House unscathed.

Besides Standard 305, the only other subject of debate was [Standard 206](#) (PDF), which requires law schools to "demonstrate by concrete action a commitment to diversity and inclusion by providing full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities."

There were some rumblings of dissatisfaction in the House over the fact that the standard was not revised to include sexual orientation and disability to the list of underrepresented groups, but the House voted to concur in the section's revisions after Mark D. Agrast of Washington, D.C., who chairs the Commission on Disability Rights, said the commission and section are planning to discuss the possibility of including those groups at a later time.

### **CONCUR, NOT APPROVE**

Because of the unique standing of the legal education section's council as the entity the U.S. Department of Education recognizes as the accrediting agency for U.S. programs leading to a JD degree, the House of Delegates may not approve or reject council actions relating to the accreditation standards or procedural rules. Instead, the House may either concur with a proposed change or refer it back to the council for reconsideration. And the House may only refer a matter back to the council twice; the council has the final say.

Ruth V. McGregor, a retired Arizona Supreme Court justice who is one of the section's representatives in the House, noted that the standards will require law schools to give students more experiential training. Results of the teaching process will be measured on the basis of outcomes, such as bar passage rate, rather than inputs, such as library and other support facilities. The council also decided to retain existing Standard 405, which is widely understood to require that schools adopt some form of tenure system for their faculties. And the council approved a change that will permit a law school to fill up to 10 percent of its entering class with students who haven't taken the Law School Admission Test.

McGregor said that accrediting bodies recognized by the Department of Education must undergo comprehensive reviews every 10 years, so the next one is already on the horizon for the legal education section.

Moreover, ongoing changes in legal education mean it's unlikely the section can stand pat with the standards even with the recent revisions. The ABA's new [Task Force on the Financing of Legal Education](#) held a public hearing in Boston in an effort to begin to get a handle on why law school tuition and student debt are skyrocketing.

Chaired by former ABA President Dennis W. Archer of Detroit, the panel will examine the cost of legal education for students, student lending and how law schools are being financed. It is delving into how law schools use merit scholarships, tuition discounts and need-based financial aid.

Kyle McEntee, executive director of the nonprofit group Law School Transparency, asked the task force to seek congressional action to stop what he considers the biggest problem: readily available student loans.

"This task force should go hat in hand to Congress and say the legal education system is broken and it's propped up by student loans," he said.

Reform, McEntee added, should include the elimination of GradPLUS loans; reintroduction of bankruptcy protections for student loan recipients; caps on private interest rates; a requirement for schools to co-sign private loans; and a ban on consolidation of private loans with direct federal loans.

McEntee acknowledged his proposals would lead to a period where low-income individuals would have even fewer opportunities to attend law school. But eventually, he asserted, turning off the student loan "spigot" will drive down the cost and make law school more affordable for everyone.

### **'AN UNSUSTAINABLE PATH'**

Recognizing a dearth of data on the actual cost to deliver legal education, task force member Heather Jarvis, a student loan adviser in Wilmington, North Carolina, said she isn't convinced that student loans are a major factor in tuition increases. Jarvis observed that law school tuition costs were on the rise well before the GradPLUS program became available.

Bucky Askew, the former consultant to the legal ed section, testified about his observations and concerns.

"So much of the debate going on today is emotional and so much is based on inaccurate information," Askew said. "A lot of what's particularly on the blogs is uninformed and not based on data."

Among the cost drivers Askew identified were decreases in state support of public law schools; an overall lowering of student/faculty ratios; and the resulting increase in the number of tenure-track and adjunct faculty.

Askew didn't have an answer to what law schools should do or how they should change. But, he said, "I think many law schools are on an unsustainable path."

"In terms of access to justice, there will be a terrible problem if we don't produce lawyers who will be able to serve communities in need," he said. "I would say we're not overlawyered here, we're underlawyered."



people across the state. There are just four people in the Ontario office: managing attorney Ted Reuter, attorney Walter Fonseca, office manager Dolores Escobedo and paralegal Maria Romero.

Thornburgh praised the work the Ontario office is doing. Ontario is one of 17 communities across the state in which Oregon Law Center has an office.

"For me, it's one of the most important communities," Thornburgh said.

That's because of the poverty level in Malheur County, Oregon's poorest, he said.

"Poverty can be more severe in rural communities," Thornburgh said.

Kranovich said he welcomed the chance to attend the open house. While his practice focuses on insurance litigation, Kranovich said he believes everyone should have access to legal help.

"When the opportunity came up, I jumped at it," he said of attending the open house. "I believe in what legal aid is trying to do."

There is a false perception that young lawyers who work in rural areas "maybe aren't as up to speed" as their peers in larger cities, Kranovich said.

"That's just not true," he said. "As a bar, we're trying to [debunk] that."

One of Oregon Law Center's most important functions is providing protection for people who need it, Kranovich said. He added that helping people, regardless of income, obtain access to restraining orders and other protective measures is one of the basic functions of the legal system.

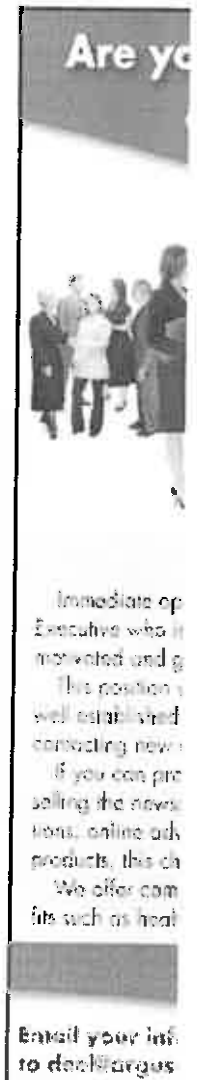
"If we fail to provide access to where people can get that protection, then we're failing society," Kranovich said.

Bentz asked those present to send him stories that illustrate the importance of that protection. Forty-one percent of Oregon Law Center's cases involve family law, especially domestic violence. But numbers aren't effective in convincing legislators and other potential funders to put more money into the justice system, Bentz said.

Lawyers can talk about ideas like liberty and justice, but anecdotes about real people are what help illustrate need, he added.

"Access to justice sounds oblique. It's not necessarily clear," Bentz said. "Text me anecdotes about why legal aid is important. It needs to be the best, most clear justification you can bring up."

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**ABA Journal, October 2014**

## **In rural America, there are job opportunities and a need for lawyers**

POSTED OCT 01, 2014 05:40 AM CDT

BY [LORELEI LAIRD](#)



*Mary DePuydt and Cody Cooper are married and both lawyers who plan to open separate law offices in Wishek, North Dakota, as well as grow their own food. Photo by Greg Latza.*

Wishek, North Dakota, is 90 minutes southeast of Bismarck and roughly six hours from either Minneapolis-Saint Paul or Winnipeg, Manitoba. Settled by ethnic Germans fleeing Russia, it's a farm community on the opposite end of the state from North Dakota's oil boom. As a result, Wishek hasn't seen the influx of people and money causing problems for its northern neighbors. Though it's the biggest city in McIntosh County, it's still pretty small—the 2010 census counted 1,002 people.

But that might change, says Duke Rosendahl, economic development coordinator of Wishek's



Job Development Authority. Oil companies were exploring drilling in McIntosh County this past spring.

"If they find what they think they're going to, within five or six years, people are going to need attorneys who are versed in land laws and how they can protect themselves with getting into oil leases," Rosendahl says. "Not to mention general civil attorney needs."

That's a problem because Wishek's only lawyer retired last year. That left residents without anyone nearby to handle their basic legal needs. "It's always a challenge to get professionals into a rural area," Rosendahl says. "Particularly with the perception that we're not far from the North Pole."

And Rosendahl doesn't think Wishek residents should have to drive all the way to Bismarck for legal help when there is so much work for a local attorney.

"It'd be nice to be able to grab a guy's collar, if you will," he says. "Be close enough to get nose to nose with these people and get a relationship going."

So Wishek took the unusual step of offering to pay for office space and other business expenses if a young lawyer agreed to move to town. The city got two: Cody Cooper and Mary DePuydt, a married couple who both finished law school in 2013 and moved to Wishek from the Twin Cities in April. They planned to set up separate law offices to avoid potential conflicts of interest.

The two were interested in Wishek because they want to try growing and making much of their own food. They also liked the idea of living in a small community because it provides more opportunities to take on leadership roles. Cooper hopes to eventually run for McIntosh County state's attorney. "That's also a thing that attracted us to Wishek—the possibility that we're going to be able to do good out there," Cooper says. "In a big town like Minneapolis, you feel like there's not so much to do to really make an impact."

## **RURAL DEARTH**

Wishek isn't the only rural place looking to attract new attorneys. Nearly 20 percent of Americans live in rural areas, but the *New York Times* says just 2 percent of small law practices are in those areas. Those still practicing law in small towns are often nearing retirement age, without anyone to take over their practices.

And without an attorney nearby, rural residents may have to drive 100 miles or more to take care of routine matters like child custody, estate planning and taxes. For people of limited means, a long drive is a logistical hardship, requiring gas, a day away from work and sometimes an overnight stay. And census information shows that rural communities are disproportionately

poor.

All this creates a "justice gap," with legal needs going unmet because potential clients can't find a lawyer, or they can't afford the lawyers they can find.

"It increases the expense," says Judge Gail Hagerty of the North Dakota Supreme Court, a leader in her state's effort to address the issue. "In some cases, people just don't get the legal services they need."

Pat Goetzinger, the 2011-2012 president of the State Bar of South Dakota, adds that "the strain on local budgets as a result of not having local lawyers is astronomical." That's because local governments have to pay judges, prosecutors and private defenders to drive in and handle local cases. Goetzinger's native Bennett County was forced to do this after its only attorney retired, leaving the closest lawyer more than 120 miles away.

Recognizing these issues, the ABA's House of Delegates passed a 2012 resolution encouraging governments and bar groups to address the loss of lawyers in rural areas and access-to-justice issues in rural America.

Bar leaders, law schools and governments are increasingly taking up the challenge. Particularly in the Midwest and Upper Midwest, programs have sprung up in recent years to encourage law students to start their careers in rural America via clerkships, job opportunities or help setting up new offices.

The problem is not a lack of new attorneys. Law school graduating classes have increased in size over the past 30 years, according to data from the ABA Section of Legal Education and Admissions to the Bar. And those new lawyers are having trouble finding meaningful work. The section found this year that only 57 percent of 2013 law graduates had full-time, nontemporary jobs requiring bar passage. Another 10.1 percent had full-time "law degree preferred" jobs. The remaining graduates, roughly a third, were unemployed or had part-time, temporary or nonlegal work.

At the same time, the legal needs of low- or moderate-income Americans are going unmet because the demand is so much greater than the supply of help. The Legal Services Corp. says one legal aid attorney is available for every 6,415 low-income Americans, which means that as many as four out of five of those people's civil legal problems are not addressed.

The ABA's immediate-past president, James Silkenat, put this paradox front and center with his [Legal Access Job Corps](#) initiative, which seeks to connect underemployed young lawyers with underserved low- to moderate-income clients. He described it as his biggest priority during his year in office.

"I devoted the largest part of my budget to pursuing this, and it really addresses two issues: not

only the unmet legal needs, which are enormous around the country, but the underemployed young lawyers looking for training," he says. It's "matching up those two problems in the same bucket rather than treating them as two separate problems."

That was part of why Bruce Cameron, a solo practitioner in Rochester, Minnesota, wrote *Becoming a Rural Lawyer*. Released in 2013, the book discusses the pros and cons of rural practice and gives practical advice on setting up an office. Cameron came to the law as a second career and found himself less frightened by the prospect of starting his own firm than trying to find an associate job in a competitive market.

"There seemed to be a concentration on one standard career path—practice for a law firm in a metropolitan area," he says. "It seemed to me that there were a lot of small towns out there wanting or needing attorneys. And in 2008, there were a lot of attorneys wanting or needing places to practice."

"[I was] trying to help encourage the idea that there are two needs out there, and perhaps one could help fulfill the other."

## **CITY VS. RURAL**

New attorneys don't often choose rural law practice after graduation. That mirrors a general trend toward Americans concentrating in cities. In Wishek's McIntosh County, for example, the population has dropped from a high of 9,621 during the 1930 census to 2,809 in 2010.

And with lawyers, there's the added problem of high student loan debt. "I think the biggest inhibitor out there is debt," says Phil Garland, who practices law in Garner, Iowa, and chairs the Iowa Bar Association's Rural Practice Committee. "You have a lot of kids who are carrying \$100,000 or more in debt, and small-town lawyers don't necessarily [get paid] as well."

Debt also prevents brand new lawyers from buying an entire practice outright, one traditional way to get started. And then there's love and marriage.

"They want to be in a place where it's easy to meet people, especially if they're single," says Franci Foral of the State Bar of South Dakota. "Or if they have a significant other or spouse, the other barrier is they're going to make sure they have opportunities for their significant other as well."

To fight these demographic trends, Foral's state went big. In 2013, South Dakota attracted national attention when it became the first—and so far, only—state to pay young lawyers to relocate permanently to rural areas.

Modeled on similar programs for medical professionals, South Dakota's [Rural Attorney](#)

[Recruitment Program](#) promises young attorneys \$12,000 a year for five years if they move to a qualifying county of 10,000 or fewer people. The payments are designed to cover 90 percent of the cost of attending the University of South Dakota's School of Law. Before June 30, 2017, the state aims to recruit 16 participating attorneys.

The program was the result of consistent advocacy by South Dakota Supreme Court's Chief Justice David Gilbertson, who gives a yearly state of the judiciary speech for state leaders. Gilbertson included the rural attorney shortage for several years running and won an ally in State Sen. Mike Vehle, R-Mitchell, who drafted legislation in 2013 authorizing the program and its funding.

Goetzinger adds that the direct-payments model was difficult to get through the state legislature because of the financial commitment. To make it acceptable, supporters gave the program an end date and required the state to put up only half of the money. Another 35 percent of payments come from participating counties, and the final 15 percent comes from the state's bar foundation. The program demonstrates the State Bar of South Dakota's commitment, Goetzinger says. The Rural Attorney Recruitment Program took effect in July 2013. Nine months later, in April, the program already had one participant practicing law, two others who were awaiting bar exam results and several interested law students, Foral says.

The response "is beyond, quite frankly, our expectations," Goetzinger says.

## **PULLING THEM IN**

South Dakota has been a leader among states that are trying to address a lack of attorneys in rural areas. In addition to the Rural Attorney Recruitment Program, it also has [Project Rural Practice](#), a task force of the state bar that advocates for and supports young attorneys who choose rural South Dakota. Foral says rural recruitment has been a frequent topic of discussion at the Jackrabbit Bar Conference, which brings together bar personnel from eight Mountain and Plains states. And last spring, the University of South Dakota held a rural practice symposium that Goetzinger says attracted visitors from more than 10 states.

The Rural Attorney Recruitment Program has also caught the eye of bar leaders. Silkenat says press coverage for the program helped him integrate rural attorney programs into the Legal Access Job Corps. In July, the corps announced seven "catalyst grants" to innovative programs that address low-income legal needs while also providing training to young lawyers. Two grants, to Legal Aid of Arkansas and the Nebraska State Bar Association, are expressly aimed at enhancing rural access to justice. The Arkansas grant will fund fellowships for new attorneys who will work in rural areas for a year, then with people of modest means for another two years. The Nebraska grant will fund an existing program. Another grant, to the Vermont Bar Association, is not expressly about rural justice but will support new solos and small firms in an overwhelmingly rural state.

And Linda Klein, the only declared candidate for the ABA presidency in 2016-2017 and a former chair of the House of Delegates, got involved in her state after learning about South Dakota's program at the 2012 Jackrabbit Bar Conference.

"I had been president of the State Bar of Georgia in 1997-98, and I knew that 70 percent of our lawyers were in Atlanta," says Klein, managing shareholder of Baker Donelson's Atlanta office. "So I realized that this was a problem not just in South Dakota, but it was a problem everywhere."

But because direct payments are expensive and it's difficult to convince politicians to approve them, most U.S. institutions are not following South Dakota's model.

Garland, the Iowa lawyer who heads that state bar's Rural Practice Committee, says Iowa's program is more typical of state rural-lawyer recruitment programs. His committee matches law students—mostly from the University of Iowa, Drake University in Des Moines and Creighton University in Omaha, Nebraska—with rural lawyers who are looking for summer clerks or new associates. "They need to come and see what we're doing is real law and get used to the community," he says.

The summer clerkships meet an additional goal: giving the established lawyer time to get to know the young lawyer. If it's a good match, Garland says, the established lawyer may be able to offer a higher starting salary to account for the fact that the student already knows the office. And that's important, because he says offers from rural lawyers are competing for "very employable" students with higher offers from city law firms.

To the west, the Nebraska State Bar Association is taking a similar approach. Law students from Creighton and the University of Nebraska at Lincoln, and lawyers with fewer than two full years of practice, can apply to be part of the NSBA Rural Practice Initiative's bus tours. Held annually, these typically bring young lawyers to two small towns each year. The students meet with local leaders, tour the towns' landmarks and, in the evening, do "speed dating" interviews with local attorneys.

The recent ABA grant means the NSBA will be able to sweeten the deal for both sides, expanding the program in 2015. The money will partially fund 15 summer clerks next year.

Sam Clinch, associate executive director of the NSBA, says 12 of Nebraska's 93 counties have no lawyers at all.

"It's interesting, when we go out on this bus tour, every lawyer that meets with a student said if they find the right fit, they would hire that lawyer that day," he says. "So there's a definite need for lawyers."

## MAINE NEEDS

In Maine, former state bar president Bill Robitzek saw the same need in the state's northern counties: Older lawyers were reaching retirement age without successors. The state has one law school, at the University of Maine in Portland, and Robitzek says graduates typically stay in that area. That's the result of a June report from the Maine Board of Overseers of the Bar, which found that 10 percent of the lawyers outside Cumberland County, where Portland is located, are younger than 35. After the job market dried up, that scarcity caused problems.

"If you keep pumping out 80 lawyers a year, you're going to max out opportunities" in Portland, he says. "And many of the young lawyers didn't know of the existence of opportunities outside the Portland area. Basically, what I saw were two problems that might solve each other."

So Robitzek launched an informal matchmaking program—connecting law students with rural attorneys who were looking for successors. As president of the state bar in 2013, he also encouraged the law school to introduce students to rural Maine. This started with a road trip for law students up the coast, toward the less-populated areas of northern Maine. This year, lawyers from Lincoln County returned the favor by visiting the law school. And law student Danylle Carson—Robitzek's former assistant—has co-organized the Maine Law Student/Bar Networking Society, designed to connect law students with rural job opportunities.

Robitzek characterizes the efforts as very informal, but still planned to meet with Maine Chief Justice Leigh I. Saufley to discuss formalizing the process. Meanwhile, the [June report](#) (PDF) from the Maine Board of Overseers of the Bar made several recommendations for luring more young attorneys into rural Maine, including a "boot camp" teaching skills for solo practitioners, technology grants for new rural lawyers, a solo/small firm email discussion list and recruitment or internship programs like those in other states.

In North Dakota, a rural attorney shortage is complicated by the state's oil boom, which has roughly doubled the population in some areas. Along with all those extra people come extra legal needs—not just oil and gas work, but more ordinary civil and criminal needs. In these regions, says Kathryn Rand, dean of UND's law school, the problem is not finding a private attorney; it's finding one who is available.

"Even in counties that had a small number of attorneys, those attorneys have been so overwhelmed by the amount of work that needs to be done that they are turning away business," Rand says.

Hagerty tackled the issue as 2012-2013 president of the State Bar Association of North Dakota. She worked with Rand and the law school to start a clerkship program for law students, matching them with rural state judges. With funding from the state supreme court, the program offered a summer stipend to two to three students starting in 2014. If the relationship works out, the students and judges may continue working together via phone and the Internet

during the school year.

Hagerty describes it as a first step, a program that could be launched quickly while the bench and bar think of more solutions. But interest was so high—even from federal judges and private attorneys—that there was immediate interest in expanding it.

## **CLOSING THE JUSTICE GAP**

In Georgia, Klein says, she and other former presidents of the state bar were discussing solutions this past spring. They were examining all kinds of programs in other states, and they have a high-profile champion in the form of Chief Justice Hugh Thompson, who made the rural attorney shortage part of his first state of the judiciary address in February. That speech acknowledged that six of the state's 159 counties have no lawyers at all; another 40 have 10 attorneys or fewer.

Thompson sees the problems firsthand, as a leader in the court system. They include a flood of pro se defendants who slow down the system and rarely win.

"Most people who are not represented have bad results," notes Thompson. "And the truth is, a lot of people who don't have lawyers don't get quote-unquote 'justice.' "

Georgia's not the only state thinking about the rural justice gap. Montana is working on a program, which will in part address the spillover from North Dakota's oil boom. Silkenat mentions that the New York State Bar Association is discussing the issue. The Vermont Bar Association and Vermont Law School are running a new incubator program in 2014-2015, helping three new attorneys set up solo practices for underserved communities, including rural communities. And in New Hampshire, state Bar Association Board of Governors President Lisa Wellman-Ally launched a rural practice program when she started her term in June. She described it as her central issue.

"My goal is to attract attorneys to those more rural areas so the people in the rural areas will have access to justice—they'll have attorneys who are local, part of their communities," says Wellman-Ally, who practices law in Claremont, New Hampshire, "and to show [new attorneys] that there is a quality of life that is different in these rural areas."

### **Sidebar**

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#### **City vs. Country**

**There's plenty of work to go around, but rural lawyers need to be able to hit the ground running**

Even if not many new attorneys are choosing rural law, proponents have plenty of arguments in

its favor. Chief among these is lifestyle. [Project Rural Practice](#) offers testimonies from young attorneys who frequently cite work-life balance or a better environment for children. That's something that might be missing from the stereotypical big-city associate job, and something that surveys say workers born after 1980 want.

Bruce Cameron, author of *Becoming a Rural Lawyer*, says it's not so much about balancing work and life; it's about living in a community that understands you have both constraints.

Clients "understand that there are times when life takes precedence; there are times when work takes precedence," he says. "It's easy to tell a client: 'I'll get to that—but, hey, I have to deal with a sick kid.' "

Jake Fischer, the first participant in South Dakota's Rural Attorney Recruitment Program, made a conscious decision to prioritize lifestyle when he joined the program. Fischer was born and raised in Parkston, South Dakota—population 1,508 in the 2010 census—but attended college and law school at the University of Minnesota. He enjoyed living in the Twin Cities, where he launched his legal career, got married and bought a house.

But after their daughter was born in 2013, Fischer and his wife, Robin, began to think about the time commitment to their jobs and where they'd like to raise a family. Ultimately, that led Fischer to join the Swier Law Firm, an established firm in South Dakota, and to open its new office in Corsica, population 592.

Fischer specializes in agricultural law, but he also takes whatever comes—a requirement at a rural firm, he says, and something he enjoys.

"It allows me to take on new projects all the time," he says.

Major issues for his clients include estate planning for transfer of large farms and land sales, which can be high-dollar transactions. But he's also done a bit of litigation and put himself on the public defender list for a few counties near Corsica.

All of this has allowed Fischer to take on responsibility faster than an associate at a big-city firm might.

"If you're a young attorney looking for experience, you're instantly able to get into the courtroom and represent clients in a serious and substantial matter," he says.

And there's plenty of work.

"I've worked in three different legal communities with my firm so far, and there's always people calling," he says. "It's really eye-opening to learn how much legal work there is to be done."

Cody Cooper might agree. As of June, he had a long waiting list of clients ready to use his



services—largely for wills and property matters, reflecting the demographics of Wishek. Even though he was admitted to the Minnesota bar, the North Dakota bar needed six to eight months to do his character and fitness check, something he wished he knew before his move. While he waited, he was volunteering, working with another local lawyer and getting to know his neighbors.

The flip side of all the work, says Cameron, is that young attorneys interested in a rural practice have to be ready to hit the ground running. That means getting into the courtroom right away and also knowing how to run an office. Those are skills that students may not have if they planned to become urban law firm associates.

Cameron also warns that rural practice is a long-term commitment. "This is not where you [say]: 'I'm going to put in five years and have the thing on my resumé and move on,' " he says. "It's going to take that five years just to get your practice up and going."

That's because relationships are vital in a small-town practice, Cameron says. A new lawyer has to build trust and a good reputation. Community involvement may be even more important than conventional advertising.

The chance for greater, and more personal, community involvement was another reason Fischer moved back to South Dakota. Like Cooper, he has plans to run for office after he's better established in the area. That's something he says he couldn't have done back in Minneapolis, where the bigger population meant fewer leadership roles per capita.

He sees public service as a more satisfying way to do good than his old job in Minneapolis, working on energy policy.

"It was engaging work, and I enjoyed my work, but you start to wonder: 'How can I effect change more directly?' " he says. "I've come to the conclusion that being able to participate in local government is a way that I feel more fulfilled."

There are also sacrifices when choosing a rural practice. Cameron notes that lawyers with families have to think about the move for the entire family—the logistics of the commute for a spouse, schools for kids and changes in cost of living. The Fischers' move meant a shift to part-time work for Robin, who was the principal of a charter school in Minneapolis. And because she's working less, the move also meant less money—a concern for people with student loans to pay off.

"The money thing was kind of a big issue and it weighed heavily on us, but we also had to re-examine our priorities," attorney Fischer says. "And in the end, we settled on the idea that we're OK with making not quite as much money as a household."

And a rural area might be a bad fit for someone who isn't ready to commit to just one job, Cameron says.

"A small town might have two or three law firms, if it's lucky," he says. "You're looking at a career someplace, because that lateral move to the other law firm in town may not be possible because you're conflicted out."

But there are advantages, too. Cooper says it's helpful, from a marketing perspective, that everyone in Wishek knows his business. And local stores offer him personal credit rather than run his credit card.

Like Cooper and his wife, Mary, the Fischers are doing some farming. In addition to keeping some chickens, Fischer plans to raise grass-fed cattle with his father.

"I love it. I got into a lot of those things as an adult living in Minneapolis, [where] those things are just on fire right now," he says. "Everybody's about understanding food systems and sustainability, doing things on your own. It's sort of built in here."