

Oregon State Bar
Meeting of the Board of Governors
November 20, 2015
Surf Sand Resort, Cannon Beach, OR
Open Session Agenda

*The Open Session Meeting of the Oregon State Bar Board of Governors will begin at 1:00pm on November 20, 2015.
Items on the agenda will not necessarily be discussed in the order as shown.*

Friday, November 20, 2015, 1:00pm

1. Call to Order / Finalization of Agenda

2. Report of Officers & Executive Staff

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| A. President's Report [Mr. Spier] | Inform | Exhibit |
| 1) Uniform Bar Exam | Inform | |
| 2) OSB Representative on OCLEAB | Inform | Exhibit |
| 3) Role of Immediate-Past President | Inform | |
| B. President-elect's Report [Mr. Heysell] | Inform | |
| C. Executive Director's Report [Ms. Stevens] | Inform | Exhibit |
| 1) BOG Preference Forms | Inform | Exhibit |
| D. Director of Regulatory Services [Ms. Evans] | Inform | Exhibit |
| E. Director of Diversity & Inclusion Report [Ms. Hyland] | Inform | Exhibit |
| F. MBA Liaison Report [Mr. Spier] | Inform | |
| G. Oregon New Lawyers Division Report [Ms. Clevering & Mr. Andries] | Inform | Exhibit |

3. 2016 President & President-elect Elections

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| A. Confirmation of Michael Levelle for 2016 President-elect [Mr. Heysell] | Inform | |
| B. Confirmation of Ray Heysell as 2016 OSB President [Mr. Spier] | Inform | |

4. Professional Liability Fund [Ms. Bernick]

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| A. August 31, 2015 Financial Statements | Inform | Exhibit |
| B. 2016 Excess Application | Action | Exhibit |
| C. 2016 Excess Base Rate | Action | Exhibit |
| D. 2016 Bylaws and Policies – Chapter 7 and Policy 1.250 – Goal No. 2 | Action | Exhibit |
| E. PLF Policy 5.100 | Action | Exhibit |

5. OSB Committees, Sections and Councils

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|--|--------|---------|
| A. MCLE Committee [Ms. Hirschbiel] | | |
| 1) MCLE Sponsor Accreditation Fee Policy Proposal | Action | Exhibit |
| 2) DCBA Correspondence | Inform | Exhibit |
| B. NLMP Committee [Ms. Hirschbiel] | | |
| 1) Recommendations for Amendments to NLMP Rules | Action | Exhibit |
| C. Client Security Fund Committee [Ms. Stevens] | | |
| 1) Request for Review ALLEN (Scott) 2014-32 | Action | Exhibit |
| 2) Request for Review GOFF (Mantell) 2013-24 | Action | Exhibit |
| 3) Award Recommendations | Action | Exhibit |

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|---|--|--------|---------------------------|
| D. | Legal Services Committee [Ms. Baker] | Inform | |
| 1) | Program Update | | |
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| 6. BOG Committees, Special Committees, Task Forces and Study Groups | | | |
| A. | Board Development Committee [Ms. Matsumonji] | | |
| 1) | Appointments | Action | Exhibit ^{1 of 2} |
| B. | Budget & Finance Committee [Ms. Kohlhoff] | | |
| 1) | Approve 2016 OSB Budget | Action | Exhibit |
| C. | Governance & Strategic Planning [Mr. Heysell] | | |
| 1) | Sponsorship Policy | Action | Exhibit |
| 2) | Amend ULTA Bylaws Article 27 | Action | Exhibit |
| 3) | Retired Member Status | Action | Exhibit |
| 4) | Accelerator Program Feasibility Study | Action | Exhibit |
| D. | Public Affairs Committee [Mr. Prestwich] | | |
| 1) | Legislative Interim Update | Inform | |
| E. | OSB Knowledge Base Task Force Report [Ms. Stevens] | Inform | Exhibit |
| F. | Discipline System Review Committee [Mr. Johnson-Roberts] | | |
| 1) | Report | Action | Exhibit |
| 2) | Whitney Boise Correspondence re: SPRB | Action | Exhibit |
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| 7. Other Items | | | |
| A. | Section Policy Discussion Update [Ms. Pulju] | Inform | |
| B. | Comments on ABA Issues Paper on Legal Services Providers [Ms. Stevens] | Action | Exhibit |
| C. | Workers Compensation Board Attorneys Fees Proposals [Ms. Stevens] | Action | Exhibit |
| D. | Request for Donation to FBA for Mendez Exhibit [Ms. Dahab] | Action | Exhibit |
| E. | 2016 HOD Meeting Summary of Actions [Mr. Spier] | Inform | Exhibit |
| F. | Legal Opportunities Coordinator's Report [Ms. Stevens] | Inform | Exhibit |
| G. | Implicit Bias CLE [Mr. Levelle] | Action | Exhibit |
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| 8. Consent Agenda | | | |
| A. | Approve Minutes of Prior BOG Meetings | | |
| 1) | Regular Session September 11, 2015 | Action | Exhibit |
| 2) | Special Open Session October 6, 2015 | Action | Exhibit |
| 3) | Special Open Session October 9, 2015 | Action | Exhibit |
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| 9. Default Agenda | | | |
| A. | CSF Claims Financial Report and Awards Made | | Exhibit |
| B. | President's Correspondence | | Exhibit |
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| 10. Closed Sessions – <u>CLOSED</u> Agenda | | | |
| A. | Executive Session (pursuant to ORS 192.660(1)(f) and (h)) – General Counsel/UPL Report | | |
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| 11. Good of the Order (Non-Action Comments, Information and Notice of Need for Possible Future Board Action) | | | |
| A. | Correspondence | | |
| B. | Articles of Interest | | |

Report of President

Richard G. Spier

Oregon State Bar Board of Governors Meeting November 20, 2015

September 15	Corporate Counsel Section Executive Committee meeting
September 18	OCLEAB (Oregon Council on Legal Education and Admission to the Bar) meeting
September 21	Meet with Don Friedman and Bar staff regarding practice assistance to new lawyers/"incubator" program
September 24	Speak at ONLD CLE
September 29	Urban League dinner in honor of Charles Wilhoite
October 6	Special BOG meeting re appellate court recommendations
October 6-8	Central and Eastern Oregon local bar visits with Sylvia Stevens
October 9	BOG committees and special meeting
October 9	CLE publications author reception
October 12	Speak at National Association of Administrative Law Judges annual national meeting
October 16	OGALLA dinner and auction
October 20	HOD Region 5 meeting
October 23	BBX meeting
October 23	Celebrity judge at CEJ Laf-Off
October 24	Taxation Section Executive Committee meeting
October 24	Youth, Rights & Justice dinner and auction
October 26	Welcome breakfast for ABA President Paulette Brown
October 27	MBA Board meeting

October 29	Speak at Pro Bono Celebration awards ceremony
November 5	Multnomah County Circuit Court annual legislative meeting
November 5	Meeting with Chief Justice and OSB staff
November 5	Speak at PLF Learning the Ropes CLE luncheon for new admittees
November 19-20	BOG retreat and meetings
November 24	CEJ Board meeting
December 4	Meeting at Pacific Continental Bank in recognition of obtaining OLF Leadership Bank status
December 10	Meeting with Chief Justice and OSB staff
December 10	Annual OSB Awards Luncheon
December 10	Sylvia Stevens retirement event
December 11	BBX meeting
December 15	Speak at special session of US Court of Appeals, Ninth Circuit, in recognition of Edward J. Devitt Distinguished Service to Justice Award to Hon. Edward Leavy
December 16	Speak at Solo & Small Firm Section CLE
December 18	Oregon Bench & Bar Professionalism Commission meeting

Report prepared as of November 4, 2015.

From: Richard G. Spier [<mailto:rspier@spier-mediate.com>]
Sent: Monday, September 21, 2015 5:31 PM
To: David F. White (david.white@pgn.com)
Cc: Sylvia E. Stevens; 'Dawn Evans'; 'Helen Hierschbiel'
Subject: OCLEAB membership

David,

I am suggesting that Admission Rule 10.05 be amended to add to the membership of OCLEAB the following:

A member of the BOG selected by the president of the OSB

The executive director [soon to be called chief executive officer] of the OSB

The chief disciplinary counsel/director of regulatory services of the OSB

What do you think?

Best wishes,

Rich

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OREGON STATE BAR

Board of Governors Agenda

Meeting Date: November 20, 2015
From: Sylvia E. Stevens, Executive Director
Re: Operations and Activities Report

OSB Programs and Operations

Department	
Accounting & Finance/ Facilities/IT (Rod Wegener)	<p><i>Accounting:</i></p> <ul style="list-style-type: none"> ▪ The department and others are beginning to plan for the upcoming member fee billing cycle. The notice to members will go out the week after Thanksgiving. <p><i>Facilities:</i></p> <ul style="list-style-type: none"> ▪ The replacement of the parking lot lights with low-energy LED lights was completed mid-October. The cost to the bar is \$13,594, but we will receive an Energy Trust of Oregon incentive of \$6,030 for a net cost of \$7,564. The payback in reduced energy cost is four years. ▪ Some concrete sills on the first floor have deteriorated and are being replaced. This is the first major expenditure in preventive maintenance since the building opened in 2008. <p><i>IT:</i></p> <ul style="list-style-type: none"> ▪ The bar signed the second half of the Aptify Statement of Work (SOW) on October 30. In the coming weeks staff will begin setting up the system environment and preparing for data conversion before moving into the build phase where Aptify will configure the software and develop existing and new online features for members. ▪ In preparation for the new database, we have engaged Convergence Networks to conduct an IT infrastructure audit. Convergence will assess the current IT infrastructure including servers, firewalls, routers, switches, desktops and laptops to obtain information needed for the analysis. ▪ Based on the infrastructure assessment and interviews with key staff and stakeholders, Convergence will deliver a high-level Risk Analysis report to identify the areas of risk compared to industry Best Practices and high-level recommendations for appropriate solutions. Its partner Luminant Digital Security will prepare an additional report that includes any vulnerabilities discovered which will be rated as Critical, High, Medium, Low, and Informational. This information will enable the bar to make informed decisions about any necessary changes in infrastructure or operations.

<p>Communications & Public Services (includes RIS and Creative Services) (Kay Pulju)</p>	<p><i>Communications:</i></p> <ul style="list-style-type: none">▪ OSB priority issues communicated through recent editions of the Bulletin include: “Outside the Urban Box,” the first in a new series on rural practice; “Poets, Tramps and Lawyers,” which related to lawyer professionalism; “Judges as Candidates” exploring judicial independence and free speech; and multiple articles on legal ethics and technology in law practice. In addition, OSB President Rich Spier covered current OSB issues and priorities in his column.▪ Communications staff produced electronic Bar News and BOG Updates newsletters, and provided communications and marketing support for other bar programs, including CLE Seminars, Member Services, Pro Bono and Referral & Information Services.▪ Public information efforts are focused on video production, transitioning the Legal Links program from a 30-minute talk show format to a series of shorter and more focused videos to be placed on the OSB website.▪ Revenue from the bar’s online career center continues to exceed budget, reaching \$15,000 in September. <p><i>Creative Services:</i></p> <ul style="list-style-type: none">▪ Two more sections have successfully transitioned to the OSB WordPress platform: Estate Planning and Administration (estateplanning.osbar.org) and Administrative Law (adminlaw.osbar.org). We are working with other sections as leadership discussions on section policy changes continue.▪ Staff attended the Aptify Users Conference in Denver in, meeting with several bars and a variety of other regulatory groups that have already launched the system. Experienced users offered consistent advice on successful development and implementation: stay close to the system core and do not spend resources on overly configuring the system to match “the way it has always been done.” <p><i>Referral & Information Services:</i></p> <ul style="list-style-type: none">▪ Panelist feedback on the new proprietary LRS software has been uniformly positive. The new system is faster and more convenient, especially since it is accessible from the OSB website and panelists no longer need a separate password to access the LRS portal.▪ Percentage fee revenue for LRS exceeded projections for the year in September, with a year-to-date total of \$496,529. Panelist registrations for the new program year, which began September 1, total just over \$100,000. Through nine months, total revenue was at 99.4% of budget, with total expense at 72% of budget.▪ RIS continues to monitor a one-year pilot program for several new Modest Means.
<p>CLE Seminars (Karen Lee)</p>	<ul style="list-style-type: none">▪ The CLE Seminars homepage has been refreshed and includes links to speaker training videos.▪ We added a new educational partner, MCLE+, which specializes in entertaining and engaging ethics webinars. Initial attendance figures are strong.

	<ul style="list-style-type: none">▪ We offered tiered pricing for on-demand seminars (the more seminars purchased the greater the discount) for a two-week period in August and almost doubled the sales and net revenue compared to same period (non-discounted) in 2014. The department plans to test one or two more pricing discounts before the end of the year.▪ We are branding seminars addressing practice management topics with the tagline “Your Law Practice” to identify OSB CLE seminars that cover topics relevant either to the general practice of law or the basics for a specific practice area. Two seminars with this brand are being offered this fall: understanding clients with mental illness (general) and evaluating potential personal injury cases (practice specific).
Diversity & Inclusion (Mariann Hyland)	<ul style="list-style-type: none">▪ <i>Clerkship Stipend Program:</i> We awarded 12 clerkship stipends this summer, which provided a \$7/hr match with employers who hired our law student recipients, providing a total benefit of \$33,028.80 for our recipients. The clerkship stipend recipients worked a combined 4,718 hours in counties throughout Oregon, including Multnomah County, Washington County, Marion County, and Benton County, in private practice, public interest, and the state government.▪ <i>Fellowships:</i> We awarded a total of eight fellowships this summer, including six Public Honors Fellowships, one Rural Opportunities Fellowship, and one Access to Justice Fellowship, providing a total benefit of \$43,360 for our recipients. Based on the success of the new Rural Opportunities and Access to Justice Fellowship, we have budgeted for an one additional one of each type for 2016. The fellowship recipients obtained public interest, judicial, and governmental opportunities in a number of counties throughout Oregon, including Multnomah County, Washington County, Marion County, and Klamath County.▪ <i>Judicial Mentorship Program:</i> We are in the final stages of assigning judges and students for our Judicial Mentorship Program for the 2015-2016 school year. This year, we have 34 students apply from the three Oregon law schools, up from 17 in 2014-2015, and 16 judges from Multnomah County, Washington County, Clackamas County, Lane County, the Oregon Tax Court, the Oregon Court of Appeals, and the Oregon Supreme Court, to volunteer their time to mentor one or more law students.▪ <i>BOWLIO:</i> BOWLIO was Saturday, November 7, 2015. As of November 5, there were 171 law students, lawyers, judges, and guests registered for the event, which will include 3 hours of bowling, appetizers, and soft drinks, trophies, and a fundraising raffle for 13 amazing packages and gift certificates.▪ <i>Bar Exam Grant:</i> We accepted applications for Bar Exam Grants until November 15, 2015. This cycle’s grant will cover the cost of sitting for

	<p>the bar exam, as well as a bar preparation course for the MBE portion of the bar exam.</p> <ul style="list-style-type: none"> ▪ <i>Explore the Law Program:</i> The PSU Explore the Law Program is currently in full swing for the 2015-2016 academic year. PSU students had their first orientation on September 10 where they were assigned attorney mentors, and since then have attended a “Personal Statement 101” workshop and began seeking out other attorneys and judges in Oregon for an informational interview. A “Financing Law School” program was held on November 13, 2015 and students toured the Multnomah County Courthouse on November 18. Beginning with Spring Term 2016, Explore the Law students will be able to earn academic credit for completing the Explore the Law Program through PSU’s History Department, further underscoring PSU’s commitment to this important pipeline program for undergraduate students who are interested in the law.
<p>General Counsel (includes CAO and MCLE) (Helen Hirschbiel)</p>	<ul style="list-style-type: none"> ▪ General Counsel and Deputy General Counsel have been busy with various elder abuse reporting and ethics CLE presentations: General Counsel has given five and Deputy General Counsel seven over the last two months. ▪ Client Assistance Office attorneys also have been providing ethics CLE presentations throughout the state, including in Warrenton, Newport, Eugene and Bend. ▪ Deputy General Counsel continues her participation in the Legislative Task Force on Immigration Consultant Fraud.
<p>Human Resources (Christine Kennedy)</p>	<ul style="list-style-type: none"> ▪ Filled vacant Receptionist and Legal Publications Attorney Editor positions. ▪ Continuing active search for two part-time RIS Assistants and Deputy General Counsel.
<p>Legal Publications (Linda Kruschke)</p>	<ul style="list-style-type: none"> ▪ The following have been posted to BarBooks™ since my last report: <ul style="list-style-type: none"> ✓ Two chapters of <i>Creditors’ Rights and Remedies</i>. ✓ Nine chapters of <i>The Ethical Oregon Lawyer</i>. ✓ Ten reviewed or revised <i>Uniform Civil Jury Instructions</i>. ✓ Two new and five revised <i>Uniform Criminal Jury Instructions</i>. ✓ The final PDF of <i>Oregon Real Estate Deskbook</i>. ✓ All chapters and the PDF of <i>2015 Oregon Legislation Highlights</i>. ▪ The <i>Oregon Real Estate Deskbook</i> and <i>Oregon Real Estate Codebook</i> have been printed and all pre-orders shipped: <ul style="list-style-type: none"> ✓ Sales to date = \$137,293 ✓ Budget = \$117,325 ▪ We started taking pre-orders for <i>The Ethical Oregon Lawyer</i> in late October: <ul style="list-style-type: none"> ✓ Sales to date = \$8,504 ✓ Budget = \$23,400

	<ul style="list-style-type: none"> ✓ Book will go to the printer in early December and be shipped before the end of the year. ▪ Our new Attorney Editor, Yasha Renner, started on November 2.
<p>Legal Services (Judith Baker) (includes LRAP, Pro Bono and an OLF report)</p>	<p><i>Legal Services Program</i></p> <ul style="list-style-type: none"> ▪ The LSP Committee reviewed the configuration of legal aid programs with an eye toward what is in the best interest of clients. A subcommittee was formed and recommended that the review be focused on Lane County Law and Advocacy Center’s service model. ▪ The overall accountability process of the four legal aid providers is ongoing with the report being drafted ▪ The LRAP Advisory Committee meets on November 14 to review the policies and guidelines that govern the program. ▪ The Pro Bono Fair was held on October 29 with three CLEs followed by an Awards Ceremony. Although a success attendance was down from past years. <p><i>Oregon Law Foundation</i></p> <ul style="list-style-type: none"> ▪ The Oregon Law Foundation has revised its governing documents and is no longer a member-based organization. The OLF has expanded board membership to include two more public members for a total of four public members and nine attorney members. It is OLF’s intent to recruit bankers for the two additional public member spots resulting in four bankers on the board. The OLF anticipates that interest rates will soon begin to increase with the first increase hopefully taking place in December. As rates increase the OLF will work with banks to increase the IOLTA interest rate accordingly.
<p>Media Relations (Kateri Walsh)</p>	<ul style="list-style-type: none"> ▪ Leading efforts to draft amendments to UTCR 3.180 (the cameras in the court rule) to modernize it with inclusion of guidance for use of cell phones, notebooks and other modern technologies. ▪ Planning for the Bar Press Broadcasters Council's 2016 Building a Culture of Dialogue event. The Council will host two "culture" events this year, and will videotape one for sharing with a broad audience. ▪ Facilitating some discussions between the <i>Oregonian</i> and several parties who have had conflict with media in recent months. ▪ Assisting statewide courts in drafting of localized FAQs to address how each Court and/or Presiding Judge manages media. ▪ Beginning process of creating a body of materials to be posted online on behalf of the Bar Press Broadcasters Council. Site would include such items as relevant trial court rules; sample Public Access Orders for high-profile cases, etc. ▪ Managing media coverage of eight ongoing disciplinary matters, and fielding the regular calls (roughly six or eight per week, absent a big breaking story) of media seeking legal experts to enhance the quality and

	<p>accuracy of law-related stories.</p>
<p>Member Services (Dani Edwards)</p>	<ul style="list-style-type: none"> ▪ The Board of Governors election ended on October 19 with 15% voter participation. This election included the first race for a representative from out of state. The newly elected BOG members are Kate von Ter Stegge & Christine Costantino (Reg. 5), Julia Rice (Reg. 6), and John Bachofner (OOS). Robert Gratchner accepted the appointment as a public member of the BOG. ▪ Rich Spier, Tom Kranovich, and several senior staff continued meeting with the 42 sections to discuss CLE program, fund balance, and website policy issues. Feedback from these meetings will be discussed during the November BOG meeting. ▪ The Pro Bono Fair and Awards Ceremony, co-sponsored by the ONLD, was held at the World Trade Center on October 29. The event featured three CLE programs, a pro bono provider “vendor fair”, and an awards ceremony honoring law students, lawyers, and firms for the pro bono services provided in 2014. ▪ New bar members were welcomed during an ONLD-sponsored reception following the October Admission Ceremony at Willamette University. The sections providing complementary membership to new members were given the opportunity to participate in the reception as a way of providing new members access to bar groups offering professional development and networking activities.
<p>New Lawyer Mentoring (Kateri Walsh)</p>	<ul style="list-style-type: none"> ▪ Hosted a CLE & Social for Mentors New Lawyers at the annual Movies & Mentoring event Monday November 9. Discussion of evidence, expert witnesses and professionalism, followed by private viewing of My Cousin Vinnie at the Hollywood Theater. ▪ Finalizing proposed amendments to the Oregon Supreme Court Mentoring Rule that would allow lawyers who practice in certain federal settings (social security, immigration, etc.) but are not Oregon State Bar members to serve as mentors. ▪ Preparing for a December 31 deadline for many participants to complete the program. ▪ In concert with several other OSB Directors, we are meeting with all specialty bars to talk about engaging them in mentoring partnerships to better serve both our participants and their members. ▪ Launching fall recruitment efforts in areas where we need more mentors. ▪ Planning for the May conference of the National Legal Mentoring Consortium in Denver, as part of my role as a board member.
<p>Public Affairs (Susan Grabe)</p>	<ul style="list-style-type: none"> ▪ <i>2015-17 Interim Session:</i> Pubic Affairs Department is focusing on 2015-17 Interim Session activities including workgroup support, and reaching out to bar groups about the short 2016 session and the timeline for development of proposals for the 2017 long session.

	<ul style="list-style-type: none"> ▪ <i>Appellate Screening Committee</i>: The Public Affairs Department worked with the BOG Appellate Screening Committee on the Court of Appeals vacancies. Interviews were held on September 21st and 22nd and a letter of highly qualified candidates was sent on October 6th. ▪ <i>2015 Oregon Legislation Highlights</i>: The 2015 Oregon Legislation Highlights publication is complete. It highlights legislative changes in a variety of practice areas with practice tips to assist lawyers on changes to the law that will impact their practice. The book is available on the OSB Public Affairs webpage. ▪ <i>Oregon eCourt</i>: Public Affairs has worked with the OSB/OJD eCourt Implementation Task Force to assist the court with the Oregon eCourt rollout and to develop new Uniform Trial Court Rules regarding Oregon eCourt. Mandatory eFiling for active members of the Oregon State Bar will be in place in all Oregon circuit courts by the fall of 2016. Public Affairs has also worked to ensure outreach to and training opportunities for OSB members regarding the move to mandatory eFiling. ▪ <i>Interim legislative workgroups</i>: Public Affairs will be engaging in a number of interim work group projects. At this point, we have identified the following issues: <ul style="list-style-type: none"> ✓ Advance Directives, ✓ Probate Modernization, ✓ Powers of Attorney, ✓ Digital Assets, ✓ Election Law, ✓ Uniform Collateral Consequences of Conviction Act, ✓ Guardianship, Due Process and cost shifting in contested case hearings, and ✓ Definition for elder abuse reporting.
<p>Regulatory Services (Dawn Evans)</p>	<p><i>Admissions</i></p> <ul style="list-style-type: none"> ▪ Board of Bar Examiners members Stephanie Tuttle, Jennifer Lloyd, Misha Isaak, and Jeff Howes attended the October 1 swearing-in ceremony at Willamette University School of Law, during which 152 new members of the Oregon State Bar were sworn in. Ms. Tuttle, who was serving her first day as Chair of the Board, spoke to the new lawyers, guests and dignitaries on behalf of the Board. <p><i>Disciplinary Counsel’s Office</i></p> <ul style="list-style-type: none"> ▪ Preparations for the upcoming Ethics School on Friday, November 20th, are ongoing. Staff attorneys from DCO and the Client Assistance Office are joined by Doug Querin from OAAP, offering a full day of useful information about ethics, practice management, and self-care for the busy, practicing lawyer. ▪ Disciplinary Counsel Dawn Evans spoke at the Workers Compensation

	Section Bench Bar Conference in Salem on October 23 and co-presented with Mark Johnson Roberts at the Oregon Law Institute’s 28 th Annual Ethics CLE in Portland on October 30 about Oregon’s attorney discipline system.
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Executive Director’s Activities September 12 to December 31, 2015

Date	Event
9/12	Client Security Fund Committee Meeting
9/16	EDs Breakfast
9/16	UO O’Connell Conference Panel on Future of Law Schools
9/22	Discipline System Review Committee Meeting
9/25	OLF Board Meeting (re: sharing information with CSF)
9/28	Discipline System Review Committee
9/29	Urban League Equal Opportunities Day Dinner
10/1	Lunch with Supreme Court & Admissions Ceremony
10/2	Oregon Native American Chamber Annual Gathering & Auction
10/6-8	Eastern Oregon Tour with RGS (The Dalles, Pendleton, LaGrande, Baker City, Ontario)
10/9	BOG Committees and Special Meeting/Legal Publications Reception
10/15-16	PLF Board—Astoria
10/20	HOD Region 5
10/21	EDs Breakfast
10/21	HOD Region 2 (teleconference)
10/22	HOD Region 7 (teleconference)
10/22	HOD Region 4
10/22	MBA Absolutely Social Social
10/23	CEJ Laf-Off
11/5	Meeting with Chief Justice
11/6	HOD Meeting
11/13	Native American Youth Gathering & Auction
11/14	Client Security Fund Committee
11/18	EDs Breakfast
11/19-21	BOG Meeting & Retreat
12/4	Pacific Continental Bank Reception
12/4	PLF Annual Dinner
12/11	Retirement Party !!!!

BOG Committees and Liaison Assignments

Board members serve on BOG committees and also serve as liaisons to OSB committees, sections, boards and other groups. BOG members are invited to submit their assignment preferences on a form that will be provided. The President-Elect will review the preferences and make assignments that will be effective on January 1 of the coming year.

The different groups and responsibilities are described briefly below. If you have any questions about a group or what is expected of the BOG liaison or contact, feel free to ask any of the current BOG members or the Executive Director.

BOG Committees

BOG Standing Committees

BOG standing committees generally meet immediately prior to every board meeting and on the interim committee meeting days. The membership on these committees is exclusively BOG members. A senior staff member assigned to assist each committee.

Board Development Committee

Identifies desired skills and attributes for the BOG and other volunteer positions and recruits candidates who have an interest in serving and possess the requisite criteria. Reviews applications and recommends candidates for BOG and other public member positions. Recommends appointments to various bar committees and boards for final approval of BOG. Identifies training needs for the board.

Budget & Finance

Provides oversight of the bar's financial operations; makes recommendations to the BOG about the annual budgets and assessments; manages OSB reserves and investments; receives biennial audit. Provides guidance on long-range forecasts, operating expenses and capital purchases.

Governance & Strategic Planning

Develops and monitors the governing rules and policies relating to the structure and organization of the bar; monitors all bar programs and services for effectiveness and compliance with organizational mandates and recommends changes as appropriate. Identifies and brings emerging issues to the BOG for discussion and action.

Public Affairs

Oversees the bar's government relations program, keeps the BOG abreast of legislative developments, makes recommendations regarding legislative priorities and actions.

BOG Special Committees

These committees meet as needed.

Appellate Screening

Interviews candidates for appellate court appointments and makes recommendations to Governor in accordance with established policy; serves as a resource for local bar screening committees. There is at least one appellate screening process each year, which requires one or two days depending on the number of candidates to be interviewed.

Executive Director Evaluation

Conducts annual performance assessment of executive director and makes recommendations to the BOG as to salary and benefits; as needed, serves as the executive director search committee.

Central Legal Notice System

A short-term special committee charged with determining whether a system can be devised that will satisfy all interested constituents, and with developing a political coalition that can make it a reality. The primary goals are to make public notices less expensive while creating a stable funding source for legal services.

OSB Committees

OSB committees are comprised of bar members and, in some cases, public members. They study and advise the BOG on specific issues within their BOG-developed charges. OSB committees are encouraged to hold some of their meetings away from the Bar Center and participation by conference call is available. The BOG contact serves a communication link between the committee and the BOG. Regular attendance at these meetings is not expected of BOG contacts, although it is helpful if the BOG contact attends one or two meetings per year and maintains regular contact with the committee chair.

PROGRAM ADVISORY COMMITTEES

Advisory Committee on Diversity and Inclusion

Meets the 2nd Friday of every month, 3:30 – 5:00 p.m., at the OSB.

Advise Director of Diversity & Inclusion on programs and activities designed to promote a diverse bench and bar.

Client Security Fund Committee

Meets every other month on a Saturday, 9:30 –11:30 a.m., at various locations.

Investigates claims for reimbursement of money misappropriated by the claimant's lawyer. Claims denied by the Committee may be reviewed by the BOG at the claimant's request; the BOG gives final approval to all awards of \$5,000 or more.

Legal Ethics Committee

Meets every other month on a Saturday, 9:30 a.m. in various locations.

Develop opinions interpreting rules of professional conduct; recommend changes to the rules of professional conduct.

Legal Services Program

Meets 3-4 times a year at various times and locations.

Review and report to the Board of Governors on allocation of filing fee funds dedicated to legal aid programs and on compliance with program standards.

Loan Repayment Assistance

Meets on various Saturdays, 2-3 times a year at the OSB.

Select participants for the Loan Repayment Assistance Program, amend and set program policy guidelines as needed, and raise funds to achieve programmatic objectives if necessary.

Minimum Continuing Legal Education

Meets four times a year on a Friday, noon – 1:30 p.m.

Advise the Administrator and BOG on issues relating to the mandatory continuing legal education requirement for Oregon lawyers, including accreditation of educational programs and sponsors.

New Lawyer Mentoring

Meeting schedule and location TBD

Advise on development and administration of the New Lawyer Mentoring Program, a new requirement for most 1st-year members of the OSB.

Public Service Advisory

Meets quarterly on Saturday, 10:00 a.m. – noon at the OSB.

Advise about and recommend programs and activities designed to increase access to, understanding of and respect for the justice system by adult Oregonians.

State Lawyers Assistance

Meets on the 4th Thursday every month, 4:00 – 6:00 p.m. at the OSB.

Investigate and resolve complaints about lawyers whose conduct impairs their ability to practice law.

Unlawful Practice of Law

Meets the 2nd Friday of every month, 3:00 – 5:00 p.m. at the OSB.

Investigate complaints of unlawful practice; recommend prosecution where appropriate.

OTHER COMMITTEES

Judicial Administration

Meets the 1st Thursday of every month, 3:30 – 5:00 p.m., at the OSB.
Advise BOG on judicial selection and administration issues.

Pro Bono

Meets the 1st Tuesday of every month, noon – 1:00 p.m. in Portland.
Assist with expansion and support of free legal services to low-income clients in civil matters.

Procedure & Practice

Meets monthly on a Friday, 3:30 – 4:30 p.m. at the OSB.
Study, monitor, and recommend changes in procedures governing civil cases in Oregon.

Quality of Life

Meets the 2nd Wednesday of every other month, 12:30 – 2:00 p.m. at the OSB.
Educate lawyers and firms about the benefits of balancing personal life and career obligations.

Uniform Civil Jury Instructions

Meets the 3rd Thursday of every month, 6:00 – 9:00 p.m. at the OSB.
Develops uniform jury instructions for use in civil trials.

Uniform Criminal Jury Instructions

Meets monthly either on Saturday morning or a Wednesday evening at the OSB.
Develops uniform jury instructions for use in criminal trials.

OSB Sections

Sections are voluntary membership bodies that provide education and networking opportunities for lawyer in particular areas of the law. Sections are governed by an Executive Committee elected by section members. BOG contacts for sections are not expected to attend all the Executive Committee meetings, but to serve as a communication link between the section and the BOG. Attendance at one or two meetings each year is helpful; the contact should also be available if special issues or concerns arise. Most section Executive Committees meet in the metro area and allow for participation by conference call. Section names are descriptive of the area of law the group focuses on:

Administrative Law
Admiralty
Agricultural Law
Alternative Dispute Resolution
Animal law
Antitrust, Trade Regulation

Appellate Practice
Aviation law
Business law
Business Litigation
Civil Rights
Computer & Internet Law

Constitutional Law	Indian Law
Construction Law	Intellectual Property
Consumer Law	International Law
Corporate Counsel	Juvenile Law
Criminal Law	Labor & Employment
Debtor-Creditor	Litigation
Disability Law	Non-Profit Law
Diversity	Products Liability
Elder Law	Real Estate & Land Use
Energy, Telecom & Utility Law	Securities Regulation
Environmental & Natural Resources	Sole and Small Firm Practitioners
Estate Planning & Administration	Sustainable Future
Family Law	Taxation
Government Law	Workers Compensation
Health Law	

Other Groups

Bar Press Broadcasters Council

Meets 3-4 times a year on Saturday, 10:00 a.m. at the OSB.

Facilitate communication among the OSB, Oregon Newspaper Publishers Association and the Oregon Association of Broadcasters.

Legal Heritage Interest Group

Meets on Saturday 3-4 times a year, 10:30 a.m. – noon at various locations.

Preserve and communicate the history of the OSB to interested groups.

Oregon Law Foundation Board (OLF)

Meets quarterly on Fridays at the OSB.

The Oregon Law Foundation is an independent non-profit organization that makes grants (\$1.4 million in 2011) to programs providing legal aid services to low income Oregonians and other law related charitable programs. OLF's major source of income is the Interest on Lawyers' Trust Accounts (IOLTA) program. The OLF Board is comprised of nine attorneys and two public members selected by the Board of Governors, the Chief Justice of the Supreme Court, the OLF membership, and the OLF Board.

Oregon New Lawyers Division (ONLD)

Executive Committee meets approx. 9 times each year in various locations around the state.

The ONLD is comprised of every Oregon lawyer who has practiced six years or less, or is 36 years old or younger (whichever is later). The division has its own bylaws, budget, programs, executive committee and subcommittees comprised exclusively of ONLD members.

Professional Liability Fund (PLF)

Meets six times per year at the OSB Center and various locations around the state. The public portion of the meetings that the BOG liaisons attend is generally on a Friday from 9:00 a.m. to noon. There may be an additional 5-10 telephone conferences per year. PLF board committee meetings are scheduled as necessary. In addition to the President-Elect, there are two BOG liaisons to the PLF Board, one public member and one lawyer member. The lawyer member serves for two years.

State Professional Responsibility Board (SPRB)

Meets monthly, alternately in person and by telephone conference; in person meetings are held in various locations around the state.

This ten-member board, composed of eight resident attorneys and two members of the public, acts as the grand jury in the discipline system, making probable cause decisions on complaints. The SPRB's workload is substantial and includes considerable reading in preparation for each meeting.

BOG Member 2016 Committee Assignment Liaison Preferences

Name: _____

BOG Committees - Choose 3	
Rank in order of preference (1,2,3)	
Appellate Screening Special Comm	
Board Development	
Budget & Finance	
ED Evaluation Special Comm	
Governance & Strategic Planning	
Public Affairs	
OSB Committees - Choose 2	
Rank in order of preference (1,2)	
Diversity & Inclusion	
Judicial Administration	
Legal Services	
Loan Repayment Assistance	
MCLE	
New Lawyer Mentoring	
Pro Bono	
Procedure & Practice	
Public Service Advisory	
Quality of Life	
State Lawyers Assistance (SLAC)	
UJI-Civil	
UJI-Criminal	
Special Assignments - Choose 1	
Client Security Fund Committee	
Legal Ethics Committee	
New Lawyers Division	
Professional Liability Fund	
Unlawful Practice of Law Comm.	
Other OSB Groups - Choose 1	
Bar Press Broadcasters Counsel	
Legal Heritage	
Oregon Law Foundation	
State Prof. Resp. Board	
BBX Liaison	

OSB Sections - Choose 5	
Rank in order of preference (1-5)	
Administrative Law	
Admiralty	
Agricultural Law	
Alternative Dispute Resolution	
Animal Law	
Antitrust, Trade Regulation	
Appellate Practice	
Aviation	
Business Law	
Business Litigation	
Civil Rights	
Constitutional Law	
Construction Law	
Consumer Law	
Corporate Counsel	
Criminal Law	
Debtor-Creditor	
Disability Law	
Diversity	
Elder Law	
Energy, Telecom.	
Environmental & Nat. Resources	
Estate Planning	
Family Law	
Government Law	
Health Law	
Indian Law	
Intellectual Property	
International Law	
Juvenile Law	
Labor & Employment	
Litigation	
Military & Veterans Affairs	
Non-Profit Organizations Law	
Products Liability	
Real Estate & Land Use	
Securities Regulation.	
Sole & Small Firm	
Sustainable Future	
Taxation	
Technology Law	
Workers Comp	

On the reverse side, please briefly explain your interest in the groups for which you have indicated a preference.

Please return completed form to Camille Greene as soon as possible.

fax: 503.598.6986 email: cgreene@osbar.org

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: November 21, 2015
Memo Date: November 3, 2015
From: Dawn M. Evans, Disciplinary Counsel
Re: Disciplinary/Regulatory Counsel's Status Report

1. Decisions Received.

a. Supreme Court

Since the Board of Governors last met in September 2015, the Supreme Court took the following action in disciplinary matters:

- Issued an order in *In re James F. Little*, suspending this Silverton lawyer during the pendency of his disciplinary proceedings; and
- Issued an order in *In re James F. Little*, suspending this Silverton lawyer following his conviction in Indiana for possession of cocaine; and
- Issued an order in *In re M. Christian Bottoms*, accepting this Portland lawyer's stipulation to a 2-year suspension, 1 year stayed pending successful completion of a 2-year probation.

b. Disciplinary Board

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

- *In re Diarmuid Yaphet Houston* of Portland (150-day suspension with formal reinstatement) became final on October 20, 2015; and
- *In re Robert H. Sheasby* of Bend (disbarment) became final on October 20, 2015.

Disciplinary Board trial panels have not issued any opinions since the BOG last met in September 2015.

In addition to these trial panel opinions, the Disciplinary Board approved stipulations for discipline in: *In re Lois A. Albright* of Tillamook (reprimand), *In re Job Valverde* of Woodburn (reprimand), *In re Andy Millar* of Milton-Freewater (6-month suspension), *In re James Baker* of Portland (reprimand), *In re Raylynn J. Peterson* of Portland (60-day suspension, all stayed, 2-year probation), and *In re Mark Austin Cross* of Oregon City (reprimand).

The Disciplinary Board Chairperson approved BR 7.1 suspensions in *In re Timothy J. Vanagas* of Portland (in two separate matters), *In re Michael Reuben Stedman* of Medford, and *In re Jonah Morningstar* of Ashland.

2. Decisions Pending.

The following matters are pending before the Supreme Court:

In re Rick Sanai – reciprocal discipline matter referred to Disciplinary Board for hearing on defensive issues; trial panel opinion issued (disbarment); accused appealed.

In re Robert Rosenthal – BR 3.4 petition pending.

In re James F. Little – BR 3.2 petition pending.

In re Dirk D. Sharp – reciprocal discipline matter pending.

In re Julie Krull – BR 3.1 petition pending.

In re Kevin E. Mayne – Form B resignation pending.

In re Julie Krull – Form B resignation pending.

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

In re Jeffrey Dickey – September 8, 2015 (sanctions memo filed)

In re Larry Wright – October 28, 2015 (sanctions memo filed)

In re G. Jefferson Campbell – October 29-30, 2015

In re David Brian Williamson – November 3-4, 2015

3. Trials.

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

In re William Bryan Porter – December 3-4, 2015

In re Scott W. McGraw – January 19-21, 2016

In re Lisa D. T. Klemp – February 4-5, 2016

In re Gerald Noble – February 9-10, 2016

4. Diversions.

The SPRB approved the following diversion agreements since September 2015:

None.

5. Admonitions.

The SPRB issued 3 letters of admonition in October 2015. The outcome in these matters is as follows:

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

6. New Matters.

Below is a table of complaint numbers in 2015, compared to prior years, showing both complaints (first #) and the number of lawyers named in those complaints (second #):

MONTH	2011	2012	2013	2014	2015
January	19/20	46/49	21/21	29/31	18/19
February	35/36	27/27	23/23	24/25	28/28
March	21/25	38/39	30/30	41/45	22/22
April	40/42	35/38	42/43	45/47	17/17
May	143/146*	19/20	37/37	23/24	24/24
June	20/20	39/40	31/31	23/24	31/31
July	27/28	22/22	28/30	43/44	27/27
August	22/23	35/35	33/36	19/21	28/29
September	29/29	22/22	26/27	24/24	21/21
October	22/23	23/23	26/26	25/25	38/39
November	27/27	18/18	25/26	19/19	
December	39/40	26/26	19/19	21/23	
TOTALS	444/459	350/359	341/349	336/352	254/257

* = includes IOLTA compliance matters

As of November 1, 2015, there were 170 new matters awaiting disposition by Disciplinary Counsel staff or the SPRB. Of these matters, 43% are less than three months old, 25% are three to six months old, and 32% are more than six months old. Twenty-five of these matters are on the SPRB agenda in November. Staff continues its focus on disposing of oldest cases, with keeping abreast of new matters.

7. Reinstatements.

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

8. Staff Outreach.

On October 16, Assistant Disciplinary Counsel Kellie Johnson presented at the Oregon State Investigators Conference on The Ethics of Social Media and Criminal Prosecution Investigations. Later that day, she was a facilitator for a segment of the Oregon Women Lawyers 2015 Fall Conference in Portland. Disciplinary Counsel Dawn Evans spoke at the Oregon Municipal Judges Association conference in Springfield on September 17, at the Workers Compensation Bench Bar Conference in Salem on October 23, and co-presented with Mark Johnson-Roberts at the Oregon Law Institute’s 28th Annual Ethics CLE in Portland on October 30.

DME/rh

KATE BROWN
GOVERNOR



September 3, 2015

Mariann Hyland
Oregon State Bar, Director of Diversity and Inclusion
16037 SW Upper Boones Ferry Rd.
PO Box 231935
Tigard, OR. 97281

Dear Ms. Hyland,

I write to thank you for the privilege of working with Spencer Bailey this past summer. As you know, Spencer is a 3L at Willamette University College of Law, and he received a Public Honors Fellowship from the Oregon State Bar. As a result of his Fellowship, Spencer was able to spend three months working as a law clerk to the Office of the General Counsel to Governor Brown. Spencer was an enormous asset, and I am deeply grateful to him, and to the OSB, for his substantial help during his time here.

Spencer was outstanding. He proved himself to be a conscientious, smart, and hard-working law clerk. He took on assignments in a wide variety of legal areas, and he brought back prompt, cogent answers to the (often very broad) questions he was asked. He also went beyond mere legal research, reaching out often and with great effect to experts inside and outside of state government to untangle particularly knotty issues. Spencer's work could be – and was – relied on to be accurate, complete and easily understood.

Perhaps even more important, Spencer is deeply intuitive and has outstanding judgement. These qualities served him well in the course of his work here. As might be expected, the work of the General Counsel's office is both fast-paced and unpredictable. Spencer was able to consistently read fluid situations, and to respond by providing what was actually required by the circumstances at hand, rather than sticking rigidly to the exact parameters of an assignment given several days (and crises) prior. This blend of intuition and judgment created real value to our office, and is rare in my experience with law clerks.

Substantively, Spencer's background as an enrolled member of the Shawnee Tribe was immensely helpful. By statute, the General Counsel to the Governor serves as the liaison between Oregon's governor and the state's nine federally recognized tribes. Spencer provided a helpful perspective on a number of the sensitive tribal issues presented to this office, and managed to blend substantive knowledge with an eagerness to learn more.

Mariann Hyland
Oregon State Bar
September 3, 2015

Spencer was also a delight to be around. He is unfailingly (and non-annoyingly) cheerful, and brought a positive energy to the office that proved infectious. He was professional and courteous with all staff, and in all meetings with members of the public.

In short, I could not have asked for more from our Fellow. Thank you again for making it possible for all of us to work with him.

Sincerely,

A handwritten signature in black ink, appearing to read 'B. Souede', with a long horizontal flourish extending to the right.

Benjamin Souede
General Counsel
Office of Governor Kate Brown
503.378.8636

Oregon and Washington Legal Entities Sponsor Public Interest Law Fellow at Mercy Corps' International Headquarters

Share this page:      

PORTLAND, Ore. – Two Oregon legal organizations and multiple Northwest law firms have joined together to sponsor a Public Interest Law Fellow to work at Mercy Corps' headquarters in Portland, Oregon. This position provided support on legal issues in the US, and in many of Mercy Corps' overseas operations. The fellowship strove to further develop the student's knowledge and skills in non-profit law and management, as well as provide a unique perspective of the international laws and policies that shape Mercy Corps' various local projects.

Barnes H. Ellis, General Counsel at Mercy Corps, commented: "We were very pleased with the support Mercy Corps received from this year's Public Interest Law Fellow, Alicia LeDuc. She participated in several major issues, including sale of an interest in a micro-finance entity in Mongolia, and an investigation regarding possible misconduct in the Central African Republic. Alicia was a significant part of the Mercy Corps legal team."

In addition to working with the Mercy Corps' legal team, the sponsored Law Fellow gained valuable insight into non-profit compliance, international law, social venture impact investments, and the complexities of Mercy Corps Northwest's REIT Community Investment Trust. The Fellow had the opportunity to participate in international microfinance negotiations, research cutting-edge areas of developing non-profit impact investment law, and explore the parameters of export compliance as it relates to conducting humanitarian work in Syria and Sudan.

The sponsors include Willamette University College of Law's Public Interest Law Project, a student-led project formed in 1992 to educate and prepare future lawyers to recognize the inequities that exist in our legal system and to dedicate their professional lives to the development of a more just society. The Project achieves these goals primarily through the distribution of fellowships to first and second year law students who devote their summers to working for public interest organizations.

In addition, the Oregon State Bar Diversity and Inclusion Program provided the Mercy Corps legal fellow with a summer clerkship stipend. Stipend awardees are selected for their commitment to practice law in Oregon and who will help the Diversity and Inclusion Department advance its mission of promoting respect for the rule of law, improving the quality of legal services, and increasing access to justice. Applicants are ranked according to economic disadvantage, the potential that the clerkship will advance the student's practical experience and networking in Oregon's legal community, and other considerations.

Pacific Northwest attorneys Spencer Rockwell of Salem, Oregon, J. Vander Stoep of Chehalis, Washington, and Brian Kelly of Chehalis, Washington generously provided matching funds for the Oregon State Bar stipend.

Together, these donors provided support for a public interest law fellow for 14 weeks, providing over 500 hours

of legal services to Mercy Corps' operations locally and overseas, as well as a substantive, real-world learning opportunity for a first year law student.

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Benjamin,

Thank you so much for all your help in coordinating my experience with Mercy Corps this summer through the OSB Diversity and Inclusion Clerkship Stipend program. I've been exposed to some great legal minds and made many connections and experiences that will help in my legal career. I appreciate all you've done to make it happen! Alicia

Mariann,

Thank you to you and your staff for making the OSB Diversity and Inclusion Clerkship Stipend program available to law students this summer. I have thoroughly enjoyed my time at Mercy Corps - I was able to work on very complex and substantive issues and made many new connections within the Portland legal community. Thank you so much for supporting this opportunity! Alicia

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: November 20, 2015
Memo Date: November 10, 2015
From: Karen Clevering and Colin Andries, ONLD Chair and Chair-Elect
Re: ONLD Report

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

- The CLE Subcommittee held two brown bag CLE programs in Portland focusing on Ethics and Professionalism. Super Saturday, a full day CLE program featuring three concurrent tracks of one-hour sessions, was held in late October with more than 40 members in attendance.
- The Pro Bono subcommittee expanded its established Pro Bono Celebration, held in Portland the last week of October, by executing a satellite event in Bend held at the same time. The Portland event featured three concurrent CLE seminars, an awards ceremony, provider fair, and social. The inaugural Bend event included a CLE on the basics of expungements, recognition of a local pro bono provider, and a social.
- The Member Services subcommittee hosted a reception for the newest bar members and their families after the swearing in ceremony at Willamette University. Social events were held in Salem and Portland in late September followed by a joint social with Oregon Hispanic Bar Association in November. The last social of the year will be a joint event with OAPABA and OMLA on December 3 in Portland.
- The Law School Outreach subcommittee hosted a trivia night event for Lewis & Clark students and their mentors in October at the law school. The division was also represented at the school's third annual "bar prow!" event where students learn what each bar related organization offers students and new bar members.
- Through the Pro Bono subcommittee more than 45 ONLD members volunteered to participate in a refugee adjustment day clinic planned for November 14. Several nonprofit organizations participated in the clinic which was heavily organized by John Marandas and Chanpone Sinlapasai, former ONLD chair and subcommittee member.
- Four Executive Committee representatives attended the ABA Young Lawyers Division fall conference in Little Rock, AR. In addition to highlighted two of our own programs in the affiliate showcase attendees brought back information about successful programs from other affiliates.
- The Executive Committee, through its support of OLIO, created a team to participate in the BOWLIO event in early November. Colin Andries, Chair-elect, represented the ONLD by speaking at the PLF's Learning the Ropes CLE.
- In conjunction with the September meeting in Newport the Executive Committee helped Veteran Services of Lincoln County by cleaning up a memorial park in town. The

following month the Executive Committee organized a pumpkin carving and lunch event with kids waiting to be matched in the Bend Big Brothers Big Sisters program.

- The Executive Committee made revisions to its awards criteria and eligibility requirements. As part of this process a new award was created to recognize a member of the division for their dedication to advancing the OSB's diversity values.
- On November 13 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.

2016 Executive Committee Slate:

Chair: Colin Andries

Chair-Elect: Kaori Eder

Past Chair: Karen Clevering

Secretary: Joe Kraus

Treasurer: Jennifer Nichols

Member, region 1: Justin Morton

Member, region 2: Cassie Jones

Member, region 6: Robert Welsh

Member, at large 9: Kaori Eder

Member, at large 10: Anthony Kuchulis

2015 ONLD Award Honorees:

Member Services Award: Andrew Schpak

Public Service Award: Ron K. Cheng

Advancing Diversity Award: Jonathan Patterson

Volunteer of the Year Award: Mae Lee Browning

The Honorable John V. Acosta Professionalism Award: Judge Mark Clarke

**Oregon State Bar
Professional Liability Fund
Financial Statements
8/31/2015**

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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
8/31/2015**

<u>ASSETS</u>		
	<u>THIS YEAR</u>	<u>LAST YEAR</u>
Cash	\$2,063,592.09	\$2,190,112.67
Investments at Fair Value	49,373,548.47	48,371,211.02
Assessment Installment Receivable	2,666,578.00	2,792,674.83
Due from Reinsurers	164,648.66	159,324.19
Other Current Assets	81,558.00	75,585.81
Net Fixed Assets	781,304.46	861,181.41
Claim Receivables	65,489.84	72,088.15
Other Long Term Assets	<u>6,800.00</u>	<u>7,890.50</u>
TOTAL ASSETS	<u>\$55,203,519.52</u>	<u>\$54,530,068.58</u>
 <u>LIABILITIES AND FUND POSITION</u>		
	<u>THIS YEAR</u>	<u>LAST YEAR</u>
Liabilities:		
Accounts Payable and Other Current Liabilities	\$231,493.87	\$138,753.67
Due to Reinsurers	\$370,722.19	\$402,042.56
Liability for Compensated Absences	354,702.17	370,817.99
Liability for Indemnity	15,031,682.13	12,688,319.22
Liability for Claim Expense	14,650,079.30	14,817,326.52
Liability for Future ERC Claims	2,700,000.00	2,400,000.00
Liability for Suspense Files	1,500,000.00	1,500,000.00
Liability for Future Claims Administration (AOE)	2,500,000.00	2,300,000.00
Excess Ceding Commission Allocated for Rest of Year	251,683.18	270,162.53
Assessment and Installment Service Charge Allocated for Rest of Year	<u>8,198,872.55</u>	<u>8,313,420.23</u>
Total Liabilities	<u>\$45,789,235.39</u>	<u>\$43,200,842.72</u>
Change in Net Position:		
Retained Earnings (Deficit) Beginning of the Year	\$10,928,972.39	\$9,270,287.61
Year to Date Net Income (Loss)	<u>(1,514,688.26)</u>	<u>2,058,938.25</u>
Net Position	<u>\$9,414,284.13</u>	<u>\$11,329,225.86</u>
TOTAL LIABILITIES AND FUND POSITION	<u>\$55,203,519.52</u>	<u>\$54,530,068.58</u>

**Oregon State Bar
Professional Liability Fund
Primary Program
Statement of Revenues, Expenses, and Changes in Net Position
8 Months Ended 8/31/2015**

	YEAR TO DATE <u>ACTUAL</u>	YEAR TO DATE <u>BUDGET</u>	<u>VARIANCE</u>	YEAR TO DATE <u>LAST YEAR</u>	<u>ANNUAL BUDGET</u>
<u>REVENUE</u>					
Assessments	\$16,174,633.78	\$16,578,333.36	\$403,699.58	\$16,404,301.78	\$24,867,500.00
Installment Service Charge	223,111.34	223,333.36	222.02	222,538.66	335,000.00
Other Income	79,020.21	0.00	(79,020.21)	41,077.33	0.00
Investment Return	(349,900.77)	<u>1,648,588.00</u>	<u>1,998,488.77</u>	<u>2,674,279.10</u>	<u>2,472,882.00</u>
TOTAL REVENUE	<u>\$16,126,864.56</u>	<u>\$18,450,254.72</u>	<u>\$2,323,390.16</u>	<u>\$19,342,196.87</u>	<u>\$27,675,382.00</u>
<u>EXPENSE</u>					
Provision For Claims:					
New Claims at Average Cost	\$11,656,000.00			\$12,873,000.00	
Actuarial Adjustment to Reserves	940,670.98			71,374.66	
Coverage Opinions	56,469.86			40,623.94	
General Expense	49,347.92			38,310.09	
Less Recoveries & Contributions	(4,048.65)			(17,738.58)	
Budget for Claims Expense		<u>\$13,641,600.00</u>			<u>\$20,462,400.00</u>
Total Provision For Claims	<u>\$12,698,440.11</u>	<u>\$13,641,600.00</u>	<u>\$943,159.89</u>	<u>\$13,005,570.11</u>	<u>\$20,462,400.00</u>
Expense from Operations:					
Administrative Department	\$1,692,961.92	\$1,710,276.00	\$17,314.08	\$1,566,837.18	\$2,565,413.93
Accounting Department	510,532.65	534,659.28	24,126.63	411,538.73	801,988.75
Loss Prevention Department	1,338,198.44	1,471,575.28	133,376.84	1,214,056.61	2,207,362.28
Claims Department	1,758,567.78	1,788,959.28	30,391.50	1,701,844.22	2,683,438.19
Allocated to Excess Program	(632,277.20)	(632,277.20)	0.00	(747,192.64)	(948,416.00)
Total Expense from Operations	<u>\$4,667,983.59</u>	<u>\$4,873,192.64</u>	<u>\$205,209.05</u>	<u>\$4,147,084.10</u>	<u>\$7,309,787.15</u>
Contingency (4% of Operating Exp)	\$219.14	\$163,424.64	\$163,205.50	\$0.00	\$245,137.00
Depreciation and Amortization	\$108,683.02	\$113,200.00	\$4,516.98	\$110,772.84	\$169,800.00
Allocated Depreciation	(11,320.00)	(11,320.00)	0.00	(16,244.00)	(16,980.00)
TOTAL EXPENSE	<u>\$17,464,005.86</u>	<u>\$18,780,097.28</u>	<u>\$1,316,091.42</u>	<u>\$17,247,183.05</u>	<u>\$28,170,144.15</u>
NET POSITION - INCOME (LOSS)	<u>(\$1,335,636.30)</u>	<u>(\$331,175.92)</u>	<u>\$1,004,460.38</u>	<u>\$2,095,013.82</u>	<u>(\$496,762.15)</u>

**Oregon State Bar
Professional Liability Fund
Primary Program
Statement of Operating Expense
8 Months Ended 8/31/2015**

<u>EXPENSE:</u>	<u>CURRENT</u>	<u>YEAR</u>	<u>YEAR</u>	<u>VARIANCE</u>	<u>YEAR</u>	<u>ANNUAL</u>
	<u>MONTH</u>	<u>TO DATE</u>	<u>TO DATE</u>		<u>TO DATE</u>	<u>BUDGET</u>
		<u>ACTUAL</u>	<u>BUDGET</u>		<u>LAST YEAR</u>	<u>BUDGET</u>
Salaries	\$337,668.81	\$2,783,255.99	\$2,925,211.92	\$141,955.93	\$2,755,405.39	\$4,387,817.84
Benefits and Payroll Taxes	126,774.19	1,062,875.27	1,102,404.16	39,528.89	1,009,249.18	1,653,606.07
Investment Services	0.00	19,103.00	26,666.64	7,563.64	13,839.75	40,000.00
Legal Services	69.00	19,824.17	6,666.64	(13,157.53)	4,658.50	10,000.00
Financial Audit Services	0.00	22,800.00	17,333.36	(5,466.64)	22,800.00	26,000.00
Actuarial Services	29,488.02	43,498.02	19,533.36	(23,964.66)	11,340.00	29,300.00
Information Services	5,769.75	35,851.99	74,000.00	38,148.01	35,563.99	111,000.00
Document Scanning Services	13,235.95	14,831.76	43,333.36	28,501.60	11,149.95	65,000.00
Other Professional Services	12,447.20	107,648.04	66,994.32	(40,653.72)	69,079.18	100,491.50
Staff Travel	1,820.79	12,301.82	20,433.44	8,131.62	13,495.35	30,650.00
Board Travel	11,197.89	35,791.67	30,766.64	(5,025.03)	23,734.31	46,150.00
NABRICO	1,907.10	8,431.60	12,433.36	4,001.76	6,120.38	18,650.00
Training	31.54	11,693.61	14,666.72	2,973.11	12,217.14	22,000.00
Rent	43,418.92	346,388.86	346,710.00	321.14	341,269.74	520,065.00
Printing and Supplies	7,298.30	55,219.72	53,333.28	(1,886.44)	42,100.67	80,000.00
Postage and Delivery	2,119.12	17,895.98	18,900.00	1,004.02	14,245.60	28,350.00
Equipment Rent & Maintenance	4,518.66	38,559.34	33,000.00	(5,559.34)	33,761.16	49,500.00
Telephone	1,000.00	30,013.33	33,040.00	3,026.67	31,795.59	49,560.00
L P Programs (less Salary & Benefits)	32,307.23	249,641.54	307,663.04	58,021.50	236,498.67	461,494.00
Defense Panel Training	86,365.85	89,562.63	43,281.68	(46,280.95)	124.41	64,922.30
Bar Books Grant	16,666.67	133,333.36	133,333.36	0.00	133,333.36	200,000.00
Insurance	3,318.33	27,525.11	27,929.60	404.49	8,221.00	41,894.44
Library	2,351.22	16,627.18	26,000.00	9,372.82	20,269.99	39,000.00
Subscriptions, Memberships & Other	19,300.71	108,962.14	107,168.00	(1,794.14)	30,247.27	160,752.00
Allocated to Excess Program	<u>(79,034.65)</u>	<u>(632,277.20)</u>	<u>(632,277.20)</u>	<u>0.00</u>	<u>(747,192.64)</u>	<u>(948,416.00)</u>
TOTAL EXPENSE	<u>\$680,040.60</u>	<u>\$4,659,358.93</u>	<u>\$4,858,525.68</u>	<u>\$199,166.75</u>	<u>\$4,133,327.94</u>	<u>\$7,287,787.15</u>

**Oregon State Bar
Professional Liability Fund
Excess Program
Statement of Revenue, Expenses, and Changes in Net Position
8 Months Ended 8/31/2015**

	YEAR TO DATE <u>ACTUAL</u>	YEAR TO DATE <u>BUDGET</u>	<u>VARIANCE</u>	YEAR TO DATE <u>LAST YEAR</u>	<u>ANNUAL BUDGET</u>
<u>REVENUE</u>					
Ceding Commission	\$503,366.35	\$506,666.64	\$3,300.29	\$540,325.06	\$760,000.00
Prior Year Adj. (Net of Reins.)	887.07	0.00	(887.07)	3,446.70	0.00
Profit Commission	(4,264.74)	0.00	4,264.74	0.00	0.00
Installment Service Charge	40,447.00	28,000.00	(12,447.00)	39,808.00	42,000.00
Investment Return	(27,581.11)	124,087.36	151,668.47	230,952.89	186,131.00
TOTAL REVENUE	<u>\$512,854.57</u>	<u>\$658,754.00</u>	<u>\$145,899.43</u>	<u>\$814,532.65</u>	<u>\$988,131.00</u>
<u>EXPENSE</u>					
Operating Expenses (See Page 6)	\$680,586.53	\$665,943.92	(\$14,642.61)	\$834,364.22	\$998,916.00
Allocated Depreciation	<u>\$11,320.00</u>	<u>\$11,320.00</u>	<u>\$0.00</u>	<u>\$16,244.00</u>	<u>\$16,980.00</u>
NET POSITION - INCOME (LOSS)	<u>(\$179,051.96)</u>	<u>(\$18,509.92)</u>	<u>\$160,542.04</u>	<u>(\$36,075.57)</u>	<u>(\$27,765.00)</u>

**Oregon State Bar
Professional Liability Fund
Excess Program
Statement of Operating Expense
8 Months Ended 8/31/2015**

	<u>CURRENT</u> <u>MONTH</u>	YEAR <u>TO DATE</u> <u>ACTUAL</u>	YEAR <u>TO DATE</u> <u>BUDGET</u>	<u>VARIANCE</u>	YEAR <u>TO DATE</u> <u>LAST YEAR</u>	<u>ANNUAL</u> <u>BUDGET</u>
<u>EXPENSE:</u>						
Salaries	\$44,559.08	\$356,472.64	\$356,472.64	\$0.00	\$465,528.80	\$534,709.00
Benefits and Payroll Taxes	15,961.66	127,693.28	127,693.36	0.08	172,416.84	191,540.00
Investment Services	0.00	897.00	1,666.64	769.64	1,160.25	2,500.00
Office Expense	0.00	0.00	0.00	0.00	0.00	0.00
Allocation of Primary Overhead	18,513.91	148,111.28	148,111.28	0.00	180,270.72	222,167.00
Reinsurance Placement & Travel	66.11	11,072.63	16,666.64	5,594.01	10,614.75	25,000.00
Training	0.00	0.00	333.36	333.36	0.00	500.00
Printing and Mailing	0.00	4,915.65	3,666.64	(1,249.01)	322.86	5,500.00
Program Promotion	0.00	16,679.05	10,000.00	(6,679.05)	4,050.00	15,000.00
Other Professional Services	0.00	299.30	1,333.36	1,034.06	0.00	2,000.00
Software Development	<u>2,467.15</u>	<u>14,445.70</u>	<u>0.00</u>	<u>(14,445.70)</u>	<u>0.00</u>	<u>0.00</u>
TOTAL EXPENSE	<u>\$81,567.91</u>	<u>\$680,586.53</u>	<u>\$665,943.92</u>	<u>(\$14,642.61)</u>	<u>\$834,364.22</u>	<u>\$998,916.00</u>

**Oregon State Bar
Professional Liability Fund
Combined Investment Schedule
8 Months Ended 8/31/2015**

	CURRENT MONTH <u>THIS YEAR</u>	YEAR TO DATE <u>THIS YEAR</u>	CURRENT MONTH <u>LAST YEAR</u>	YEAR TO DATE <u>LAST YEAR</u>
Dividends and Interest:				
Short Term Bond Fund	\$5,910.37	\$74,552.30	\$5,661.53	\$83,998.20
Intermediate Term Bond Funds	31,125.78	270,157.69	8,987.12	162,115.21
Domestic Common Stock Funds	0.00	91,320.86	0.00	158,733.23
International Equity Fund	0.00	0.00	0.00	0.00
Real Estate	0.00	86,674.97	0.00	72,494.95
Hedge Fund of Funds	0.00	0.00	0.00	0.00
Real Return Strategy	<u>0.00</u>	<u>95,134.79</u>	<u>0.00</u>	<u>160,695.86</u>
Total Dividends and Interest	<u>\$37,036.15</u>	<u>\$617,840.61</u>	<u>\$14,648.65</u>	<u>\$638,037.45</u>
Gain (Loss) in Fair Value:				
Short Term Bond Fund	(\$12,638.74)	(\$41,907.69)	\$16,665.90	\$45,611.38
Intermediate Term Bond Funds	(70,327.08)	(158,425.55)	93,686.15	294,355.29
Domestic Common Stock Funds	(584,490.91)	(302,008.97)	403,719.29	649,743.17
International Equity Fund	(665,072.41)	(239,292.47)	133,308.34	503,068.42
Real Estate	0.00	244,110.74	0.00	124,276.08
Hedge Fund of Funds	0.00	0.00	0.00	0.00
Real Return Strategy	<u>(217,906.99)</u>	<u>(497,798.55)</u>	<u>58,531.79</u>	<u>650,140.20</u>
Total Gain (Loss) in Fair Value	<u>(\$1,550,436.13)</u>	<u>(\$995,322.49)</u>	<u>\$705,911.47</u>	<u>\$2,267,194.54</u>
TOTAL RETURN	<u>(\$1,513,399.98)</u>	<u>(\$377,481.88)</u>	<u>\$720,560.12</u>	<u>\$2,905,231.99</u>
Portions Allocated to Excess Program:				
Dividends and Interest	\$1,681.44	\$26,333.88	\$722.18	\$52,078.34
Gain (Loss) in Fair Value	<u>(70,389.80)</u>	<u>(53,914.99)</u>	<u>34,801.44</u>	<u>178,874.55</u>
TOTAL ALLOCATED TO EXCESS PROGRAM	<u>(\$68,708.36)</u>	<u>(\$27,581.11)</u>	<u>\$35,523.62</u>	<u>\$230,952.89</u>

**Oregon State Bar
Professional Liability Fund
Excess Program
Balance Sheet
8/31/2015**

ASSETS

	<u>THIS YEAR</u>	<u>LAST YEAR</u>
Cash	\$505,986.31	\$390,827.49
Assessment Installment Receivable	66,703.00	172,050.99
Due from Reinsurers	164,648.66	159,324.19
Investments at Fair Value	<u>2,192,765.04</u>	<u>2,638,566.14</u>
TOTAL ASSETS	<u>\$2,930,103.01</u>	<u>\$3,360,768.81</u>

LIABILITIES AND FUND EQUITY

	<u>THIS YEAR</u>	<u>LAST YEAR</u>
Liabilities:		
Accounts Payable & Refunds Payable	\$2,463.75	\$2,342.46
Due to Primary Fund	\$0.00	\$13,725.36
Due to Reinsurers	370,722.19	402,042.56
Ceding Commission Allocated for Remainder of Year	<u>251,683.18</u>	<u>270,162.53</u>
Total Liabilities	<u>\$624,869.12</u>	<u>\$688,272.91</u>
Fund Equity:		
Retained Earnings (Deficit) Beginning of Year	\$2,708,571.47	\$2,708,571.47
Year to Date Net Income (Loss)	<u>(179,051.96)</u>	<u>(36,075.57)</u>
Total Fund Equity	<u>\$2,529,519.51</u>	<u>\$2,672,495.90</u>
TOTAL LIABILITIES AND FUND EQUITY	<u>\$3,154,388.63</u>	<u>\$3,360,768.81</u>

**Oregon State Bar
Professional Liability Fund
Primary Program
Balance Sheet
8/31/2015**

ASSETS


	<u>THIS YEAR</u>	<u>LAST YEAR</u>
Cash	\$1,557,605.78	\$1,799,285.18
Investments at Fair Value	47,180,783.43	45,732,644.88
Assessment Installment Receivable	2,599,875.00	2,620,623.84
Due From Excess Fund	0.00	13,725.36
Other Current Assets	81,558.00	61,860.45
Net Fixed Assets	781,304.46	861,181.41
Claim Receivables	65,489.84	72,088.15
Other Long Term Assets	<u>6,800.00</u>	<u>7,890.50</u>
TOTAL ASSETS	<u>\$52,273,416.51</u>	<u>\$51,169,299.77</u>

LIABILITIES AND FUND EQUITY

	<u>THIS YEAR</u>	<u>LAST YEAR</u>
Liabilities:		
Accounts Payable and Other Current Liabilities	\$229,030.12	\$122,685.85
Liability for Compensated Absences	354,702.17	370,817.99
Liability for Indemnity	15,031,682.13	12,688,319.22
Liability for Claim Expense	14,650,079.30	14,817,326.52
Liability for Future ERC Claims	2,700,000.00	2,400,000.00
Liability for Suspense Files	1,500,000.00	1,500,000.00
Liability for Future Claims Administration (ULAE)	2,500,000.00	2,300,000.00
Assessment and Installment Service Charge Allocated for Remainder of Year	<u>8,198,872.55</u>	<u>8,313,420.23</u>
Total Liabilities	<u>\$45,164,366.27</u>	<u>\$42,512,569.81</u>
Fund Equity:		
Retained Earnings (Deficit) Beginning of the Year	\$8,220,400.92	\$6,561,716.14
Year to Date Net Income (Loss)	<u>(1,335,636.30)</u>	<u>2,095,013.82</u>
Total Fund Equity	<u>\$6,884,764.62</u>	<u>\$8,656,729.96</u>
TOTAL LIABILITIES AND FUND EQUITY	<u>\$52,049,130.89</u>	<u>\$51,169,299.77</u>

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: November 20, 2015
Memo Date: November 3, 2015
From: Carol J. Bernick, PLF CEO 
Re: 2016 PLF Excess Coverage Application

Action Recommended

The 2016 PLF Excess Coverage Application is included for your review and approval.

Background

Very minor changes were made to the application to coincide with the new rating model. These changes are summarized as follows:

- Addition of question A.2 regarding the use of a law firm website;
- Addition of question A.7 regarding the number of non-attorney staff in the law firm;
- Addition of question A.8 regarding the use of a full-time office manager; and
- Addition of two fields in form C.1 (Current Attorney List), regarding CLE credit earned in prior year, and whether the attorney works fewer than 250 hours per year (the addition here necessitated the removal of the specific semi-retired attorney question asked in prior years).

The remainder of the application remains unchanged from 2015. The PLF Board of Directors unanimously approved these changes at its October 16, 2015 board meeting.

Attachment



PLF Excess Coverage

16037 SW Upper Boones Ferry Road, Suite 300
Tigard, Oregon 97224

PO Box 231600 | Tigard, Oregon 97281-1600

Phone: 503.639.6911
Oregon Toll-Free: 800.452.1639
Email: excess@osbplf.org
Website: www.osbplf.org

2016 NEW FIRM APPLICATION

Please fill out this Application completely and accurately. If you have questions about certain sections, refer to the Application Instructions. You may supplement any answer by attaching additional pages. Please email completed applications to excess@osbplf.org.

SECTION A – FIRM INFORMATION

A.1 Firm Name: _____

Mailing Address: _____

City: _____ State: _____ Zip Code: _____

Phone: _____

A.2 Does your firm have a website? Yes No

Website Address: _____

A.3 Application Contact Name: _____

Contact Email: _____

A.4 Type of Firm: Sole Practitioner Partnership PC LLC LLP Other: _____

A.5 Date Firm in A.1 Began Business: ____ / ____ / ____

A.6 Number of Attorneys in Firm (include of counsel): _____

A.7 Number of Non-Attorney Staff in Firm: _____

A.8 Does your firm employ a full-time office manager? Yes No

A.9 Desired Beginning Coverage Date: ____ / ____ / ____

A.10 **Requested Coverage level:** You may check more than one box to request multiple quotations. Please note: new firms may apply only for the \$700,000 or \$1.7 million coverage levels, unless the attorneys are moving from a firm with higher limits of coverage, or unless sufficient explanation for the higher limits request is provided.

- | | |
|--|---|
| <input type="checkbox"/> \$700,000 / \$700,000 | <input type="checkbox"/> \$3.7 million / \$3.7 million |
| <input type="checkbox"/> \$1.7 million / \$1.7 million | <input type="checkbox"/> \$4.7 million / \$4.7 million |
| <input type="checkbox"/> \$2.7 million / \$2.7 million | <input type="checkbox"/> \$9.7 million / \$9.7 million* |

* Higher Coverage Limits Supplement required.

SECTION B – PREDECESSOR FIRMS

B.1 A former firm qualifies as a Predecessor Firm if it was a sole proprietorship, partnership, professional corporation, or other entity (a) that is no longer engaged in the practice of law; **and** (b) at least 50% of whose attorneys are affiliated with the Firm listed in A.1.

List **all** of the Predecessor Firms that meet **all parts** of the above definition.

Predecessor Firm	Year Established/Ended	No. of Attorneys	Location
------------------	------------------------	------------------	----------

1. _____
2. _____
3. _____
4. _____
5. _____

At the PLF's discretion, a former firm that does not meet the definition of a Predecessor Firm may be added by special endorsement. If you would like to request that a former firm(s) be added by special endorsement, please list it below.

Former Firm	Year Established/Ended	No. of Attorneys	Location
-------------	------------------------	------------------	----------

1. _____
2. _____
3. _____
4. _____
5. _____

SECTION C – FIRM ATTORNEYS AND FORMER ATTORNEYS

C.1 **Current Attorneys:** Please list the following information for each attorney presently working for the Firm, including of counsel attorneys.

Attorney Name	OSB No.	Year Started with Firm	Role/Status*	3 hours of CLE Credit in Past Year? Yes/No	Part time? Yes/No (less than 250 hours per year)
1.					
2.					
3.					
4.					
5.					
6.					
7.					
8.					
9.					
10.					
11.					
12.					
13.					
14.					
15.					
16.					
17.					
18.					

* SP = Sole Practitioner. P = Partner, S = Shareholder, PC = Professional Corporation. A = Associate, C = Of Counsel. M = Member, O = Other (explain)

C.2 Do all of the attorneys listed in C.1 above carry primary PLF Coverage?

Yes No If no, please explain. _____

C.3 Former Attorneys: Name of each attorney **not presently** working for the Firm who worked for the Firm, or a qualifying or specially endorsed Predecessor Firm listed in Section B, at any time during the past five years.

Former Attorney's Name	OSB No.	Employment Dates (in years)	Role/Status*
------------------------	---------	-----------------------------	--------------

1. _____
2. _____
3. _____
4. _____
5. _____

*SP = Sole Practitioner, P = Partner, S = Shareholder, PC = Professional Corporation, A = Associate, C = Of Counsel, M = Member, O = Other (explain)

C.4 Did all attorneys listed in C.4 carry primary PLF coverage while working for the Firm or a Predecessor Firm?

Yes No If no, please explain. _____

C.5 Does your Firm include any **current or former** attorneys who are not Oregon bar members **OR** whose principal office is outside Oregon? If yes, please list the attorneys below and fill out a non-Oregon Attorney Supplement for each attorney. Yes No

Non-Oregon Attorney's Name	OSB/ Bar No.	Employment Dates
----------------------------	--------------	------------------

1. _____
2. _____
3. _____
4. _____
5. _____

SECTION D – CLAIMS EXPERIENCE

D.1 Is any attorney in the Firm aware of any claim(s) against the Firm, a Predecessor Firm, or any attorney who worked for the Firm or a Predecessor Firm that has NOT been reported to the PLF? If yes, please provide details, including the name of the claimant, name of the responsible attorney, and a description of the claim and alleged damages.

Yes No

- D.2 Is any attorney in the Firm aware of any act, error, or omission or any possible claim, which might reasonably be expected to be the basis of a professional liability claim or suit against him or her, against the Firm or any Predecessor Firm, or against any present or former attorney of the Firm or any Predecessor Firm that has NOT been previously reported to the PLF? If yes, please explain. Yes No
- D.3 Has any excess carrier paid any amount above the PLF's primary limit during the past 10 years? If yes, please explain. Yes No
- D.4 Has this Application or a Firm Attorney Questionnaire been provided to all current firm attorneys for their verification? (Sole practitioners check "YES".) If no, please explain. Yes No

SECTION E – TYPE OF PRACTICE

E.1 Please complete the chart below to describe the Firm's practice by indicating the percentage of the Firm's professional time or billings in the private practice of law devoted to each area within the most recent 12-month period for which you have data. **The total must equal 100%. Please round to the nearest whole number.**

Administrative/Regulatory	_____%	Land Use	_____%
Admiralty/Maritime	_____%	Litigation (see below)	
Antitrust/Trade Reg.	_____%	Negligence/Defense	_____%
Bankruptcy	_____%	Negligence/Plaintiff	_____%
Business	_____%	Business Litigation	_____%
Collection/Repossession	_____%	Mediation/Arbitration	_____%
Communications (FCC)	_____%	Municipal	_____%
Construction	_____%	Oil, Gas and Coal	_____%
Criminal	_____%	Patents/Copyright/Trademark	_____%
Domestic Relations	_____%	Public Utilities	_____%
Employment	_____%	Real Estate*	_____%
Entertainment/Sports	_____%	Securities Law*	_____%
ERISA/Employee Benefits	_____%	Taxation (excl. Tax Opinions)*	_____%
Estate/Probate/Wills/Trusts	_____%	Workers' Comp. (see below)	
Financial Institution Law	_____%	Defense/Employer	_____%
Immigration	_____%	Claimant/Employee	_____%
Health	_____%	Other (describe if over 5%)	_____%
Investment Counseling	_____%		
Labor Relations	_____%		

* See Instructions for specific definitions.

E.2 Has any present or former attorney with the Firm or Predecessor Firm practiced in the last **10 years** in the area of Securities Law (including federal and state securities law)? **See Instructions for definition of Securities Law.** *If yes, please submit a Securities Law Supplement Application.*

Yes No

E.3 Does one client, case, or group of related clients or cases currently represent more than 30% of the Firm's business (or has represented more than 30% in any year in the past three years)? If yes, please explain. Yes No

E.4 Does your Firm now include anyone, or has it included anyone during the past five years, who is or was registered with the U.S. Patent and Trademark Office? If yes, please complete a Patent Attorney Supplement for each Patent attorney. Yes No

SECTION F – OTHER INFORMATION

F.1 Does the Firm have excess coverage at the present time? Yes No

If yes, please complete the Firm's and all Predecessor Firms' history of prior excess professional liability insurance below for the past five years **AND PLEASE PROVIDE A COPY OF THE DECLARATIONS PAGE** from your current excess policy or policies and copies of any endorsements.

	Policy Period From/To	Insurance Co.	Policy Limits	Name of Firm Issued Coverage
1.			\$	
2.			\$	
3.			\$	
4.			\$	
5.			\$	

F.2 During the past five years, has any insurance carrier declined to issue, cancelled, refused to renew, or agreed to accept only on special terms, professional liability coverage for the Firm, any Predecessor Firm, or any attorney in the Firm or a Predecessor Firm? If yes, please explain. Yes No

F.3 Does your Firm share office space with any other firm, attorney, or organization? Yes No

IF YES:

(a) Do you share letterhead? Yes No

(b) Do you routinely refer or share cases? If yes, please explain. Yes No

(c) Names of individuals, firms, or organizations with whom your Firm shares offices:

**Please note that the PLF Excess Plan does not cover liability you may have from office sharing arrangements under the doctrine of apparent partnership, partnership by estoppel, or similar theory.*

F.4 Does the Firm use multiple letterheads? *Include all firm letterhead.* Yes No

F.5 In the past five years, has any attorney in your Firm or a Predecessor Firm been refused admission to practice, disbarred, suspended from practice, or formally reprimanded by any bar association or court? If yes, please explain. Yes No

F.6 In the past five years:

(a) has any current attorney in your Firm or a Predecessor Firm been convicted of a felony or a Class A misdemeanor (or equivalent crime in other states)? If yes, please explain. Yes No

(b) has any current or former attorney in your Firm or Predecessor Firm engaged in any of the following activities: (1) conduct which is or could be the subject of bar discipline, (2) dishonest conduct or (3) unauthorized borrowing from the Firm or a client? If yes, please explain. Yes No

F.7 Does your Firm have other office locations? If yes, please attach a list of all such locations, including the street address, city, state, and zip code, and explain whether control and supervision rest with the principal business office. Yes No

F.8 Does the Firm maintain any of counsel relationship or share letterhead with any other firm or any attorney not listed as a Firm Attorney in C.1? If yes, please explain. Yes No

F.9 Does your Firm maintain a joint venture, partnership, or ownership relationship with any other businesses or receive any compensation for referrals to such businesses? If yes, please explain. Yes No

F.10 Does your Firm use temporary or contract legal services, or retain attorneys as independent contractors, on behalf of clients of the Firm? If yes, please explain the volume and nature of the work performed and contractor relationship with the Firm. Yes No

F.11 Does the Firm, any Firm Attorney, or any Firm Attorney's spouse or immediate family member possess any beneficial interest in a client business entity? If yes, please attach a list describing the percentage of ownership and the nature of the ownership interest (ex., family business, stock in lieu of fees, etc.). Yes No

If you answered "Yes" above, have the proper disclosures and notices required to maintain coverage under the PLF's Claims Made Plans (primary and excess) been made? If no, please explain. Yes No

SECTION G – PRACTICE MANAGEMENT

If you answer “NO” to any of the questions in this section, please provide supplemental explanations.

- G.1 Does the Firm have a way to reliably track client appointments, court dates, hearing dates, or other deadlines so all firm obligations are met? Yes No

Name of system used: _____

- G.2 Does your Firm put reminders on the calendar prior to key deadline dates, such as the running of a statute of limitations? Yes No
- G.3 Does your Firm follow up to verify that deadline-related tasks were actually performed? For example, do you confirm when service of process is completed? Yes No
- G.4 Does your system for tracking deadlines capture long-range or future work beyond the current calendar year? For example: yearly reminders to file annual accounting for conservatorships. Yes No
- G.5 Does your Firm screen new clients and cases for potential conflicts of interest prior to receiving confidential information? Yes No
- G.6 Does your Firm provide written disclosures when there is a potential conflict and obtain written consent from clients to continue representation? Yes No
- G.7 Does your Firm use “engagement” letters or fee agreements with all new clients? (These letters can be one agreement or separate agreements.) Yes No
- G.8 Does your Firm use “disengagement” letters or, if the client is an ongoing client, a letter at the conclusion of each legal matter that advises the client that the matter is concluded. Yes No
- G.9 Does your Firm use “non-engagement” letters with declined clients? Yes No
- G.10 When your Firm accepts a new case from an existing client, do you open a separate file for the new matter? Yes No
- G.11 When your Firm accepts a new case from an existing client, do you re-confirm the terms of representation? Yes No

SECTION H – OTHER PROVISIONS

- H.1 **Representations**: The undersigned represents that the information contained herein is true and correct as of the date this Application is executed, and that it shall be the basis of the Excess Plan and deemed to be incorporated therein if the Professional Liability Fund accepts this Application by issuance of an Excess Plan. It is hereby agreed and understood that this representation constitutes a continuing obligation to report to the Professional Liability Fund as soon as practicable any material change in the circumstances of the applicant's practice of law, including, but not limited to, the size of the Firm and the information contained on each Supplemental Application submitted herewith.
- H.2 **Release of Claim Information**: The undersigned hereby authorizes release of claim information from any prior insurer to the Professional Liability Fund. The undersigned understands that the PLF will use for underwriting purposes internal PLF claims information about the firm attorneys listed in Sections C.1, C.4, and C.6. The undersigned warrants that he or she has authority from the attorneys listed at Section C.1, C.4, and C.6 to receive claim information from the PLF as part of the underwriting process.
- H.3 **Claims Made Excess Plan**: The undersigned understands and accepts that the Excess Plan applied for provides coverage on a "claims made" basis for only those claims that are made against the applicant while the Excess Plan is in force, that defense costs are included within coverage limits, and that all coverage ceases with the termination of the Excess Plan unless the undersigned exercises certain extended reporting coverage options available in accordance with the terms of the Excess Plan.
- H.4 **Failure to Report Claims**: The undersigned agrees that failure to report any claims made against the applicant or any attorney in the applicant's firm under any current or previous coverage or policy of insurance, or failure to reveal known facts that may give rise to a claim against any prior, current, or future coverage or insurers, may result in the absence of coverage for any matter that should have been reported or in the failure of coverage altogether.

SECTION I – ASSESSABILITY

I.1 **Supplemental Excess Assessment:** The undersigned acknowledges that the Excess Plan is assessable as provided in Section XI of the Excess Plan. Assessment may be made during the Coverage Period or in future years to cover Excess Program claims and expenses in such fashion as may be provided in the Excess Plan. The undersigned warrants that he or she has authority to sign for and bind the Firm and its partners, shareholders, members, and professional corporations for payment of supplemental assessments in accordance with the terms of the Excess Plan.

It is agreed that completion of this Application does not obligate the Firm to purchase excess coverage from the Professional Liability Fund, nor does it bind the Professional Liability Fund to issue coverage. If coverage is issued, this Application, along with the Declaration Sheets, and any applicable endorsements, will be deemed a part of the Firm's Excess Plan.

It is agreed that any coverage provided by the Professional Liability Fund will be according to the applicable Claims Made Excess Plan, and that any representations made in this Application or in the related instructions and question and answer sheet or any requests made by the Firm in this Application will not expand coverage beyond that stated in the Declarations Sheet, applicable Claims Made Excess Plan, and any Endorsements issued to the Firm.

Signature: _____ Date: _____


Print/Type Name: _____ Capacity: _____

**** This application must be signed by a partner, member, or shareholder of applicant Firm.***

REMINDER – PLEASE INCLUDE COPY OF FIRM'S LETTERHEAD – THANK YOU

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: November 20, 2015
Memo Date: November 2, 2015
From: Carol J. Bernick, PLF CEO 
Re: 2016 Excess Rates

Action Recommended

The PLF Board of Directors (BOD) requests that the Board of Governors approve a base rate of \$1,150 for 2016 excess coverage.

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.

Since the PLF began offering excess coverage, we approached pricing in a way similar to that of the primary program: a single rate. For excess, we did charge a high rate for lawyers practicing in high risk areas (primarily securities and certain types of real estate) or who had a history of claims that met a certain severity threshold (not something we do at primary). We also had two rates for out-of-state attorneys.

As I have been reporting in my updates to the BOG, the PLF completely changed its excess rating system for 2016. We have discontinued the two-rate model in favor of a fully underwritten approach that begins with a base rate. At the October 16, 2015 PLF Board meeting, the Board approved a base rate of \$1150. This rate was developed after extensive modeling provided by our broker in London, Aon, working closely with our largest reinsurer. Our goal in the changed pricing structure is to price excess coverage according to the risk. In general terms, under the old model our pricing was often too high for lower risk firms and too low for higher risk firms. This resulted in poor loss development for our reinsurers which were becoming increasingly unacceptable to them. In short, we risked losing reinsurance from the Class A carriers that the PLF has always used and believe we should use to protect the interests of our covered parties and, ultimately, the public.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: November 20, 2015
Memo Date: November 3, 2015
From: Carol J. Bernick, PLF CEO
Re: 2016 PLF Bylaws and Policies Changes

Action Recommended

Proposed changes to the 2016 PLF Bylaws and Policies are included for your review and approval. These changes were unanimously approved by the PLF Board of Directors at its October 16, 2015 board meeting.

Background

The proposed changes are summarized as follows:

- Section 1.250 – Goal No. 2 and Section 7.100(B) – “Retained Earnings” was replaced with “Net Position” to provide a more accurate description of the objective;
- Section 7 – Various changes were made to this section to clear up language and intent. These changes include: cleaning up cross-references in document, fixing capitalization issues, clarifying the role of the Excess Committee of the BOD, renumbering subsections, etc.;
- Section 7.300(A) – changes were made to Section 7.300 to simplify and clarify criteria to be used in the new rating model. Rather than list out the various criteria in detail, Section 7.300(A) was redrafted to explain the criteria for evaluating law firm applications, while leaving open the possibility that these criteria can change from year to year;
- Section 7.350 was omitted entirely for the same reasons as described above;
- Section 7.300(E) was modified to replace the former section 7.400(A), which described what the Board of Governors approves each year with regard to Excess Coverage. In prior years, the BOG approved the excess rates. Those different rates at specific coverage levels no longer exist. To align the Policies with the new rating model, the language of this section was modified to require BOG approval for the base rate used in the new excess rating model;
- Former Section 7.700(B), describing semi-retired attorneys, was removed. This class of attorneys is still relevant to the rating model, but it is best addressed under section 7.300(A), where it now resides;
- Former Section 7.700(G) was removed. This section required Board approval of application questions addressing former Section 7.300(A)(8) (questions about

- Practice Management). Questions related to this topic remain relevant and a part of the application, but the requirement of Board approval of only those questions was removed. The Board is provided with a complete copy of the upcoming year's Excess application for review each year. Specific review and approval of one section of the application is unnecessary;
- New Section 7.600(I) was edited to remove redundant information. The discretionary continuity credit is described sufficiently in the text of (I)(1) so as to not merit a duplicative chart; and
- Section 7.600(J), regarding Extended Reporting Coverage (ERC), was modified to make clear on which coverage year the cost of ERC will be based.

Attachment

1.250 MISSION STATEMENT AND GOALS OF THE PROFESSIONAL LIABILITY FUND

STATEMENT OF MISSION: The mission of the Professional Liability Fund is to provide primary professional liability coverage to Oregon lawyers in the private practice of law. In doing so, the public is served. We also provide additional coverage and services that support our primary coverage program.

GOAL NO. 1 – To provide the mandatory professional liability coverage consistent with a sound financial condition, superior claims handling, efficient administration, and effective personal and practice management assistance.

(BOD 8/27/04; BOG 10/13/04)

GOAL NO. 2 - Full Funding of Claims and ~~Retained Earnings~~Net Position: To maintain full funding of estimated claim liabilities net of reinsurance. In addition to full funding, ~~retained earnings~~a positive net position may be maintained to stabilize assessments.

(BOD 5/14/04; BOG 6/11/04)

will be provided only with the prior approval of the attorney who is subject of the reports.

(BOD 6/18/99; BOD 8/6/99; BOG 9/16/99; BOD 8/27/04; BOG 10/13/04; BOD 12/11/09; BOG 02/19/10)

6.450 SHORT-TERM LOANS FOR TREATMENT

The Chief Executive Officer may authorize loans to attorneys in an amount not to exceed \$2,500 for the purpose of obtaining immediate treatment for alcohol, chemical dependency, or other problems which impair a lawyer's ability to practice law. The loan will be used only for the purpose of such treatment, and will be evidenced by a promissory note of the attorney.

(BOD 2/21/92, BOG 3/13/92; BOD 4/23/93, BOG 8/13/93; BOD 6/18/99; BOD 8/6/99; BOG 9/16/99)

6.500 MULTIPLE CLAIMS

It will be the responsibility of the Chief Executive Officer and staff of the PLF to contact any attorney with multiple claims to attempt to mitigate future damages.

(BOD 6/18/99; BOD 8/6/99; BOG 9/16/99)

CHAPTER 7 EXCESS COVERAGE PROGRAM

7.100 EXCESS COVERAGE PROGRAM

(A) The PLF will offer excess coverage through an excess program within the PLF as authorized under ORS 9.080(2)(a). The Board of Directors of the PLF will be responsible for the excess program (subject to the ultimate control of the Board of Governors as in other matters), but delegates underwriting to the ~~Excess Committee~~ and the Chief Executive Officer.

(B) The excess program may maintain ~~retained earnings~~ a positive net position established from capital contribution, profit commissions, ceding commissions, investment income, and other sources. The purpose of the excess program ~~retained earnings~~ net position is

to provide excess program stability, capital to permit the PLF to retain some risk in its reinsurance agreements, and reserves against the possibility of failure by a reinsurer.

(BOD 6/30/97; BOG 7/26/97; BOD 10/3/97; BOG 11/15/97; BOD 5/14/04; BOG 6/11/04)

7.150 MANAGEMENT

The Professional Liability Fund will manage the excess program in accordance with the policies of the PLF Board of Directors. The excess program will reimburse the Professional Liability Fund for services so that the cost of the excess program is borne by the participants in the excess program through their excess coverage assessments and is not subsidized by the primary fund. All assets, liabilities, revenues and expenses of the excess program will be accounted for as a separate fund.

7.200 EXCESS CLAIMS SETTLEMENT

(A) The Board of Directors will have settlement authority for all claims in the primary and excess layers. In each case, settlement decisions are to be made by the ~~B~~oard considering only the interest of each respective fund, with due consideration to the duties owed under law by a primary carrier to an excess carrier, and vice versa. In the event of uncertainty or potential conflict as to appropriate trial strategy or settlement of a particular claim between the interests of the primary and excess programs, the Board of Directors may establish one or more advisory committees, seek legal or expert advice, or take such other action as the Board deems appropriate.

(B) All discussions regarding the handling of specific claims covered by the excess program will be conducted in executive sessions for reasons of confidentiality pursuant to ORS 192.660(2) (f) and (h).

(C) Excess claims will be settled according to the procedures stated at Policy 4.400. The member of the Board of Directors designated to review a

claim for settlement purposes under Policy 4.400(A) will have authority over the claim at both the primary and excess layers.

(BOD 8/11/95; BOG 11/12/95; BOD 6/30/97; BOG 7/26/97)

7.250 APPLICATION AND UNDERWRITING

(A) The PLF may require firms seeking excess coverage to complete an application form designated by the PLF. The PLF may request additional relevant information at any stage of the underwriting process. Firms will be underwritten based upon this application, such other information as the PLF deems relevant, and the underwriting guidelines established in sections 7.300 ~~and 7.350~~. Because the information requested from firms is personal, sensitive, confidential, and relates to litigation matters, applications and other underwriting materials will be exempt from disclosure under the Public Records Law, ORS 192.410 et seq. Because some meetings of the Excess Committee ~~are~~ may be for the purpose of considering and discussing the information contained in the applications submitted by firms as well as the confidential claims information maintained by the PLF, the meetings of the Excess Committee ~~will~~ may be held in executive session under the Public Meetings Law, ORS 192.610 et seq., pursuant to the provisions of ORS 192.660 (1)(f) and other applicable sections.

(B) No final decisions or action on an application will be made by the Excess Committee. ~~The committee's function is limited to committee may review and discussion of firm applications, and but~~ all final decisions or action on applications will be taken by the Chief Executive Officer or the Chief Executive Officer's designee with a right of appeal to the PLF Board of Directors.

(C) For underwriting purposes the PLF may limit the excess coverage offered to a firm in such areas as, but not limited to, imposition of a retroactive date as to a firm or individual members; imposition of an exclusion as to claims

from particular claimants, transactions, events, or subject matters; imposition of an exclusion as to claims from business entities in which the firm, firm members, or their families have an ownership or management interest or for which they serve as an officer or director; and other coverage limitations. For underwriting purposes the PLF may impose additional requirements as a condition to obtaining coverage including, but not limited to, higher assessment rates, additional surcharges, or a requirement that the firm or firm members undertake specified education or personal and practice management assistance.

(BOD 8/27/04; BOG 10/13/04; BOD 10/9/09; BOG 10/30/09)

(D) In order to ensure the integrity and quality of the underwriting process and to maintain the viability of the excess program, the individual underwriting decisions of the PLF will be final and will not be reviewed by the Board of Governors.

(E) Excess plans are underwritten and issued on an annual basis and are not renewable.

(F) No information from the Oregon Attorney Assistance Program or the PLF's other assistance programs will be obtained or used in the underwriting process unless both the applicant firm and affected firm member(s) request that it be considered. See PLF Policy 6.300.

(BOD 2/18/94; BOG 3/12/94; BOD 6/30/97; BOG 7/26/97; BOD 10/3/97; BOG 11/15/97; BOD as rev. 11/21/97; BOD 8/16/02; BOG 10/3/02; BOD 8/27/04; BOG 10/13/04)

7.300 APPLICATIONS ACCEPTABLE FOR UNDERWRITING EXCESS COVERAGE ASSESSMENT

(A) Applications will be accepted submitted for underwriting will be evaluated against a variety of factors, including, but not limited to: prior claims experience, area of practice, CLE history, firm size, amount of excess insurance sought, ratio of attorneys to non-attorneys in firm, and the use and quality of

recommended standard practice management systems if all of the following criteria are met:

~~(1) No claim has been made against any firm member during the prior five calendar years in which the total of expense plus indemnity paid equals or exceeds \$100,000;~~

~~(2) No firm member has any open claim for which the total of PLF expense and indemnity reserves equals or exceeds \$100,000;~~

~~(3) No firm member has any open claim reserved at less than \$100,000 with potential damages which equal or exceed \$100,000;~~

~~(4) No firm member has two or more claims made during the prior five calendar years for which any indemnity was paid;~~

~~(5) No firm member has two or more open claims pending;~~

~~(6) No firm member has any claim made since July 1, 1978 for which the indemnity paid equals or exceeds applicable PLF indemnity limits;~~

~~(7) No present member maintains his or her principal office as defined in ORS 9.080(2)(c) outside the state of Oregon or is not a member of the Oregon State Bar.~~

~~(8) Neither the firm nor any member practices in any Higher Risk Practice Area, and neither the firm nor a predecessor firm, nor any present or former member of the firm or a predecessor firm, has practiced in any Higher Risk Practice Area during the prior three calendar years; and~~

~~(9) Neither the firm nor any firm member provides an answer on the application which is different from answers approved by the PLF Board of Directors as indicating good practices or acceptable levels of risk.~~

~~(10) In the course of underwriting, no information becomes known to the PLF that indicates that the firm presents an unacceptable risk of excess claims.~~

~~(B) As used in these policies, "firm member" includes any partner, associate, professional corporation, professional corporation shareholder, and of counsel attorney of the firm or a predecessor firm for whom excess liability coverage is being sought.~~

~~(C) As used in these policies, Higher Risk Practice Areas include:~~

~~(1) Living Trust Law, which is defined as preparation of living trusts and related documents in connection with mass or general advertising and marketing of the service to the general public.~~

~~(2) Securities Law, which is defined as:~~

~~(a) The preparation of any part of a subscription document, prospectus, offering circular, disclosure statement or tax opinion in connection with the issuance, offer, sale, or transfer of a security.~~

~~(b) Providing services to a seller or underwriter relating to the offer or sale of a security, which is required to be registered under state or federal law.~~

~~(c) Providing services to an issuer or other seller relating to the offer or sale of a security, which is exempt from federal or state registration requirements.~~

~~(d) Providing services relating to the preparation or filing of periodic and special reports (e.g., Form 10-K, 10-Q or 8-K filings) with the Securities and Exchange Commission.~~

~~(e) Advising clients regarding reporting obligations under the securities laws.~~

~~(f) Providing advice to clients under the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Company Act of 1940, or the Investment Advisers Act of 1940.~~

~~(g) Providing advice to clients on broker dealer or investment adviser compliance.~~

~~(h) Advising unregistered broker-dealers (i.e. "finders") on transactions where they receive compensation for assisting with an offering of a security.~~

~~(i) Acting as bond counsel or special counsel in connection with the issuance of a security.~~

~~(j) Involvement in the direct sale to an individual purchaser of any security. (This category is intended to measure potential "seller" liability under state and federal securities laws, such as Section 12 of the Securities Act of 1933 or ORS 59.115 (1)).~~

~~(RCG 10/2/91, RCG 11/8/91, RCG 5/23/92, 10/1/92, RCG 11/13/92, RCG 9/24/93, RCG 11/19/93, RCG 8/15/94, RCG 6/25/94, RCG 10/19/94, RCG 11/15/98, RCG 5/14/02, RCG 10/23/02, RCG 10/19/09, RCG 10/19/09)~~

7.350 ADDITIONAL UNDERWRITING BASES FOR ACCEPTANCE

(A) An application that is not accepted for underwriting under the criteria listed in Section 7.300 (A) may nevertheless be accepted for underwriting if the PLF determines that one or more of the following provisions apply as appropriate:

(1) Prior claims against a firm member causing a failure under criteria 7.300(A)(1) (6) do not indicate a greater than average likelihood of future claims, either because of the nature of the claims, changes in the firm's or the firm members' practice, or for other reasons;

(2) Despite a failure under 7.300(A)(8), the firm and its members have adequate skills and ability to engage in Higher Risk Practice Areas without posing an unacceptable risk of excess claims and previous work by the firm, predecessor firm, firm member, or former member in Higher Risk Practice Areas does not pose an unacceptable risk of excess claims;

~~(RCG 10/29/09, RCG 10/10/09)~~

~~(3) Notwithstanding a failure of 7.300(A)(9) because any answer on the application is different from answers approved by the Board as indicating good practices or acceptable levels of risk, the firm or firm member has taken adequate steps to eliminate any unacceptable level of risk, the answer on the application has been satisfactorily explained to the PLF so that it no longer indicates an unacceptable level of risk, or refers the firm for personal or practice management assistance that is likely to mitigate any unacceptable level of risk;~~

~~(RCG 8/27/04, RCG 10/11/04)~~

(4) Despite a failure of 7.300(A)(7), the excess program is able to offer coverage to the firm based upon the underwriting standards stated in Section 7.300(A) and reinsurance requirements that allow the PLF to extend to any firm member who maintains his or her principal office as defined in ORS 9.080(2) (c) outside the state of Oregon or to a non-Oregon attorney whose principal office is in Oregon; and

(5) The firm has presented a response to a failure under Section 7.300(A)(10) which, in the opinion of the PLF, indicates that the firm does not present an unacceptable risk of excess claims and no other underwriting criteria prohibits coverage.

The PLF may request additional information from the applicant to determine whether or not the additional criteria stated in this section are met.

(B) In addition to the bases for acceptance listed in 7.350(A), the PLF may accept an application that has failed any of the criteria under Section 7.300(A) if the PLF is convinced, after considering all relevant underwriting criteria and information, including any additional information provided by the firm and any assessment rate adjustment, condition or restrictions imposed under Section 7.250(C), that the firm does not present an unacceptable risk of excess claims.

~~(B) 10/29/09; BOG 10/30/09~~

~~(CB)~~ If the PLF determines that an application is unlikely to be accepted for underwriting under the applicable criteria of Sections 7.300 and 7.350, the PLF will notify the applicant of its likely decision and the reasons. The applicant will be offered an opportunity (1) to present additional information to the PLF to demonstrate why its application meets the criteria for acceptance, (2) to withdraw its application, or (3) to have its application rejected by the PLF. If the applicant does not withdraw its application, ~~t~~The PLF will ~~thereafter~~ notify the applicant of its final underwriting decision and the reasons.

(BOD 10/9/09; BOG 10/30/09)

~~(CD)~~ If a firm has not been accepted for underwriting in a given year, the firm will not be considered for underwriting in the following two years unless there is a showing of an acceptable change in circumstances. It will be the responsibility of the firm seeking excess coverage to show an acceptable change in circumstances.

~~(ED)~~ If in a given year the PLF has offered excess coverage to a firm on the basis of any special coverage or practice limitations, restrictions, or conditions, those same limitations, restrictions, or conditions will apply to any offers of excess coverage in the following two years unless there is a showing of an acceptable change in circumstances. It will be the responsibility of the firm seeking excess coverage to show an acceptable change in circumstances.

(BOD 10/2/91, BOG 11/8/91; BOD 9/23/92, BOG 11/13/92; BOD 9/24/93, BOG 11/19/93; BOD 10/3/97, BOG 11/15/97; BOD 8/16/02, BOG 10/2-3/02; BOD 10/28/03; BOG 11/15/03)

7.400 EXCESS COVERAGE ASSESSMENT

(EA) Assessments for excess coverage will be determined through an underwriting formula and rate sheet. Base rates will be set by the PLF in agreement with reinsurers and will be approved by the Board of Governors upon recommendation of the PLF Board of Directors.

~~The assessment rates for excess coverage will be established by the Board of Governors upon the recommendation of the PLF Board of Directors.~~ ~~t~~The assessment may include debits or credits for firms based on prior claims, practice specialties, the extension of prior acts coverage (waiver of retroactive date), and other factors.

~~(EB)~~ The Board may establish requirements and procedures concerning the payment of excess coverage assessments including, but not limited to, payment due dates, cancellation for non-payment, and financing of assessments.

~~(GC)~~ The excess program may be assessable against the program participants, including firm members. Supplemental assessments will be made if required according to the terms of the excess coverage plan.

(BOD 12/6/91, BOG 3/13/92; BOD 9/23/92, BOG 11/13/92; BOD 10/9/09; BOG 10/30/09)

7.4050 REINSURANCE

The Professional Liability Fund may obtain such reinsurance for the excess program as it deems appropriate and economically advantageous. ~~The Board of Directors will be~~ PLF will obtain ~~provided~~ a formal reinsurance security report at least annually concerning the reinsurers participating in the excess program.

(BOD 9/24/93, BOG 11/19/93; BOD 6/30/97; BOG 7/26/97)

7.500 REPORTS

On a quarterly basis, the ~~C~~ Chief Executive Officer will report to the Board of Directors concerning the status of claims with excess liability potential and will furnish such additional information as the Board of Directors may request.

(BOD 6/30/97; BOG 7/26/97)

7.6700 ADDITIONAL EXCESS PROGRAM RULES

~~(A) Excess Coverage Inquiries: Former firm attorneys may inquiry-inquire~~ in writing regarding

their former law firm's excess coverage status. Information provided may include whether the former attorney's firm had or has excess coverage, the coverage period (and applicable coverage limits, if any), and whether the former attorney is listed on the firm's coverage documents.

firm's retroactive date, whichever date is more recent.

(2) The PLF may give a credit to firms with recent excess coverage retroactive dates according to the following schedule:

~~(D) Of Counsel/Part time Attorneys: There is no charge for attorneys who: (1) are over 65 years of age, (2) are in an "Of Counsel" relationship with the firm, (3) who practice no more than 250 hours per year, and (4) do not practice in any Higher Risk Practice Area.~~ [c.3]

<u>Period between Firm Retroactive Date and Start of Coverage Period</u>	<u>Excess Assessment Credit</u>
0 months to 18 months	50 percent
Over 18 months to 30 months	30 percent
Over 30 months to 42 months	15 percent
Over 42 months	No credit

(B) Coverage Limits and Primary Coverage: A firm which obtains excess coverage from the PLF must obtain the same amount of excess coverage for each member of the firm. Excess coverage will not be extended to any firm which includes any attorney who does not maintain current primary PLF coverage unless the firm obtains coverage for the attorney under the provisions of Section (D) below. Firms will not be offered excess coverage limits over \$1.7 million unless they have maintained excess coverage of at least \$1.7 million with some carrier for one year prior to applying for PLF excess coverage. Firms may be offered coverage excess coverage over \$1.7 million without having had excess coverage of at least \$1.7 million with some carrier for one year prior to applying for PLF excess coverage if the firm does not present an unacceptable level of risk and the firm can demonstrate that the reason for the limits increase is due solely to client coverage requirements (See Section (M) below regarding coverage limits restrictions at the \$9.7 million level).

The PLF may choose not to offer the credit to a firm for the underwriting considerations stated at Policies 7.250 and 7.350.

(C) Prior Acts Coverage/Retroactive Date:

(D) Non-Oregon Attorneys and Out-of-State Branch Offices:

(1) The retroactive date applicable to claims made under the excess coverage plan will be the same retroactive date that applies under the applicable primary PLF Claims Made Plan or Plans or the

(1) Firms with non-Oregon attorneys or out-of-state branch offices may be offered coverage subject to the Excess Program underwriting criteria, the restrictions of this section and any other additional underwriting and coverage limitations imposed by the PLF or its reinsurers. For the purposes of PLF Policy 7.700(E), registered patent agents will be treated the same as non-Oregon attorneys. Non-Oregon attorneys whose principal office is in Oregon must be practicing in areas of law that do not require Oregon bar membership.

(a) Excess coverage may be offered to firms which maintain out-of-state branch offices if the attorneys in such branch offices meet the underwriting criteria established for Oregon firms and such additional criteria as may be established by the PLF and the reinsurers. Coverage will not be offered for branch offices in any state determined by the PLF to represent an unacceptable level of risk.

(b) Excess coverage may be offered to firms with non-Oregon attorneys if the non-Oregon attorneys maintain principal offices in Oregon and if the non-Oregon attorneys meet the underwriting criteria established for Oregon firms and such additional criteria as may be established by the PLF and its reinsurers.

(2) The PLF may establish conditions, terms, and rates for coverage for firms with non-Oregon attorneys and/or out-of-state branches, including additional endorsements and exclusions. The PLF may offer "drop-down" coverage for the firm for any firm members not covered by the PLF primary fund, subject to such deductibles or self-insured retentions as the PLF may establish.

(3) The PLF ~~will~~ may not offer excess coverage to any firm if the total number of out-of-state lawyers in the firm exceeds more than 30% of total firm lawyers at the time of application or at any time during the past five years.

(4) Unless otherwise determined by the PLF, firms will be charged for excess coverage for non-Oregon and out-of-state attorneys at a per-attorney rate equal to the current primary rate plus the rate for excess coverage applicable to other firm attorneys.

(5) Coverage for non-Oregon and out-of-state attorneys will be subject to a deductible of \$5,000 per claim.

(BOD 10/21/05; BOG 11/19/05; BOD 6/27/08; BOG 7/18/08; BOD 10/9/09; BOG 10/30/09)

(EF) Installment Payment Plan:

(1) Firms will have the option of paying the excess coverage assessment on an installment basis as follows:

<u>Payment Due Date</u>	<u>Percent of Total</u>
January 1	40%
May 1	35%

(2) Firms ~~which~~ that choose the installment payment plan will be charged a service charge equal to \$25 plus interest of 7% per annum on the outstanding balance. The service charge must be paid with the first installment and is non-refundable. Installment payments are only available in a given year if the coverage period for a firm begins prior to March 1; if the coverage period for a firm begins on March 1 or later, the firm will be required to pay its annual excess assessment in a single payment.

(3) Firms will have a ten-day grace period for payment of installments. If payments ~~are~~ not received during the grace period, the firm's excess coverage plan will be canceled as provided under the excess coverage plan. The PLF may, but will not be required to, reinstate coverage if payment of an installment is made within ten days after the expiration of a grace period, and may require that the balance of the firm's assessment for the year be paid in full as a condition of reinstatement.

~~(G) Application: The Board of Directors approves the answers shown on the marked copy of the application and supplements attached to these rules as indicating good practices or acceptable levels of risk in accordance with Policy 7.300(A)(8).~~

(FH) Cancellation: If an excess coverage plan is canceled by the PLF, the assessment will be determined on a pro rata basis. If excess coverage is canceled, the firm will still remain liable for supplemental assessment but on a pro rata basis according to the period of coverage during the year.

~~(I) (Reserved)~~

(G) Predecessor Firm Endorsement:

(1) A former firm which does not meet the Excess Plan definition of a “predecessor firm” may be added for underwriting reasons as a “predecessor firm” by special endorsement. The following conditions, among others, must ordinarily be met:

(a) The former firm is no longer engaged in the practice of law;

(b) The former firm is not covered by any excess policy, including extended reporting coverage under such policy;

(c) The former firm and the attorneys who worked for the firm do not present an unacceptable level of risk in the view of the PLF; and

(d) At least 50 percent of the firm attorneys who were with the former firm during its last year of operation and who are presently engaged in the private practice of law in Oregon will carry current PLF excess coverage during the year.

The PLF may impose special limitations or conditions, and may impose an additional assessment for underwriting reasons as a condition to granting the endorsement, or may decline to grant the endorsement for underwriting reasons.

(2) No firm may be listed as a predecessor firm (by endorsement or otherwise) for the same or an overlapping period of time on more than one Excess Plan.

(K) Firm Changes After the Start of the Coverage Period:

(1) Except as provided in subsection (2), firms are not required to notify the PLF if an attorney joins or leaves the firm after the start of

the Coverage Period, and will neither be charged a prorated excess assessment nor receive a prorated refund for such changes. New attorneys who join after the start of the Coverage Period will be covered for their actions on behalf of the firm during the remainder of the year, but will not be covered for their actions prior to joining the firm. All changes after the start of the Coverage Period must be reported to the PLF on a firm’s renewal application for the next year.

(2) Firms are required to notify the PLF after the start of the Coverage Period if:

(a) The total number of current attorneys in the firm either increases by more than 100 percent or decreases by more than 50 percent from the number of current attorneys at the start of the Coverage Period.

(b) There is a firm merger. A firm merger is defined as the addition of one attorney who practiced as a sole practitioner or the addition of multiple attorneys who practiced together at a different firm (the “merging firm”) immediately before joining the firm with PLF excess coverage (the “current firm”). It is only necessary to report a firm merger to the PLF if the current firm is seeking to add the merging firm as a predecessor firm or specially endorsed predecessor firm to the current firm’s Excess Plan.

(c) There is a firm split. A firm split is defined as the departure of one or more attorneys from a firm with PLF Excess Coverage if one or more of the departing attorneys form a new firm which first seeks PLF Excess Coverage during the same Coverage Period.

(d) An attorney joins or leaves an existing branch office of the firm outside of Oregon.

(e) The firm establishes a new branch office outside of Oregon.

(f) 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.

(g) A non-Oregon attorney joins, or leaves the firm.

In each case under this subsection (2), the firm's coverage will again be subject to underwriting, and a prorated adjustment may be made to the firm's excess assessment.

(L) Discretionary Continuity Credit:

(1) 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 – see table below) 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 High Risk Practice Area, or fails to meet acceptable practice management criteria.~~

(BOD 02/14/14, BOG 02/05/14)

Full Years of Continuous PLF Coverage of Applicable Firm
 Continuity Credit
 (As Percentage Assessment)

10 or more	20%
9	18%
8	16%
7	14%
6	12%
5	10%
4	8%
3	6%
2	4%
1	2%

~~(2) No firm will be entitled to receive a continuity credit if the firm is receiving a credit for a recent retroactive date under Policy 7.700(D)(2).~~

(BOD 6/20/03; BOG 9/18/03)

(JAA) Extended Reporting Coverage:

~~(1) Firms which that purchase excess coverage for two full years will may be offered the following extended reporting coverage (ERC) options at the following prices (stated as a percentage of the firms' annual excess assessment for the last full or partial year of coverage):~~

~~(1)(2)~~

<u>Extended Reporting Coverage Period</u>	<u>ERC Premium</u>
12 months	100%
24 months	160%
36 months	200%
60 months	250%

~~If the last day of a firm's excess coverage is on or after July 1, the ERC premium will be calculated based on the firm's annual excess assessment for the year; if the last day of a firm's excess coverage is prior to July 1, the ERC premium will instead be calculated based on the firm's annual excess assessment for the prior calendar year if the firm carried excess coverage with the PLF during that year.~~

(2) A firm must exercise its right to purchase ERC and must pay for the ERC coverage within 30 days of termination or cancellation of its PLF excess coverage. The Chief Executive Officer may include wording in the Excess Coverage Plan to indicate that ERC options vary from year to year, and that any particular option may be unavailable in a future year.

(KAN) Continuous Coverage: The PLF will not offer a renewing firm continuous coverage from January 1 unless the firm's renewal application is received by the PLF in substantially completed

form by January 10 (or the next business day if January 10 is a weekend or holiday). If a renewal application is received after that date and the firm is approved for underwriting, the coverage period offered to the firm will begin on the day the renewal application was approved for underwriting and the assessment will be prorated accordingly. Renewing firms may qualify for the discretionary continuity credits 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.

(BOD 08/14/14; BOG 09/05/14)

(L) Current and Former Attorneys:

(1) _____ (1) — No attorney may be listed as a current attorney for the same or an overlapping period of time on more than one Excess Plan.

(2) _____ (2) — No attorney may be listed as a former attorney for the same or an overlapping period of time on more than one Excess Plan.

(M) Higher limits coverage: Firms who meet the additional underwriting criteria and procedures established by the PLF and its reinsurers may be eligible to purchase limits in excess of the \$4.7 million excess limits offered by the PLF's standard excess program. In accordance with reinsurance agreements, firms applying for higher limits coverage may be subject to additional underwriting considerations and may not be eligible for credits available with the standard excess program coverage.

(1) The higher limits coverage will be an additional \$5 million in excess of the \$4.7 million standard excess coverage. Firms will be charged for higher limits excess coverage at

rates proposed by the PLF Board of Directors and approved by the OSB Board of Governors. These rates are subject to reinsurer adjustment for firms meeting certain underwriting criteria.


(2) Firms will not be offered higher limits coverage above \$4.7 million unless they have maintained excess coverage with limits of at least \$4.7 million with the PLF or some other carrier for the prior two years.

(NQ) Non-Standard Excess Coverage: Firms who do not meet the underwriting criteria established by the PLF and its reinsurers under PLF Policies 7.300 and 7.350, may be eligible to purchase non-standard excess coverage offered by the PLF and its reinsurers. In accordance with reinsurance agreements, firms applying for non-standard excess coverage may be subject to additional underwriting considerations and may not be eligible for credits available with the standard excess program coverage.

(BOD 10/2/91; BOG 11/8/91; BOD 12/6/91; BOG 3/13/92; BOD 9/23/92; BOG 11/13/92; BOD 9/24/93; BOG 11/19/93; BOD 2/18/94; BOG 3/12/94; BOD 8/12/94; BOG 9/26/94; BOD 9/26/94; BOG 11/12/94; BOD 8/11/95; BOG 11/12/95; BOD 8/9/96; BOG 9/25/96; BOD 8/15/97; BOG 9/26/97; BOD 10/3/97; BOG 11/15/97; BOD 8/14/98; BOG 9/25/98; BOD 8/6/99; BOG 9/16/99; BOD 11/19/99; BOG 1/28/00; BOD 10/20/00; BOG 11/20/00; BOD 12/7/01; BOG 12/6/01; BOD 12/3/02; BOG 12/16/02; BOD 10/28/03; BOG 11/15/03; BOD 10/22/04; BOG 11/20/04; BOD 6/27/08; BOG 7/18/08)

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: November 20, 2015
Memo Date: November 3, 2015
From: Carol J. Bernick, PLF CEO 
Re: PLF Policy 5.100

Action Recommended

The PLF Board of Directors asks you to approve the attached changes to Section 5.100 of the PLF Policies.

Background

The proposed changes raise the threshold to \$10,000 (from the current \$500) for checks requiring two signatures. This change is in keeping with the Bar's practices and was unanimously approved by the PLF Board on November 2, 2015. The second change vests with the CEO the responsibility to determine who may be a check signer, reporting any changes to the Board when they occur. The current policy requires the Board to approve any new check signer. Determining who should sign checks is an administrative function that is properly vested with the CEO. The Board approved this change in a 5-2 vote (two members were absent) on November 2, 2015. The PLF auditors expressed that both changes were acceptable to them.

Attachment

**CHAPTER 5
FINANCIAL**

5.100 BANKING

(A) The Board of Directors will designate bank depositories under the standard bank resolution forms. Authorized signatories to such bank accounts will be the Chief Executive Officer or Chief Financial Officer or one or more employees ~~recommended-designated~~ by the Chief Executive Officer and reported to the Board of Directors. ~~and authorized by the Board of Directors.~~ One signature will be required on any check under ~~\$2,500~~10,000, with two signatures required on any check of ~~\$2,500~~10,000 or more. At least one signature on any check of \$25,000 or more will be the signature of the Chief Executive Officer or the Chief Financial Officer. In the absence of the CEO and CFO, either one may designate either the Director of Administration, Director of Claims, or Director of Personal and Practice Management.

(B) Any check payable to a Director, the Chief Executive Officer, or the Chief Financial Officer will bear two signatures, not to include the signature of the payee.

(C) The Chief Executive Officer or Chief Financial Officer will review a copy or record of any check not signed by either of them, together with supporting documentation, within ten days of disbursement.

(BOD 12/6/91; BOG 3/13/92; BOD 12/3/93; BOG 3/12/94)

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: November 19, 2015
From: MCLE Committee
Re: MCLE Sponsor Accreditation Fee Policy

Action Recommended

Consider and approve the MCLE Committee's proposal to eliminate Regulation 4.350(e), which provides an exemption from payment of the sponsor fee by local bar associations in Oregon.

Background

At its December 2014 meeting, the MCLE Committee began discussion of the Board of Governors' request to recommend a sponsor accreditation fee policy that applies equally (or at least more equitably) to all applicants. The focus of the discussion was on Regulation 4.350(e), which is set forth below.

Reg 4.350 (e) All local bar associations in Oregon are exempt from payment of the MCLE program sponsor fees. However, if accreditation applications are received more than 30 days after the program date, the late processing fee set forth in MCLE Regulation 4.350(d) will apply.

A 2005 House of Delegates resolution that expressed concerns about small, rural bar associations that charge low or no member fees and offer a small number of CLE programs as a way to promote networking opportunities for their members resulted in this regulation being approved by the Board of Governors at its November 2005 meeting. The regulation also applies to the larger local bars that offer frequent CLEs and realize significant savings from not having to pay the sponsor accreditation fee.

The Committee has set forth two options for review by the Board of Governors. Option 1, which is favored, is to eliminate the exemption entirely.

Option 1:

~~Reg 4.350 (e) All local bar associations in Oregon are exempt from payment of the MCLE program sponsor fees. However, if accreditation applications are received more than 30 days after the program date, the late processing fee set forth in MCLE Regulation 4.350(d) will apply.~~

Reasons why this option is favored:

- It addresses the BOG's concern that the existence of any exemption does not fairly apportion the costs of this regulatory program among CLE providers.
- Even without a specific exemption for local bars, a sponsor could still use the workaround already in the rules (having an OSB member submit an accreditation application as an individual member rather than a sponsor). See Rules 4.3(b) and (f).

Rule 4.3(b) A sponsor or individual active member may apply for accreditation of a CLE activity by filing a written application for

accreditation with the MCLE Administrator. The application shall be made on the form required by the MCLE Administrator for the particular type of CLE activity for which accreditation is being requested and shall demonstrate compliance with the accreditation standards contained in these Rules.

Rule 4.3 (f) Accreditation of a CLE activity obtained by a sponsor or an active member shall apply for all active members participating in the activity.

- The sponsor fee is only \$40 for programs that are four or fewer credit hours, which is the majority of programs offered by local bars. In addition, many of the programs would qualify for the series rate, which is set forth in Regulation 4.350(c):

Reg 4.350(c) Sponsors presenting a CLE activity as a series of presentations may pay one program fee of \$40.00 for all presentations offered within three consecutive calendar months, provided:

(i) The presentations do not exceed a total of three credit hours for the approved series; and

(ii) Any one presentation does not exceed one credit hour.

Please note that the Committee is aware that eliminating this exemption will have a financial impact on all local bar associations but, given the workaround in Rule 4.3, the low cost of the sponsor fee and the series rate available, believes the economic impact will not be significant.

The current regulation applies only to local bar associations in Oregon. It does not apply to specialty bars. Around the same time that the BOG asked the MCLE Committee to recommend a sponsor accreditation fee policy that applies equally (or at least more equitably) to all applicants, the Oregon Women Lawyers ("OWLS") asked the MCLE Committee to exempt it from the sponsor accreditation fee as well.

In order to address these two competing requests, the MCLE Committee also proposes a second option for the BOG to consider.

Option 2:

Reg 4.350 (e) All local and specialty bar associations in Oregon are exempt from payment of the MCLE program sponsor fees if the program is offered at no charge, excluding meal costs, to its members. However, if accreditation applications are received more than 30 days after the program date, the late processing fee set forth in MCLE Regulation 4.350(d) will apply.

Committee members agreed that this proposed regulation is more equitable than the current regulation because it also applies to specialty bars. It also limits the exemption only to local and specialty bars that offer the program at no charge to its members. Thus, the Multnomah Bar Association, which is the second largest bar association in the state and currently exempt from payment of the sponsor fee, would be required to pay the sponsor fee unless it is offering free programs to its members.

Because of the stipulations in this option, it may require significant additional software programming, which will result in increased costs for the OSB. It will also require developing a definition

of a “specialty bar.” Such a definition may look something like this:

A specialty bar is an association that represents a particular demographic segment (age, gender, race, ethnicity) of the Oregon State Bar and addresses the issues or concerns of that group.

Many OSB Sections offer free programs to their members and they likely will want to be included in the exemption. It is also possible that other providers that offer free programs, such as the Oregon New Lawyers Division and the Professional Liability Fund, will want to be included in the exemption. Therefore, even if the BOG adopted a narrow definition of “specialty bar” at the outset, it is likely that other providers will ask the MCLE Committee and Board of Governors to apply the exemption to them in the future.

Therefore, although both options are acceptable to the MCLE Committee, because of the reasons set forth above, it recommends the BOG approve Option 1.

BRYANT
LOVLIE
& JARVIS

EST. 1915
ATTORNEYS AT LAW

September 9, 2015

ATTORNEYS

Neil R. Bryant

Sharon R. Smith

John D. Sorlie

Mark G. Reinecke

Melissa P. Lande

Paul J. Taylor

Jeremy M. Green

Melinda Thomas

Heather J. (Hepburn) Hansen

Garrett Chrostek

Danielle Lordi

Caroline J. Ponzini

Via: First Class Mail

Richard G. Spier,
President, OSB Board of Governors
2536 NE 28th Ave
Portland, OR 97212-4916

Dear Mr. Spier,

The Deschutes County Bar Association is in favor of retaining the \$40 CLE credit application fee waiver for local bar associations. It is our understanding that this issue came before the Board of Governors in September of 2014 and is still under consideration.

Opportunities to attend CLEs are limited in Central Oregon. The DCBA is the only local organization to host regular live CLEs, where our members can not only meet our presenters, but network with each other as well. It has been our experience that the benefits of in person CLE events stretch beyond legal education. These events strengthen our local bar and provide connections with legal professionals state wide. Last season, DCBA CLEs provided the opportunity for Central Oregon lawyers to meet and learn from Senior Judge and University of Oregon Law Professor David Schuman, Oregon State Bar General Counsel Helen Hierschbiel, Presiding Judge Alta Brady and Trial Court Administrator Jeff Hall.

Charging all local bar associations a \$40 CLE fee would have a significant economic impact on our organization's ability to host these programs. Our membership has voted not to pay annual dues to fund the DCBA, but rather to pay per event. Between September, 2014 and May, 2015 the DCBA hosted nine CLEs at \$25 per attendee. After expenses to host the CLE, our average net income is less than \$150 per event. We use these funds to host events like the Supreme Court reception held last October, and to honor retiring judges and deceased members of the Central Oregon legal community. If required to pay a \$40 fee for each CLE, we would not have the financial ability to support the legal community in these important ways.

During our annual membership meeting on August 18, 2015, our members voted unanimously to oppose eliminating the fee waiver and asked the DCBA board of directors to communicate their strong opposition to you.

Please do not hesitate to contact the board of directors with any questions. Thank you for your consideration.

Sincerely,



Cara Ponzini

Deschutes County Bar Association President

Cc: Helen Herschbiel (via first class mail)
Kirsten Naito, DCBA Vice-President (via email)
Stephen Eichelberger, DCBA Secretary (via email)
Pat Cougill, DCBA Treasurer (via email)

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: November 19-20, 2015
Memo Date: November 9, 2015
From: Sarah Petersen, Chair, New Lawyer Mentoring Program
Kateri Walsh, Director, New Lawyer Mentoring Program
Re: Oregon Supreme Court New Lawyer Mentoring Rule

Action Recommended

Forward to the Oregon Supreme Court the attached amendments to the New Lawyer Mentoring Rule, with recommendation for adoption.

Issue

The Oregon State Bar New Lawyer Mentoring Program is thankful to the Board of Governors for its continued support of the program's mission. We are pleased to report that in the four years since the program's inception, nearly 1,400 new lawyers have been welcomed into the profession by seasoned OSB members. Similarly, it has enrolled nearly 1,200 mentkwers in a program that builds positive engagement with the OSB, and promotes the professionalism, collegiality, and competence that make Oregon a particularly gratifying place to practice law.

We respectfully ask the Board of Governors to recommend to the Oregon Supreme Court the attached amendments to the court's New Lawyer Mentoring Rule.

The most substantive change, to Subsection 4, regards the eligibility requirements for mentors. The current rule requires active OSB membership, five years of experience and a clean recent disciplinary history.

We have heard from a variety of attorneys who practice in Oregon and would like to serve as mentors, but who practice in federal settings that do not require OSB membership. Examples would be attorneys who practice before the Social Security Administration or the Internal Revenue Service.

Of particular note is immigration law, an area where we regularly experience a shortage of mentors due to the large number of new lawyers interested in this practice area. Noting the complexity and high stakes in this area of law, we would like to open new avenues for service to assure that each new lawyer has prompt access to a mentor as they begin their professional life.

The rule revision would still require licensure in at least one U.S. state. It would also grant the NLMP Administrator the discretion to recommend attorneys who are not OSB members for appointment as NLMP mentors. This discretion is sought simply to provide for any categories not expressly captured in the drafting of the rule.

Finally, the changes to Subsection 7 are sought to help the rule comport with how the NLMP program is currently practicing. Although the original intent was to link the program year to the OSB's two swearing-in ceremonies, we find that New Lawyers are being sworn in more regularly throughout the entire calendar year, and the program has adjusted to that reality.

New Lawyer Mentoring Program Rule

(adopted by the Oregon Supreme Court December 6, 2010; revised January 16, 2013)

- 1. Applicability.** All lawyers admitted to practice in Oregon after January 1, 2011 must complete the requirements of the Oregon State Bar's New Lawyer Mentoring Program (NLMP) except as otherwise provided in this rule.
- 2. Administration of the NLMP; MCLE Credit.**
 - 2.1. The OSB Board of Governors shall develop the NLMP curriculum and requirements in consultation with the Supreme Court and shall be responsible for its administration. The OSB Board of Governors shall appoint a standing committee to advise the BOG regarding the curriculum and administration of the NLMP.
 - 2.2. The OSB Board of Governors may establish a fee to be paid by new lawyers participating in the NLMP.
 - 2.3. The OSB Board of Governors shall establish by regulation the number of Minimum Continuing Legal Education credits that may be earned by new lawyers and mentors for participation in the NLMP.
- 3. New Lawyer's Responsibilities.**
 - 3.1. Unless deferred or exempt under this rule, new lawyers must enroll in the manner prescribed by the OSB.
 - 3.2. The new lawyer shall be responsible for ensuring that all requirements of the NLMP are completed within the requisite period including, without limitation, filing a Completion Certificate executed by the assigned mentor attesting to successful completion of the NLMP.
- 4. Appointment of Mentors.**
 - 4.1 The Supreme Court may appoint mentors recommended by the NLMP Committee. Except as otherwise provided in this rule, To to qualify for appointment, the mentor must be a member of the OSB in good standing, with at least five years of experience in the practice of law, and have a reputation for competence and ethical and professional conduct.
 - 4.2 Attorneys who are not members of the Oregon State Bar, but are qualified to represent clients before the Social Security Administration, the Internal Revenue Service, the United States Patent and Trademark Office, or the United States Citizenship and

Immigrations Services office, are eligible to serve as a mentors, provided they meet the other requirements of Section 4.1 of this rule.

4.3 Attorneys who are not members of the Oregon State Bar may be appointed with the recommendation of the NLMP Administrator.

4.4 Attorneys described in Section 4.2 or Section 4.3 must be licensed to practice law in at least one U.S. state, possession, territory, commonwealth, or the District of Columbia, and shall be subject to the same additional criteria included in section 4.1 of this rule.

5. Deferrals.

5.1. The following new lawyers are eligible for a temporary deferral from the NLMP requirements:

5.1.1. New lawyers on active membership status whose principal office is outside the State of Oregon and for whom the OSB determines that no mentorship can be arranged conveniently; and

5.1.2. New lawyers serving as judicial clerks; and

5.1.3. New lawyers who are not engaged in the practice of law.

5.2. The NLMP administrator may approve deferrals for good cause shown. Such deferrals shall be subject to the continued approval of the administrator.

5.3. A new lawyer who is granted a deferral under section 5.1.1 of this Rule and who, within two years of beginning to practice law in any jurisdiction, establishes a principal office within the State of Oregon, must enroll in the next NLMP session. A new lawyer whose participation in the NLMP was deferred under sections 5.1.2 or 5.1.3 of this rule must enroll in the next NLMP session following the conclusion of the judicial clerkship or the lawyer's entering into the practice of law.

6. Exemptions.

6.1. New lawyers who have practiced law in another jurisdiction for two years or more are exempt from the requirements of the NLMP.

6.2 . The NLMP administrator may grant exemptions for good cause shown.

7. Certificate of Completion; Noncompliance.

- 7.1. Each new lawyer is expected to complete the NLMP ~~within 12 months of the date of enrollment, but in no event later than December 31 of the first full year of admission to the bar by the deadline assigned to them by the OSB,~~ unless the new lawyer has been granted an extension of time ~~by the OSB~~. The Certificate of Completion must be filed with the bar on or before that date.
- 7.2. A new lawyer who fails to file a Certificate of Completion by ~~December 31 of the first full year of admission~~ the assigned deadline shall be given written notice of noncompliance and shall have 60 days from the date of the notice to cure the noncompliance. Additional time for completion of the NLMP may be granted for good cause shown. If the noncompliance is not cured within the time granted, the OSB Executive Director shall recommend to the Supreme Court that the affected member be suspended ~~from membership in the bar~~.
- 8. Reinstatement.** A new lawyer suspended for failing to timely complete the NLMP may seek reinstatement by filing with the OSB Executive Director a Certificate of Completion and a statement attesting that the applicant did not engage in the practice of law during the period of suspension except where authorized to do so, together with the required fee for the NLMP and a reinstatement fee of \$100. Upon receipt of the foregoing, the Executive Director shall recommend to the Supreme Court that the member be reinstated. The reinstatement is effective upon approval by the Court. Reinstatement under this rule shall have no effect upon the member's status under any proceeding under the Bar Rules of Procedure.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: November 20, 2015
From: Sylvia E. Stevens, Executive Director
Re: CSF Claim No. No. 2014-12 ALLEN (Scott) Request for BOG Review

Action Requested

Consider the claimant's request for BOG review of the Client Security Fund Committee's denial of his claim for reimbursement.

Discussion

Claimant retained Sara Allen in April 2013 to represent him in obtaining custody of his two children. Shortly after being retained, Allan prepared and filed the initial pleadings and a motion seeking an immediate ex parte grant of custody based on alleged emergency. That motion was denied for lack of evidence of urgency. Communication between Claimant and Allen was sporadic, although the court docket indicates she continued to work on the matter. A limited judgment was entered in early September, and later in the month it appears Allen submitted a second emergency custody motion, which was also denied.

Claimant's last contact with Allen was in October 2013, when she reported having attended a status conference, that a custody evaluator had been agreed upon, and that Claimant's case was set for hearing in February 2014. Despite many attempts to contact Allen by telephone and email, Claimant heard nothing more from Allen. In January 2014 Claimant retained other counsel to complete his matter.

Claimant contends he had to "start over" with the new attorney and seeks an award of the entire \$5,000 he paid to Allen. There was no written fee agreement and the terms are not clear. In his application to the CSF, Claimant describes the fee as "a \$5,000 retainer and with agreement of further billing if necessary." However, in response to DCO's inquiry¹ Claimant said his understanding was that the \$5,000 was a flat fee for the representation.

CSF Rule 2.2 allows a reimbursement only when the loss is caused by the lawyer's dishonest conduct. In the case of the lawyer's refusal to refund the unearned portion of a fee, there must be evidence either that the lawyer (1) made a false promise to provide services in exchange for the fee or (2) failed to maintain the advance payment in trust until earned. A lawyer's failure to complete a legal engagement does not by itself constitute dishonest conduct. (CSF Rule 2.2.2.)

¹ Prior to filing his application with the CSF, Claimant had not made a disciplinary complaint to the bar. As is our practice, the CSF application was shared with DCO, who opened a file and began an investigation.

Allen clearly provided some services in exchange for the fees advanced by Claimant; it is not clear whether the fees were properly maintained in trust until earned.

Even if Allen failed to maintain the advance fees in trust CSF Rule 2.2.3 allows reimbursement of a legal fee only if:

- (1) the lawyer provided no legal services to the client in the engagement;
- (2) the legal services that the lawyer actually provided were, in the Committee's judgment, minimal or insignificant; or
- (3) the claim is supported by a determination of a court, a fee arbitration panel, or an accounting acceptable to the Committee that establishes that the client is owed a refund of a legal fee. No award reimbursing a legal fee shall exceed the actual fee that the client paid the attorney.

While the CSF Committee was sympathetic to the difficulty faced by a client who is abandoned by his lawyer in the middle of a case and the consequent additional costs that flow from that, the Committee denied Claimant's application on its conclusion that the services provided by Allen were more than "minimal or insignificant," and on the absence of an independent determination of any refund owed to the Claimant.

In his request for BOG review, Claimant alleges he received no value from Allen's services, because he eventually secured custody of his children through the services of the new lawyer (albeit based on the same information offered by Allen in the temporary custody motions). It does not appear his new lawyer had to refile the pleadings or re-do other work performed by Allen, but merely picked up where she had left off.

Attachments: Application for Reimbursement
Investigator's Report
Claimant's Request for Review

Andrew L. Scott
15298 SW Greenfield Drive
Tigard, OR 97224

September 27, 2015

Sylvia E. Stevens
Executive Director
Oregon State Bar
PO Box 231935
Tigard, OR 97281-1935

RECEIVED

SEP 30 2015

Oregon State Bar
Executive Director

Re: Client Security Fund Claim No. 2014-32
Lawyer: Sara Lynn Allen

Dear Ms. Stevens,

Thank you for your letter dated September 17, 2015 providing me with the status of my claim for reimbursement. While I appreciated the update, I am not in agreement with the findings that Sara Allen performed significant services on my behalf.

As you are aware, I paid Sara Allen a retainer of \$5,000.00 to serve as my attorney in a child custody case. When I initially hired Ms. Allen, the agreement was that she would provide counsel and attend hearing dates as needed. I agree that she did attend the first hearing date with me when we were assigned to the docket of Judge Letourneau. During the second hearing date, she failed to contact the court to ensure that Judge Letourneau would be in court. Instead, I showed up, there was a different judge, and Ms. Allen came in about 15 to 20 minutes late. The judge took no action because Ms. Allen was not properly prepared for court and the judge did not believe the children were in danger.

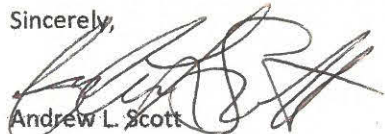
As you are aware, Ms. Allen abandoned her practice without any notice to me. I sent emails and made phone calls attempting to reach her. As the next court date grew near, I was forced to hire another attorney, Kevin Kelly, to represent me.

After I hired Mr. Kelly and attended a hearing with Judge Letourneau, he stated that we did initially (the 2nd hearing date with another Judge) have enough evidence initially and that the children were in danger. Judge Letourneau stated that had he been in court that day he stated that I would have received custody at that time.

Ms. Allen did not provide the services that she contracted for. I was forced to hire a new attorney and start all over again which cost me far more than an additional \$5,000.00. I received no benefit from Ms. Allen's alleged services. In addition, I was forced to wait an extra seven months in order to rescue my children from the harmful situation they were in.

I am requesting a breakdown of the services that Sara Allen allegedly performed on my behalf. This breakdown should contain an hourly accounting of her time and fees.

Sincerely,



Andrew L. Scott

cc: Dawn M. Evans, Disciplinary Counsel

CLIENT SECURITY FUND INVESTIGATIVE REPORT

FROM: Steven R. Bennett
DATE: May 14, 2015
RE: CSF Claim No. 2014-32
Claimant: Andrew L. Scott
Attorney: Sara Lynn Allen

Investigator's Recommendation

Recommend denial of the claim.

Statement of Claims

Claimant seeks reimbursement of \$5,000.00 retainer paid to Sara Allen in a child-custody case.

Material Dates

04/22/13	Claimant hired Allen to represent him to obtain full custody of his children
04/23/13	Petition filed in court, seeking change of custody
10/04/13	Status conference at court; Allen's email to claimant proving case status
12/02/13	Claimant made several attempts to reach Allen, learned she left her practice group
Jan 2014	Loss occurred – Client lost contact with Allen, went to her office and found it closed
01/09/14	Claimant sent letter terminating Allen
01/27/14	Claimant hired Kevin Kelly, who got setover and eventually succeeded in getting custody
11/24/14	Allen was suspended by OSB
12/18/14	CSF claim filed
3/30/15	DCO notified Allen that it is investigating possible misconduct by Allen in her representation of Andrew Scott

Discussion

Allen was admitted to the Oregon Bar in 1999. Scott met with Sara Allen in April of 2013, and paid her \$5,000, apparently as a flat fee. There was no written fee agreement. Immediately after Scott engaged Sara Allen, she prepared the Petition and several related documents, and filed them with the court the next day. Scott admitted he prepared no documents, so the implication is that whatever was filed with the court, Sara Allen prepared. This included a motion and order for temporary emergency custody.

Over the next 5 months, the court docket shows various filings and rulings. These included a motion and affidavit in for temporary parenting time. Sara Allen appears to have communicated with the client sporadically over the next few months, then made an appearance at a status conference in October, and communicated the case status to Scott.

Unfortunately, that was the last that Scott heard from Sara Allen, so in January of 2014 he sent her a letter terminating her services.

Sara Allen has entered a Stipulation for Discipline, stemming from six (6) separate bar complaints. In addition, DCO notified Sara Allen in March of this year, that the bar is investigating possible misconduct by Sara Allen in her representation of Andrew Scott. Based on my review of the 20-page Stipulation for Discipline, it is clear that Allen is dealing with many problems, including health condition, mental and emotional challenges, practice management issues, and possible other problems. These factors apparently led to her “dropping out” and abandoning numerous client projects. There is no excuse for such conduct.

On the other hand, Sara Allen did perform certain legal services for Andrew Scott, and such services were more than de minimis. Furthermore, there is no indication of dishonesty on her part. Rather than payment to Andrew Scott by the CSF, the parties should resolve matters as a fee dispute.

Findings and Conclusions

1. Claimant was the client of the accused.
2. The accused was an active attorney and member of the Oregon Bar at the time of the loss.
3. The accused maintained an office in Lake Oswego, Oregon, at the outset of the engagement.
4. Claimant engaged Allen at her office to represent him in a child custody proceeding.
5. After the initial consultation, Claimant met with Allen, and Allen performed certain valuable services for the benefit of Claimant.
6. Claimant paid Allen \$5,000 in advance, apparently as a flat fee.

7. Allen performed substantial services for the benefit of Allen, but then ceased communications and became un-reachable.
7. Claimant filed the CSF claim within 2 years of the discovery of Allen's conduct.
8. Allen failed to account for any part of the \$5,000 retainer deposit.
9. Claimant has made no attempt to collect from Allen, and claims he lost contact with her.
10. There is no direct evidence of dishonesty on the part of the Accused

RECEIVED

DEC 18 2014

Return completed form to:

Client Security Fund Application for Reimbursement

Oregon State Bar Executive Director

Oregon State Bar Client Security Fund PO Box 231935 Tigard, OR 97281-1935

2014-32

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: Andrew L. Scott
b. Street Address: 15298 SW Greenfield Drive
c. City, State, Zip: Tigard, OR 97224
d. Phone: (Home) 503-848-9715 (Cell) 541-580-9563 (Work) 503-297-5288 x111 (Other)
e. Email: lee.scott.a@gmail.com

2. Information about the lawyer whose conduct caused your claim (also check box 10A on page 3):

- a. Lawyer's Name Sarah Allen
b. Firm Name Allen Law Group PC
c. Street Address: 12755 SW 69th Ave
d. City, State, Zip: Portland, OR 97223
d. Phone: 503-726-5207
e. Email: sallen@allenlawgroup.com

3. Information about the representation:

- a. When did you hire the lawyer? April 22, 2013
b. What did you hire the lawyer to do? Represent me in my case for custody of my two children.
c. What was your agreement for payment of fees to the lawyer? (attach a copy of any written fee agreement) I paid a \$5,000 retainer and with agreement of further billing if necessary.
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? \$5,000
g. What services did the lawyer perform? I met with her twice in person and she came to court twice, although the second time the judge was not present so no legal proceedings occurred.

h. Was there any other relationship (personal, family, business or other) between you and the lawyer?

None

4. Information about your loss:

a. When did your loss occur? January 2014

b. When did you discover the loss? January 2014

c. Please describe what the lawyer did that caused your loss she abandoned her practice without notifying myself. She also did not turn my case over to another lawyer. She has not returned my emails or phone calls. I have been unable to obtain a refund of my retainer.

d. How did you calculate your loss? Retainer was \$5000 and had to start over again with new lawyer.

5. Information about your efforts to recover your loss:

a. Have you been reimbursed for any part of your loss? *If yes, please explain:* None

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.* She moved and did not leave a forwarding address and my phone calls were not returned.

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:* She moved and did not leave a forwarding address and my phone calls were not returned.

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* N/A

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:* Yes, Kevin L. Kelly, Hale & Kelly, LLP, 1318 SW 12th Avenue, Portland, OR 97201

8. Please give the name and the telephone number of any other person who may have information about this claim: None

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.)

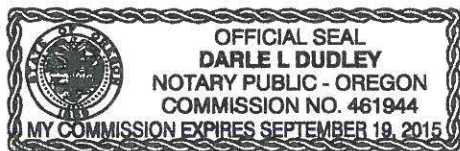
State of Oregon)
 County of Washington) ss

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.


 Claimant's Signature

Signed and sworn (or affirmed) before me this 17th day of DECEMBER, 2014.




 Notary's Signature
 Notary Public for OREGON
 My Commission Expires 9/19/2015

Please complete page 4 if an attorney is representing you for this claim.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: November 20, 2015
From: Sylvia E. Stevens, Executive Director
Re: CSF Claim 2013-24 GOFF (Mantell) Request for BOG Review

Action Requested

Consider claimant's request for BOG review of the Client Security Fund Committee's denial of his application for reimbursement.

Discussion

Procedural History of Claim

In March 2013, Elliott Mantell submitted a claim for reimbursement of \$47,609, comprised of \$37,500 for fees paid together with accrued interest at 9%.¹ The CSF Committee considered the claim at its meeting in November 2013 and voted unanimously to deny it on the grounds that there was insufficient evidence of dishonesty, the lawyer provided more than minimal services, and there was no independent determination that Mantell was entitled to a refund.

Upon being informed of the Committee's decision, Goff asked that the BOG review the Committee's decision. Because he claimed to have additional information that the Committee had not seen and wanted to make an oral presentation, he agreed to have the claim returned to the Committee for further evaluation. As it turned out, however, although the Committee waited throughout 2014, Mantell was unable to make any of the Committee's meetings and also did not provide any additional material for the committee to consider. The Committee discussed Mantell's claim again at some length in November 2014, reaching the same conclusion as it had initially.

At its January 2015 meeting, based on Mantell's failure to provide more information, the Committee decided that Mantell's request for review should be submitted to the BOG. When Mantell learned of that decision, he again asked for more time; he eventually appeared at the Committee's July 2015 and September 2015 meetings. At each appearance, he reiterated his belief that Goff had not earned the fees, but was not able to provide any information the CSF Committee had not already considered. After discussion, the Committee again denied Mr. Goff's claim and he made a timely request for BOG review.

¹ CSF Rule 2.9 provides that awards shall not include interest on a judgment or any amount in excess of funds actually misappropriated by the lawyer.

Goff's Representation

Mantell hired Eugene attorney Daniel Goff on April 7, 2007 in connection with several pending matters, including defense against a claim for outstanding legal fees and a possible legal malpractice action against his prior attorney. Goff agreed to handle Mantell's several legal matters for a fixed fee of \$50,000. On May 14, Goff sent Mantell a proposed fee agreement requiring payment of the \$50,000 fee in advance, plus an advance of \$5,000 toward costs. Mantell rejected the agreement and over the next few weeks there was an exchange of correspondence about the terms and scope of the representation. Mantell's principal objection was with the "earned upon receipt" language, preferring that Goff earn fees incrementally as work was completed. No fee agreement was ever signed.

Despite the absence of a fee agreement, between April 7 and June 7, 2007 Mantell deposited \$42,500 with Goff (which included a \$5,000 advance for costs), which Goff deposited into his trust account. Between April 10 and July 6, 2007 Goff withdrew most of the funds. Mantell terminated Goff's representation on July 6, complaining that Goff wasn't providing timely representation.

Mantell requested an accounting and a refund of the fees he'd paid. On July 24, Goff provided an accounting for costs of \$3,294.65 and enclosed a check for \$1,705.35, representing the balance of the \$5,000 cost advance. Goff refused to refund any of the \$37,500 allocated to his fees, claiming to have worked more hours than he had been paid for. On July 12 and July 26, Goff withdrew the last of Mantell's funds, totaling \$2,673, from his trust account.

Bar Complaint and Civil Proceedings

In April 2008, Mantell filed a complaint with the Bar. In December 2008 he filed a civil suit against Goff seeking return of the fees he'd paid. In a mediated settlement in which he admitted no liability, Goff agreed to confess judgment for \$37,500 and Mantell agreed not to file the judgment so long as Goff made \$500 monthly payments. Goff made three of the monthly payments, before filing a no-asset Chapter 7 bankruptcy petition in August 2010.

Four disciplinary matters, including Mantell's complaint, were consolidated and tried over five days in late 2010. The trial panel issued an opinion on March 28, 2011 finding that Goff had violated several rules and recommending an 18-month suspension. The opinion was affirmed by the Supreme Court on June 2012. Goff filed a Form B resignation on December 13, 2012.

Among the charges relating to Goff's representation of Mantell were allegations that Goff had charged and collected an excessive fee, and the bar sought restitution for Mantell. Witnesses before the trial panel included Mantell, the adverse attorney during the time Goff represented Mantell, and one of the attorneys who took over Mantell's legal matters after Goff was discharged. Goff was examined and cross-examined at length.

Goff submitted a recap of the time he spent on Mantell's case showing 183.2 hours between April 7 and July 7 (plus another 3.5 between July 8 and July 18, after he had been discharged). Most entries cover periods of 7-10 days each and the first five periods reflect 20, 25, 25, 30 and 33 hours worked, respectively. Because there were no daily contemporaneous records of the time Goff spent, the bar argued the recap was very likely created after-the-fact and had no probative value. At the same time, the record contains numerous exhibits reflecting frequent communications between Goff and Mantell about a myriad of issues during the three months of the representation.

Trial Panel and Supreme Court Decisions

The trial panel found that Goff "was not a credible witness on his own behalf." It also found that Mantell was a difficult, argumentative, demanding and time-consuming client. The excessive fee charge and request for restitution were dismissed with the following explanation:

Whether or not [Goff] performed all of the work he claims cannot be established; but the work he undertook to perform was substantial, time lines were short, and Mr. Mantell was a difficult client who interrupted [Goff] on a nearly daily basis.

The trial panel also found that the bar had not proven by clear and convincing evidence that Goff hadn't earned the fees he withdrew from his trust account and declined to order restitution to Mantell. The Supreme Court affirmed the trial panel opinion in its entirety, including the denial of restitution for Mantell.

Committee Decision

For a claim of unearned fees, CSF Rule 2.2 requires proof of dishonesty as well as evidence that the lawyer provided no or only minimal services to the client:

2.2.1 In a loss resulting from a lawyer's refusal or failure to refund an unearned legal fee, "dishonest conduct" shall include (i) a lawyer's misrepresentation or false promise to provide legal services to a client in exchange for the advance payment of a legal fee or (ii) a lawyer's wrongful failure to maintain the advance payment in a lawyer trust account until earned.

2.2.2 A lawyer's failure to perform or complete a legal engagement shall not constitute, in itself, evidence of misrepresentation, false promise or dishonest conduct.

2.2.3 Reimbursement of a legal fee will be allowed only if (i) the lawyer provided no legal services to the client in the engagement; or (ii) the legal services that the lawyer actually provided were, in the Committee's judgment, minimal or insignificant; or (iii) the claim is supported by a determination of a court, a fee arbitration panel, or an accounting acceptable to the Committee that establishes that the client is owed a refund of a legal fee. No award reimbursing a legal fee shall exceed the actual fee that the client paid the attorney.

The CSF Committee concluded there was insufficient evidence of dishonesty on Goff's part. It appears he began work immediately on Mantell's matter, so there was no "false

promise to provide legal services.” Additionally, the record shows that Goff deposited all funds received from Mantell into his trust account.

The difficulty in this case was the nature of the fee agreement. Goff seems to have treated the fees initially as earned on receipt and withdrawn from trust without regard to the amount of time he worked. In response to the disciplinary complaint and at trial, however, he relied on a recap of his time spent on Mantell’s matter to justify his fee. Mantell, on the other hand, insists that he and Goff agreed to a fixed fee and disagreed only as to whether it was earned on receipt or in stages as work was completed.

If the fee was a fixed fee, it is undisputed that Goff did not earn all of it, as he did not complete the matters for which he was engaged. However, the Committee concluded that the requirements of Rule 2.2.3 were not met. The Committee found no basis to conclude that Goff’s services were only “minimal or insignificant.” Moreover, there was no independent determination of the amount of refund to which Mantell was entitled.² The Committee was strongly influenced by the decision of the trial panel, affirmed by the Supreme Court, that it was impossible to determine the amount of work performed by Goff and the refusal to order restitution in any amount. The Committee gave no weight to the fact that Goff stipulated to a judgment in favor of Mantell for the entire amount of the fees paid.

Request for Review

Mantell has not provided any new information in conjunction with the Committee’s reconsideration of his claim or his request for review, referring only to the volume of material accumulated by DCO in its prosecution of Goff. He also argues that weight should be given to the faith that Disciplinary Counsel’s Office had in his view of Goff’s work. In a series of emails, Mantell expressed his objection to the Committee’s conclusion thusly:

“Mr. Goff did virtually no work. If he billed for more than 7- 8 hours of work it was fraudulent. He lied at the hearing....

Other attorneys who have looked over his billing statement which was 1 single sheet of paper listing 186 hours of work noted to me that it was fraudulent and absurd. They said that if he did do the hours he stated I would have had to be his only client the first 5 weeks he billed for. Also of note it was not an hourly agreement but a fixed fee agreement. The boxes of documents he said he reviewed were clearly never opened....

I hope the Board and committee understood that I had to hire another lawyer Robert Snee and pay him about \$10,000 in my civil suit to get Goff's confession of judgment [sic] as well as hire Margaret Lieberhan [sic] and Matthew McKean and one other attorney at the cost of approximately \$25,000 (note this is from memory at this time) to finish up the work that I had contracted Goff to do....

² In his deposition, Goff apparently admitted that he should not have withdrawn the last \$3,673 from trust, as he had been discharged and knew that Mantell was disputing Goff’s right to the fees. However, he never returned the funds to trust or reimbursed Mantell, claiming to be waiting for the trial panel to tell him what to do.

Additionally I am now speaking to another attorney on these issues who was of the opinion that perhaps my case came at a difficult time for the CSF in light of the Gruetter and McBride pay outs.”

While this was not a close case for the CSF Committee and it was dubious about the quantum of work performed by Goff, the Committee was not persuaded that Goff was dishonest or provided only minimal services. As indicated, the Committee decision was strongly influenced by the findings and conclusions of the trial panel and the Supreme Court and found no compelling basis to reach a different result.

Attachments: Mantell Application for Reimbursement
 Committee Report
 Goff Billing Statement
 Trial Panel Opinion

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: November 20, 2015
From: Sylvia E. Stevens, Executive Director
Re: CSF Claim No. 2013-24 GOFF (Mantell) Request for Review

Action Requested

Consider the request of claimant Mantell to review the Client Security Fund's denial of his claim for reimbursement.

Discussion

**CLIENT SECURITY FUND
INVESTIGATION REPORT**

DATE: November 13, 2013

RE: CFS Claim No. 2013-24

Attorney: Dan Goff, OSB No. 721018
(Form B Resignation from OSB, December 13, 2012)

Claimant: Elliott Mantell

INVESTIGATOR: Bill Davis

INVESTIGATOR'S RECOMMENDATION

Elliott Mantell has submitted a claim for \$47,609. This claim seeks return of \$37,500 Mantell paid to Dan Goff in fees between April and June 2007, plus 9% interest from July 2007 to August 12, 2010.

It is recommended this claim be denied.

STATEMENT OF CLAIM

Claimant retained Dan Goff on April 7, 2007, to represent him on several pending matters. Claimant was in the aftermath of a recent week-long commercial real estate trial involving claimant and one of his tenants. There were several other pending and potential litigation matters for which claimant also wanted Goff to provide representation. Claimant had incurred over \$200,000 in fees with his prior attorney up through the recently completed trial, and was resisting demands from that counsel for payment. One of the matters claimant wanted evaluated was the evaluation of the potential for a legal malpractice action against the prior attorney.

Claimant and Goff orally agreed that Goff would handle three of the matters as well as one for claimant's business partner for a flat fee of \$50,000. Between April 7, 2007, and June 7, 2007, claimant paid Goff \$42,500 which Goff deposited into his lawyer trust account.

On May 14, 2007, Goff sent claimant a proposed written fee agreement providing that Goff would handle the four legal matters for a flat fee of \$50,000, paid in advance and earned upon receipt, and a deposit of \$5,000 towards costs. On May 23, 2007, claimant responded, disagreeing with several terms in the proposed agreement. Over the next few weeks

several other letters and emails were exchanged between them about the terms and scope of the representation. Mantell's primary concern was the "earned upon receipt" language, wanting the flat fee to be earned incrementally as Goff completed various aspects of the representation. No signed agreement was ever jointly agreed upon.

Between April 10, 2007, and July 6, 2007, Goff had withdrawn the vast majority of the funds paid by Mantell.

Claimant terminated Goff's representation on July 6, 2007, stating he was not providing timely representation.

Claimant requested an accounting and a refund of all fees paid. In a July 24, 2007, letter to Mantell, Goff did provide an accounting of \$3,294.65 in costs and included a check for \$1,705.65 in reimbursement for \$5,000 which he said had been submitted to cover costs. Goff refused to refund the remaining \$37,500, stating, "I have actually labored more hours than you have paid me for." On July 12, 2007, Goff withdrew another \$2,000 from his trust account of the money Mantell had paid, even though this was after he had been terminated and after Mantell had written him asking for return of all moneys paid to him.

In April 2008 Mantell filed a complaint with the Oregon State Bar. In December 2008 Mantell filed a complaint against Goff seeking return of his fee payments. This litigation was resolved in May 2010 through mediation, with Goff agreeing to confess judgment in the amount of \$37,500 but to have the judgment not filed as long as Goff paid Mantell \$500 a month. Goff paid \$500 a month for three months and then filed for bankruptcy in August 2010.

There were several other Bar complaints against Goff from other clients. Four of the complaints were consolidated into a Disciplinary Board trial held over five days in late 2010. The transcript of the trial runs over 1,000 pages. The remaining portions of the Bar file exceed 1,500 pages. After that trial, the Trial Panel issued an opinion on March 28, 2011, finding Goff had violated the Oregon Code of Professional Responsibility in a number of particulars and recommended an 18-month suspension. The opinion was affirmed by the Oregon Supreme Court in June 2012. On December 13, 2012, Goff submitted his Form B resignation.

The Bar prosecuted ten ethical violations against Goff stemming from his representation of Mantell. Among the violations were contentions Goff had charged Mantell an excessive fee and had collected an excessive fee. The Bar sought an order requiring Goff to pay restitution to Mantell of the fees.

The alleged violations involving Mantell were thoroughly litigated in the Bar trial. Mantell testified at length (the transcript of his testimony is 83 pages). The attorney who represented the primary party adverse to Mantell during Goff's representation testified. One of the several attorneys who took over Mantell's various legal matters after Goff was discharged also testified. The direct and cross-examination of Goff on the Mantell matter was extensive. The

trial record contains numerous exhibits reflecting frequent communications between Goff and Mantell during the three months of representation involving the myriad of issues for Mantell's representation. Goff testified he obtained six bankers boxes of documents from Mantell's prior attorney which he reviewed as well as performed a significant amount of other work.

Included in the evidence submitted by Goff were compilations of the time he expended on behalf of Mantell during the three months of representation. Because these were not daily, contemporaneous records of daily time, the position of the Bar prosecution was the records had no probative value.

From a review of the trial transcript and record, it is apparent the question of whether Mantell was entitled to restitution of the fees paid to Goff was fully litigated in the Bar's prosecution of Goff.

In its findings, the Trial Panel found that Mantell was a particularly difficult, argumentative, demanding, and time consuming client. The panel stated, "The evidence simply does not support a conclusion one way or another as to whether the Accused performed the work he claims."

The Trial Panel dismissed the charge Goff entered into an agreement for an excessive fee and collected an excessive fee holding:

Whether or not the Accused performed all of the work he claims cannot be established; but the work he undertook to perform was substantial, time lines were short, and, Mr. Mantell was a difficult client who interrupted the Accused on a nearly daily basis.

The Trial Panel found the Bar had not proven that Goff did not earn the money he withdrew from his trust account.

Goff appealed the Trial Panel's findings to the Oregon Supreme Court. The Bar cross-appealed, asking the court to find that Goff had charged Mantell an excessive fee and withdrawn unearned fees. The Bar sought an order not only suspending Goff for 18 months but also ordering him to pay restitution.

In *In re Goff*, 352 Or 104 (2012), the Supreme Court affirmed the Trial Panel's opinion in its entirety. With respect to the Bar's request for the Trial Panel's opinion on the charge of excessive fee and collecting an unearned fee, the Supreme Court held:

On *de novo* review, we . . . agree with the trial panel that the Bar has not presented clear and convincing evidence of the three additional violations charged by the Bar, two of which (collection of excessive fee) were the basis on which the Bar sought

restitution. Accordingly, we therefore also decline to order the accused to pay restitution.

352 Or at 105-106.

FINDINGS AND CONCLUSIONS

Mantell's claim should be denied because of the application of Client Security Fund Rules 2.2.3, 2.8, and 2.11. Additionally, the Oregon Supreme Court, on *de novo* review of the Oregon State Bar Disciplinary Trial Panel, has ruled Goff should not provide restitution to Mantell for the fees Mantell paid Goff. *In re Goff*, 352 Or 104 (2012).

Rule 2.2.3

Goff's actions of removing Mantell's funds from his trust account while there was a dispute over the terms of the retainer agreement and refusing to provide an accounting was found by the Trial Panel to constitute dishonest conduct. Such a finding is insufficient, by itself, to qualify Mantell for reimbursement of his attorney fee payments. Qualification for fee reimbursement is governed by Rule 2.2.3, which states:

2.2.3 Reimbursement of a legal fee will be allowed only if (i) the lawyer provided no legal services to the client in the engagement; or (ii) the legal services that the lawyer actually provided were, in the Committee's judgment, minimal or insignificant; or (iii) the claim is supported by a determination of a court, a fee arbitration panel, or an accounting acceptable to the Committee that establishes that the client is owed a refund of a legal fee. No award reimbursing a legal fee shall exceed the actual fee that the client paid the attorney.

Mantell's claim does not fit any of the three criteria for reimbursement. The Trial Panel specifically held "the work [Goff] performed was substantial" so criteria (i) and (ii) cannot be met. There has been no determination of a court, fee arbitration panel, or accounting that establishes Mantell is owed a refund of a legal fee, so criterion (iii) is not met. Indeed, there has been a finding by an Oregon State Bar Trial Panel, affirmed on *de novo* review by the Oregon Supreme Court, that the allegation Goff collected an excessive fee was not proven and Goff should not be ordered to pay restitution to Mantell.

Because Mantell's claim does not satisfy the criteria of Rule 2.2.3, it should be denied.

Rule 2.8

Rule 2.8 sets forth the time parameters for submitting a claim for reimbursement to the Client Security Fund. This rule states:

A loss of money or other property of a lawyer's client is eligible for reimbursement if:

* * *

2.8 The claim was filed with the Bar within two years after the latest of the following: (a) the date of the lawyer's conviction; or (b) in the case of a claim of loss of \$5,000.00 or less, the date of the lawyer's disbarment, suspension, reprimand or resignation from the Bar; or (c) the date a judgment is obtained against the lawyer, or (d) the date the claimant knew or should have known, in the exercise of reasonable diligence, of the loss.

Subparagraph (a) is not applicable because Goff has not been convicted of any crime. Subparagraph (b) is not applicable because the claim is in excess of \$5,000. Subparagraph (c) requires the claim to be brought within two years of the date of the judgment. Goff stipulated to a judgment of \$37,500 in favor of Mantell in May 2010. It was originally not filed with the court pursuant to a covenant not to file as long as Goff made \$500 monthly payments. Goff made three monthly payments and then filed for bankruptcy in August 2010. The fact the judgment was not ever filed is irrelevant; it was "obtained" in May 2010.

With respect to subparagraph (d), Mantell obviously knew of the loss as of December 2008 when he filed a lawsuit against Goff seeking recovery of the money he had paid Goff for fees. Mantell was represented by legal counsel at the time and according to Goff was well aware of the potential for seeking reimbursement through the Client Security Fund. Goff testified in the Bar trial that in the May 2010 negotiations to settle Mantell's civil case, Mantell wanted to include in the stipulated judgment a recitation that Goff had wrongfully withheld Mantell's money and had failed to return unearned legal fees. Goff testified Mantell told him he wanted the language included for use in a later claim against the Client Security Fund, but Goff refused to agree to have that admission in the stipulated judgment. Given this testimony, Mantell was aware by May 2010 that he could submit a claim to the Client Security Fund.

Mantell filed his complaint with the Client Security Fund on March 4, 2013. This was over two years after the latest of the triggering events set out in Rule 2.8. As a result, Mantell's claim is time barred.

Rule 2.11

This rule provides the committee with discretion to ignore the failure of a claim to qualify under the other rules. It states:

2.11 In cases of extreme hardship or special and unusual circumstances, the Committee, in its sole discretion, may recommend for payment a claim that would otherwise be denied due to noncompliance with one or more of these rules.

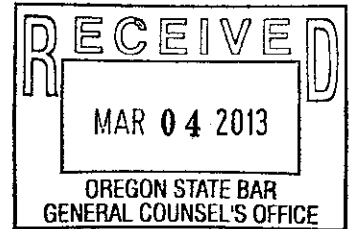
This is not a case of extreme hardship or special and unusual circumstances. Mr. Mandell is not unsophisticated: he is a chiropractor with over 30 years experience, a commercial property owner with substantial experience in legal matters. His correspondence with Goff and his testimony at Goff's trial reflect a man of broad intellect very capable of looking out for his own interests.

Mantell has already had the Oregon State Bar invest substantial time and effort to try to obtain restitution for him through the disciplinary process. The contentions that Goff charged an excessive fee and/or refused to return an unearned fee were thoroughly litigated in an extensive Bar trial. The Trial Panel, while holding Goff had committed five ethical violations with respect to his representation of Mantell, held the charges of excessive and unearned fees were not proven. On *de novo* review, the Oregon Supreme Court affirmed that ruling. Given the full hearing his claim has already received, this case is not even remotely close to one where "extreme hardship or special and unusual circumstances" exist to justify payment of a claim that does not otherwise meet the Client Security Fund rules for reimbursement.

It is recommended that Mantell's claim be denied.

**Client Security Fund
Application for Reimbursement**

Case # 2013-24



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 and other information submitted in support of your claim are public records.

1) Full names of all persons filing this claim (first, middle, last):

Elliott J. Mantell
Street Address: 1250 Sunningdale Road
Lake Oswego, Or. 97034

Phone (Work): 503-232-4099
(Home): 503-819-7952

2) What is the name, address, telephone number, and firm name (if any) of the lawyer whose conduct is alleged to have caused your loss?

Lawyer's Name Daniel Goff Lawyer's Telephone Number 541-345-7211

Lawyer's Firm Name
Goff & Smith

Lawyer's Address 310 11th Avenue Eugene, Or. 97401

3) What is the amount of your loss? \$ 47,609.00

Describe in detail how you calculated that amount (*if the loss was property, include appraisal, receipts, or other evidence of value*):

Amount paid to Mr. Goff	\$37,500.00
Interest at 9% / year 7/7/07 – 7/5/08	\$ 3,375.00
Interest at 9% / year 7/6/08 -7/5/09	\$ 3,678.75
Interest at 9% / year 7/6/09 – 7/5/10	\$ 4,009.83
Interest at 9% / year 7/6/10 – 8/12/10	\$ 545.42
(Mr. Goff then filed for bankruptcy)	

**Interest only payments made by Mr. Goff as per a mediated settlement agreement and confession of judgment for \$37,500 plus interest at 9% (until he defaulted by filing bankruptcy and stopping payments.)
(3 payments of \$500 each) - \$ 1,500**

Total owed and outstanding \$ 47, 609.

4) Please describe what the lawyer did that was dishonest and how it caused your loss.

Use a separate sheet if necessary. Your claim will not be accepted if this question is not answered.

Mr. Goff agreed to represent me in a few cases for a fixed fee of \$50,000 plus expenses. He demanded that the funds be paid right away. \$42,500 was paid to Mr. Goff (\$37, 500 towards the \$50,000 fixed fee and \$5,000 towards expenses) were paid to Mr. Goff from April 2007 – June 2007.

Mr. Goff did essentially no work and nothing of value on any of my cases. This was a fixed fee case and not on an hourly basis. Since Mr. Goff did not do any work of value for our fixed fee agreement I had to hire other counsel to finish the cases that he was supposed to do and spent over \$23,000 on other counsel as well as over \$10,000 to obtain a judgment against Mr. Goff.

In July 2007 when it was apparent that Mr. Goff would continue to do no work to advance my cases and it looked apparent that he would miss a deadline. I asked him to let me know what he had accomplished and

that I would be looking for new counsel. Mr. Goff took this to mean that he was dismissed and an opportunity to keep the entire retainer I had paid and use it towards his fixed fee even though he had not earned it. Mr. Goff told the court that he was dismissed and then proceeded to keep transferring funds from his trust account to his personal account even though he was well aware of the fee dispute we had. He also refused to give me an accounting.

In August Mr. Goff stated that I was not entitled to an accounting of his work and that we had a fixed fee and contingent fee agreement. The trial panel concluded on Page 27 of the Opinion of The Trial Panel “In an August 15, 2007 letter to Mr. Mantell, the Accused represented that he and Mr. Mantell had agreed to a mixed fixed and contingent fee, that the fees Mantell paid the Accused were immediately earned and not refundable,; and that Mantell was not entitled to receive any accounting from the Accused. These representations by the Accused were false and material and the Accused knew they were false and material at the time he made them.”

The trial panel concluded that Mr. Goff violated RPC 1.15-1(e) “ ... No later than May 23, 2007, the Accused knew that there was a dispute over the terms of his fee agreement with Mantell. After that date, he nonetheless withdrew a total of \$24,000 from his trust account to pay his own fees.”

RPC1.15-1(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

The trial panel also agreed that the Mr. Goff violated RPC 1.15-1(d) by refusing to provide an accounting and advising that I was not entitled to one.

RPC 1.15-1 (d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the

client or third person, shall promptly render a full accounting regarding such property.

The Trial panel also agreed that Mr. Goff violated RPC 8.1(a)(2)

(b) When did you discover the loss?

In July 2007 when Mr. Goff refused to refund his unearned money as this was a fixed fee agreement. This was temporarily settled in April 2010 when Mr. Goff agreed to our mediated settlement and payments were being made. It was again realized in July 2010 when Mr. Goff stopped making payments and then filed for corporate and personal bankruptcies. The loss was not fully realized until the end of 2012 after Mr. Goff received a discharge in his personal and corporate bankruptcies and after the Oregon supreme court decision on his suspension from the practice of law.

6) (a) Was the lawyer named in Question 2 hired to represent you? Yes

(b) If Yes, give the approximate date you hired the lawyer: April 7, 2007

(c) If No, describe your relationship to the lawyer: N/A

7) (a) What did you hire the lawyer to do?

Mr. Goff was hired to represent me in a few cases and a business associate of mine in one case for a fixed fee. He did virtually no work and nothing to advance these cases and it was of no value and I had to hire new counsel to do the work that Mr. Goff was supposed to do.

(b) What was your agreement for payment of fees to the lawyer?

Mr. Goff was hired on a fixed fee agreement of \$50,000 plus expenses to represent as stated in #7.

(c) How much has been paid so far? \$37,500 plus additional towards expenses.

(d) Did anyone else pay the lawyer to represent you? No

If yes, give the name, address and telephone number of that person and explain the circumstances:

(e) What services did the lawyer actually perform? Virtually none and none of any value.

(f) Did you hire another lawyer to finish any of the work? Yes

If yes, please provide the name and telephone number of the lawyer

1. Margaret Lieberman 503-641-7990 From August 31, 2007 – June 25, 2008 I paid Counselor Lieberhan over \$11, 119.95

2. Nachtingal, Eisenstein & Assoc. 503-640-6612 I paid this firm over \$12, 500 to finish up the work that Mr. Goff did not complete

3. Jay Chock of Dunn Carney 503-224-6440

4. Additionally I hired Mr. Snee at a cost of approximately \$10,000 to obtain the settlement agreement and confession of judgment from Mr. Goff

8) Was there at any time a family, personal, business or other relationship between you and the lawyer? No

9) (a) Has demand for repayment been made of the lawyer? Yes

(b) Amount demanded:

\$ 47, 609

Date(s) when demand was made:

Initial demand was made for principle of \$37,500 in July 2007.

In 2008 my attorney Mr. Robert Snee, filed a lawsuit against Mr. Goff to recover the fees that I had paid and demand was again made at that time. Through a mediated settlement Mr. Goff agreed to a repayment plan and to a confession of judgment for \$37,500, plus interest at 9% from July 2007, in the event that he defaulted on the repayment plan.

Mr. Goff acted on the mediated settlement payment plan and made his first of three payments of \$500 each (\$1,500 total payments were made). Mr. Goff then defaulted on our settlement agreement when he stopped making payments and then filed for bankruptcy protection. The confession of judgment drawn up by Mr. Goff's attorney Robert Smith stated that \$37,500 plus interest at 9% per annum from July 6, 2007 became due and payable once he defaulted on the payment plan. The \$1,500 in payments that Mr. Goff made was to be towards interest

owed. I was precluded from acting directly on Mr. Goff's confession of judgment due to his filing for bankruptcy protection.

Therefore, at the time Mr. Goff he filed for bankruptcy in August 2010, [less credit for the three payments he made (\$1,500)] he owed \$47,609, which was submitted to the bankruptcy court as my claim for damages owed.

(d) Who made the demand? I made the initial demand in July 2007, then my attorney Robert Snee through civil lawsuit filed in 2008. I then made additional demands through bankruptcy court after Mr. Goff defaulted on our settlement agreement and filed for bankruptcy.

(e) Demand was **written.** *(If it was written, attach a copy of the demand to this application.)*

Through initially by emails from me, then the lawsuit filed by Mr. Snee and then through bankruptcy claims that I filed.

10) (a) Has the lawyer (or any other person) ever admitted that he/she owes you money or agreed to reimburse you? Yes

(b) If Yes, please explain:

Mr. Goff agreed to a mediated settlement with confession of judgment and commenced his first 3 payments in compliance with that agreement.

The trial panel recognized that agreement on page 28 paragraph #3. Stating "...In 2008 Mr. Mantell brought a civil action against the Accused for recovery of the amount of \$37,500 paid to the Accused for attorney fees in the above matter. In a mediated settlement of this action, and without admitting any liability, the Accused agreed to give Mr. Mantell a Confession of Judgment in that same amount. To date the Accused has repaid Mr. Mantell \$1,500 of the \$37,500."

11) (a) Describe what you have done to recover your loss:

(b) Have you sued the lawyer? Yes and filed claims in Mr. Goff's two bankruptcy petitions

(c) Have you obtained a judgment? Yes

(d) If yes, in what amount? \$37,500 plus interest at 9% from July 2007 until Aug 2010 when the accused filed for bankruptcy.

(e) Have you made any other claim against the lawyer or the lawyer's assets

(such as insurance claims, arbitration claims, etc.)? No He has filed for bankruptcy.

(f) Have you made attempts to locate assets and/or recover on a judgment? Yes by filing claims in his two bankruptcy petitions.

(g) If yes to any of the above, attach copies of all related documents. If no, please explain:

I filed claims in bankruptcy court against Daniel Goff and against Daniel Goff P.C. I have been informed by the bankruptcy court that those have been discharged as no asset bankruptcies. I have been unable to collect anything since he stopped after making the first 3 payments totaling \$1,500.

12)(a) Have you been reimbursed for any part of your claim? Yes

(b) If Yes, who paid you and how much did you receive?

I received the first 3 payments of \$500 each from Mr. Goff in April, May and June 2010 totaling \$1500. Those were labeled as interest only payments.

13)(a) Is there any insurance, indemnity or bond which might cover your loss?

None that I am aware of.

b) If Yes, what is the name and address of the insurance company?

Unknown

14) (a) This loss has been reported to (check all that apply):

District Attorney, Yes

Police, Yes

Oregon State Bar Professional Liability Fund, Yes

Oregon State Bar Disciplinary Counsel Yes

(b) Explain action taken, and attach a copy of your complaint, if available:

See Oregon State Bar Complaints and trial panel's ruling and supreme court ruling

15) (a) Please identify any other person who may have information about this claim:

Stacy Hankins Oregon State Bar Disciplinary Council 503-620-0222 ext. 347

16037 SW Upper Boones Ferry Road
Tigard, Or. 97281

Attorney Robert Snee 503-294-0411

P.O. Box 16866

Portland Or. 97292

Investigator Representatives of the Oregon State Bar

Other Complainants that Ms. Hankins cited in the Bar Disciplinary Hearing that she prosecuted against Mr. Goff.

They were: Taunya Fambrough-Anderson Case No. 08-143

Fred Whitsel Case No. 09-53

Imre Juhasz Case No. 10-14

(b) Nature of the information these persons can provide:

Ms. Hankins can discuss the details of my case against Mr. Goff as well as other cases against Mr. Goff that she prosecuted, and that the conclusion to suspend Mr. Goff from the practice of law for 18 months. As well as additional cases that Ms. Hankins prosecuted on Mr. Goff at the same time including Case Nos. 08-143, 09-12, 09-53 & 10-14

Investigators at OS Bar should be able to go over Mr. Goff's complaint file with you, which had over 6,000 pages of documents when I filed my complaint.

Mr. Snee can provide information on the mediated settlement agreement with payment plan with Mr. Goff, and his confession of judgment. He can also tell you about the payments that Mr. Goff made and his failure to fulfill the agreement.

16) Agreement and Understanding

The claimant agrees that, in exchange for any payment made by the Client Security Fund (CSF), the claimant will:

(a) Transfer to the CSF any rights the claimant may have against the lawyer or any other person or entity who may be liable, up to the full amount of the CSF's payment;

(b) Authorize the CSF to pursue any claims against the lawyer and any other person or entity who may be liable, either in the name of the CSF or in the name of the claimant, as the CSF deems appropriate;

(c) Cooperate with the CSF in its efforts to recover its payments;

(d) Notify the CSF if the claimant receives any payment from the lawyer or from any other person or entity with regard to the loss for which this claim is made;

(e) Reimburse the CSF if the claimant recovers any portion of the loss from the lawyer or any other person or entity.

17) Claimant's Authorization

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.

Payment to Third Party: (This section must be completed if you answered yes to Question 7(d) or if you wish to have payment delivered to someone else for any reason.) I hereby authorize the OSB Client Security Fund to pay all amounts awarded to me to:

Name Elliott Mantell_ ,
Address: 1250 Sunningdale Road Lake Oswego, Or. 97034
Signature:

18) 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)

)ss

County of WALWALUMAS)

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.

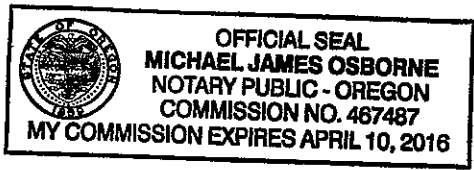
[Handwritten Signature]
Claimant's Signature

Signed and sworn (or affirmed) before me this 23RD day of FEBRUARY 2013.

Notary's Signature [Handwritten Signature]

Notary Public for OREGON

My Commission Expires APRIL 10, 2016



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 # Attorney's Phone

Attorney's Address

IN THE SUPREME COURT OF THE STATE OF OREGON

In Re:

Complaint as to the Conduct of:

DANIEL W. GOFF, OSB #721018,
Accused.

Oregon State Bar
08143, 0912, 0953, 1014

S059467

RECEIVED

JUN 26 2012

DISCIPLINARY
COUNSEL

ORDER MODIFYING CASE DISPOSITION

The court on its own motion modifies the disposition in this case to provide that the accused is suspended from the practice of law for 18 months, commencing 60 days from June 14, 2012, the date of the decision of the court.

6/26/2012
4:48:21

Robert D. Durham
ROBERT D. DURHAM
PRESIDING JUSTICE SUPREME COURT

c: Robert J Smith
Stacy J Hankin

kac

ORDER MODIFYING CASE DISPOSITION

REPLIES SHOULD BE DIRECTED TO: State Court Administrator, Records Section,
Supreme Court Building, 1163 State Street, Salem, OR 97301-2563

June 15, 2012

State Court Administrator
Appellate Courts Records Section
1163 State Street NE
Salem, OR 97301-2563

Re: *In re Conduct of Daniel W. Goff, SC S059467*

Dear State Court Administrator:

Yesterday, the court issued its decision in the above-referenced matter. The Bar asks the court to correct that part of the decision dealing with when Mr. Goff's suspension commences so that the suspension commences 60 days from the date of the decision rather than "60 days from the effective date of this decision."

For the last several years, all of the court's opinions suspending or disbaring lawyers were effective 60 days from the date of the decision.

Under the current language in the opinion, the effective date would not occur until the date of entry of the appellate judgment and the suspension would not commence until 60 days later. ORAP 14.05(2). Tying the suspension dated to a point after entry of the appellate judgment creates uncertainty for the parties as to when a suspension will begin and unnecessarily delays implementation of the court's decision.

Thank you for your attention to this matter.

Very truly yours,

Stacy J. Hankin
Assistant Disciplinary Counsel
Extension 347

SJH:
cc: Robert J. Smith (Counsel for Accused)

Filed: June 14, 2012

IN THE SUPREME COURT OF THE STATE OF OREGON

RECEIVED

In Re.
Complaint as to the Conduct of:

JUN 14 2012

DISCIPLINARY
COUNSEL

DANIEL W. GOFF,

Accused.

(OSB 08143, 0912, 0953, 1014; SC S059467)

En Banc

On review from a decision of a trial panel of the Disciplinary Board.

Argued and submitted January 13, 2012.

Robert J. Smith, Robert J. Smith, P.C., Eugene, argued the cause and filed the briefs for the accused.

Stacy J. Hankin, Assistant Disciplinary Counsel, Oregon State Bar, argued the cause and filed the brief for the Oregon State Bar.

PER CURIAM

The accused is suspended from the practice of law for 18 months, commencing 60 days from the effective date of this decision.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Oregon State Bar

No costs allowed.

Costs allowed, payable by: The Accused

Costs allowed, to abide the outcome on remand, payable by:

1 PER CURIAM

2 The Oregon State Bar charged Daniel W. Goff, the accused, with numerous
3 violations of the Rules of Professional Conduct and the Disciplinary Rules of the Code of
4 Professional Responsibility, based on his representation of clients in four separate
5 matters. After a five-day hearing, the trial panel found that the accused had committed
6 15 violations, as follows: *former* DR 9-101(A) (failure to maintain client funds in trust);
7 *former* DR 9-101(C)(3) and RPC 1.15-1(d) (failure to maintain trust-account records and
8 failure to provide an accounting of client funds) (three counts); *former* DR 6-101(B)
9 (neglect of a legal matter) (two counts); *former* DR 1-102(A)(3) and RPC 8.4(a)(3)
10 (conduct involving misrepresentation or dishonesty) (three counts); RPC 1.4(a) (failure to
11 keep client reasonably informed) (two counts); RPC 1.15-1(e) (mishandling disputed
12 funds); RPC 8.1(a)(1) (false statements of material fact in connection with a Bar
13 disciplinary matter); RPC 8.1(a)(2) (failure to respond to the Bar) (two counts). The trial
14 panel concluded that the appropriate sanction was an 18-month suspension from the
15 practice of law. The accused sought review pursuant to ORS 9.536(1) and Bar Rules of
16 Procedure 10.1 and 10.3.

17 On review, the accused urges this court to reject the trial panel's findings in
18 full. The Bar, in response, defends the trial panel decision on all 15 rule violations, and
19 also urges this court to find three additional violations that the trial panel did not find:
20 RPC 1.5(a) (collecting an excessive fee) (two counts) and RPC 1.15-1(c) (withdrawal of
21 unearned fees). Based on the two excessive fee charges, the Bar requests that we order
22 the accused to pay restitution as well as suspend him from the practice of law for at least

March 28, 2011

Dr. Elliott J. Mantell
2927 NE Everett Street
Portland, OR 97232

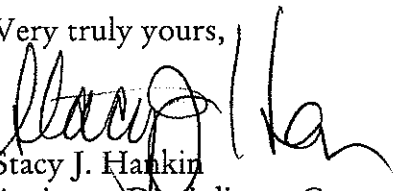
Re: Case Nos. 08-143, 09-12, 09-53 & 10-14 — Daniel W. Goff

Dear Dr. Mantell:

Please find enclosed a copy of the decision of the Trial Panel in the above-entitled matter. Pursuant to BR 10.1, the Bar or the Accused may seek review of the matter by the Supreme Court; otherwise, the decision of the Trial Panel is final on the 61st day following the notice of receipt. You will be notified if this matter is appealed, otherwise, the decision of the Trial Panel will be final on May 23, 2011.

Thank you for bringing your concerns to our attention and for your contribution to the regulation of our profession.

Very truly yours,


Stacy J. Hankin
Assistant Disciplinary Counsel
Extension 347

SJH:abe
Enclosure
111-09

IN THE SUPREME COURT OF THE STATE OF OREGON

In re: Complaint as to the Conduct of DANIEL W. GOFF, Accused.	Case Nos. 08-43, 09-12, 09-53 & 10-14 OPINION OF THE TRIAL PANEL
--	--

Counsel for the Oregon State Bar:

Stacey J. Hankins

Counsel for the Accused:

Robert J. Smith

Disciplinary Board:

Jack A. Gardner, Chair; Mary Lois Wagner;
Audun (Dunny) Sorensen, Public Member

This matter came before a Trial Panel of the Disciplinary Board of the Oregon State Bar on October 5, 14, November 10, 16, and December 10, 2010 at the offices of Gardner, Honsowetz, Potter, Budge & Ford in Eugene, Oregon. The Trial Panel heard witnesses, considered evidence, and considered the written argument of Counsel, all concerning the Accused's conduct with respect to four separate clients, each of which shall be addressed separately.

Before detailing the specific facts of each case, however, the Trial Panel makes findings concerning the Accused which are generally applicable to each case, and, as necessary, will be further explained in the context of the individual cases.

With respect to the Accused, the Trial Panel finds:

The Accused was at all relevant times an attorney at law and a member of the Oregon State Bar, admitted in 1972 by the Supreme Court of the State of Oregon to practice law in this state.

At all times relevant to the matters considered here, the Accused maintained a staffed office in Eugene, Lane County, Oregon. Beginning from about the mid 1990's, the Accused resided in Salem, Oregon and also practiced from an office in his home there. Beginning in 2006 and continuing through December 2009, the Accused shared office space with another attorney in Salem for the limited purpose of meeting with clients. He did not maintain any staff there other than a shared receptionist. Beginning about 2003, the Accused came to his Eugene office about only once or twice a month. His Eugene office was staffed on a full time basis and listed on his letterhead. Files were maintained in several different places and sometimes lost or misplaced as a result.

The Accused was the person most often responsible for handling and recording financial and banking matters in his practice.

The Accused was diagnosed with colon cancer in early 2008. He was treated for colon cancer, including chemotherapy, throughout 2008 and early 2009. During that period of time, the Accused continued his law practice. He was fatigued and ill through this time period, but his memory was not significantly impacted by his illness and the treatment for it.

The Accused was previously disciplined by stipulation on April 28, 2000 for his conduct in two separate matters, Case No. 97-125 and Case No. 99-135. In each of the two matters, the Accused admitted violation of DR 6-101(B) (Neglect of a Matter) and accepted a sanction of public reprimand.

The Accused made numerous inconsistent and contradictory statements to the Bar in response to inquiries from disciplinary counsel and throughout his hearing before the trial panel. The Panel finds that the Accused was not a credible witness in his own behalf.

In the Matter of Taunya Fambrough-Anderson (Case No. 08-143)

In its Second Amended Formal Complaint, the Bar charges the Accused with violations of the Oregon Code of Professional Responsibility and the Oregon Code of Professional Conduct. The Accused's representation of Ms. Fambrough-Anderson in this matter began in 1995, when the former Code was in place, and continued into 2007, when the new Rules were in place. The charges are:

1. Violation of former Oregon Code of Professional Responsibility DR 6-101(B), which provides that "A lawyer shall not neglect a legal matter entrusted to the lawyer." Specifically, the Bar describes a course of conduct that the Accused had with Ms. Fambrough-Anderson and with Meoli, the Trustee in Ms. Fambrough-Anderson's bankruptcy proceeding and, in that capacity, the nominal plaintiff in her state court litigation. The Bar alleges that the Accused generally failed to keep both Ms. Fambrough-Anderson and Meoli advised of the proceedings; and, with regard to the Trustee, that the Accused failed to timely execute a retainer agreement to Meoli; to inform and to advise Meoli of a second personal injury complaint filed in this matter; to advise Meoli when that case was dismissed on a motion for summary judgment; and to advise Meoli when that case was appealed and ultimately dismissed.. The Accused denies these allegations.

2. Violation of DR 1 -102(A)(3) and of of RPC 8.4(A)(3), each of which provides that it "is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation ." Specifically, the Bar describes a course of conduct in the Accused's handling of \$10,000 paid in settlement of one of Ms. Fambrough-Anderson's professional malpractice actions, known hereafter as "the Trujillo settlement". The Trujillo

settlement is alleged to have been deposited into the Accused's trust account subject to the Accused's agreement in settling the Trujillo case to hold it there pursuant to specific conditions, and the allegations of dishonesty in handling those funds, and as are more specifically described in Complaints 3, 4, and 5, which follow.

The Accused neither admits nor denies that the \$10,000 was deposited into his trust account; denies those allegations describing his agreement to hold the funds there; and denies any dishonesty in his dealings with those funds.

3. Violation of DR 9-101(A) and of RPC 1.15-1(a), each of which provides that "all funds of clients paid to a lawyer or law firm, including advances for costs and expenses . . . shall be deposited and maintained in one or more identifiable trust accounts in the state in which the law office is situated."

Specifically, the Bar charges that, sometime after August 19, 1997 the Accused withdrew the Trujillo settlement funds from his trust account and converted those funds to his own use. The Accused denies those allegations.

4. Violation of DR 9-101(C)(3) and of RPC 1.15-1(D), each of which requires that a lawyer shall maintain "complete records of all funds, securities and other properties of a client coming into the possession of the lawyer and render appropriate accounts to the lawyer's client regarding them. Every lawyer engaged in the private practice of law shall maintain and preserve for a period of at least five years after final disposition of the underlying matter, the records of the accounts..."

Specifically, the Bar charges that the Accused failed to maintain complete records of the Trujillo settlement funds and failed to appropriately account to Meoli and to Fambrough-

Anderson regarding those funds, in spite of their repeated requests that he do so. The Accused denies those allegations.

5. Violation of DR 9-101(C)(4) which requires that, when a lawyer holds client funds in his trust account, the lawyer shall promptly “pay or deliver to a client as requested by the client the funds, securities or other properties in the possession of the lawyer which the client is entitled to receive.”

Specifically, the Bar charges that the Accused failed to deliver the settlement funds to Meoli or to Fambrough-Anderson. The Accused denies those allegations.

6. Violation of DR 1-102(A)(3) which provides that it “is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation .”

The Bar charges that the Accused knowingly failed to notify Meoli when he withdrew the Trujillo settlement funds from his trust account. The Bar further charges that, when the second personal injury action was dismissed at the trial court level, the Accused knowingly failed to notify Meoli. The Accused denies those allegations.

7. Violation of RPC 8.1(a)(1) which provides that a lawyer, in connection with a disciplinary matter shall not “knowingly make a false statement of material fact.”

The Bar charges that, in response to inquiries which were part of its investigation of the Fambrough-Anderson matter, the Accused, in a series of letters to the Bar, knowingly made false and material representations. The Accused denies those allegations.

8. Violation of RPC 8.1 (a)(2) which provides that a lawyer, in connection with a disciplinary matter, shall not . . . “knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority”.

The Bar charges that, in response to inquiries which were part of its investigation of the Fambrough-Anderson matter, the Accused failed to produce financial records and stated that they were lost. The Accused denies those allegations.

9. Violation of RPC 8.4(a)(3) which provides that it “is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation .”

The Bar charges that the Accused violated this rule by making the false and material statements alleged in charges 7 and 8. The Accused denies those allegations.

The Accused makes the following justification and affirmative defenses to these charges:

1. That he entered into a written fee agreement with Ms. Fambrough-Anderson that provided that the Trujillo settlement funds were fixed fees, immediately earned;
2. That such fee agreement precluded any claim to them by the Bankruptcy Court;
and
3. That, by entering into such fee agreement, Ms. Fambrough-Anderson waived any right to the fees in dispute.

The Accused also alleges:

4. Quantum Meruit, that is, that he earned the fees; and
5. Laches, that is that Ms. Fambrough-Anderson delayed her complaints about the Accused for such a lengthy period of time that the Accused no longer has the records necessary to defend himself.

FINDINGS OF THE TRIAL PANEL

The Trial Panel finds by clear and convincing evidence:

Taunya Fambrough-Anderson was injured on March 29, 1990 when a piece of exercise equipment fell on her at a gym. She hired attorney Daniel Simcoe (Simcoe) and the firm of Trujillo and Peick (Trujillo) to represent her in a personal injury claim against the gym's owner. The action was filed in March, 1992. In late 1992, both Simcoe and Trujillo withdrew from representation of Ms. Fambrough-Anderson. In December 1992, the defendant filed a motion for summary judgment, alleging that he was not the owner of the gym.

By January, 1993, Ms. Fambrough-Anderson had moved to Michigan. Due to financial problems resulting in large part from medical bills, she filed for bankruptcy in Michigan. Her personal injury action in Oregon was listed in the bankruptcy petition as having no value and her debts were discharged in bankruptcy on May 3, 1993.

On June 2, 1993, Fambrough-Anderson's personal injury action was dismissed on defendant's motion for summary judgment. Ms. Fambrough-Anderson then consulted with attorney Larry Gildea, who believed she had a professional malpractice claim against her former attorneys based on their having sued the wrong party. Mr. Gildea had Fambrough-Anderson enter into a contingency fee agreement for representation in a malpractice action on July 13, 1993 and referred her to the Accused, with whom Gildea had discussed the case. The Accused undertook to represent her under the same fee agreement. The Accused filed a professional malpractice action on Ms. Fambrough-Anderson's behalf against Simcoe and Trujillo on May 11, 1995.

In August, 1995, Attorney John Barker, who represented Trujillo, notified the Accused by telephone and by letter that he intended to raise the issue of estoppel, based on her Michigan bankruptcy, as a defense against Ms. Fambrough-Anderson's claim. The Accused contacted Jack Lintner (Lintner), who had represented Ms. Fambrough-Anderson in the bankruptcy by phone, and learned that she had indeed listed the personal injury action, but had not listed the malpractice action in her bankruptcy petition. He requested a copy of the bankruptcy file from Lintner. On October 2, 1995, Barker filed a response in the malpractice action, listing estoppel as an affirmative defense. On behalf of Defendant Simcoe, attorney William Deatherage filed a similar affirmative defense.

In the summer of 1996, both Simcoe and Trujillo filed motions for summary judgment on the estoppel defense. On August 19, 1996, the trial court ordered Ms. Fambrough-Anderson to furnish proof by August 30, 1996 that she had reopened her bankruptcy.

In July 1996, Fambrough-Anderson agreed to accept \$10,000 in settlement of her claim against Trujillo. In connection with that agreement and in anticipation of the bankruptcy being reopened, Trujillo's attorney Barker required that the \$10,000 be held in the Accused's trust account until it was determined that a Trustee in Bankruptcy would not pursue claims against Ms. Fambrough-Anderson for those funds. Barker sent the Accused a Covenant Not to Sue containing these terms on August 8, 1996.

Sometime in August 1996 the Accused entered into a modified fee agreement with Ms. Anderson and, on August 2, 1996 contacted Michigan attorney Lintner requesting that the bankruptcy be reopened.

The language of three separate documents created at the time bear setting out here.

The modified fee agreement with Ms. Fambrough-Anderson, states that “the reason for the modification is that Client intends to reopen her Chapter 7 Bankruptcy in Michigan”. The fee agreement further provides that “Attorney is still entitled to his 1/3 contingent fee. Attorney is further entitled to an additional fixed and non-refundable fee of \$6,666.67. This fixed fee is immediately earned and no portion of it will be refunded to Client. Attorney further agrees not to seek costs from Client and agrees to represent Client in any appeal from this or any related matter without additional fees or costs from Client.”

Both Ms. Fambrough-Anderson and the Accused testified that they understood that “this or any related matter” was intended to include both the pending malpractice action and any possible new personal injury claim arising out of the March 1992 gym accident.

The Covenant Not to Sue prepared by Attorney Barker and sent to the Accused on August 8, 1996 (but not signed by the Accused and Ms. Fambrough-Anderson until December 15, 1996) includes the following provision:

“Plaintiff may seek to reopen the bankruptcy. Because of uncertainties concerning plaintiff’s bankruptcy and the effect of plaintiff reopening it bankruptcy (sic), counsel for plaintiff and plaintiff agree that the proceeds of this settlement will remain in the client trust account of the law firm of Daniel W. Goff, P.C., until it has been finally determined that they can be paid to plaintiff free of any claim of lien or entitlement by the bankruptcy trustee or any other person or entity, including medical care providers.”

On August 23, 1996, bankruptcy attorney Lintner e-mailed the Accused a draft of a **Motion to Reopen Estate** for review and approval. The identical motion was filed in the

Michigan bankruptcy court on August 29, 1996 and contained this language:

“7. That the Debtor’s attorney in the State of Oregon is Daniel Goff of Eugene, Oregon and the Debtor originally brought the legal negligence action against more than one of her former attorneys and all but one attorney has settled for a gross amount of \$10,000.00.

“8. That Attorney Goff will hold this \$10,000.00 in trust until he receives authority from the Trustee to make disbursements.

“9. That Attorney Goff believes that the Debtor has good claim against the one attorney and would expect a total verdict/settlement to be in excess of \$100,000.”

On September 11, 1996, the trial court granted Defendant Simcoe’s motion for summary judgment on the basis of the Accused’s failure to furnish proof by August 31 that the bankruptcy had been reopened; on September 24, 1996, the trial court entered a judgment dismissing Ms. Fambrough-Anderson’s claim against Simcoe and awarding costs to Simcoe. On October 25, 1996, the Accused filed a Notice of Appeal from that judgment. However, by December 17, the Judgment of Dismissal was set aside and the Accused moved to dismiss the appeal.

On December 15, 1996, Fambrough-Anderson and the Accused signed the Covenant Not to Sue and stipulation for dismissal of the claim against Trujillo. The funds, in a check made payable to the Accused’s trust account, were received in January, 1997. The Accused did not submit the stipulation for dismissal of the Trujillo claim to the trial court until sometime after August 1997.

On February 3, 1997, the Michigan Bankruptcy Court ordered that the Fambrough-Anderson bankruptcy be re-opened and appointed Marcia Meoli as the Trustee in Bankruptcy. The first conversation between the Accused and Meoli was by telephone on June 11, 1997. Following that discussion, on July 24, 1997, the Accused

wrote to Meoli advising her of the \$10,000 settlement received from Trujillo. He also stated that he intended to deduct \$3,333 from that amount for his fees and to use the balance of \$6,667 for costs.

In anticipation of substituting the Trustee as Plaintiff in the malpractice claim remaining against Simcoe, the Accused also enclosed a Contingent Fee Retainer Agreement for Meoli's signature. That agreement states that "Plaintiff [Fambrough-Anderson] has deposited the amount of \$6,666.67 to be held in trust by Attorney to secure and pay costs." Meoli responded with an Addendum to that Agreement requiring that the entire agreement be approved by the Bankruptcy Court and that the Trustee have no obligation to pay costs or any bill except through recovery on the claim or by specific agreement of the Trustee in advance. Meoli returned the signed fee agreement to the Accused, subject to his signing the Addendum on August 19, 1997. The Accused did not return the signed Addendum to Meoli until two years later, on August 3, 1999.

Defendant Simcoe offered \$10,000 to settle the malpractice claim against him. In May, 1998, the Accused gave notice to the trial Court that the case was settled; in September, 1998, Simcoe's attorney also gave notice to the trial Court was settled and that he was waiting for paperwork.

Simcoe's attorney, Mr. Deatherage, had convinced the Accused that there was a statutory provision that would waive the two year period of limitations and allow the personal injury claim to be filed against the proper defendant. In reliance on this theory, the Accused advised Meoli on August 12, 1999 to accept the \$10,000 settlement because he believed the personal injury claim was still viable. Meoli agreed and the

case was settled between the parties. (The Stipulation settling the case was not submitted to the Court, and a judgment entered dismissing the case, until November, 2000.)

On October 1, 1999 the Accused sent the Trustee the \$10,000 settlement check with a request for distribution as follows:

Attorney Fees:	\$3,333.33
Costs Advanced:	
Expert Witness Fee	990.00
Postage	21.00
Photocopies	67.40
Depositions	439.75
Filing Fees	118.00 ¹
Service Fee	98.00 ²
Distribution to Ms. Fambrough-Anderson	4,932.52

The expert witness fee of \$990 was for payment to a Dr. Kurlychek for his evaluation of Ms. Fambrough-Anderson. These charges had not been paid as of the disciplinary hearing. And, the representations of the Accused in his final written argument notwithstanding, the record contains no evidence that they were paid any time thereafter.

On January 31, 2000, Goff filed the second personal injury claim, with Meoli as Plaintiff.

From December 13, 2000 through February 19, 2002, and from February 21, 2002 through May 8, 2002, the Accused had no contact with Meoli nor with Fambrough-Anderson, in spite of numerous requests from each of them for information. During this time period, several important events occurred in the personal injury case.

¹ The original filing fees for the malpractice action against Trujillo and Simcoe.

² The original service fees for the malpractice action against Trujillo and Simcoe.

On February 8, 2001, Defendant's Motion for Summary Judgment in the personal injury case was granted on statute of limitations grounds and Defendant was awarded costs. The Accused did not notify Meoli of this dismissal until more than a year later.

On March 6, 2001, the Accused filed a Notice of Appeal from the summary judgment ruling with the Oregon Court of Appeals. The Accused did not notify Meoli of this appeal until more than a year later.

On June 18, 2001, the Court of Appeals issued a notice of dismissal because the order appealed from was not a final order. The dismissal was held in abeyance for 30 days in order to give the trial court time to enter a final judgment. The Accused did not promptly notify Meoli or Fambrough-Anderson of the dismissal.

Thereafter, between August 13, 2001 and November 3, 2003, the Accused filed Amended Notices of Appeal, followed by dismissals, no fewer than three times. On October 15, 2003, the Court of Appeals issued a Notice of Intent to Dismiss for appellant's failure to file the brief on time and the Accused had to request an extension of time. Ultimately, on June 1, 2005, the Court of Appeals affirmed the ruling of the trial court on the merits and awarded Respondent his costs on appeal.

The Accused filed a petition with the Oregon Supreme Court for review, which was denied on September 27, 2005. The Accused notified Ms. Fambrough-Anderson of that result on October 3, 2005.

In response, Ms. Fambrough-Anderson wrote on November 8, 2005 to the Accused asking for an explanation of what had happened, what recourse she had, and for an accounting of the \$20,000 that had been paid in settlement of the malpractice claims.

The Accused responded on December 22, 2005 that she had no further recourse, and that he had been ill and would respond to her other questions later. He never did so.

On September 29, 2005, counsel for the Respondent on appeal requested that the Accused pay the outstanding judgments for trial and appeal costs. The Accused forwarded the letter to Meoli, who, on October 7, 2005, informed the Accused that she was abandoning the asset and that he would need to take care of the costs. This debt was partially satisfied by Respondent's taking the \$500 undertaking paid to the trial court when the appeal was filed. Despite his prior agreement to use the Trujillo settlement funds to pay all costs, the remaining balance owed on cost bills remains an outstanding judgment against Meoli. The Accused, in his final written argument, asserts that the balance has been paid. However, the record contains no evidence in support of that assertion.

At no time did Meoli request an accounting of the \$6,667 remaining from the Trujillo settlement and which the Accused had agreed to hold in trust for costs.

After payment of creditors, on September 7, 2007 the Trustee sent Ms. Fambrough-Anderson a check for \$3,476.74. This amount constitutes the only recovery Fambrough-Anderson received from either the personal injury claims or the malpractice claims. Shortly thereafter, Ms. Fambrough-Anderson contacted the Oregon State Bar.

The Oregon State Bar initiated an investigation into Ms. Fambrough-Anderson's complaint with a letter requesting information from the Accused dated September 26, 2007. By that date, the Accused had no trust records for any of the monies received or disbursed by him in connection with his representation of Ms. Fambrough-Anderson or of

Ms. Meoli.

On November 19, 2007. in response to a letter of investigation from disciplinary counsel at the Bar, the Accused represented:

1. That he had not represented Ms. Fambrough-Anderson since August of 1997 and therefore had only limited records available concerning her matter;

2. That Ms. Fambrough-Anderson had first filed for bankruptcy in Michigan during the Accused's course of representation of her, and without notifying him that she was doing so;

3. That the Accused had the balance of the Trujillo settlement (\$6,667) remaining after payment of his attorney fees to pay existing costs, including expert witness fees, and that those costs exceeded her share of the settlement proceeds;

4. That Ms. Fambrough-Anderson agreed at the time she entered into the August, 1996 fee agreement that the balance of the Trujillo settlement could be used to pay existing costs;

5. That, upon settlement of the Simcoe claim, the amount of \$1734.15 was used to pay unpaid costs;

6. That, after his representation of Ms. Fambrough-Anderson ended, the Accused made every effort to keep her informed.

These statements were false.

On June 23, 2008, through his attorney, Robert J. Smith, the Accused made the following representations in response to a letter of investigation from disciplinary counsel at the Bar:

1. That the \$6,667 remaining from the Trujillo settlement was, pursuant to his agreement with Ms. Fambrough-Anderson, applied toward attorney fees and costs for the personal injury litigation that followed the settlement of the Simcoe lawsuit;

2. That, pursuant to the fee agreement entered into by Ms. Fambrough-Anderson and the Accused, the \$6,667 remaining from the Trujillo settlement was to be a fixed partial attorney fee, to be reduced by any necessary costs that would be paid by Mr. Goff.

These statements were false.

On September 11, 2008, in response to a letter of investigation from disciplinary counsel at the Bar, the Accused made the following representation through his attorney, Robert Smith:

“While Mr. Goff’s reference that the funds were being held in trust may be confusing but (sic) it was not intended to mean that they were being held in his lawyer’s trust account.”

This statement is false.

With respect to the justification and affirmative defenses claimed by the Accused, the Trial Panel finds:

1. That the Accused entered into a written fee agreement with Ms. Fambrough-Anderson that provided that the Trujillo settlement funds were fixed fees, immediately earned;

2. That the written fee agreement with Ms. Fambrough-Anderson may or may not have precluded any claim to them by the Bankruptcy Court. However, the written fee agreement entered into between the Accused and Meoli committed the

Accused to holding \$6,667 of those fees in trust to be used for costs and expenses pending his representation of Meoli.

3. That, by entering into the fee agreement, Ms. Fambrough-Anderson waived any right to the Trujillo settlement fees.

4. The Accused entered into contingent fee agreements in these matters, not hourly rate fee agreements. In addition, a not insignificant portion of the extra attorney time and costs incurred resulted from the Accused's neglect of the matters he undertook and were not costs or time reasonably necessary to be charged to the client.

5. Ms. Fambrough-Anderson did delay her complaints about the Accused for a lengthy period of time, but not for so long that the Accused was excused from his obligation to keep client files and records.

CONCLUSIONS

1. Violation of former Oregon Code of Professional Responsibility DR 6-101(B), which provides that "A lawyer shall not neglect a legal matter entrusted to the lawyer." The trial panel finds a violation.

The numerous delays set out in the findings will not be recited again here; nonetheless, the more egregious delays include but are not limited to: failure to timely reopen the bankruptcy case; failure to return her fee agreement to Meoli for a period of two years; failure advise Meoli of the Simcoe settlement agreement for a period of over a year after the agreement was made; and failure, two years after having filed a notice of appeal, to have a brief ready to file on the appointed date. All of these delays resulted in additional costs and attorney time, let alone significant delay in Ms. Fambrough-

Anderson receiving the small amount finally distributed to her.

2. Violation of DR 1 -102(A)(3) and of of RPC 8.4(A)(3), each of which provides that it “is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation .” The trial panel finds a violation.

This charge addresses the Accused’s conduct with respect to the \$10,000 Trujillo settlement. The Accused entered into a series of agreements where he agreed or represented:

-that the \$10,000 would be held in his trust account until it was finally determined that the funds could be paid to Ms. Fambrough-Anderson free of any claim by the Trustee or any other person (Covenant Not to Sue);

- that he would “hold this \$10,000.00 in trust until he receives authority from the Trustee to make disbursements” (Motion to Reopen Bankruptcy);

-that Ms. Fambrough-Anderson had designated the funds be held in trust by Attorney to secure and pay costs (Contingent Fee Retainer Agreement entered into with Meoli); and

- that “Attorney is still entitled to his 1/3 contingent fee. Attorney is further entitled to an additional fixed and non-refundable fee of \$6,666.67. This fixed fee is immediately earned and no portion of it will be refunded to Client.” (Amended Fee Agreement with Ms. Fambrough-Anderson).

The Accused never informed attorney Barker, attorney Lintner, nor his client, Ms. Meoli, of his fee agreement with Ms. Fambrough-Anderson. His later claim to the Bar

that by “in trust” he never meant “in his client trust account” is disingenuous at best and at worst indicates an attempt to deceive Meoli, Barker and Lintner. This excuse also makes clear that, in spite of his promises and professional conduct rules to the contrary, these funds were not held in the client trust account as agreed and as required.

3. Violation of DR 9-101(A) and of RPC 1.15-1(a), each of which provides that “all funds of clients paid to a lawyer or law firm, including advances for costs and expenses . . . shall be deposited and maintained in one or more identifiable trust accounts in the state in which the law office is situated.” The Trial Panel finds a violation.

There is no clear evidence as to when the Accused withdrew the Trujillo settlement funds from his client trust account. Nonetheless, his later statements, both in his testimony at the disciplinary hearing and in his September 11, 2008 letter to disciplinary counsel, make it clear that the Trujillo funds did not remain in his trust account to be used for costs and expenses, as agreed with Meoli and as represented to Lintner.

4. Violation of DR 9-101(C)(3) and of RPC 1.15-1(D), each of which requires that a lawyer shall maintain “complete records of all funds, securities and other properties of a client coming into the possession of the lawyer and render appropriate accounts to the lawyer’s client regarding them. Every lawyer engaged in the private practice of law shall maintain and preserve for a period of at least five years after final disposition of the underlying matter, the records of the accounts...”

The Trial Panel finds a violation. Although the claim against Trujillo was resolved in 1997, the Accused thereafter agreed with Meoli that these funds would be

held in trust for costs and expenses in the continuing litigation against Simcoe, and in a potential second personal injury action. DR 9-101(A) and of of RPC 1.15-1(a) each provide that “all funds of clients paid to a lawyer or law firm, including advances for costs and expenses . . . shall be deposited and maintained in one or more identifiable trust accounts in the state in which the law office is situated.” The Simcoe matter was not finally resolved until November 14, 2000, and the personal injury claim was not resolved until September 27, 2005. The Accused was obligated to maintain his trust account records until at least September 26, 2010, well after he was unable to produce them for the Bar.

In addition, the Accused was obliged to account for these funds to his client, Meoli. The fact that she did not request an accounting is immaterial. A lawyer is required to account to a client even if the client does not request an accounting. *In re Gildea*, 324 Or 281, 290 (1997).

5. Violation of DR 9-101(C)(4) which requires that, when a lawyer holds client funds in his trust account, the lawyer shall promptly “pay or deliver to a client as requested by the client the funds, securities or other properties in the possession of the lawyer which the client is entitled to receive.”

The Trial Panel finds no violation. There was no instance in which either Ms. Fambrough-Anderson or Ms. Meoli was entitled to receive funds and the Accused failed to pay those funds.

6. Violation of DR 1-102(A)(3) which provides that it “is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation .” The Trial Panel finds a violation.

The Accused’s failures to disclose to Meoli that he did not hold the \$6,667 in trust and that he had reached an agreement with Fambrough-Anderson that those funds were immediately earned by him as fees prior to the reopening of the bankruptcy were material omissions. Similarly, his failure to disclose promptly to her that the personal injury claim had been dismissed and an appeal filed was a material omission.

7. Violation of RPC 8.1(a)(1) which provides that a lawyer, in connection with a disciplinary matter shall not “knowingly make a false statement of material fact.”

The Trial Panel finds a violation. The representations made by the Accused in his letters in response to inquiries from disciplinary counsel, and found to be false by the Trial Panel, are set out in the findings.

8. Violation of RPC 8.1 (a)(2) which provides that a lawyer, in connection with a disciplinary matter, shall not . . . “knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority”.

The Trial Panel finds no violation. In light of the general disorder evident in the Accused’s office practices, the Trial Panel finds the Accused’s claim that he could not find financial records to be credible.

9. Violation of RPC 8.4(a)(3) which provides that it “is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation .”

Taking into consideration its conclusion with respect to Claim 7, the Trial Panel finds a violation.

IN THE MATTER OF ELLIOT MANTELL (CASE NO. 09-12)

In its Second Amended Formal Complaint, the Bar charges the Accused with violation of the following disciplinary rules:

1. Violation of RPC 1.5(a), which provides that a lawyer “shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee.”

Specifically, the Bar charges that the Accused entered into an agreement with Mr. Mantell for a clearly excessive fee (\$50,000) and collected a clearly excessive fee (\$42,500). The Accused denies that his fees were excessive and claims that he earned the fees agreed to and collected.

2. Violation of the Oregon Rules of Professional Conduct RPC 1.15 -1(c), which requires that a lawyer “shall deposit into a lawyer trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred, unless the fee is denominated as ‘earned on receipt,’ ‘nonrefundable’ or similar terms and complies with Rule 1.5(c)(3).” RPC 1.5.(3) requires that a fee shall not be so denominated “unless it is pursuant to a written agreement signed by the client.”

Specifically, the Bar alleges that the Accused deposited Mr. Mantell’s retainer of \$42,500 into his trust account and withdrew the same amount from his trust account over a period of about the next six weeks, without having earned them. This was pursuant to an oral fee agreement which the parties were unable to reduce to writing. The Accused admits withdrawing the funds, but claims that he had earned them as he withdrew them.

3. Violation of RPC 1.15-1(d) which requires a lawyer holding a client's funds in trust, upon request from a client, to "promptly render a full accounting regarding such property."

Specifically, the Bar alleges that when Mr. Mantell requested an accounting of his trust funds, the Accused refused to provide it. The Accused denies this allegation.

4. Violation of RPC 1.15-1(e) which requires that "when in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved."

The Bar alleges, that after Mr. Mantell terminated the Accused's services and demanded an accounting, the Accused continued to pay himself from the funds held in trust even though he knew that Mantell disputed his right to do so.

The Accused admits the withdrawals from his trust account, but denies that he knew there was a dispute about his fees.

5. Violation of RPC 8.4(a)(3) which states that it is professional misconduct for a to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law."

This charge incorporates the allegations, admissions, denials, and defenses set out in paragraphs 1 through 4 above.

6. Violation of RPC 8.4(a)(3) which states that it is professional misconduct for a to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law."

The Bar alleges that in response to a request for accounting from Mr. Mantell, the Accused first represented falsely that he had not been paid for all of his work and, in a second letter, represented falsely that the parties had a mixed fixed and contingent fee agreement, no part of which was refundable, and that Mr. Mantell was not entitled to an accounting.

The Accused admits making the representations, but denies that they were false.

7. Violation of RPC 3.4(b) which provides that a lawyer shall not falsify evidence.

The Bar alleges that, in connection with Bar disciplinary proceedings, the Accused fabricated a time sheet purporting to describe the time he had worked on the Mantell case. The Accused denies fabricating the time sheet.

8. Violation of RPC 8.1(a)(1) which provides that a lawyer, “in connection with a disciplinary matter shall not knowingly make a false statement of material fact.”

The Bar alleges that, in a letter to the Bar dated October 25, 2008, and in connection with a disciplinary matter, the Accused knowingly misrepresented the amount of time that he had spent working on the Mantell matter. The Accused admits the representations, but denies that they were false.

9. Violation of RPC 8.1 (a)(2), which provides that a lawyer, in connection with a disciplinary matter shall not “knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority.”

/ / / /

Specifically, the Bar charges that, in response to its letter of November 18, 2008 requesting information, the Accused failed to respond or to provide that information. The Accused does not respond to this allegation in his Answer.

10. Violation of RPC 8.4(a)(3) which states that it is professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer’s fitness to practice law.”

This charge incorporates the allegations, admissions, denials, and defenses set out in paragraphs 7, 8, and 9 above.

As affirmative defense to all of the above charges, the Accused alleges that Mantell intentionally changed the terms of the oral fee agreement in order to avoid a written agreement; that Mantell has a history of refusing to honor fee agreements with attorneys, that Mantell attempted to act on behalf of the Accused; and that the Accused more than earned his fees in the Mantell matter.

Findings of the Trial Panel

On April 7, 2007, the Accused undertook to represent Elliott Mantell and his business partner regarding disputes they were having with a commercial tenant and to review the performance of Mantell’s prior attorneys to determine whether a malpractice action against them was viable. The Accused and Mantell orally agreed that the Accused would handle all of the legal matters for a flat fee of \$50,000.

At the time of that meeting, Mr. Mantell paid \$10,000 to the Accused. Between April 20, 2007 and June 7, 2007, Mantell paid an additional \$32,500 towards his fees. The Accused deposited all of these funds into his lawyer trust account.

On May 14, 2007, the Accused sent Mr. Mantell a proposed written fee agreement providing that the Accused would handle Mr. Mantell's legal matters for a flat fee of \$50,000, paid in advance and deemed fully earned upon receipt, and a deposit of \$5,000 towards costs. On May 23, 2007, Mr. Mantell responded to the Accused, disputing the terms of the fee agreement. Thereafter, the Accused and Mr. Mantell could not at anytime agree, either orally or in writing, on the terms of a flat or any other fee agreement. The areas of dispute between the parties were (1) the scope of services to be provided; and (2) whether the Accused could consider the funds "earned upon receipt" or whether he would have to wait until various portions of his services were completed to withdraw funds.

On April 11, 2007, the Accused withdrew \$7,000 from his lawyer trust account for payment of attorney fees billed at an hourly rate of \$250 and allegedly incurred by Mr. Mantell between April 7 and April 11, 2007. Between April 23, 2007 and May 15, 2007, the Accused withdrew an addition \$9,000 from his lawyer trust account for payment of attorney fees allegedly incurred in the Mantell matters. Between May 24, 2007, the day after receiving the fax from Mr. Mantell disputing the terms of the fee agreement, and July 6, 2007, the day that Mantell terminated the Accused's representation of him and requested an accounting, the Accused withdrew an additional \$21,327 for his fees. The Accused did not notify Mr. Mantell that he was withdrawing funds from the trust account.

On July 6, 2007, Mr. Mantell terminated the Accused's representation and asked the Accused for an accounting and refund of the fees paid. On that same date, the Accused responded to Mr. Mantell's letter and told Mr. Mantell that he would prepare an

accounting and return any fees not yet earned. However, at no time thereafter did the Accused provide Mr. Mantell with the requested accounting, nor did he return any fees to Mr. Mantell.

On July 12, 2007, the Accused withdrew an additional \$2,000 from the Mantell trust account, and on July 26, 2007, withdrew an additional \$673 from the trust account, all for payment of attorney fees in the Mantell matters. The Accused knew when he made these withdrawals that Mr. Mantell disputed the Accused's entitlement to those funds.

In an August 15, 2007 letter to Mr. Mantell, the Accused represented that he and Mr. Mantell had agreed to a mixed fixed and contingent fee; that the fees Mantell paid the Accused were immediately earned and not refundable; and that Mantell was not entitled to receive any accounting from the Accused. These representations by the Accused were false and material and the Accused knew they were false and material at the time he made them.

In April, 2008, Mr. Mantell filed a complaint with the Bar regarding the Accused's conduct. In response to Mr. Mantell's complaint, the Accused submitted a time sheet that purported to describe the hours he spent on the Mantell legal matters. The Trial Panel cannot find by clear and convincing evidence that the Accused fabricated this time sheet nor that the time sheet did not accurately reflect the hours the Accused spent on the Mantell legal matters.

On October 25, 2008 in connection with the Bar's investigation into his conduct, the Accused made representations as to the total number of hours he had worked on the Mantell legal matter, described with particularity the nature of the work he allegedly

performed, and claimed that Mr. Mantell had not paid the Accused for all of the hours worked.

The evidence simply does not support a conclusion one way or the other as to whether the Accused performed the work he claims. Thus, the Trial Panel cannot find that the Accused's representations about his work were false and material, nor that the Accused intended to make false representations.

On November 18 2008, Disciplinary Counsel's Office requested that the Accused respond to some specific questions on or before December 2, 2008. The Accused obtained an extension of time to January 5, 2009. Thereafter, the Accused failed to respond to the November 18, 2008 letter.

In 2008 Mr. Mantell bought a civil action against the Accused for recovery of the amount of \$37,500 paid to the Accused for attorney fees in the above matter. In a mediated settlement of this action, and without admitting any liability, the Accused agreed to give Mr. Mantell a Confession of Judgment in that same amount. To date, the Accused has repaid Mr. Mantell \$1,500 of the \$37,500.

With respect to the Accused's justifications and affirmative defenses, the Trial Panel finds that Elliot Mantell was a particularly difficult, argumentative, demanding and time-consuming client. There were warning signs that he would be difficult to please from the first meeting. A friend of the Accused's, who accompanied him to the meeting and took notes of the conversation described Mantell as "rather excitable". Mantell's prior attorneys on the same matters had already run up \$200,000 in fees on an hourly basis. Mantell was engaged in a fee dispute with his former attorneys over a balance

owed to them of \$100,000 and wanted to sue them for malpractice. The fee dispute was one of the matters in which the Accused agreed on April 7, 2008 to represent Mr. Mantell, as was evaluation of a potential malpractice claim against the former lawyers.

It is also true that Mr. Mantell requested that the Accused's secretary email him the Accused's fee agreement in Word Perfect format. Mr. Mantell then worked from that document to draft his own version of the fee agreement; there is no evidence he was attempting to "act on behalf of the Accused", as claimed. Nor is there evidence that Mr. Mantell was attempting to avoid a written fee agreement.

Conclusions

1. Violation of RPC 1.5(a). The Trial Panel finds that this allegation was not proved by clear and convincing evidence. Whether or not the Accused performed all of the work he claims cannot be established; but the work he undertook to perform was substantial, time lines were short, and, Mr. Mantell was a difficult client who interrupted the Accused on a nearly daily basis.

2. Violation of the Oregon Rules of Professional Conduct RPC 1.15 -1(c). The Bar's allegation here is that the Accused did not earn the moneys he withdrew from his trust account. That charge is not proved by clear and convincing evidence.

3. Violation of RPC 1.15-1(d). The Trial Panel finds that the Accused violated this rule when he refused to provide Mantell with an accounting, advising him that he was not entitled to one.

4. Violation of RPC 1.15-1(e). The Trial Panel finds a violation. No later than May 23, 2007, the Accused knew that there was a dispute over the terms of his fee agreement with Mantell. After that date, he nonetheless withdrew a total of \$24,000 from his trust account to pay his own fees.

5 and 6. Violations of RPC 8.4(a)(3). The Trial Panel finds violations of this rule, first taking into consideration its conclusion on charges 3 and 4; and then on the basis of the Accused's representation to Mr. Mantell that he was not entitled to an accounting of the Accused's time.

7. Violation of RPC 3.4(b). The Bar has not proved this allegation by clear and convincing evidence.

8. Violation of RPC 8.1(a)(1). The Bar has not proved this allegation by clear and convincing evidence.

9. Violation of RPC 8.1 (a)(2). The Trial Panel finds a violation of this rule.

10. Violation of RPC 8.4(a)(3). Taking into consideration its conclusions on charges 7 and 8, the Trial panel finds that the Bar has not proved this allegation by clear and convincing evidence.

IN THE MATTER OF W. FRED WHITSEL (CASE NO. 09-53)

In its Second Amended Formal Complaint, the Bar charges the Accused with violation of the following disciplinary rules:

1. Violation of former Oregon Code of Professional Responsibility DR 2-106(A) and of The Oregon Rules of Professional Conduct RPC 1.5(a), both of which provide that “a lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee.” The Accused’s representation of Mr. Whitsel on this matter began in 2003, when the former Code was in place, and continued into 2008, when the new Rules were in place.

Specifically, the Accused initially charged Mr. Whitsel a flat fee of \$7,500 to handle his dissolution of marriage. When Mr. Whitsel terminated The Accused’s services in 2008, the Accused refused to refund Mr. Whitsel’s \$7,500. The Accused denies that the fees were excessive and claims that there were no unearned fees to refund to Mr. Whitsel.

2. Violations of former Oregon Code of Professional Responsibility DR 6-101(B) and of the Oregon Rules of Professional Conduct RPC 1.3, both of which require that a “lawyer shall not neglect a legal matter entrusted to the lawyer.”

Specifically, the Bar charges that the Accused failed to assure that a dissolution judgment was entered and allowed the dissolution to be dismissed by the Court; and that subsequently, when the client discovered that he was not divorced, failed to follow through with obtaining a dissolution judgment over a period of about 18 months. The Accused denies these allegations. He blames the dismissal of the original dissolution

judgment on the malfeasance of an employee and blames the failure to complete paperwork for the second dissolution proceedings on Mrs. Whitsel's failure to come into the office and sign documents.

3. Violation of RPC 1.5(a) of the Oregon Rules of Professional Conduct, which requires that a "lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information."

The specific violations alleged are that the Accused failed to notify Whitsel that his first Petition for Dissolution of Marriage had been dismissed and failed to keep him informed of progress in subsequent attempts to obtain the dissolution. The Accused denies these allegations.

4. Violation of RPC 8.1 (a)(2) which requires that, in connection with a disciplinary proceeding, a lawyer shall not "knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority...".

Specifically, the Bar charges that, in response to its letter of November 12, 2008 requesting information, the Accused failed to respond or to provide that information. The Accused denies this allegation and claims that the Bar failed to respond to his related correspondence of January 5 and January 12, 2009.

Findings of the Trial Panel

W. Fred Whitsel was a client who retained the Accused from time to time for business matters. In about March, 2003, Mr. Whitsel retained the Accused to represent him in his dissolution of marriage. The Accused undertook to represent Mr. Whitsel for a flat fee of \$7,500. He filed a Petition for Dissolution of Marriage on Mr. Whitsel's

behalf in Lane County Circuit Court on March 17, 2003.

Mr. Whitsel and his then wife, Kimberly Whitsel, were in substantial, but not complete, agreement about the terms of their dissolution. The Whitsels had a “long term marriage”, both in terms of years and in terms of intermingling of their financial lives. Mr. Whitsel was a partner with other members of his family in a lumber mill which had substantial value and produced substantial income for him. The parties had four children, all of whom were grown.

Kimberly Whitsel was advised of her right to separate counsel and declined to retain her own attorney.

On April 8, 2003, the parties entered into a written Marital Settlement Agreement addressing all issues in their dissolution and which was intended to be incorporated into the parties’ judgment of dissolution of marriage. The Marital Settlement Agreement provided that Mr. Whitsel would pay his former wife substantial spousal support.

Within 60 to 90 days after the Marital Settlement Agreement was signed, Mr. Whitsel had a telephone conference with the Accused during which the Accused told him that his dissolution judgment had been signed by a judge and that the divorce would be final after 60 or 90 days. In reliance on the Accused’s representations, Mr. Whitsel began paying spousal support to Kimberly Whitsel pursuant to the terms of the Marital Settlement Agreement.

At the time of this telephone conversation, no judgment of dissolution had been filed with the Court. On August 11, 2003, the Lane County Circuit Court issued to the Accused a “Notice of Intent to Dismiss/ No Default or Appearance” in the Whitsel matter.

This notice provided that the dissolution would be dismissed after 28 days if no further action were taken by the Petitioner. A copy of the Notice was provided to the Accused by the Court.

On October 22, 2003, on the Court's initiative, a Judgment of Dismissal was filed in the Whitsel matter. A copy of the Notice was provided to the Accused by the Court.

The Accused did not inform Mr. Whitsel that no judgment of dissolution had been signed nor that the dissolution case had been dismissed by the Court.

The Accused testified that a dissolution judgment had been prepared in 2003, but that a clerical employee had failed to file the judgment and, to cover her tracks, had prepared a fake, hand-conformed dissolution judgment for the file. No copy of the allegedly faked judgment was provided to Mr. Whitsel in 2003 nor to the Trial Panel as evidence at hearing. The Trial Panel also takes notice of Lane County Supplemental Local Rule requiring that all attorneys maintaining their principle offices in the Eugene/Springfield area submit *ex parte* matters in person at the Court session scheduled for that purpose.

The Trial Panel finds that, in 2003, the Accused never prepared a General Judgment of Dissolution of Marriage in the Whitsel matter; never submitted a dissolution judgment to the Court; and never took steps to ensure that the Whitsel dissolution would be completed.

Three years later, in the fall of 2006, Mr. Whitsel discovered that the dissolution had been dismissed and that he and Kimberly Whitsel were still married. He promptly contacted the Accused, who promised to take care of the situation. On September 1,

2007, Mr. Whitsel and Kimberly Whitsel signed a second Marital Settlement Agreement prepared by the Accused.

Between the fall of 2006 and March, 2008, Mr. Whitsel called the Accused repeatedly to learn the status of his case. His sister, who was helping Mr. Whitsel with tax matters, also called the Accused repeatedly. The Accused responded only that he was trying to get the new dissolution to be “retroactive” to 2003 and working on the perceived tax (spousal support) problem.

The tax problem resulted from audits of Mr. Whitsel’s 2004 and 2005 State and Federal income tax returns. When Mr. Whitsel was unable to prove that he was divorced during those two years, both taxing entities disallowed his spousal support deductions and demanded that he pay taxes on the amounts deducted as alimony.

In final argument, the Accused asserts that the spousal support paid by Mr. Whitsel was deductible under the terms of the Marital Settlement Agreement signed in 2003, even though a judgment had not been entered. It is correct that a cash payment made pursuant to the terms of a “written separation agreement” can be considered “alimony” under 26 USC 71. However the record contains absolutely no indication that the Accused was aware of this provision during his representation of Mr. Whitsel, let alone that he discussed this information with his client.

The Accused’s plan for addressing the tax issue was to try and make the new dissolution judgment retroactive to 2003. However, this plan was abandoned and Mr. Whitsel, unaware of the federal tax law, was ultimately required to pay back taxes and penalties on the amounts deducted as spousal support.

After September 1, 2007, the Accused failed to take any action to pursue Whitsel's dissolution of marriage. In particular, he failed to file a Petition for Dissolution with the Court, failed to obtain a Waiver of Appearance and Consent to Entry of Judgment by Default from Kimberly Whitsel, and failed to ensure that the Court signed and entered a judgment.

There is some evidence that although Kimberly Whitsel came to the office of the Accused to sign a second Marital Settlement Agreement, she refused to come into the office again to sign an Acceptance of Service and Consent to Entry of Default. No evidence was offered to explain why, in light of her refusal to come the office of the Accused, the Accused did not undertake to prepare and file a Petition and have it served on Mrs. Whitsel.

In March, 2008, no dissolution judgment had yet been sought or obtained for Mr. Whitsel by the Accused and Mr. Whitsel terminated the Accused's services. The Whitsels then obtained their dissolution of marriage *pro se*.

From 2003 to the fall of 2006, Mr. Whitsel paid spousal support to the woman he believed was his former wife in reliance on his belief that he was required to do so by a dissolution judgment. He claimed those spousal support payments as deductions on his State and Federal income tax returns, causing him problems when his State and Federal tax returns for those years were audited.

In April, 2008, Mr. Whitsel filed a complaint with the Oregon State Bar regarding the Accused's conduct. On November 12, 2008, Disciplinary Counsel's Office requested the Accused's response to some specific questions on or before November 26, 2008. The

Accused obtained an extension of time until January 5, 2009. Thereafter, the Accused produced no documents or information in response to the Bar's November 12, 2008 request. No evidence was offered in support of the Accused's affirmative defense he sent the Bar correspondence in 2009 to which the Bar failed to respond.

Conclusions

1. Violation of former Oregon Code of Professional Responsibility DR 2-106(A) and of The Oregon Rules of Professional Conduct RPC 1.5(a).

Although in 2003, the parties had reached substantial agreement about settlement of their dissolution, they were not in complete agreement. Because of the long term nature of the marriage, the matter had the potential to consume a substantial amount of time before full agreement was reached between the parties. A flat fee of \$7,500 was not a clearly excessive fee under these circumstances and charging that fee does not violate of DR 2-106(A).

2. Violations of former Oregon Code of Professional Responsibility DR 6-101(B) and of the Oregon Rules of Professional Conduct RPC 1.3, both of which require that a "lawyer shall not neglect a legal matter entrusted to the lawyer."

The Accused failed to complete the matter for which he was retained in 2003. His attribution of fault to his employee is without merit and the trial panel finds that he is in violation of DR 6-101(b).

The Accused again failed to complete the matter for which he had been retained in 2006. His attribution of fault to the opposing party's failure to cooperate is without merit and the trial panel finds that he is in violation of RPC 1.3.

3. Violation of RPC 1.5(a) of the Oregon Rules of Professional Conduct, which requires that a “lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.”

RPC 1.5(a) was not in effect in 2003. Nonetheless, the Trial Panel finds that the Accused failed to keep Mr. Whitsel advised of the status of his dissolution, including the fact that the Court had dismissed the dissolution petition. Beginning in 2006, the Accused failed to keep Mr. Whitsel advised of the status of his case, in violation of RPC 1.5(a).

4. Violation of RPC 8.1 (a)(2) which requires that, in connection with a disciplinary proceeding, a lawyer shall not “knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority...”

The Accused failed to respond to the Bar’s November 12, 2008 request for information and is violation of RPC 8.1(a)(2).

IN THE MATTER OF IMRE JUHASZ (CASE NO. 10-14)

In Cause of Complaint 10 of its Second Amended Formal Complaint, the Bar charged the Accused with violation of RPC 1.4(a) of the Oregon Rules of Professional Conduct, which requires that a “lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.” The specific violation alleged is that, after an initial meeting with the client, the Accused’s failed to provide his client with his opinion on the two questions of concern to the client.

The Accused denies that allegation and that he violated the RPC. In addition, he

alleges that, during the period of time he represented Mr. Juhasz, the Accused suffered from colon cancer and underwent intensive chemotherapy, all of which compromised his memory and ability to work.

Findings of the Trial Panel

Imre Juhasz was convicted of a crime in December, 2007. Mr. Juhasz met with and retained the Accused on January 28, 2008. Mr. Imre, who was also represented by court appointed counsel, asked that the Accused give him a second opinion as to whether there were grounds for a new trial and whether an appeal of his conviction would be meritorious.

At that meeting, Mr. Juhasz and the Accused agreed that Mr. Imre would pay a retainer of \$1000 and the Accused would charge him \$250 an hour for his services. Mr. Juhasz paid the retainer that same day.

The Accused was aware that time limits were in place for Mr. Juhasz to ask for a new trial and to decide whether he should pursue his appeal. By February 1, 2008, the Accused had reviewed the matter and concluded that no grounds existed for a new trial and that any appeal was without merit.

At hearing, the Accused presented inconsistent testimony about when he communicated his conclusions to Mr. Juhasz, saying first March 9, 2009, then March 20, 2009 and then sometime earlier than those dates. He further claimed that Mr. Juhasz had failed to pay him for all of the services provided and that the retainer had been exhausted by February 1, 2008.

Mr. Juhasz testified that he never heard from the Accused after January 28, 2008 until Mr. Juhasz wrote and asked for his retainer to be refunded. The documentary evidence included a letter from the Accused dated March 9, 2009, in which the Accused told Mr. Juhasz he had used up the retainer and there was no refund; and a letter dated March 20, 2009, in which the Accused provided his opinion on the legal issues. The time sheet provided by the Accused showed no additional work on the matter after February 1, 2008 and no evidence of correspondence to Mr. Juhasz. No other relevant documents, including billing documents or a request for additional retainer, were in evidence.

Conclusions

The Panel finds that the Accused did communicate his findings to his client, but not before March 20, 2009, one year and two months after the services were requested and paid for. The Accused therefore failed to keep Mr. Juhasz reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

The Accused presented no evidence that his cancer interfered with his representation of Mr. Juhasz. On the contrary, he testified that he had performed the work for which he was retained and communicated his conclusions to his client at some point in time. The Accused's illness is not a factor in this matter.

SANCTIONS

In considering the appropriate sanction in this proceeding, the trial panel refers to the American Bar Association Standards for Imposing Lawyer Sanctions and Oregon case law. The ABA Standards require the panel to consider four factors: (1) the duty violated;

(2) the Accused's mental state; (3) the actual or potential injury caused by the Accused's conduct; and (4) the existence of aggravating and mitigating circumstances.

Duties Violated.

Duties to Clients. The most important duties a lawyer has are those owed to clients. *American Bar Association Standards*, p. 6.

The Accused violated the duty of loyalty to his clients when he failed to preserve and account for their monies held in his trust accounts.

He violated this duty to Meoli when he failed to hold the Trujillo settlement funds in his trust account for costs and expenses as agreed; when he represented to her that he held the funds "in trust" when, by use of that term, he did not mean in his client trust account; and when he failed to provide her with an accounting of his use of those funds.

He violated this duty to Ms. Fambrough-Anderson and Ms. Meoli when he failed to pay all of the costs and expenses incurred in pursuing her case, even though he had undertaken to do so. *Standards 4.1 and 4.6.*

He violated this duty to Mr. Mantell when he removed all of Mantell's retainer from the client trust account when he knew there was a dispute about the terms of the fee agreement and when he refused to make any accounting of the trust funds.

He also violated this duty by failing to maintain records of this trust account activities in the Mantell and Fambrough-Anderson/ Meoli matters.

He violated his obligation of diligence to Meoli, Fambrough-Anderson, Whitsels and Juhasz when he failed to act on their matters with reasonable diligence and promptness. *Standard 4.*

Duties to the Public and the Profession.

The Accused violated his duty of integrity to the Public and to the Profession when he misrepresented his intentions with respect to the Trujillo settlement money to attorney Barker, to attorney Lintner, and to Trustee Meoli.

He also violated this duty when he made misrepresentations to the Bar in the course of disciplinary proceedings.

Intent.

The Accused acted intentionally when he continued to draw fees from his trust account in the Mantell matter when he knew that his client disputed his right to do so.

The Accused acted intentionally when he represented to Trustee Meoli and to Attorney Lintner (and allowed Attorney Lintner to then represent to the Bankruptcy Court) that he would hold the Trujillo funds “in trust” when the Accused knew that he was not using that term in its commonly accepted meaning, that is, in his client trust account.

The Accused acted knowingly when he failed to keep Meoli, Ms. Fambrough-Anderson, and Mr. Juhasz informed of the status of their matters and when he failed to diligently pursue their matters.

The Accused acted knowingly when he failed to diligently pursue Mr. Whitsel’s dissolution matter.

Injury.

The Accused, by his actions, caused injury to his clients and to at least one third party.

The Accused caused injury to Ms. Fambrough-Anderson by neglecting her case, sometimes over periods of more than two years at a time, with the result that she did not receive payment for her damages until twelve years after the Accused began representation of her.

The Accused caused injury to Ms. Fambrough-Anderson and to Trustee Meoli by failing to keep them informed about the case for extended periods of time, so that each of them was required to make numerous requests of the Accused for information.

The Accused caused injury to Trustee Meoli by failing to pay the judgments entered against for costs and prevailing party fees, with the result that there is still a judgment outstanding against her.

The Accused caused injury to Mr. Whitsel by neglecting his dissolution, with the result that Mr. Whitsel remained married for three years without knowing it, and, once he learned there had been no dissolution judgment, for another year and a half.. In addition, Mr. Whitsel incurred State and Federal income tax problems because he had been paying spousal support and deducting it on his tax returns in the mistaken belief that he was required to do so under a judgment of dissolution.

The Accused caused injury to Mr. Juhasz by taking payment of \$1,500 from him and then failing to provide him with the services requested in a manner timely enough to be of value to his client.

The Accused caused injury to Dr. Kurlychek, an expert witness in the Fambrough-Anderson matter, by failing to pay him the \$990.00 dollars owed for the evaluation of Ms. Fambrough-Anderson.

Aggravating Circumstances. The Trial Panel finds the following aggravating circumstances:

1. Prior Disciplinary Offenses involving one of the same issues, that is, neglect of a client matter.
2. A Pattern of Misconduct, that is, neglect of client matters and trust account violations.
3. Multiple Offenses.
4. Obstruction of Disciplinary Proceedings.
5. Refusal to Acknowledge the Wrongful Nature of his Conduct.
6. Substantial Experience in the Practice of Law.

Mitigating Circumstances. The Trial Panel finds the following mitigating circumstances:

1. In 2008 and early 2009, the Accused's illness and difficult course of medical treatment.
2. The Accused has entered into an arrangement with Mr. Mantell and has made some payments towards settlement of Mr. Mantell's claims against him.

The aggravating circumstances outweigh the mitigating circumstances.

CONCLUSION AND DISPOSITION

Having found that the Accused violated the Oregon Code of Professional Responsibility and the Oregon Code of Professional Conduct in the particulars discussed above, and taking into consideration the duties violated, the injuries to persons, the mental

state of the Accused, and the aggravating and mitigating factors discussed above, the Trial Panel concludes that the Accused be suspended from the practice of law for a period of eighteen months.

Dated this 23rd day of March, 2011.

Jack A. Gardner
Jack A. Gardner

Mary Lois Wagner
Mary Lois Wagner

Audun (Dunny) Sorensen
Audun (Dunny) Sorensen

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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

ELLIOTT MANTELL,

Plaintiff,

vs.

**DANIEL W. GOFF, P.C., and DANIEL
W. GOFF,**

Defendants.

Case No. 08-12-18241

CONFESSION OF JUDGMENT

DANIEL W. GOFF, P.C. and Daniel W. Goff, Defendants confess judgment in favor of Elliott Mantell for the sum of \$37,500.00 plus interest thereon at the rate of 9% per annum from July 6, 2007. Defendants Daniel W. Goff, P.C. and Daniel W. Goff acknowledge that the sums due and owing to Plaintiff are owed out of Defendants' business purposes. Plaintiff has filed an action in Multnomah County against Defendants for the recovery of the sum of \$37,500.00 paid to Defendants for attorney fees in various litigation matters that Plaintiff was involved in. Plaintiff claimed that all of the moneys were due and owing to him and should be returned. Defendants filed an answer therein denying that they owed any sums to Plaintiff as a result of those payments and alleging that the \$37,500.00 paid in fees had been fully earned. This matter was the subject of a mediation and settlement conference. As a result thereof the parties agreed that Defendant shall confess judgment in the sum of \$37,500.00 plus interest thereon at the rate of 9% per annum from July 6, 2007 in favor of Plaintiff.

1. Defendants hereby authorize the entry of judgment for the above sum;

CONFESSION OF JUDGMENT

1 2. The litigation referenced above has been settled by the parties and the sum
 2 confessed to, and therefore is justly and presently due pursuant to the facts set forth
 3 hereinabove and the settlement of the parties;

4 3. Defendants in signing the confession of judgment understand that it
 5 authorizes entry of judgment without further proceeding which would authorize
 6 execution to enforce payment of the judgment; and

7 4. This confession has been executed after the date or dates when the sums
 8 described hereinabove have become due.

9 DATED this _____ day of May, 2010.

10 DANIEL W. GOFF, P.C.

11 By: _____
 12 Daniel W. Goff, President

13 _____
 14 Daniel W. Goff, Individually

15
 16 STATE OF OREGON)
 17 County of _____) ss.

18 I, Daniel W. Goff, being first duly sworn, depose and say that I am the
 19 Defendant individually named in this matter and the President of Daniel W. Goff, P.C.,
 20 with authority to bind the corporation. I hereby verify that the foregoing Confession
 of Judgment is true and correct to the best of my knowledge.

21 _____
 Daniel W. Goff

22 SUBSCRIBED AND SWORN to before me this _____ day of May, 2010.

23
 24 _____
 25 Notary Public for Oregon
 My Commission Expires: _____

26
 2 CONFESSIOIN OF JUDGMENT

COVENANT NOT TO FILE OR EXECUTE

THIS COVENANT is made on the ____ day of April, 2010 by and between Plaintiff Elliott Mantell, (hereafter "Plaintiff") and Defendants Daniel W. Goff, P.C. and Daniel W. Goff, (hereinafter "Defendant").

WHEREAS a claim has been filed by Plaintiff against Defendant in the Multnomah County Circuit Court, entitled:

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH
ELLIOTT MANTELL,)
)
Plaintiff,) Case No.: 0812-18241
vs.)
)
DANIEL W. GOFF, P.C., and) COMPLAINT
DANIEL W. GOFF ,)
)
Defendants.)
)

WHEREAS, the parties mediated this above matter with Craig Murphy acting as mediator, and desire to settle all claims presently arising in the above captioned matter, and

WHEREAS the parties agree to dismiss the pending action, without prejudice, and

WHEREAS a Confession of Judgment has been or will be executed in favor of Plaintiff by Defendant, said Confession of Judgment entitled:

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

ELLIOTT MANTELL,)	
)	No.
Plaintiff,)	
)	
v.)	CONFESSION OF JUDGMENT
)	
DANIEL W. GOFF, P.C., and)	
DANIEL W. GOFF ,)	
)	
Defendant.)	

NOW, THEREFORE, for the performance and consideration specified solely in the terms set forth below, Plaintiff and Defendant hereby covenant and agree as follows:

1. Plaintiff will not file and enter said Confession of Judgment and will not execute upon said Confession Judgment. The Confession will be held by and in the offices of Craig C. Murphy.

2. Defendants Daniel W. Goff, P.C. and Daniel W. Goff MUST PERFORM THE FOLLOWING:

a) Payment of the sum of five hundred dollars (\$500.00) must be deposited to Plaintiff's bank account at Wells Fargo Bank, Routing # 123006800, account # 0311696090 on or before 5:00 p.m. on April 15, 2010.

b) Thereafter payments of five hundred dollars (\$500.00) must be deposited to Plaintiff's bank account at Wells Fargo Bank, Routing # 123006800, account # 0311696090

on or before 5:00 p.m. May 15, 2010 through and including December 15, 2010 on or before the 15th of every month.

c) Defendant shall make a final payment to Plaintiff of eighteen thousand seven hundred fifty dollars (\$18,750.00) to be on deposited to Plaintiff's bank account at Wells Fargo Bank, Routing # 123006800, account # 0311696090 on or before 5:00 p.m. on January 15, 2010.

d) All payments due pursuant to the Covenant Not to File and Execute are due on or before the specified due dates. If the due date falls on a weekend or a recognized holiday, the due date will be viewed as the next business day.

3. The above provisions embody the sole consideration for which Plaintiff covenants and agrees not to file and execute upon the Stipulated Judgment against Defendant. If any payment is not received by Plaintiff on or before its due date, this Covenant Not to File or Execute shall be null and void, and without further notice or demand upon Defendant, Plaintiff may provide proof of Defendant's default to Craig C. Murphy, obtain the Confession of Judgment from Craig C. Murphy, file the Confession of Judgment with the court, and pursue all claims arising as a result of the Confession of Judgment.

Any payment received from Defendant shall first be credited against any accrued and unpaid interest due under the Confession of Judgment. Specifically, the entire unpaid principal balance of said Confession of Judgment then remaining unpaid, plus interest

thereon, less credit for payments received, shall become immediately due and payable, and plaintiff may issue execution upon the entry of the judgment.

I HAVE READ AND UNDERSTAND THIS AGREEMENT.

Daniel W. Goff, P.C.

By: _____
Daniel W. Goff, President

Date

Daniel W. Goff, individually

Date

Robert J. Smith, P.C.

Robert J. Smith
of attorneys for Defendants

Date

Elliott Mantell, Plaintiff

Date

Robert M. Snee, OSB #85334
Attorney for Plaintiff

Date

Jensen & Leiberan
 4915 SW Griffith Drive, Suite 100
 Beaverton, OR 97005
 (503) 641-7990

September 25, 2007

Elliott Mantell
 1250 Sunnynydale Road
 Lake Oswego OR 97034

BILLING SUMMARY	
Current Fees	\$285.00
Current Expenses	\$0.00
Previous Balance	\$0.00
Payments and Credits	(\$285.00)
Amount to Replenish Trust	\$0.00
Amount Due	\$0.00

Professional Services

		<u>Hours</u>	<u>Amount</u>
8/31/2007	CC Pull OJIN reports on circuit court and appeal cases	0.20	20.00
9/6/2007	CC Pull OJIN report for circuit court and court of appeals status	0.20	20.00
9/10/2007	CC Draft Notice of Representation	0.30	30.00
	ML Draft instructions to assistant to do notice of representation; Review and revise Notice of Representation	0.20	50.00
9/11/2007	CC Ready Notice of Representation for filing and service	0.20	20.00
	CC Telephone call with court transcriber; memo to attorney	0.10	10.00
	ML Review new Court of Appeals case on issue preclusion relevant to this appeal	0.50	125.00
9/12/2007	CC Telephone call to client re: transcript; memo to attorney	0.10	10.00

	<u>Hours</u>	<u>Amount</u>
Professional services, current month	1.80	\$285.00
9/25/2007 Payment from account		(\$285.00)

PLEASE PAY THIS AMOUNT

\$0.00

INITIAL RETAINER OF \$5000 WILL BE PAID WITH ATTORNEY FEE AGREEMENT. ADDITIONAL RETAINERS ARE DUE AS FOLLOWS:

- \$3000 OCT. 15, 2007
- \$2000 NOV. 15, 2007
- \$2000 DEC. 15, 2007
- \$2000 JAN. 15, 2008
- \$2000 FEB. 15 2008
- \$2000 MAR. 15, 2008
- \$2000 APRIL 15, 2008

Professional Summary

<u>Name</u>	<u>Hours</u>	<u>Rate</u>
Margaret Leek Leiberan	0.70	250.00
Christie Cauley	1.10	100.00

Jensen & Leiberan
 4915 SW Griffith Drive, Suite 100
 Beaverton, OR 97005
 (503) 641-7990

October 22, 2007

Elliott Mantell
 1250 Sunninydale Road
 Lake Oswego OR 97034

BILLING SUMMARY	
Current Fees	\$2,459.00
Current Expenses	\$0.00
Previous Balance	\$0.00
Payments and Credits	(\$2,459.00)
Amount to Replenish Trust	\$0.00
Amount Due	\$0.00

Professional Services

		<u>Hours</u>	<u>Amount</u>
9/25/2007	ML Review letter from Leo; Draft letter to Leo re: supersedeas bond	0.40	100.00
	ML Telephone call with client re: all of issues in case	0.90	225.00
9/26/2007	CC Telephone call with court transcriber; memo to attorney	0.10	8.50
9/27/2007	ML Review OJIN record re: current status of case; Leave long voice mail for Court of Appeals clerk in charge of transcripts to attempt to correct OJIN record on status of case	0.30	75.00
	ML Telephone call with Gracie at Court of Appeals re: status of case and OJIN record	0.20	50.00
10/4/2007	ML Review letter from Leo and pleadings relevant to bond included with letter; Review several e-mails from client with a number of attached pleadings; Draft very long e-mail to client regarding bond issues and interfacing appeal with	3.50	875.00

		<u>Hours</u>	<u>Amount</u>
	other lower court case; Review draft motion to abate; Draft e-mail to client on motion to abate		
10/5/2007	ML Review two e-mails from client with questions on appeal issues; Draft long e-mail to client	0.50	125.00
	ML Review e-mail from Chock	0.30	75.00
	ML Telephone call with client re: issues in related case and motion to abate	0.30	75.00
	ML Telephone call [2 additional] with client	0.50	125.00
	ML Draft and fax letter to Leo re: extension of time for motion for summary judgment; Fax copy of letter to Chock	0.50	125.00
10/8/2007	ML Review long e-mail from client with comments on transcript and issues in case; Draft response e-mail to client; Review second e-mail from client and draft response to second e-mail	0.40	100.00
	ML Review e-mail from Chock; Draft reply e-mail to Chock and client	0.30	75.00
10/11/2007	ML Review letter from Leo; Draft e-mail to client re: letter from Leo and requirement that he file motion for extension in related case	0.30	75.00
	CC Cover letter to client enclosing letter from Roger Leo	0.10	8.50
	ML Review long e-mail from client re: stay issues and preservation of appeal; Draft long reply e-mail to client	0.60	150.00
10/16/2007	ML Telephone call with Chock re: issues on appeal	0.50	125.00
10/17/2007	CC Letter to court clerk enclosing check for costs judgment issued by court	0.20	17.00
10/18/2007	ML Review e-mail from client; Draft e-mail to client	0.20	50.00
	Professional services, current month	<u>10.10</u>	<u>\$2,459.00</u>
10/22/2007	Payment from account		(\$2,459.00)

Amount

PLEASE PAY THIS AMOUNT

\$0.00

INITIAL RETAINER OF \$5000 WILL BE PAID WITH ATTORNEY FEE AGREEMENT. ADDITIONAL RETAINERS ARE DUE AS FOLLOWS:

\$3000 OCT. 15, 2007
\$2000 NOV. 15, 2007
\$2000 DEC. 15, 2007
\$2000 JAN. 15, 2008
\$2000 FEB. 15 2008
\$2000 MAR. 15, 2008
\$2000 APRIL 15, 2008

YOUR OCTOBER 15 PAYMENT IS NOW PAST DUE. PLEASE SEND YOUR PAYMENT OR CALL OUR OFFICE.

Professional Summary

<u>Name</u>	<u>Hours</u>	<u>Rate</u>
Margaret Leek Leiberan	9.70	250.00
Christie Cauley	0.40	85.00

Jensen & Leiberan
4915 SW Griffith Drive, Suite 100
Beaverton, OR 97005
(503) 641-7990

November 21, 2007

Elliott Mantell
1250 Sunninydale Road
Lake Oswego OR 97034

BILLING SUMMARY	
Current Fees	\$5,060.00
Current Expenses	\$0.82
Previous Balance	\$0.00
Payments and Credits	(\$5,060.82)
Amount to Replenish Trust	\$0.00
Amount Due	\$0.00

Professional Services

		<u>Hours</u>	<u>Amount</u>
10/22/2007	ML Review e-mail from client	0.10	25.00
10/31/2007	ML Review series of e-mails from client and between client and other attorney; Draft e-mails to client	0.40	100.00
11/5/2007	CC Letter to opposing attorney; draft MOET - File Opening Brief; ready for filing and service	0.60	60.00
11/6/2007	ML Telephone call with client re: issues on appeal	0.30	75.00
11/15/2007	ML Review transcript	4.10	1,025.00
11/16/2007	ML Review transcript	2.50	625.00
11/20/2007	ML Review pleadings and transcript	6.50	1,625.00
11/21/2007	ML Review transcript; Draft notes on transcript; Draft e-mail to client on missing portions of transcript	6.10	1,525.00

	<u>Hours</u>	<u>Amount</u>
Professional services, current month	20.60	\$5,060.00
11/21/2007 ML Postage		0.82
Expenses, current month		<u>\$0.82</u>
Total fees and costs now owing		<u>\$5,060.82</u>
11/21/2007 Payment from account		(\$5,060.82)
		<u><u>\$0.00</u></u>

PLEASE PAY THIS AMOUNT

INITIAL RETAINER OF \$5000 WILL BE PAID WITH ATTORNEY FEE AGREEMENT. ADDITIONAL RETAINERS ARE DUE AS FOLLOWS:

- \$2000 NOV. 30, 2007
- \$2000 DEC. 30, 2007
- \$2000 JAN. 30, 2008
- \$2000 FEB. 30, 2008
- \$2000 MAR. 30, 2008
- \$2000 APRIL 30, 2008

Professional Summary

<u>Name</u>	<u>Hours</u>	<u>Rate</u>
Margaret Leek Leiberan	20.00	250.00
Christie Cauley	0.60	100.00

	<u>Amount</u>
CLIENT TRUST ACCOUNT: Prior Balance	\$2,256.00
11/7/2007 Payment to account. Check No. Visa	\$2,000.00
11/16/2007 Payment to account. Check No. Visa	\$1,000.00
11/21/2007 Payment from account	(\$5,060.82)
	<hr/>
CLIENT TRUST ACCOUNT: New Balance	\$195.18

Jensen & Leiberan
 4915 SW Griffith Drive, Suite 100
 Beaverton, OR 97005
 (503) 641-7990

December 21, 2007

Elliott Mantell
 1250 Sunninydale Road
 Lake Oswego OR 97034

BILLING SUMMARY	
Current Fees	\$2,240.00
Current Expenses	\$5.23
Previous Balance	\$0.00
Payments and Credits	(\$195.18)
Amount to Replenish Trust	\$0.00
Amount Due	\$2,050.05

Professional Services

		<u>Hours</u>	<u>Amount</u>
11/26/2007	ML Review all exhibits; Review pleadings in this case and in the waste case; Review all e-mails sent by client on issues in case; Legal research; Draft letter to client evaluating appeal	4.50	1,125.00
	CC Review instructions from attorney; review trial court pleadings; email to client re: February 23 Order	0.30	30.00
11/27/2007	ML Finish drafting opinion letter to client; Revise and finalize letter	1.10	275.00
	CC Edit and finalize letter to client	0.20	20.00
11/29/2007	ML Telephone call with client re: evaluation of case	0.40	100.00
	ML Review e-mail from client and attached Plaintiff's Motion to Abate; Draft e-mail to client re: stay for mediation and comments on motion to abate	0.50	125.00

		<u>Hours</u>	<u>Amount</u>
12/4/2007	ML Telephone call with client re: evaluation of appeal and possibility of mediation	0.80	200.00
12/6/2007	ML Telephone call with Willmott; Telephone call with client re: permission to speak to Willmott about issues in case; Review e-mail from client; Draft e-mail to Willmott re: issues on appeal	0.40	100.00
12/7/2007	ML Review several e-mails regarding material that client sent directly to opposing counsel; Draft response e-mail	0.30	75.00
12/14/2007	ML Telephone call with client re: settlement	0.20	50.00
12/17/2007	ML Telephone call with client re: settlement and motion for extension of time on appeal	0.20	50.00
	CC Letter to opposing attorney re: extension; draft second MOET	0.40	40.00
	ML Draft instructions to assistant to file motion for extension to complete settlement; Review and revise motion for extension	0.20	50.00
	Professional services, current month	<hr/> 9.50	<hr/> \$2,240.00
12/20/2007	ML Faxes		4.00
	ML Postage		1.23
	Expenses, current month		<hr/> \$5.23
	Total fees and costs now owing		<hr/> \$2,245.23
12/21/2007	Payment from account		(\$195.18)
	PLEASE PAY THIS AMOUNT		<hr/> \$2,050.05 <hr/>

INITIAL RETAINER OF \$5000 WILL BE PAID WITH ATTORNEY FEE AGREEMENT. ADDITIONAL RETAINERS ARE DUE AS FOLLOWS:

\$2000 NOV. 30, 2007
\$2000 DEC. 30, 2007
\$2000 JAN. 30, 2008
\$2000 FEB. 30, 2008
\$2000 MAR. 30, 2008
\$2000 APRIL 30, 2008

Professional Summary

<u>Name</u>	<u>Hours</u>	<u>Rate</u>
Margaret Leek Leiberan	8.60	250.00
Christie Cauley	0.90	100.00

	<u>Amount</u>
CLIENT TRUST ACCOUNT: Prior Balance	\$195.18
12/21/2007 Payment from account	(\$195.18)
	<hr/>
CLIENT TRUST ACCOUNT: New Balance	\$0.00
	<hr/> <hr/>

Jensen & Leiberan
4915 SW Griffith Drive, Suite 100
Beaverton, OR 97005
(503) 641-7990

January 25, 2008

Elliott Mantell
1250 Sunninydale Road
Lake Oswego OR 97034

BILLING SUMMARY	
Current Fees	\$0.00
Current Expenses	\$0.41
Previous Balance	\$2,050.05
Payments and Credits	\$0.00
Amount to Replenish Trust	\$0.00
Amount Due	\$2,074.05

	<u>Amount</u>
1/24/2008 ML Postage	0.41
Expenses, current month	\$0.41
Interest on overdue balance	\$23.59
Total fees and costs now owing	\$24.00
Previous balance	\$2,050.05
PLEASE PAY THIS AMOUNT	\$2,074.05

YOU ARE PAST DUE ON BOTH AGREED RETAINERS AND OUTSTANDING BALANCE. DUE TO POSSIBLE SETTLEMENT WE ARE WILLING TO ALTER RETAINER SCHEDULE, HOWEVER YOU

MUST PAY \$3,000 IMMEDIATELY TO BRING ACCOUNT CURRENT AND HAVE SOME RETAINER IN TRUST.

FAILURE TO DO THIS MAY RESULT IN WITHDRAW OF THIS FIRM FROM YOUR CASE.

\$2000 NOV. 30, 2007
\$2000 DEC. 30, 2007
\$2000 JAN. 30, 2008
\$2000 FEB. 30, 2008
\$2000 MAR. 30, 2008
\$2000 APRIL 30, 2008

Jensen & Leiberan
 4915 SW Griffith Drive, Suite 100
 Beaverton, OR 97005
 (503) 641-7990

February 25, 2008

Elliott Mantell
 1250 Sunninydale Road
 Lake Oswego OR 97034

BILLING SUMMARY	
Current Fees	\$25.00
Current Expenses	\$0.00
Previous Balance	\$2,074.05
Payments and Credits	\$0.00
Amount to Replenish Trust	\$0.00
Amount Due	\$2,119.95

Professional Services

	<u>Hours</u>	<u>Amount</u>
2/18/2008 ML Review e-mail from client re: settlement and extension of appeal; Draft reply e-mail	0.10	25.00
Professional services, current month	0.10	\$25.00
Interest on overdue balance		\$20.90
Total fees and costs now owing		\$45.90
Previous balance		\$2,074.05
PLEASE PAY THIS AMOUNT		\$2,119.95

YOU ARE PAST DUE ON BOTH AGREED RETAINERS AND OUTSTANDING BALANCE. DUE TO POSSIBLE SETTLEMENT WE ARE WILLING TO ALTER RETAINER SCHEDULE, HOWEVER YOU MUST PAY \$3,000 IMMEDIATELY TO BRING ACCOUNT CURRENT AND HAVE SOME RETAINER IN TRUST.

FAILURE TO DO THIS MAY RESULT IN WITHDRAW OF THIS FIRM FROM YOUR CASE.

- \$2000 NOV. 30, 2007
- \$2000 DEC. 30, 2007
- \$2000 JAN. 30, 2008
- \$2000 FEB. 30, 2008
- \$2000 MAR. 30, 2008
- \$2000 APRIL 30, 2008

THE CREDIT CARD YOU PROVIDED IS BEING DECLINED PLEASE MAKE A PAYMENT AS SOON AS POSSIBLE OR CALL THE OFFICE WITH A NEW CREDIT CARD NUMBER.

Professional Summary		
<u>Name</u>	<u>Hours</u>	<u>Rate</u>
Margaret Leek Leiberan	0.10	250.00

Jensen & Leiberan
 4915 SW Griffith Drive, Suite 100
 Beaverton, OR 97005
 (503) 641-7990

March 25, 2008

Elliott Mantell
 1250 Sunninydale Road
 Lake Oswego OR 97034

BILLING SUMMARY	
Current Fees	\$725.00
Current Expenses	\$0.41
Previous Balance	\$2,119.95
Payments and Credits	(\$2,119.95)
Amount to Replenish Trust	\$1,500.00
Amount Due	\$2,225.41

Professional Services

	<u>Hours</u>	<u>Amount</u>
2/26/2008 ML Telephone call with client re: status of settlement; Draft and fax letter to opposing attorney re: does he object to extension of time; Draft motion for extension of time	0.60	150.00
3/10/2008 ML Review order from Court of Appeals granting extension and stating no more extensions; Draft letter to Mantell re: no more extensions and must complete settlement	0.40	100.00
3/18/2008 ML Prepare for conference with client; Conference with client	1.90	475.00
Professional services, current month	<u>2.90</u>	<u>\$725.00</u>
3/25/2008 ML Postage		0.41
Expenses, current month		<u>\$0.41</u>
Total fees and costs now owing		<u>\$725.41</u>

	<u>Amount</u>
Previous balance	\$2,119.95
3/11/2008 Payment - thank you. Check No. Visa	(\$2,119.95)
Client trust replenishment required	\$1,500.00
	<hr/>
PLEASE PAY THIS AMOUNT	\$2,225.41
	<hr/> <hr/>

DUE TO POSSIBLE SETTLEMENT WE HAVE ALTERED AGREED RETAINER SCHEDULE, HOWEVER YOU MUST PAY \$1,500 IMMEDIATELY TO BRING ACCOUNT CURRENT AND HAVE SOME RETAINER IN TRUST.

FAILURE TO DO THIS MAY RESULT IN WITHDRAW OF THIS FIRM FROM YOUR CASE.

Professional Summary		
<u>Name</u>	<u>Hours</u>	<u>Rate</u>
Margaret Leek Leiberan	2.90	250.00

Jensen & Leiberan
 4915 SW Griffith Drive, Suite 100
 Beaverton, OR 97005
 (503) 641-7990

April 25, 2008

Elliott Mantell
 1250 Sunninydale Road
 Lake Oswego OR 97034

BILLING SUMMARY	
Current Fees	\$220.00
Current Expenses	\$0.41
Previous Balance	\$725.41
Payments and Credits	\$0.00
Amount to Replenish Trust	\$546.79
Amount Due	\$1,500.00

Professional Services

	<u>Hours</u>	<u>Amount</u>
4/2/2008 ML Brief review of settlement agreement sent by opposing attorney; Instruct assistant to follow up on who represents client on this agreement and to draft confirmation letter to client; Review and revise letter to client	0.50	125.00
CC Telephone call with Matt McKean; letter to client for attorney's signature	0.20	20.00
4/3/2008 ML Telephone call with client	0.30	75.00
Professional services, current month	1.00	\$220.00
4/25/2008 ML Postage		0.41
Expenses, current month		\$0.41
Interest on overdue balance		\$7.39

	<u>Amount</u>
Total fees and costs now owing	\$227.80
Previous balance	\$725.41
Client trust replenishment required	\$546.79

PLEASE PAY THIS AMOUNT

\$1,500.00

IN OUR PRIOR BILL WE STATED THAT YOU NEEDED TO PAY \$1,500 IMMEDIATELY TO BRING ACCOUNT CURRENT AND HAVE SOME RETAINER IN TRUST. YOU HAVE FAILED TO MAKE ANY PAYMENT. IF YOU DO NOT PAY THE FULL \$1,500 ON OR PRIOR TO MAY 7 THIS FIRM WILL FILE A MOTION TO WITHDRAW AS YOUR ATTORNEY.

Professional Summary

<u>Name</u>	<u>Hours</u>	<u>Rate</u>
Margaret Leek Leiberan	0.80	250.00
Christie Cauley	0.20	100.00

Jensen & Leiberan
 4915 SW Griffith Drive, Suite 100
 Beaverton, OR 97005
 (503) 641-7990

May 23, 2008

Elliott Mantell
 1250 Sunnynydale Road
 Lake Oswego OR 97034

BILLING SUMMARY	
Current Fees	\$465.00
Current Expenses	\$1.65
Previous Balance	\$953.21
Payments and Credits	(\$1,000.00)
Amount to Replenish Trust	\$546.79
Amount Due	\$966.65

Professional Services

		<u>Hours</u>	<u>Amount</u>
5/1/2008	ML Telephone call with client	0.30	75.00
	ML Review e-mail from client	0.20	50.00
	ML Review additional e-mail from client	0.20	50.00
5/2/2008	ML Review e-mail from client; Draft e-mail to client	0.30	75.00
	CC Draft MOET; revise MOET per attorney instructions; ready for filing and service	0.40	40.00
5/6/2008	ML Review letter from Leo; Instruct assistant to send letter to client by e-mail; Review e-mail from client; Draft e-mail to client	0.20	50.00
5/14/2008	ML Review order from Court of Appeals granting extension of time; Draft e-mail to client	0.20	50.00

	<u>Hours</u>	<u>Amount</u>
5/23/2008 ML Draft, mail and e-mail letter to client re: I will withdraw on May 28 if case not settled	0.30	75.00
Professional services, current month	2.10	\$465.00
5/23/2008 ML Copies		0.40
ML Postage		1.25
Expenses, current month		\$1.65
Total fees and costs now owing		\$466.65
Previous balance		\$953.21
5/5/2008 Payment from account		(\$953.21)
5/23/2008 Payment from account		(\$46.79)
Client trust replenishment required		\$546.79
PLEASE PAY THIS AMOUNT		\$966.65

Professional Summary

<u>Name</u>	<u>Hours</u>	<u>Rate</u>
Margaret Leek Leiberan	1.70	250.00
Christie Cauley	0.40	100.00

	<u>Amount</u>
CLIENT TRUST ACCOUNT: Prior Balance	\$0.00
5/5/2008 Payment to account. Check No. Visa	\$1,000.00
5/5/2008 Payment from account	(\$953.21)
5/23/2008 Payment from account	(\$46.79)
	<hr/>
CLIENT TRUST ACCOUNT: New Balance	\$0.00
	<hr/> <hr/>

Jensen & Leiberan
 4915 SW Griffith Drive, Suite 100
 Beaverton, OR 97005
 (503) 641-7990

June 25, 2008

Elliott Mantell
 1250 Sunninydale Road
 Lake Oswego OR 97034

BILLING SUMMARY	
Current Fees	\$220.00
Current Expenses	\$7.75
Previous Balance	\$419.86
Payments and Credits	\$0.00
Amount to Replenish Trust	\$0.00
Amount Due	\$652.17

Professional Services

	<u>Hours</u>	<u>Amount</u>
5/27/2008 ML Review e-mail from client; Draft Response e-mail to client; Draft instructions to assistant to draft motion to withdraw as his attorney and motion for extension of time	0.40	100.00
5/29/2008 CC Review instructions from attorney; draft motion to withdraw, MOET, and declaration under oath; revise per attorney instruction; finalize pleadings; email to Roger Leo re: MOET; ready pleadings for filing and service	1.20	120.00
Professional services, current month	<u>1.60</u>	<u>\$220.00</u>
6/25/2008 CC Postage		2.35
CC Copies		5.40
Expenses, current month		<u>\$7.75</u>
Interest on overdue balance		\$4.56

Elliott Mantell

Page 2

Total fees and costs now owing

Amount

\$232.31

Previous balance

\$419.86

PLEASE PAY THIS AMOUNT

\$652.17

<u>Name</u>	<u>Professional Summary</u>	
	<u>Hours</u>	<u>Rate</u>
Margaret Leek Leiberan	0.40	250.00
Christie Cauley	1.20	100.00

July 25, 2008

Jensen & Leiberan
4915 SW Griffith Drive, Suite 100
Beaverton, OR 97005
(503) 641-7990

Elliott Mantell
1250 Sunnynydale Road
Lake Oswego OR 97034

BILLING SUMMARY	
Current Fees	\$0.00
Current Expenses	\$0.00
Previous Balance	\$652.17
Payments and Credits	\$0.00
Amount to Replenish Trust	\$0.00
Amount Due	\$658.56

	<u>Amount</u>
Interest on overdue balance	\$6.39
Total fees and costs now owing	\$6.39
Previous balance	\$652.17
PLEASE PAY THIS AMOUNT	\$658.56

NACHTIGAL, EISENSTEIN & ASSOCIATES

Attorneys at Law

101 S.W. Washington Street

Hillsboro, Oregon 97123

(503)-640-6612

93-1177387

Account

Elliot J. Mantell
2927 NE Everett Street
Portland OR 97232

Account No. 8662.16
Through 12-08-08
Printed 12-09-08
Managed by: MCM,ML,PP

RE: Mentell v. Common Ground Wellness Center

Late Charge on Past Due Balance:

370.54

SERVICES PROVIDED

10-24-07	Open file.	
10-24-07	Prepare and send fee agreement to Client.	No Charge
10-24-07	Phone call with client regarding case and request to amend complaint	
11-02-07	Organize pleadings and notes faxed from client - dictate instructions to staff	
11-02-07	Review judgment and findings of fact for case no. 0601-00532	
11-02-07	Phone call with client regarding case background	
11-06-07	Phone call from client regarding case and motion to abate	
11-09-07	Email exchange client regarding Motion for Summary judgment	
11-13-07	Review case history on OJIN	
11-13-07	Review pleadings faxed regarding waste case and motion for summary judgment	
11-13-07	Research on Waste issues	
11-13-07	Phone call to Matt Wilmont regarding case	
11-13-07	Phone call with client regarding history of case and reply to motion for summary judgment	
11-14-07	Draft notice of representation and dictate instructions to staff	
11-15-07	Phone message from client regarding faxed receipts and transcript of post trial hearing	
11-15-07	Review receipts for fan and other maintenance issues	
11-15-07	Review letters and inspection report regarding maintenance issues	
11-15-07	Review oregon case law on waste	
11-15-07	Phone call with client regarding motion	
11-15-07	Review motion to abate	
11-16-07	Phone call to messenger service with instructions for Multnomah County filing on Tues. Draft cover letters to messenger service and Multnomah County Court; prepare court confirmation card.	
11-16-07	Phone call with client regarding response to MSJ	
11-16-07	Review email from client regarding response to MSJ	
11-16-07	Draft motion in opposition to summary judgment	
11-16-07	Draft Affidavit in support of motion against MSJ	
11-16-07	Review Transcript of Dr Harris	
11-16-07	Review of Trial transcript 13	
11-16-07	Review Building inspector reports and other emails from client	
11-16-07	Outline memo on summary judgment	
11-17-07	Draft Memorandum in opposition to summary judgment - dictate instructions to staff	
11-17-07	Edit Plaintiff's affidavit in opposition to motion for summary judgment per client's changes - dictate instructions to staff	
11-17-07	Review email and faxes from client	
11-19-07	Revisions to, and finalize, Plaintiff's Motion in Opposition to Summary Judgment, Affidavit, Memorandum in Support of Motion in Opposition to Summary Judgment. Notarize Affidavit.	

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- Finalize letters to messenger service and Multnomah County Circuit Court; prepare and send certified true copies to opposing counsel/
- 11-19-07 Prepare two more rounds of revisions to Affidavit. Copy documents for Client.
- 11-19-07 Email with client and sent affidavit for his review
- 11-19-07 Edit memo on summary judgment and dictate instructions to staff
- 11-19-07 Email draft of Memo to client for review
- 11-19-07 Edit affidavit per new comments from client
- 11-19-07 Phone call with client regarding edits of documents and that he will come in today to sign
- 11-19-07 Met with client for review of documents regarding MSJ
- 11-20-07 Review email and edit memo per client's wishes
- 11-20-07 Phone call with J Chock regarding filing of documents and motion to compel
- 11-26-07 Email exchange with Jay Chock regarding motion to reset hearing
- 11-26-07 Review various email from client and others
- 11-28-07 Review Roger Leo's reply memo on motion for summary judgment
- 11-30-07 Email exchange with client regarding case and hearing for MSJ
- 11-30-07 Phone call with Matt Wilmont regarding hearing and motion to compel
- 11-30-07 Phone call with client regarding hearing and request for production
- 12-01-07 Review Defendant's discovery motions
- 12-01-07 Review Defendant's motion for protective order
- 12-01-07 Review Defendant's motion for protective order
- 12-03-07 Review email regarding protective order from Roger Leo
- 12-03-07 Review draft protective order from Matt Wilmont
- 12-03-07 Phone call regarding hearing with Matt Wilmont
- 12-04-07 Prepare fax cover sheet, fax documents to Client.
- 12-04-07 Research case law regarding failure to object to RFP
- 12-04-07 Phone call with client regarding discovery to provide to other side and hearing on friday
- 12-04-07 Fax defendant's reply to Memo on MSJ to client
- 12-04-07 Phone call to Jay Chock regarding hearing
- 12-04-07 West law research
- 12-05-07 Organize pleadings and correspondence into indexes.
- 12-05-07 Fax cover letter to Robert Snee - fax copy of correspondence from R. Leo with Defendant's Reply Memorandum on Motion for Summary Judgment
- 12-05-07 Email exchange with client regarding response to RFP
- 12-05-07 Email exchange regarding new evidence
- 12-05-07 Phone call with Bob Snee regarding affidavit he is putting together
- 12-05-07 Phone call to Matt Wilmont regarding reply to motion to compel
- 12-05-07 Outline Plaintiff's response to Defendant's discovery motions
- 12-06-07 Prepare instructions to messenger service; prepare court confirmation card and letter to court; prepare certified true copies of Plaintiff's Response to Defendant's Discovery Motions and Plaintiff's Response to Defendant's First Request for Production to opposing counsel; prepare fax cover to opposing counsel. Mail copies of all to opposing counsel and Client.
- 12-06-07 Phone call with Matt Wilmont regarding Leo's motion and exhibits
- 12-06-07 Email exchange with client regarding hearing and draft document
- 12-06-07 Phone call with Matt Wilmont regarding hearing and draft documents
- 12-06-07 Draft response to defendant's discovery motions
- 12-06-07 Review faxed documents from Matt Wilmont
- 12-06-07 Draft response to Defendant's RFP
- 12-06-07 Phone call with client regarding documents for Friday's hearing
- 12-06-07 Review Super Sedeas Deposit motion from client
- 12-06-07 Prep for hearing
- 12-06-07 Email from Leo regarding ex parte contact from client
- 12-06-07 Phone call to client regarding ex parte contact with Leo
- 12-07-07 Review chapter 13 of trial transcript
- 12-07-07 Meet with Client and Matt Wilmont to prep for hearing

25.00

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12-07-07 Hearing regarding MSJ, Motion to compel, and motion to abate in Portland
 12-07-07 Travel to and from Portland for hearing
 12-07-07 Meet with client, Jay Chock, and Matt Wilmont regarding settlement
 12-07-07 Review emails from Jay Chock and Roger Leo regarding next court date
 12-10-07 Fax Plaintiff's Response to Defendant's Discovery Motions to Mr. Chock.
 12-10-07 Review email from Roger Leo
 12-10-07 Review email from Jay Chock
 12-10-07 Review email from client
 12-10-07 Email exchange with client regarding motion to compel and discovery
 12-10-07 Phone call with Jay Chock regarding affidavit
 12-10-07 Fax Plaintiff's motion on Def discovery motions to Jay Chock
 12-11-07 Finalize letter to Roger Leo; prepare cover sheets for 3 sets of discovery documents. Copies of letter to Client and Matt Wilmont.
 12-11-07 Email exchange with client regarding discovery
 12-11-07 Review Discovery material that client had faxed to Roger Leo
 12-11-07 Phone call with Matt Wilmont regarding settlement offer
 12-11-07 Email with client regarding discovery issues
 12-11-07 Phone call with Matt Wilmont regarding settlement offer
 12-11-07 Phone call with client regarding settlement offer
 12-11-07 Review discovery material provided by client
 12-11-07 Review email from Roger Leo regarding settlement and discovery issues
 12-11-07 Draft letter to Roger Leo regarding discovery
 12-11-07 Bates stamp discovery and prep to send to other side - dictate instructions to staff
 12-11-07 Phone call with client regarding settlement offer and email
 12-11-07 Phone call with Matt Wilmont regarding settlement offer
 12-11-07 Draft letter to client and dictate instructions to staff
 12-12-07 Draft letter to Client; revisions to Client letter, finalize and send.
 12-12-07 Review email from Wilmont, client, and Leo regarding settlement talks
 12-12-07 Email to Matt Wilmont regarding discovery
 12-12-07 Email to client regarding photos and other discovery
 12-12-07 Phone call with Jay Chock regarding settlement talks and reset of hearing
 12-12-07 Phone call with client regarding reset of hearing, MSJ, and motion to compel
 12-12-07 Conference call with Jay Chock, client, and Matt Wilmont regarding settlement offer
 12-12-07 Review settlement offer from Roger Leo
 12-12-07 Conference call with Jay Chock, client, and Matt Wilmont regarding settlement offer
 12-13-07 Review Leo email regarding stipulated protective order
 12-13-07 Review new settlement offer from client
 12-13-07 Email to client regarding discovery and settlement
 12-14-07 Phone call with client regarding hearing today
 12-14-07 Phone call with Jay Chock regarding possible settlement today
 12-14-07 Hearing to put settlement on the record with Judge Baldwin
 12-14-07 Prep for motion hearing
 12-17-07 Review email from Jay Chock regarding settlement
 12-17-07 Phone call with client regarding settlement and option agreement
 12-18-07 Email to Roger Leo regarding option to buy agreement
 12-19-07 Email with Roger Leo regarding option agreement
 01-08-08 Email to Roger Leo regarding documents
 02-20-08 Phone call to Matt Wilmont regarding case
 02-22-08 Phone call from Roger Leo regarding settlement
 02-22-08 Phone call to client regarding Leo call and settlement and regarding billing
 02-28-08 Phone call with Matt Wilmont regarding drafting of settlement
 02-28-08 Phone call to Roger Leo regarding my not representing Elliot as a witness in any other proceeding
 03-31-08 Phone call with client regarding settlement and who will draft option agreement
 04-02-08 Copy and send to Client: 4/1/08 letter from Roger Leo including all attachments.

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04-02-08 Phone call with Christy, assistant to Margaret Leiberan regarding my representation of Elliot
 04-02-08 Review draft settlement documents sent over by Roger Leo
 04-04-08 Phone call with Roger Leo regarding proposed settlement
 04-08-08 Phone call with client regarding documents from Leo
 04-14-08 Phone call from Roger Leo regarding settlement
 04-14-08 Email from and to Roger Leo regarding settlement and drafting first right of refusal
 04-18-08 Send Client copy of 4/16/08 letter from Roger Leo.
 04-22-08 Phone call with Matt Wilmont regarding who is speaking for client on the stipulated agreement
 04-22-08 Phone call with Roger Leo regarding settlement and first right of refusal agreement
 04-30-08 Review email from Roger Leo regarding settlement agreement
 05-06-08 Review email from client regarding scope of my representation
 05-06-08 Review Leo letter regarding settlement and amount of time it is taking
 05-06-08 Review draft settlement from Matt Wilmont
 05-07-08 Email to client regarding new PPL matters and billing issues
 05-08-08 Review email and draft first right of refusal sent over by Roger Leo
 05-08-08 Phone call from client regarding changes to Right of First Refusal
 05-20-08 Email from and to client regarding First Right of Refusal document
 05-20-08 Prepare letter to Client and fax cover sheet, copy enclosures to letter; fax and mail all to Client.
 05-21-08 Review changes made by client and discuss with him.
 05-21-08 Convert document of changed 1st right of refusal to not showing track changes and email to Roger Leo to review
 05-27-08 Phone call from client regarding case and was document sent to Leo
 05-30-08 Review letter regarding changes to settlement from Roger Leo - dictate instructions to staff
 06-02-08 Phone call from Roger Leo regarding settlement
 06-03-08 Phone call with client regarding 1st right of refusal agreement
 06-04-08 Review Respondent's Responses and declaration regarding appeals pleadings
 06-05-08 Phone call with client regarding settlement agreement
 06-09-08 Forward letter and pleadings from opposing counsel to Client.
 06-09-08 Phone call with client regarding any response from Leo, and other LLC matters
 06-10-08 Review email from Roger Leo and draft reply to counter offer. Sent to client for review
 06-10-08 Review changes and comments on Leo email from client and revise and send email to Leo
 06-11-08 Review several emails from Leo and Wilmont regarding case. Email to client regarding agreement on 1st Right of Refusal
 06-11-08 Phone call with Matt Wilmont regarding settlement
 06-11-08 Review more emails to and from client regarding settlement
 06-11-08 Email from and to client regarding adding a last minute provision to the 1st right of refusal
 06-11-08 Review and respond to emails from Matt Wilmont and Roger Leo regarding settlement and timeline for documents
 06-11-08 Draft first right of refusal document
 06-12-08 Edit Right of First Refusal per client's wishes.
 06-12-08 Draft email to client answering questions about agreement
 06-13-08 Review email from Roger Leo regarding settlement
 06-23-08 Review email from Roger Leo regarding changes to 1st right of refusal and fwd to client
 06-23-08 Edit First Right of Refusal per client
 06-25-08 Phone call from Roger Leo regarding changes to FRR
 06-25-08 Review emails from Matt Wilmont and Roger Leo concerning settlement
 06-27-08 Review email from Roger Leo and Matt Wilmont regarding documents. Draft email and include copy of First Right of Refusal
 06-30-08 Phone call from Matt Wilmont regarding settlement
 06-30-08 Email to client regarding that I sent document to Wilmont for client to sign with the other documents
 07-01-08 Email from and to client regarding settlement and asking about possible option on property
 07-02-08 Phone call with client regarding the presentation of an option agreement to buy house and rental of the garage
 07-07-08 Phone call with Matt Wilmont regarding changes to first right of refusal and settlement issues

No Charge

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8662-All

07-07-08	Review email from Matt Wilmont regarding changes to documents and property description	
07-07-08	Edit First Right of Refusal document per client's changes - draft email and send to Matt Wilmont to have client sign with the settlement document	
07-14-08	Review emails between Leo and Wilmont regarding new issues and possible need to appear before Judge Baldwin	
07-16-08	Review email from Roger Leo regarding revised agreement	
07-16-08	Phone call with Matt Wilmont regarding revising documents	
07-17-08	Phone call with client regarding first right of refusal changes	
07-17-08	Revise First Right of Refusal document to conform with Roger Leo's objections	
07-21-08	Review letter from Leo regarding settlement and going back in front of Judge Baldwin	No Charge
07-22-08	Forward letter from Leo to Client.	
07-23-08	Phone call to Matt Wilmont regarding revising documents and contacting Roger Leo	
07-28-08	Review email traffic regarding changes to settlement and other issues	
07-30-08	Phone call to Roger Leo regarding signed documents	
07-31-08	Review emails from Roger Leo and Matt Wilmont regarding settlement	
08-01-08	Phone call from client regarding option to buy	
08-01-08	Phone call to Roger Leo regarding possible option to buy	
08-01-08	Email to client regarding option	
08-01-08	Phone call to client to send me email with offer that he wants to present	
08-04-08	Review email from client regarding option offer	
08-04-08	Email to Roger Leo with option offer	
08-04-08	Review email from Roger Leo regarding settlement issues	
08-08-08	Phone call from client regarding option offer	
08-11-08	Phone call to Roger Leo regarding option	
08-11-08	Email to client regarding that option offer was declined	
08-13-08	Review letter from Roger Leo regarding settlement	
08-19-08	Review emails from Matt Wilmont and Roger Leo	
08-19-08	Email to Matt Wilmont for signed copies of documents for file	
08-26-08	Review letter from Roger Leo	
09-05-08	Review letter from Roger Leo	No Charge
09-09-08	Forward copy of letter from opposing counsel to Client.	
09-10-08	Review letter from Matt Wilmont regarding final documents in the settlement and recording of 1st right of refusal with the county	
09-17-08	Email from and to client regarding recording 1st right of refusal	
09-22-08	Review emails from client and Roger Leo	
10-07-08	Review Stipulated judgment of dismissal, Satisfaction of judgment, and order of dismissal and appellate judgment	
10-13-08	Prepare draft of cover letter and copy Roger Leo's September 30, 2008 enclosures to client.	
10-13-08	Review email from Roger Leo and fwd to client	
10-20-08	Review email from Matt Wilmont and Roger Leo regarding when final documents will be sent	
10-30-08	Review letter and stipulated judgment of dismissal and other documents from Roger Leo.	
10-30-08	Review email traffic from Roger Leo and Matt Wilmont regarding stipulated judgment. Draft followup email to all parties regarding judgment.	
10-31-08	Email from Matt Wilmont regarding changes to settlement documents	
11-03-08	Review email from Roger Leo regarding settlement and the status of my representation of my client	
11-03-08	Email to client regarding my representation of him	
11-05-08	Review letter and judgment of dismissal	
11-07-08	Prepare cover letter to Attorney Wilmont with Stipulated Judgment of Dismissal signed by MCM. Copy to client.	
11-20-08	Emails from and to client regarding continuation of my representation	
12-02-08	Review notice of entry of judgment and draft closing letter to client	
	Total Services:	\$16,922.00

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8662-All

ADJUSTMENTS and CREDITS

		-13.13	
10-31-07	Prepaid Legal Discount	-1,299.38	
11-30-07	Prepaid Legal Discount	-2,815.01	
12-31-07	Prepaid Legal Discount	-2,828.14	
01-31-08	Prepaid Legal Discount	-2,880.64	
02-29-08	Prepaid Legal Discount	-2,893.77	
03-31-08	Prepaid Legal Discount	-3,011.90	
04-30-08	Prepaid Legal Discount	-3,151.90	
05-30-08	Prepaid Legal Discount	-3,567.53	
06-30-08	Prepaid Legal Discount	-3,773.16	
07-31-08	Prepaid Legal Discount	-3,913.16	
08-31-08	Prepaid Legal Discount	-3,952.54	
09-30-08	Prepaid Legal Discount	-4,035.67	
10-31-08	Prepaid Legal Discount	-4,088.17	
11-30-08	Prepaid Legal Discount		
	Total Adjustments:		\$-4,088.17

COSTS INCURRED

		\$25.00	
11-13-07	Westlaw research	\$25.00	
11-17-07	Westlaw research	\$28.00	
11-29-07	Ace Messenger - Check No. 4480	\$32.00	
12-13-07	Ace Messenger - Check No. 4529	\$36.49	
01-02-08	62 miles - Check No. 4583	\$171.60	
	Photocopies 858 @ \$ 0.20		
	Total Costs:		\$318.09

PAYMENTS RECEIVED

		\$99.37	
10-31-07	Receipt no 26637	\$3,400.63	
11-30-07	Receipt no 26698	\$1,500.00	
03-31-08	From trust account.	\$2,000.00	
05-30-08	Receipt no 139215	\$2,500.00	
06-30-08	Receipt no 139285		
	Total Payments:		\$9,500.00

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STATEMENT SUMMARY		
Previous Balance		0.00
New Services Provided	16,922.00	
New Advanced Costs	318.09	
Late Charges Assessed	<u>370.54</u>	
	17,610.63	17,610.63
Total New Charges		
Credits and Adjustments	-4,088.17	
Payments Received	<u>-9,500.00</u>	
	-13,588.17	-13,588.17
Total Credits		
	AMOUNT DUE	\$4,022.46

(To ensure proper credit, please include Account No. on remittance)

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Common Ground Chiropractic
Elliott J. Mantell, D.C., P.C.
Doctor of Chiropractic

Phone: (503) 232-4099

Fax: (503) 234-0370

Admin. E-mail: admin@commongroundpdx.com

Doctor's E-mail: commonchiro@yahoo.com

www.commongroundhealingcenter.com

FAX COVER SHEET

Company: <i>OS Bar</i>	From: <i>Elliott Mantell</i>
Attention: <i>Sylvia Stevens</i>	Date: <i>12/16/13</i>
Fax Number: <i>503 684 1366</i>	Re: <i>Dr Gott</i>

- Urgent
- Please Review
- Please Process for Payment
- For Your Information

Total Pages (including cover): 2

Comments:

Attached is Mr Gott's "timesheet"
for 186 hours

Would you believe that?

EJM

The Health Insurance Portability & Accountability Act of 1996 (HIPAA) is a federal program that requires that all medical records and other individually identifiable health information used or disclosed by us in any form, whether electronically, or paper, or orally, will be kept properly confidential. This fax contains confidential and privileged information and is intended for the addressee only. If the receiver of this information is not the intended recipient, modification or dissemination of this information is strictly prohibited.

If you have received this communication in error, please call us immediately. Thank you!!

DATE	INITIALS	CLIENT	MATTER	RATE	CODE	TIME	MONEY
4/7/07 4/14/07	DWG	MANTELL	VARIOUS - LITIG.	30	FF	30	2
4/15/07 4/21/07	DWG	MANTELL	VARIOUS - LITIG.	30	FF	25	4
4/22/07 4/29/07	DWG	MANTELL	VARIOUS - LITIG.	30	FF	25	6
4/29/07 5/6/07	DWG	MANTELL	VARIOUS - LITIG.	30	FF	30	1
5/6/07 5/12/07	DWG	MANTELL	VARIOUS - LITIG.	30	FF	33	7
5/13/07 5/19/07	DWG	MANTELL	VARIOUS - LITIG.	30	FF	3	5
5/20/07 5/26/07	DWG	MANTELL	VARIOUS - LITIG.	30	FF	5	2
5/29/07 6/5/07	DWG	MANTELL	VARIOUS - LITIG.	30	FF	6	8
6/5/07 6/10/07	DWG	MANTELL	VARIOUS - LITIG.	30	FF	4	6
6/10/07 6/16/07	DWG	MANTELL	VARIOUS - LITIG.	30	FF	3	2
6/17/07 6/23/07	DWG	MANTELL	VARIOUS - LITIG.	30	FF	5	4
6/24/07 6/29/07	DWG	MANTELL	VARIOUS - LITIG.	30	FF	6	1
7/1/07 7/7/07	DWG	MANTELL	VARIOUS - LITIG.	30	FF	3	4
7/18/07 7/24/07	DWG	MANTELL	VARIOUS - LITIG.	30	FF	3	5

11/11

FOAM SPRING

STANDARD ACCOUNTING SYSTEMS

PART OF
A
EBC SYSTEM
SYSTEM

EXHIBIT 212
9 OF 15

352 Or. 104
280 P.3d 984
In re Complaint as to the CONDUCT OF Daniel W. GOFF, Accused.
(OSB 08143, 0912, 0953, 1014; SC S059467).
Supreme Court of Oregon,
En Banc.
Argued and Submitted Jan. 13, 2012.
Decided June 14, 2012.

On review from a decision of a trial panel of the Disciplinary Board.

Robert J. Smith, Robert J. Smith, P.C., Eugene, argued the cause and filed the briefs for the accused.

Stacy J. Hankins, Assistant Disciplinary Counsel, Oregon State Bar, argued the cause and filed the brief for the Oregon State Bar.

PER CURIAM.

[352 Or. 105]The Oregon State Bar charged Daniel W. Goff, the accused, with numerous violations of the Rules of Professional Conduct and the Disciplinary Rules of the Code of Professional Responsibility, based on his representation of clients in four separate matters. After a five-day hearing, the trial panel found that the accused had committed 15 violations, as follows: *former* DR 9–101(A) (failure to maintain client funds in trust); *former* DR 9–101(C)(3) and RPC 1.15–1(d) (failure to maintain trust-account records and failure to provide an accounting of client funds) (three counts); *former* DR 6–101(B) (neglect of a legal matter) (two counts); *former* DR 1–102(A)(3) and RPC 8.4(a)(3) (conduct involving misrepresentation or dishonesty) (three counts); RPC 1.4(a) (failure to keep client reasonably informed) (two counts); RPC 1.15–1(e) (mishandling disputed funds); RPC 8.1(a)(1) (false statements of material fact in connection with a Bar disciplinary matter); RPC 8.1(a)(2) (failure to respond to the Bar) (two counts). The trial panel concluded that the appropriate sanction was an 18–month suspension from the

practice of law. The accused sought review pursuant to ORS 9.536(1) and Bar Rules of Procedure 10.1 and 10.3.

On review, the accused urges this court to reject the trial panel's findings in full. The Bar, in response, defends the trial panel decision on all 15 rule violations, and also urges this court to find three additional violations that the trial panel did not find: RPC 1.5(a) (collecting an excessive fee) (two counts) and RPC 1.15–1(c) (withdrawal of unearned fees). Based on the two excessive fee charges, the Bar requests that we order the accused to pay restitution as well as suspend him from the practice of law for at least 18 months.

On *de novo* review, we conclude that the record establishes by clear and convincing evidence that the accused committed the 15 rule violations found by the trial panel. We also agree with the trial panel that the Bar has not presented clear and convincing evidence of the three additional violations charged by the Bar, two of which (collection of excessive fee) were the basis on which the Bar sought restitution. Accordingly, we therefore also decline to order the accused to [352 Or. 106]pay restitution. We further conclude that an 18–month suspension is the appropriate sanction. An explanation of the extensive facts related to the four matters underlying this proceeding and of the appropriateness of the sanction would not benefit the bench, bar, or public.

The accused is suspended from the practice of law for 18 months, commencing 60 days from the effective date of this decision.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: November 20, 2015
From: Sylvia E. Stevens, Executive Director
Re: CSF Awards Recommended for Payment

Action Requested

Consider the following claims for which the Client Security Fund Committee recommends awards:

HALL (Meier-Smith)	\$ 9,333.92
ROLLER (Games)	12,252.00
DICKEY (Patapoff)	25,485.00
STEDMAN (Husel)	6,500.00
CYR (Hallam)	20,207.24
GERBER (Koepke)	13,000.00
GERBER (Lawson)	10,000.00
GERBER (Moore)	5,000.00
GERBER (Roelle)	9,740.00
TOTAL	\$111,518.16

Discussion

HALL (Meier-Smith) - \$9,333.92

Claimant retained C. David Hall in 2009 to pursue claims against two drivers for injuries sustained in a motor vehicle accident. She was unable to provide much detail about the representation, other than it had been a contingent fee case. The investigator developed information by reviewing the court file, contacting opposing counsel, and examining Hall's subpoenaed bank records.

Hall filed suit in 2011 and the case was resolved by a settlement of \$27,000 in mid-2012. Hall deposited the settlement funds into his trust account, then paid himself \$9,510 for his fees and costs, leaving \$17,490 as Claimant's share.

Hall made payments to two of Claimant's medical providers totaling \$7,277.08, leaving a balance of \$10,212.92 owed to claimant. His bank records show one payment to her of \$879, but the remaining \$9333.92 was never delivered or accounted for prior to Hall's suspension on unrelated charged in May 2013. At the time Claimant filed her request for reimbursement with the CSF, Hall's trust account had a balance of \$52.

The CSF Committee concluded that Hall misappropriated his client's funds, entitling Claimant to an award of \$9,333.92. Given that Hall has never sought reinstatement and his whereabouts are unknown, the committee recommends waiving the requirement that she obtain a civil judgment against him.

ROLLER (Games) - \$12,252

Claimant hired Dale Roller in May 2013 to represent him on two felony charges in Curry County. Claimant paid \$17,000 for what Roller's fee agreement characterized as "earned on receipt" and "non-refundable" fee. Claimant also gave Roller \$10,000 for bail. Claimant was subsequently released from custody and Roller received a bail refund of \$7,491.36 (there is no explanation of why the entire bail wasn't refunded).

Games terminated Roller's representation within a few months (and before his criminal case concluded). When Roller refused to refund any of the prepaid fee, Games complained to the bar. The SPRB authorized formal proceedings alleging that Roller had charged an excessive fee and failed to include required language in his fixed fee agreement. The case resulted in a Diversion Agreement that included Roller's stipulation that he would resolve the fee dispute with Claimant through the OSB Fee Arbitration Program and pay any amount found to be unearned.

The fee arbitration panel concluded that Roller was only entitled to \$5,000 of the \$15,000 he had collected for fees and awarded Claimant \$19,491.36 (the excess \$12,000 in fees collected plus the \$7,491.36 bail refund).

Roller disagreed with the fee arbitration award and filed a petition in court to have it vacated. Among other arguments, he disputed the arbitrators' jurisdiction over the bail refund, since it didn't constitute "fees." When asked why he didn't return the bail refund to Claimant, Roller explained that Claimant had refused to accept less than the full \$10,000, but that Roller failed to follow up and determine why the court refunded a lesser sum. He also claimed to be holding the money to avoid being sued. The bail money had been put up by Claimant's sister and Roller feared he'd be sued by her if he returned the money to Claimant or by Claimant if he delivered the bail refund to the sister.

Roller's petition to vacate the arbitration award was unsuccessful and his petition was dismissed.¹ Through negotiation facilitated by the CSF investigator and Claimant's attorney, Roller eventually refunded the bail money to Claimant. However, he continues to fail and refuse to pay the remaining \$12,000 of the arbitration award.

¹ Roller's petition was premature. ORS 36.700 allows the prevailing party in arbitration to petition for an order confirming the award. The other party may then petition for vacation or modification of the award. Roller filed his petition before Claimant had a chance to seek confirmation; Claimant's *pro bono* counsel in the matter has cautioned him against doing so now because Roller has made it clear that he will continue to challenge the award.

The CSF doubts that Roller has the ability to pay Claimant. At one point in the representation Roller apparently told Claimant he was “bankrupt and living in a trailer.” While he was on diversion, the bar received more complaints against Roller, including another from Claimant for Roller’s mishandling of the bail refund. In addition to authorizing prosecution on those, the SPRB revoked Roller’s diversion for his failure to refund the unearned fees to Claimant.

The CSF recommends an award to Claimant of \$12,252, which includes the court fee he paid to respond to Roller’s petition to vacate the arbitration award. (CSF Rule 2.9 allows for an award to include a claimant’s costs awarded by the court, but subsequent inquiry establishes that the court did not award Claimant his costs in responding Roller’s petition.)

DICKEY (Patapoff) - \$25,485

Claimant hired Jeffrey Dickey in March 2013 to defend him against criminal case and to pursue a forfeiture recovery. Claimant was incarcerated and gave Dickey his power of attorney for the purpose of vacating Claimant’s apartment, selling or storing his personal property, paying his bills and generally acting on Claimant’s behalf while he was incarcerated.

Dickey agreed to handle the forfeiture recovery on a 40% contingency fee. It is not clear on what basis he agreed to handle Claimant’s other legal matters. Claimant has virtually no information of how Dickey disposed of his personal effects; Dickey’s responses are incomplete and he offers no supporting documentation. Claimant values his personal property at nearly \$42,000 and believes Dickey sold it for a fraction of its value; he has seen none of the proceeds and Dickey hasn’t provided an accounting.

The power of attorney gave Dickey access to Claimants account at Wells Fargo, into which Claimant’s monthly Social Security payments were deposited. Dickey’s assistant and domestic partner, Zeke, also had access to the Wells Fargo account. Between March 2013 and September 2014 when Claimant fired Dickey, there were hundreds of cash withdrawals and debit card expenditures from the Wells Fargo account for things other than paying Claimant’s bills. Rather, it appears that Dickey used Claimant’s account for their own use, making withdrawals at bars and casinos, and making purchases for restaurant meals, gas, home improvement, and entertainment. Dickey initially blamed the misuse on Zeke, but Zeke was arrested and jailed in April 2014, and the bank activity continued for another several months.

In response to inquiries from DCO, Dickey said some of the withdrawals were payment for legal and other services provided to Claimant, but despite requests, he has never invoiced Claimant or documented the services he provided. In general, Dickey had no credible explanation for his handling of Claimant’s affairs.

The investigation revealed that during the time Dickey (and Zeke) had access to the Wells Fargo account, a little over \$28,000 was withdrawn. Claimant believes that only about

\$5,500 was for authorized expenditures (car insurance and the like). The investigator's reconciliation indicates that Dickey misappropriated at least \$22,260 from the Wells Fargo account.

On the forfeiture matter, Dickey received \$9,800 from the US Treasury in October 2013. Dickey's 40% share of that was \$3,920, leaving \$5,580 for Claimant. Bank records reflect a \$500 disbursement to Claimant in November. The state of the records makes it impossible to determine what happened to the remaining \$5,080, although there are unaccounted-for deposits as well as withdrawals during the month. Ultimately, the CSF concluded that Dickey misappropriated at least \$3,225 of the forfeiture recovery.

DCO is investigating Claimant's and three other complaints against Dickey, who was suspended on September 24, 2014 for failure to respond to their inquiries. Dickey stipulated to an interim suspension during the pendency of the various disciplinary matters, claiming to be experiencing serious health issues. Dickey did not respond to the formal complaint and a default order was entered August 31, 2015. The bar is seeking disbarment based on the severity of Dickey's misconduct.

The CSF recognizes that the documentation for its findings is confusing, but is satisfied that the losses have been sufficiently established to justify an award of \$24,485 (\$22,260 + \$3,225). Given that Claimant remains incarcerated and Dickey is likely judgement-proof, the Committee also recommends that the requirement for a civil judgment be waived.

STEDMAN (Husel) - \$6,500

Claimant, a resident of Nevada, hired Michael Stedman in January 2012 to represent him in a Jackson County criminal case. Claimant paid an initial \$2,500 retainer. In March 2012 Stedman demanded and Claimant paid a \$4,000 "trial fee." Over the next year, Stedman repeatedly broke telephone appointments. In July 2013, however, Stedman told Claimant he could resolve the criminal charges through a civil compromise if he wired Stedman \$5,000 immediately, which Claimant did.

There was, in fact, no such compromise, and a month later Claimant received a notice to appear, but Stedman told him he could ignore it. In October 2013, Claimant received another notice to appear or be arrested. He called Stedman, who said he was quitting practice to travel the world, but if Claimant would advance \$14,000, Stedman would handle the upcoming trial. Claimant asked for time to think it over, but when he called Stedman two days later, his telephone had been disconnected. Claimant then hired another lawyer, who was quickly able to effect a civil compromise. He was also able to get a refund from Stedman of the \$5,000 Claimant had previously deposited for that purpose.

Other than filing a notice of representation and seeking several continuances, there is no evidence that Stedman did anything on Claimant's case.

Stedman has failed and refused to refund any of the \$6,500 advanced for fees. He has not responded to inquiries from the CSF investigator or to DCO, which is pursuing formal charges on this and other matters. Stedman was suspended in May 2014 for failure to pay his annual fees and to comply with his IOLTA reporting requirement. His current whereabouts are unknown.

CYR (Hallam) - \$20,207.24

Claimant retained Steven Cyr in August 2013 to handle the administration of Claimant's sister's estate. According to Claimant, Cyr initially told her the probate would be relatively straightforward and estimated his fees would be in the \$5000-8000 range. Over the course of the representation, however, Cyr billed and Claimant paid \$22,207.24.

Cyr filed a petition to have Claimant appointed personal representative in October 2013. Thereafter, Cyr failed to appear at several scheduled hearings, offered no explanation to the court, and sought no continuances or postponements. In September 2014, Claimant received a letter from the probate court indicating that she and Cyr had missed a hearing and inquiring about the status of the case. The letter also indicated the court was concerned about Cyr's requested fees. Claimant contacted Cyr who claimed he didn't get the court letter, but she shouldn't worry. Despite Claimant's continued prodding, Cyr failed to provide information the court wanted to close the probate. Claimant eventually hired another lawyer to complete the matter.

In the final judgement, the court ordered that

“Reasonable attorney's fees and costs for attorney...Cyr is \$2,500. Any amount which...Cyr receives or has received in regard to services provided in this probate proceeding over and above that amount is unreasonable and excessive.”

Following entry of the judgement, Claimant's new counsel made demand on Cyr for a refund of the fees declared by the court to be excessive, but he has refused.

In response to the CSF investigator's inquiry, Cyr claims his fees were reasonable because the case was complicated by the search for a distant “other beneficiary.” He also claims to have paid an investigator \$5,000 to conduct a search, but the investigator refutes Cyr's claim both as to the amount paid and the complexity of the work she performed. The Probate Court Administrator reported that this was a simple, low asset case and that Cyr's fee petition was “way out of line” with the work required. He also confirmed that Cyr appeared to have done little work on the case and collected fees prior to obtaining court approval in contravention of ORS 125.095.

Shortly before Claimant hired Cyr, he was indicted for tax fraud and in October 2013 he pleaded guilty to those charges. Based on his conviction, the bar began investigating him in October 2013. Cyr was sentenced in June 2014 to 2 years' probation. In August 2014, the SPRB authorized formal prosecution against Cyr; he resigned Form B in June 2015.

The CSF Committee recommends an award to Claimant of \$20,207.24, the difference between what she paid Cyr and what the court determined was a reasonable fee for his services. The committee also recommends against requiring Claimant to obtain a judgment against Cyr.

SUSAN GERBER COMMON FACTS

Beginning sometime in 2010, Susan Gerber practiced in Ontario, Oregon, first with the Rader Stoddard Perez firm, the in a brief partnership with Vicki Vernon, and by 2013 on her own. She represented clients in post-conviction relief cases and criminal appeals.²

In the spring and summer of 2014, the bar received several complaints from Gerber's clients and a Malheur County judge alleging that Gerber was missing court dates and not attending to her clients' matters. In response to the bar's investigation, Gerber explained that she had become overwhelmed by her workload starting in December 2013. She also attributed her conduct to her addiction to prescription pain medication following knee surgery. In October 2014, Gerber stipulated to an involuntary transfer to inactive status on the ground that her addiction disabled her from "assisting and cooperating with her attorney and from participating in her defense" of disciplinary matters.

In anticipation of her change of status, Gerber into an agreement with Vicki Vernon pursuant to which Vernon would take over 12 of Gerber's pending matters in exchange for \$5,000. The agreement contemplated that Gerber would be reinstated to active practice in 30 days and in the interim would assist Vernon with the transferred cases as a legal assistant or law clerk. If Gerber was not reinstated in 30 days, the agreement provided for an additional \$10,000 payment to be deposited in Vernon's trust account and from which she could withdraw funds at the rate of \$150 hour for her services to the clients whose matters were transferred.

Gerber was not reinstated in 30 days and remains on disability inactive status. She never paid Vernon the promised \$10,000, but Vernon received that amount from the PLF. Three of Gerber's clients declined to be represented by Vernon, but she continues to represent the remainder.

² Prior to moving to Ontario, Gerber worked for several years for the Department of Justice handling similar types of cases. She had the reputation of being very good at her work.

GERBER (Koepke) - \$13,500

Gerber consulted with Koepke in the fall of 2013 and offered to start right away with his PCR petition. Koepke formally hired Gerber in January 2014; his parents paid her fixed fee of \$15,000. Koepke recalls meeting with Gerber about six times between January and October 2014, but there was no real movement on the case because the appeal of his conviction wasn't final until October 2014. In November 2014, Koepke talked to Gerber about Vernon becoming involved in the case on what he understood was a temporary basis. It was not clear to him until January 2015 that Gerber's inactive status continued and that Vernon was his attorney for the PCR case. His petition was filed in September 2015.

The CSF recommends an award of \$13,500 to Koepke. While Vernon says Gerber did perform some initial work that Vernon was able to use, it is clear that Gerber did not earn the flat fee she collected. Gerber's records indicate she spent 30 hours on the case, but the Committee was unwilling to credit her with more than 10 because most of what she did could not be used by Vernon. The Committee used an hourly rate of \$150/hour to calculate a fee of \$1500 by Gerber, and the remainder of \$13,500 to be awarded to Koepke.

In reaching its decision, the Committee also discussed at length CSF Rule 2.2.4, which provides:

2.2.4 In the event that a client is provided equivalent legal services by another lawyer without cost to the client, the legal fee paid to the predecessor lawyer will not be eligible for reimbursement, except in extraordinary circumstances.

Koepke has not been required to pay Vernon anything more for her services, but the Committee believes this situation constitutes "extraordinary circumstances." Vernon is not obliged to provide extended services Koepke without remuneration and the \$10,000 she received from the PLF barely covers her expenses for the nine cases she took. The Committee also wants to avoid giving Koepke a windfall, but didn't want to intercede in the attorney-client relationship or decide, as between Koepke and his parents, what should happen to the money they paid for Gerber's services. The Committee's solution was for Vernon to be made aware when an award is approved and that the claimant be asked where the funds should be directed. That will enable Vernon. If she is so inclined, to request payment for her services in order to continue the representation.³

Finally, the Committee recommends waiving the requirement that this and the other claimant pursue civil judgments against Gerber. Not only do these incarcerated claimants lack the resources to do so, the likelihood of a judgment against Gerber being collectible in the foreseeable future is slim. She has no assets that we know of (other than a PERS account that is exempt from execution); she currently lives with her parents in the Chicago area, attending therapy sessions in the mornings and working at Home Depot in the afternoons.

³ The Committee recommends that this approach be used in all four cases.

GERBER (Lawson) - \$10,000

Lawson first met with Gerber around June of 2014; there were about three meetings around that time. After the second meeting Lawson decided to retain Gerber and they spent the third meeting discussing fees. However, after Lawson arranged payment of Gerber's \$10,000 fixed fee, he says he never heard from her again.

Lawson says he got a call from Vernon in September 2014 and they discussed his case but he did not agree that she could take over the representation, as he was unsure of Gerber's status. He met with Vernon again in October to discuss additional investigation necessary for his PCR petition. He is unsure of the status of his case, but believes a hearing on the petition is scheduled for some time in November 2015.

Lawson could not provide a fee agreement, nor could Gerber. Her standard agreement, however, provides that the client is entitled to a refund if the representation ends before completion of the agreed work. Gerber claims to have worked on Lawson's case, but there are no records or other indication that her services were anything more than de minimis; moreover, Gerber never mentioned the difficulty she was having or that she was facing disciplinary charges that might prevent her from handling the case. The Committee concluded that her acceptance of the case and failure to refund the unearned fee was dishonest and that he should receive an award of the full \$10,000.

GERBER (Moore) - \$5,000

Moore retained Gerber on June 19, 2014. He recalls a couple of telephone calls thereafter, but Gerber never produced any work product relating to his PCR petition. In early 2015, Moore became concerned about the lack of communication from Gerber. When his aunt confronted Gerber and demanded a refund, she explained her inactive status and said Vernon would be handling Moore's case until Gerber became active again. In the meantime, she offered to "help" with Moore's case.

In a letter to the CSF investigator, Gerber admitted providing no meaningful services to Moore and acknowledging that he is entitled to a full refund of the \$5,000 flat fee he advanced. Moore was not included on the case transfer list and is not represented by Vernon; we have no information about the status of his PCR claim.

GERBER (Roelle) - \$9,740

Roelle hired Gerber in June 2014 after hearing about her good reputation from other inmates.⁴ He paid a flat fee of \$9,740, which he says was for a PCR petition and potential representation at retrial. Roelle met with Gerber the following month and explained his desire

⁴ Some of you may recall that Roelle submitted a claim to the CSF alleging that his trial attorneys, Des and Shannon Connall, had not properly investigated his case. The committee denied the claim and the denial was upheld by the BOG in July 2013.

to initiate the PCR process as soon as his appeal rights were exhausted, which he estimated to be in December 2014. Roelle provided Gerber with documents relating to his trial, and says he had a few conversations with Gerber over the next few months.

In November or December 2014, Roelle talked to Gerber about whether he should agree to have Vernon take over his case, which he ultimately declined to do, based at least in part on Gerber's assurance that her inactive status would only last a few months. In early 2015, Roelle talked to Gerber about the status of his PCR case, and was apparently assured that it was moving along.

On March 15, one of Roelle's family members requested a status update on his behalf. Gerber replied that she had amended the PCR petition, which she claimed to have filed the week prior. A week or so later Roelle that the court had no record of a PCR petition filed on his behalf, and again contacted Gerber. She reminded him she could not act as his attorney until she returned to active status, but offered to help as a paralegal in the interim. In June 2015, Roelle filed his own PCR petition and moved for appointment of a public defender.

Gerber provided a time log showing that she performed some legal research, reviewed trial transcripts and wrote a couple of letters. The total of her time is less than 10 hours. She did not prepare or file anything on his behalf and the Committee concluded that her services were insignificant and that he should receive a full refund of the fees he paid.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: November 20, 2015
Memo Date: November 10, 2015
From: Audrey Matsumonji, Board Development Committee Chair
Re: Appointments to various bar committees, councils, and boards (1 of 2)

Action Recommended

On October 9 the Board Development Committee selected the following members for appointment:

Advisory Committee on Diversity and Inclusion

Chair: Jacqueline Alarcon
Secretary: Daniel Simon
Members with terms expiring 12/31/2018:
Bryson E Davis
Claudia G Groberg
Gary W Glisson
Jollee Faber Patterson
Kyle Kazuo Nakashima
Alex Cook, public member

Bar Press Broadcasters Council

Chair: Lisa Ludwig
Members with terms expiring 12/31/2018:
Dawn Andrews
Kevin Ray McConnell
Lisa J Ludwig
Rachel Philips
Patrick Joseph Ehlers

Client Security Fund Committee

Chair: Ronald Atwood
Secretary: Stephen Raheer
Members with terms expiring 12/31/2018:
Rick Braun
Courtney Dippel
Nancy Cooper
Carrie Hooten, public member

Judicial Administration Committee

Chair: Bernadette Bignon
Secretary: Jessica Fleming
Members with terms expiring 12/31/2018:
Adina Matasaru
Celia A Howes
Jeffrey M Wallace
Laura B Rufolo
Lauren F Blaesing

Legal Ethics Committee

Chair: Kristin Asai
Secretary: Ankur Doshi
Members with terms expiring 12/31/2017:
Ankur Doshi
Members with terms expiring 12/31/2018:
Sarah E. Harlos
Kyann C. Kalin
John Klor
W. Greg Lockwood
Justin M. Thorp

Legal Heritage Interest Group

Chair: Jamie Lynne Dickinson
Secretary: Mary Anne Anderson
Members with terms expiring 12/31/2018:
Alfred Frank Bowen
Susan Hogg

Legal Services Committee

Chair: Kamala Shugar
Secretary: Andrea Thompson
Members with terms expiring 12/31/2018:
Kristin Bremer Moore
Andrea H. Thompson
Ari Halpern

Loan Repayment Assistance Committee

Members with terms expiring 12/31/2018:

Micah Maskowitz

Richard Wesenberg

William Penn, Advisory Member

MCLE Committee

Chair: Allison Banwarth

Secretary: Katherine Zerkel

Members with terms expiring 12/31/2018:

Douglas Olsen

Eugene Thompson

New Lawyer Mentoring Program Committee

Chair: Sarah Petersen

Members with terms expiring 12/31/2018:

Paul Duden

Martin McKeown

Monica Martinez

Lolly Anderson

Kathryn Brown

Pro Bono Committee

Chair: Christo de Villiers

Members with terms expiring 12/31/2016:

Meagan Robbins

Members with terms expiring 12/31/2018:

Stephen Galloway

David Goldfried

Melissa Haggerty

Natalie Hedman

Sandra Gustitus

Kuyng Duk Ko

State Lawyers Assistance Committee

Chair: Vaden Francisco

Secretary: John Parsons

Members with terms expiring 12/31/2019:

Kevin E. Lucey

Jerilyn Krier

Josh Soper

Uniform Civil Jury Instructions Committee

Secretary: Kim Sewell

Members with terms expiring 12/31/2018:

Jeffrey Armistead

Rob Beatty-Walters

Beth Creighton

Shannon Armstrong

Kate Wilkinson

Uniform Criminal Jury Instructions Committee

Chair: Andrew Robinson

Secretary: Erik Blumenthal

Members with terms expiring 12/31/2018:

Gregory Rios

Paul Maloney

Ryan O'Connor

Stacey Reding

Graham Fisher

The committee selected the following members to recommend to the Supreme Court for appointment:

State Professional Responsibility Board

Chair: E. Bradley Litchfield, term expires 12/31/2016

Members:

Heather Bowman, region 5, term expires 12/31/2019

Carolyn Alexander, region 5, terms expires 12/31/2019

After discussion and thorough review by the committee, Mr. Lavelle motioned and Ms. Nordyke seconded a motion to not make appointments to the Local Professional Responsibility Committee for 2016 members. The motion was unanimously approved by the committee.

2016 FINAL BUDGET



November 21, 2015

Report to the Board of Governors

Summary

At the October 9 meeting, the Board of Governors resolved to increase the 2016 active member fee by \$50.00 and reduce the Client Assessment by \$30.00. The House of Delegates approved the \$50.00 active fee increase.

The purpose of this report is to identify changes included in this report from the October 9 budget report to attain the final 2016 budget.

The biggest change is the October 9 report which included a \$30.00 fee increase, but the BOG later approved a \$50.00 increase.

Exhibit A is the Program by Program summary of the budget.

Exhibit B is the 2016 budget with the \$50.00 fee increase and the five-year implications of that increase.

- **The final 2016 Budget includes a \$854,048 Net Operating Revenue.**
- **By vote of the House of Delegates, the General Member Fee is increased by \$50.00.**
- **By BOG action at the October meeting, the Client Security Fund assessment is reduced by \$30.00 to \$15.00.**
- **The total active Member Fee in 2016 will be \$557.00 - a \$20.00 increase over 2015.**

Changes in Revenue

❖ Membership Fees Revenue

The \$50.00 active member fee increase (\$47.00 for under 2-year members) generates \$773,600 additional revenue. Of that amount approximately \$733,100 is due to the fee increase and \$40,000 for the increase in the number of members.

❖ Other Revenue Changes

With the additional revenue the *investment income* increased \$6,000. This amount assumes the funds have remained in the short-term investment portfolio. *Legal Publications* increased \$7,225 with the addition of another book for sale in 2016.

Changes in Expenses

❖ Personnel Costs

The BOG approved the 3% salary pool at the October meeting. That meeting's budget report included the pleasant surprise of lower than expected personnel costs due to lower than initially expected PERS costs and the position vacancies at the end of 2014 and the personnel changes during 2015 filled by lower salaried personnel (and staff participating in the lower cost OPSRP of PERS).

Even with a 3% salary pool, the 2016 increase in personnel costs from the 2015 budget is 1.1%.

Since the October 9 report personnel costs have dropped further since the bar received notice that the cost of the UAL bond payment is reduced from 6.7% to 6.0% beginning November 1, 2015. Now personnel costs are even lower than budgeted in October, and are only \$86,500, or 1.1%, more than the 2015 budget.

❖ Other Expense Accounts

With updated information non-personnel changes were made to the following accounts (some increased, some decreased): Legal Publications (added a new book), postage, and property and liability insurance. The net increase in expenses was only \$3,138.

Five-Year Forecast

As anticipated with the various forecast scenarios, a \$50.00 fee increase will delay the next fee increase to 2020. Although the forecast includes a \$30.00 fee increase in 2020, the amount would be set on the financial conditions at that time and how long before the next fee increase thereafter. However, in the next four to five year period these are some of the issues that will determine the when and how much of the next increase:

- the implementation and full execution of the new Association Management Software;
- the uncertainty of a number of the non-dues revenue of certain programs, e.g. Admissions, CLE Seminars, Lawyer Referral percentage fees;

- the cost of PERS – will increased rates expected in 2017 and 2019 be offset by fewer Tier 1/2 employees;

What to Look for in 2016

- Although **Member Fee revenue** shows a small growth in 2016 and subsequent years, will this revenue source decline in the near future as members leave or retire at a faster rate than applicants join? One-half of 1% is included in the next years' forecasts, and that amounts to approximately \$40,000 in additional revenue from member fees.
- Admissions revenue** did not decline as much as initially forecast. However, the number of bar exam applicants could be less than projected, and could decline even further for a few years. This means lower Admissions revenue and eventually lower Member Fee revenue.
- The cost of **grading the two bar examinations** is budgeted at \$124,100. This is the cost for the graders' two weeks of grading in Sunriver. Staff recommend that alternative sites be considered and a RFP for a venue issued.
- CLE Seminars** is undergoing new revenue models and relationship with sections. Will the revenue optimism in the 2016 be achieved?
- Revenue from the **percent fees on lawyer referrals** has been a steady climb. At some point will the referrals not generate the level of revenue as the last three years?
- The **rate the bar pays for PERS** has vacillated wildly the past several years. The rate will change again at July 2017. Based on preliminary information from PERS, rates are expected to increase in mid 2017. That rate will be known in late 2016.
- Unknown is the impact of the **AMS software installation** in summer 2016. The system will create greater service to members and new roles, responsibilities, and efficiencies for staff, but probably not until 2017. How much will the efficiencies of the new system improve the bar's budget?
- Since the fee increase generates more revenue than needed in 2016, the Budget & Finance Committee should evaluate with the CFO **the best use of the excess funds**. Options could be: leave it in short-term investments; develop a longer-term investment strategy with the investment managers; or use it to fund the AMS costs without using any reserve funds.

. . . the Budget & Finance Committee should evaluate the best use of the excess funds

Recommendations of the Budget & Finance Committee to the Board of Governors

- Approval, with any changes, of the 2016 budget.
- Recommended Changes: _____

OREGON STATE BAR 2016 Budget Summary by Program

<i>Department / Program</i>	<i>Revenue</i>	<i>Sal & Benefits</i>	<i>Direct Program</i>	<i>Gen & Admin</i>	<i>Total Expense</i>	<i>Indirect Costs</i>	<i>Net Revenue</i>
Admissions	\$705,985	\$293,280	\$247,768	\$29,565	\$570,613	\$134,115	\$1,257
Bulletin	\$675,306	\$173,400	\$351,818	\$6,725	\$531,943	\$127,839	\$15,524
CLE Seminars	\$1,030,490	\$488,100	\$388,990	\$19,236	\$896,326	\$265,941	(\$131,777)
Client Assistance Office	\$0	\$533,200	\$1,100	\$21,956	\$556,256	\$158,401	(\$714,657)
Communications	\$26,750	\$469,516	\$19,550	\$7,167	\$496,233	\$133,334	(\$602,817)
General Counsel	\$2,500	\$409,400	\$66,300	\$18,321	\$494,021	\$108,112	(\$599,633)
Governance (BOG)	\$0	\$299,500	\$171,850	\$22,133	\$493,483	\$103,017	(\$596,500)
Legal Publications	\$294,520	\$585,500	\$74,199	\$24,625	\$684,324	\$215,972	(\$605,776)
Loan Repayment Assistance Progra	\$152,000	\$0	\$142,400	\$0	\$142,400	\$0	\$9,600
MCLE	\$301,500	\$176,000	\$1,750	\$11,308	\$189,058	\$97,810	\$14,632
Member Services	\$0	\$168,500	\$13,250	\$2,865	\$184,615	\$116,426	(\$301,041)
New Lawyer Mentoring Program	\$20,200	\$248,300	\$9,800	\$6,039	\$264,139	\$77,481	(\$321,420)
New Lawyers Division	\$5,350	\$67,300	\$83,850	\$2,880	\$154,030	\$46,505	(\$195,185)
Public Affairs	\$0	\$456,700	\$20,900	\$32,276	\$509,876	\$111,606	(\$621,482)
Referral & Information Services	\$715,000	\$446,400	\$42,000	\$8,900	\$497,300	\$228,436	(\$10,736)
Regulatory Services	\$87,350	\$1,708,600	\$111,800	\$92,170	\$1,912,570	\$390,797	(\$2,216,017)
Special Projects	\$200,000	\$9,800	\$173,200	\$375	\$183,375	\$0	\$16,625
TOTAL PROGRAMS	\$4,216,951	\$6,533,496	\$1,920,525	\$306,541	\$8,760,561	\$2,315,792	(\$6,859,402)
ALLOCATIONS:							
Finance & Operations	\$7,738,450	\$1,613,164	\$837,029	\$108,992	\$2,559,185	(\$2,319,015)	\$7,498,280
Less: Dept Charges/Offsets			(\$240,170)		(\$240,170)		\$240,170
Oregon State Bar Center						\$0	\$0
Contingency			\$25,000		\$25,000		(\$25,000)
TOTAL OPERATIONS	\$11,955,401	\$8,146,660	\$2,542,384	\$415,533	\$11,104,576	(\$3,223)	\$854,048
Fanno Creek Place	\$841,523	\$122,200	\$1,509,977	\$21,475	\$1,653,652	(\$160,459)	(\$651,670)
TOTAL GENERAL FUND	\$12,796,924	\$8,268,860	\$4,052,361	\$437,008	\$12,758,228	(\$163,682)	\$202,378
DESIGNATED FUNDS:							
Diversity Inclusion	\$719,850	\$323,200	\$243,880	\$35,691	\$602,771	\$102,878	\$14,201
Client Security Fund	\$237,900	\$43,500	\$202,950	\$2,444	\$248,894	\$31,861	(\$42,855)
Legal Services	\$6,155,000	\$111,400	\$6,599,200	\$9,586	\$6,720,186	\$28,943	(\$594,129)
TOTAL ALL FUNDS	\$19,909,674	\$8,746,960	\$11,098,391	\$484,729	\$20,330,079	\$0	(\$420,405)

Exhibit A

2016 Budget

Oregon State Bar

Five-Year Forecast

		Operations	\$50.00 Increase in 2016					
		November-15						
Proposed Fee increase for Year →		\$50	\$0	\$0	\$0	\$30	\$0	
Operations	BUDGET	BUDGET	F O R E C A S T					
	2015		2016	2017	2018	2019	2020	2021
REVENUE								
MEMBER FEES								
General Fund	\$7,157,000	\$7,197,500	\$7,970,000	\$8,009,900	\$8,049,900	\$8,090,100	\$8,591,800	
Active Member Fee Increase		733,100	0	0	0	459,000	0	
% of Total Revenue	64.8%	66.3%	66.5%	66.5%	66.4%	63.5%	66.9%	
PROGRAM FEES:								
Admissions	716,643	705,985	635,400	635,400	667,200	733,900	733,900	
CLE Seminars	953,350	1,030,490	1,030,490	1,051,100	1,051,100	1,051,100	1,051,100	
Legal Publications (print sales)	362,597	294,520	280,000	250,000	200,000	200,000	200,000	
Lawyer Referral New Model fees	485,900	600,000	588,000	550,000	550,000	550,000	550,000	
All Other Programs	1,024,162	1,037,456	1,058,200	1,079,400	1,101,000	1,123,000	1,139,800	
Total Program Fees	3,542,652	3,668,451	3,592,090	3,565,900	3,569,300	3,658,000	3,674,800	
OTHER INCOME								
PLF Contribution	200,000	200,000	200,000	200,000	200,000	200,000	200,000	
Investment & Other Income	145,350	156,350	225,800	260,600	303,800	327,400	372,700	
TOTAL REVENUE	11,045,002	11,955,401	11,987,890	12,036,400	12,123,000	12,734,500	12,839,300	
EXPENDITURES								
SALARIES TAXES & BENEFITS								
Salaries - Regular	5,888,800	5,985,600	6,097,100	6,210,600	6,326,100	6,443,600	6,563,200	
Benefits - Regular	2,155,300	2,147,900	2,383,500	2,446,400	2,570,900	2,699,200	2,815,000	
Salaries & Taxes - Temp	16,058	13,160	30,000	20,000	30,000	20,000	30,000	
Total Salaries & Benefits	8,060,158	8,146,660	8,510,600	8,677,000	8,927,000	9,162,800	9,408,200	
% of Total Revenue	73.0%	68.1%	71.0%	72.1%	73.6%	72.0%	73.3%	
DIRECT PROGRAM:								
CLE Seminars	401,225	388,990	392,900	396,800	402,800	406,800	412,900	
Legal Publications	113,999	74,199	112,000	100,000	80,000	80,000	80,000	
AMS Impact	0	0	88,000	35,000	35,000	35,000	35,000	
All Other Programs	1,950,348	2,054,195	2,085,000	2,126,700	2,169,200	2,234,300	2,301,300	
Total Direct Program	2,465,572	2,517,384	2,677,900	2,658,500	2,687,000	2,756,100	2,829,200	
GENERAL & ADMIN (incl offsets)	402,002	412,309	418,500	426,900	435,400	448,500	462,000	
CONTINGENCY	25,000	25,000	25,000	25,000	25,000	25,000	25,000	
TOTAL EXPENSES	10,952,732	11,101,353	11,632,000	11,787,400	12,074,400	12,392,400	12,724,400	
NET REVENUE/(EXPENSE) - OPERATIONS	\$92,270	\$854,048	\$355,890	\$249,000	\$48,600	\$342,100	\$114,900	

Fanno Creek Place

Fanno Creek Place	BUDGET	BUDGET	F O R E C A S T				
	2015	2016	2017	2018	2019	2020	2021
REVENUE							
RENTAL INCOME							
PLF	\$520,065	\$527,865	\$535,783	\$543,820	\$551,977	\$560,257	\$568,661
First Floor Tenant - Suite 175 - Zip Realty	44,966	46,315	47,704	49,136	50,610	39,096	53,692
First Floor Tenant - Suite 150 - Joffe	132,580	100,550	138,089	142,231	146,498	150,893	155,420
First Floor Tenant - Suite 100 - Simpson Prop	24,191	24,917	25,700	26,500	27,300	28,119	28,963
First Floor Tenant - Suite 110 - Prof Prop Gp	28,808	29,672	30,562	31,479	31,479	32,423	32,423
First Floor Tenant - Suite 165 - ALA	22,638	47,378	48,799	50,263	51,771	53,324	26,662
OLF	30,264	31,176	32,100	33,100	34,100	35,100	36,200
Meeting Rooms	30,000	32,000	30,000	25,000	24,000	24,000	24,000
Operating Expense Pass-through	0	0	3,000	3,100	3,200	3,300	3,400
INTEREST	1,890	1,650	2,000	2,200	2,500	2,800	3,000
TOTAL REVENUE	835,402	841,523	893,738	906,829	923,435	929,313	932,420
EXPENDITURES							
OPERATING EXPENSE							
Salaries & Benefits	119,600	122,200	124,600	128,300	132,100	136,100	140,200
Operations	336,340	323,909	330,400	340,300	350,500	361,000	371,800
Depreciation	506,100	512,600	512,600	517,600	517,600	527,600	527,600
Other	19,500	16,059	16,100	16,100	16,100	16,100	16,100
DEBT SERVICE							
Interest	693,700	678,884	663,158	646,462	628,739	609,924	589,951
TOTAL OPERATING EXPENSES	1,675,240	1,653,652	1,646,858	1,648,762	1,645,039	1,650,724	1,645,651
ICA to Operations	(160,459)	(160,459)	(165,300)	(165,300)	(165,300)	(165,300)	(169,400)
NET EXPENSES	1,514,781	1,493,193	1,481,558	1,483,462	1,479,739	1,485,424	1,476,251
NET REVENUE/(EXPENSE) - FC Place	(\$679,379)	(\$651,670)	(\$587,820)	(\$576,633)	(\$556,304)	(\$556,111)	(\$543,831)
ACCRUAL TO CASH ADJUSTMENT							
SOURCES OF FUNDS							
Depreciation Expense	506,100	512,600	512,600	517,600	517,600	527,600	527,600
Landlord Contingency Fund	51,000	30,000				200,000	
Loan Proceeds							
USES OF FUNDS							
Assign PLF Subtenants' Leases (Net)							
TI's - First Floor Tenants	(51,000)	(30,000)					
Principal Pmts - Mortgage	(240,608)	(255,424)	(271,150)	(287,846)	(305,569)	(324,384)	(344,357)
NET CASH FLOW - FC Place	(\$413,887)	(\$394,494)	(\$346,370)	(\$346,879)	(\$344,273)	(\$152,895)	(\$360,588)

Funds Available/Reserve Requirement

	BUDGET		F O R E C A S T				
	2015	2016	2017	2018	2019	2020	2021
FUNDS AVAILABLE							
Funds Available - Beginning of Year	\$ 1,844,000	\$1,144,683	\$1,226,437	\$1,435,457	\$1,673,277	\$1,391,404	\$1,281,609
SOURCES OF FUNDS							
Net Revenue/(Expense) from operations	92,270	854,048	355,890	249,000	48,600	342,100	114,900
Depreciation Expense	114,100	92,200	94,000	95,900	97,800	98,800	99,800
Provision for Bad Debts	36,300	49,000	40,000	40,000	40,000	40,000	40,000
Increase in Investment Portfolio MV	53,000	53,000	59,000	65,000	0	85,000	102,000
Allocation of PERS Reserve	64,440		108,500	217,000	108,500		
Projected HIGHER Net Operating Revenue	50,000						
USES OF FUNDS							
Capital Expenditures	(62,150)	(73,350)	(70,000)	(80,000)	(80,000)	(120,000)	(80,000)
Capital Expenditures - Building	(15,000)	0	(30,000)		(50,000)		(50,000)
Capital Reserve - AMS Software	(552,000)	(497,000)					
Capital Reserve Expenditures - Building						(200,000)	
Landlord Contingency Interest	(1,890)	(1,650)	(2,000)	(2,200)	(2,500)	(2,800)	(3,000)
Net Cash Flow - Fanno Creek Place	(413,887)	(394,494)	(346,370)	(346,879)	(344,273)	(152,895)	(360,588)
Addition to PERS Reserve	(64,500)				(100,000)	(200,000)	(100,000)
Projected LOWER Net Operating Revenue	0						
CHANGE IN FUNDS AVAILABLE	(699,317)	81,754	209,020	237,821	(281,873)	(109,796)	(236,888)
Funds Available - End of Year	\$1,144,683	\$1,226,437	\$1,435,457	\$1,673,277	\$1,391,404	\$1,281,609	\$1,044,721
RESERVE REQUIREMENT							
Operating Reserve	500,000	500,000	500,000	500,000	500,000	500,000	500,000
Capital Reserve	500,000	500,000	500,000	500,000	500,000	500,000	500,000
Total - Reserve Requirement	\$1,000,000	\$1,000,000	\$1,000,000	\$1,000,000	\$1,000,000	\$1,000,000	\$1,000,000
RESERVE VARIANCE							
Over/(Under) Reserve Requirement	\$144,683	\$226,437	\$435,457	\$673,277	\$391,404	\$281,609	\$44,721
RECONCILIATION CASH to ACCRUAL	BUDGET	BUDGET	F O R E C A S T				
	2015	2016	2017	2018	2019	2020	2021
NET REVENUE/(EXPENSE) - Operations	92,270	854,048	355,890	249,000	48,600	342,100	114,900
NET REVENUE/(EXPENSE) - FC Place	(679,379)	(651,670)	(587,820)	(576,633)	(556,304)	(556,111)	(543,831)
NET REVENUE/(EXPENSE) - OSB	(\$587,109)	\$202,378	(\$231,930)	(\$327,633)	(\$507,704)	(\$214,012)	(\$428,931)

OREGON STATE BAR

Governance and Strategic Planning Committee Agenda

Meeting Date: November 20, 2015
From: Sylvia E. Stevens, Executive Director
Re: Guidelines for Sponsorships/Contributions

Action Requested

Consider the adoption of formal policy and an annual budget for sponsorships and contributions.

Options

1. Adopt a formal policy against purely financial sponsorships or contributions, but allowing support through the purchase of tickets to events.
2. Adopt a policy allowing for a fixed dollar amount of financial sponsorships or contributions annually, limited to programs or events that are germane to the bar's mission.

Discussion

In recent years, and with increasing frequency, the BOG has been asked to contribute funds to co-sponsor an upcoming event of interest or relevance to the legal community. The requests are presented to the BOG and addressed on an *ad hoc* basis, as there is no policy for making such contributions and no budget for them. In 2014 and 2015, the BOG approved \$20,050 in "sponsorship" contributions:¹

2014-Nat'l. Legal Aid & Defender Association Conference - \$5,000
2014-Nat'l. Black Law Students Conference - \$5,000
2014-OWLs 25th Anniversary Celebration - \$250
2014-ABA Young Lawyers Fall Conference - \$5,000
2015-District of Oregon Conference - \$1,000
2015-ABA President's Visit - \$1,000
2015-CEJ Laf-Off - \$1,000

These contributions are in addition to the budgeted expenditures for the BOG and some senior staff to attend a variety of local bar, specialty bar and community events. BOG attendance at bar and community events is a demonstration of the bar's leadership role in the Oregon legal community and its commitment to promoting diversity and inclusion in the profession.

¹ The November BOG meeting agenda includes a request to sponsor a Federal Bar Association exhibit depicting the history of school desegregation in Los Angeles prior to the decision in *Brown vs. Bd. of Education*.

Contributing funds to co-sponsor an event (often at which there is no particular OSB presence) is more attenuated, regardless of the objectives of the event or the donee's mission.

At the October 9 meeting, the BOG asked staff to draft language for a bylaw governing sponsorships and contributions. In establishing any policy regarding sponsorship (essentially charitable contributions), the BOG must be mindful of the restrictions on the use of mandatory fees under *Keller v. State Bar of California*.² In that case, the US Supreme Court held that an integrated bar's use of compulsory fees to finance political and ideological activities violates the 1st Amendment rights of dissenting members when such expenditures are not "necessarily or reasonably incurred" for the purpose of regulating the legal profession or improving the quality of legal services. Stated another way, mandatory fees may be used *only* to fund activities "germane" to the purpose for which the bar exists.

ORS 9.080(1) charges the Board of Governors to "direct its power to the *advancement of the science of jurisprudence* and the *improvement of the administration of justice*." The first phrase connotes the creation and interpretation of law and support for the rule of law. The second phrase, while clearly relating to judicial processes, also captures what we refer to broadly as "access to justice." That phrase in turn encompasses diversity in the profession, the elimination of barriers to legal services and justice, and regulation of the legal profession (including education to assure competency).

Activities that promote access to justice are germane to the bar's mission and can be supported with mandatory fees. Whether mandatory fees *should* be used for charitable donations, even to the most deserving of causes, is a different policy choice for the BOG. With regard to legislative and policy matters, the bar has long endeavored to avoid taking positions that will be controversial among our diverse membership. As stated in Bylaw Section 12.3 regarding the legislative process, the bar is to "respect divergent opinions of subgroups within the legal profession" and to "avoid committing bar funds to issues that are divisive or result in creating factions within the profession." It is also worth noting that an increasing number of mandatory bars are facing challenges to the use of compulsory fees for anything not closely related to regulating the profession or improving the quality and availability of legal services.

I have found only two other state bars (Arizona and Michigan) with formal policies on sponsorships and contributions, and they take rather different approaches. The State Bar of Arizona (SBA) established an annual budget for contributions, limits them to \$1,000 per applicant, and makes its decisions and distributions once a year. The policy references the bar's Keller limitations and requires that the event or program be consistent with the bar's "core values of integrity, service, diversity, professionalism, justice and leadership." The SBA also prohibits the use of contributed funds for alcohol, administrative costs, speakers, religious services or fundraising drives.

² 499 US 1, 111 Sct 2228 (1990).

Michigan starts from the premise that the bar's general policy for supporting various organizations is through the purchase of event tickets, but that financial sponsorship of events is permitted in "limited circumstances." Requests can be made at any time, although any request for support in excess of \$100 requires board approval. Additionally, the expenditure must either have been specifically budgeted for or cannot exceed funds allotted for contingencies. Consideration is given to whether the requesting organization is one with which the bar has or intends to have, a "significant relationship." The bar's participation must be "Keller-permissible" and advance the goals of the bar's strategic plan.

Proposals

Both options presume the addition of a new section to Bylaw Article 7 Financial Matters:

Option 1

Section 7.7 Sponsorships

It is the policy of the bar to support events of Oregon's local and specialty bars and of other legal and community organizations that are germane to the bar's mission through the purchase of event tickets and attendance of bar leadership and staff. The board will identify the events for which tickets will be purchased and will include an allocation in the annual budget for that purpose. No other support, financial or in-kind, will be provided to such groups except in extraordinary and limited circumstances with the prior approval of the board and a showing that the contribution is germane to the bar's purpose and mission.

Option 2

Section 7.7 Sponsorship and Contribution Requests

Subsection 7.7.1 General

The board may establish an annual budget for sponsorships and contributions for the purpose of supporting legal and community organizations. This budget shall be in addition to the budget established for bar leadership and staff attendance at local bar and community dinners and similar events.

Subsection 7.7.2 Qualification

The program or event for which the contribution is requested must be germane to the bar's mission to serve justice by promoting respect for the rule of law, by improving the quality of legal services and by increasing access to justice.

The program or event must be germane to the bar's functions as a professional organization, as a provider of assistance to the public, as a partner with the judicial system, as a regulatory agency, as leaders serving a diverse community, and as advocates for access to justice.

The program or event must be non-partisan and non-political, and must comply with the bar's non-discrimination policy.

Subsection 7.7.3 Application and Use of Funds

The Bar will establish a due date for applications in the last quarter of the year prior to the event for which funds are requested. Applications will be reviewed by the Budget & Finance Committee and submitted with a recommendation to the Board of Governors at its last meeting of the year. Successful applicants will be notified after the board has made its decision, and funds will be distributed in January unless a later distribution date is requested by the recipient. Late applications will be considered if there are budgeted funds remaining after the distribution date.

Funds awarded may be used only for the program or event designated in the application unless the applicant obtains approval from the bar for an alternative use. Funds awarded may not be used for alcohol, religious activities, lobbying or fundraising.

Recipients must include recognition of the bar's sponsorship in brochures, programs or other event materials.

Contribution Request Procedures and Guidelines

The SBA recognizes the value of supporting Arizona-based, legal and community organizations and invites them to submit a request for financial support. We will consider solicitations for contributions not to exceed \$1,000 for those events and activities that an organization is planning for 2016. In our mission to promote diversity in the profession and within the SBA, we ask that organizations request funding for activities promoting interaction between all members of the Bar.

Guidelines for Qualification

Please note that the State Bar of Arizona's Contribution Policy requires the following:

- The event or program must be consistent with the Mission Statement of the State Bar:

The State Bar of Arizona serves the public and enhances the legal profession by promoting the competency, ethics and professionalism of its members and enhancing the administration of and access to justice.

- The event or program must be consistent with State Bar core values of integrity, service, diversity, professionalism, justice and leadership.
- Funds may not be used for alcohol, administrative costs, speakers, religious services or scholarship fundraising drives.
- The event or program must be consistent with Keller (non-partisan/political).
- Recipients must include sponsorship recognition in brochures, programs, or other event materials distributed.
- Recipients must utilize awarded funds for the event or program requested. If the recipient is unable to utilize the funds for the awarded purpose, a request must be submitted to the Bar for approval of the alternative proposed use of the funds. If the "alternative use" approval is denied, then funds must be returned to the State Bar.
- Recipients must complete and return the **Reporting Form** provided by the State Bar of Arizona. This provides the Board of Governors with a report of how the funds have been spent in furthering the mission of the State Bar of Arizona, includes copies of event materials recognizing the Bar as a sponsor, and documents that the event or program is consistent with Keller.
- Failure to utilize funds for approved events and/or failure to submit the Reporting Form will impact the organization's ability to receive future funds.

Application Process

To apply, please complete the **Contribution Request Form**. The completed request form should be sent electronically to kathy.gerhart@staff.azbar.org. Please do not hesitate to contact Kathy Gerhart, Chief Financial Officer, by email or at 602.340.7392 if you have questions or need additional assistance.

Request submitted will be reviewed by the SBA Finance Committee in October and considered for approval by the

Board of Governors at the December 2015 meeting. SBA notification of the status of your request will occur in January 2016.

We value your service to our community and encourage you to apply for support from the State Bar.

October 1st	Deadline for applications
October	Finance Committee review and approve applications
January 2nd	Contribution request approval/denial letters/emails sent
30 days prior to event	Distribution of funds
60 days after event or program	File Reporting Form with State Bar

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State Bar of Michigan

Sponsorship Guidelines for Event Programs Policy

It is the general policy of the State Bar of Michigan to support events of its recognized affinity bars, sections, and other legal and non-legal organizations through the purchase of event tickets and attendance of State Bar leadership or staff where appropriate and consistent with the Strategic Plan. Further support may be provided through the listing of events in the e-Journal and other relevant publications.

As a general matter, the State Bar does not provide financial sponsorships for events. Recognizing that financial sponsorships may be appropriate in limited circumstances, these guidelines will be applied to requests for financial sponsorships:

1. The State Bar's participation as a financial sponsor through the purchase of tickets, advertising, or direct underwriting of an event for an amount in excess of \$100 requires the advance approval of the Board of Commissioners or Executive Committee. Such expenditures may only be approved if:
 - a. the State Bar's participation is Keller-permissible;
 - b. the State Bar's participation advances a goal of the Strategic Plan; and
 - c. the proposed expenditure has been either specifically budgeted for or does not exceed funds allotted for contingencies
2. In determining the extent of the Bar's financial participation, the following should also be considered, as applicable:
 - a. whether the event is sponsored by an organization with which the State Bar has, or intends to have, a significant relationship
 - b. whether the event advances a strategic mission of the State Bar
 - c. whether the event honors a member of the State Bar
3. The following are not eligible for financial support:
 - a. Individuals
 - b. Political parties or groups
 - c. Events outside of Michigan, except to the extent that there is a significant Michigan/SBM connection
 - d. Religious organizations
4. Requests for financial support pursuant to this policy should include at least the following:
 - a. An outline of the project or event for which the support is requested
 - b. The amount/product value requested, together with a the projected cost of the State Bar's participation in the event
 - c. A list of other contributors, partners, if available

5. Where necessary for Keller reasons or other considerations, a letter of acceptance of an invitation to provide sponsorship of an event or advertising in an event program must make clear that the sponsorship does not imply endorsement of a product or service or particular aspect of the program or event.
6. All agreements of support or sponsorship should include the recipient's agreement to acknowledge the State Bar's sponsorship at the event in some form.

This policy is not applicable to educational or training events planned by the State Bar in conjunction or collaboration with State Bar- related entities.

Adopted by the Board of Commissioners on July 24, 2009

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: November 20, 2015
From: Governance and Strategic Planning Committee
Re: Unclaimed Lawyer Trust Account Funds

Action Recommended

The Board of Governors should adopt the proposed amendments to Article 27 of the OSB Bylaws relating to Unclaimed Lawyer Trust Account Funds.

Background

In 2010, the Legislature amended Oregon's unclaimed property laws to require that abandoned funds in lawyer trust accounts be delivered to the Oregon State Bar. Pursuant to ORS 98.392(2), the board adopted rules for the administration of claims to the abandoned funds, which are found in Article 27 of the OSB Bylaws.

Although the OSB receives unclaimed funds from lawyer trust accounts, the Oregon Department of State Lands ("DSL") continues to maintain records of abandoned property and provide the online portal for individuals to submit claims for abandoned property. In order to ensure that DSL records are accurate, the OSB provides DSL with a listing of claims it resolves. Under OSB Bylaw 27.103(j), the bar is required to provide DSL with a listing on a monthly basis. Because the number of claims the bar receives is relatively small, OSB staff has discussed with DSL whether we can change the bar's reporting to quarterly, rather than monthly. DSL has agreed to this change.

The Governance and Strategic Planning Committee recommends that OSB Bylaw 27.103(j) be amended as follows:

(j) On a ~~monthly~~ quarterly basis, the Executive Director or designee shall provide a listing of the claims resolved to the Department of State Lands. The Executive Director shall also provide an annual report of the claims resolved to the Board.

OREGON STATE BAR

Governance & Strategic Planning Committee Agenda

Meeting Date: November 20, 2015
From: Sylvia E. Stevens, Executive Director
Re: Creation of a Retired Membership Status and
Eliminating 50-Year Member Fee Waiver

Action Recommended

Continue considering staff's recommendations to (1) create a new membership status of Retired for lawyers over 65 years who are fully retired; and (2) eliminate the fee waiver for 50-year members who are not fully retired.

Discussion

Retired Status

The Committee has discussed this proposal at its last two meetings, but has not arrived at any conclusions. As indicated, staff recommends the creation of a "retired" class of membership to simplify the configuration of the new enterprise management software (AMS), and to simplify the often-confusing compliance requirements for our older members.

Currently, the OSB has two classes of membership— Active and Inactive:¹

OSB Bylaws Article 6
Section 6.1 Classification of Members
Subsection 6.100 General

Members of the Bar are classified as follows:

(a) Active member - Any member of the Bar admitted to practice law in the State of Oregon who is not an inactive or suspended member. Active members include Active Pro Bono members.

(b) Inactive member - A member of the Bar who does not practice law may be enrolled as an inactive member. The "practice of law" for purposes of this subsection consists of providing legal services to public, corporate or individual clients or the performing of the duties of a position that federal, state, county or municipal law requires to be occupied by a person admitted to the practice of law in Oregon.

¹ "Active Pro Bono status" is a special active status available to members who limit their practices to providing pro bono services for low-income Oregonians or to volunteer services in disciplinary matters. Active Pro Bono members pay fees equivalent to the Inactive Member fees and are exempt from the MCLE requirements.

Active members are generally required to meet Minimum Continuing Legal Education requirements and to certify their compliance with the IOLTA and PLF requirements. There are, however, a variety of exceptions and exemptions for retired members.

The MCLE rules allow an exemption for “retired members,” defined as members over the age of 65 and “fully retired” from the practice of law. The rules require these retired members to file a compliance report every three years confirming that they do not practice law; the rules also prohibit a fully retired member from resuming the practice of law without prior written notice to the MCLE Administrator. Approximately 45 members reported themselves “active retired” for MCLE purposes. Because this is not a membership status, the bar does not have an accurate record of who claims the exemption or whether (and when) any return to active practice. About half of the members exempt from MCLE as “active retired” are 50-year members.

By statute, all active members are required to file an IOLTA compliance report. Although the requirement has been in place since 2011, compliance continues to be confusing for some of our members who are retired, who are not handling client funds, and who do not understand the continuing requirement to submit a compliance report. A similar issue arises in relation to the annual PLF compliance. Retired lawyers who do not engage in any practice of law are exempt from PLF coverage, but must claim the exemption annually.

Discussions among staff indicate we can simplify the AMS configuration and operations, while also implementing conveniences for member compliance by creating a formal membership status of “Retired” or “Emeritus.” The new status would be available to members who are 65 years old or older and fully retired from the practice of law (including pro bono work). Because they would not be active members, they would be exempt from compliance with MCLE and IOLTA reporting and from annually claiming a PLF exemption. They would also be exempt from the requirement to provide a current email address (although they could opt-in to email notifications). We suggest they pay fees at the same level as inactive members.

Moving this group of members from active status will simplify their annual regulatory requirements. It will also save uncounted hours of staff time spent explaining and helping older members through the various processes. Other internal efficiencies include allowing us to individualize the regulatory notices and track data on retired members.

On the public protection side, creating a formal status for retired members will inform the public that they are not eligible to practice law, and if they wish to become eligible, they will need to seek reinstatement. Finally, it provides a way for older, retired lawyers to remain members in some category other than Inactive, which we understand to be an important consideration.

Modification of the 50-Year Member Fee Waiver

In 1973, the Bar Act was amended to exempt 50-year members of the OSB from paying the annual membership fee.² Our records do not contain any minutes or other information regarding the BOG's analysis or rationale (although there is a note in minutes from 1972 that a member who had been pushing for the waiver threatened to go to the legislature if it wasn't supported by the BOG).

At present, there are 462 members in the 50-year category, ranging from 2 who were admitted in 1946 to 54 in the class of 1965. The number of 50-year members who remain in active status (and continue to practice) has increased steadily over the years. According to the PLF, there are currently 76 who are still paying PLF premiums and therefore still actively engaged in the private practice of law. This represents nearly \$40,000 in annual fee revenue that the bar is foregoing.

In the class of 1966 (next year's 50-year members), there are 30 active members who are paying for PLF coverage. Assuming no attrition (although there will likely be some), this is another \$15,000+ in fees that will be waived. There is no reason to expect that the number of active, practicing 50-year members will decline over time; rather it is likely to increase. Lawyers, like nearly everyone else, are living and working longer either by choice or necessity.

Whatever the rationale for waiving membership fees for this group of members may have been 42 years ago, with pressure to keep fees as low as possible, it may be time to rethink the 50-year member fee waiver, at least for those who continue to engage in the practice of law (prospectively only, allowing current 50-year members to continue being exempt from fees). Once retired, the 50-year member would be entitled to the fee waiver.

It is likely that there would be opposition to this idea, particularly from members approaching the 50-year mark who have been anticipating the benefit of the waiver. One way to minimize opposition would be to announce the change, but defer implementation for a year or two. Additionally, it is likely there will be considerable support for the idea from struggling younger members who may not appreciate having to subsidize the membership of older lawyers who they might see as much more able to pay their own way.

² ORS 9.191(2): The board may not require that a member who has been admitted to practice law in Oregon for 50 years or more pay membership fees, assessments or any amount under ORS 9.645, except that the member shall be required to pay any amount assessed under any plan for professional liability insurance if the member is engaged in the private practice of law and the member's principal office is in Oregon.

Membership Type	Eligibility	Compliance Items	Purpose & Membership Benefits	Annual Fee
Active	OSB member	Fees IOLTA PLF MCLE	License to practice Benefits: BarBooks, Fastcase, Bulletin	\$537
Inactive	OSB member	Fees	Retain membership while not practicing/employed as an Oregon lawyer Benefits: Bulletin	\$125
Active Pro Bono	OSB member in good standing	Fees IOLTA PLF	License to practice limited to pro bono legal services and certain OSB volunteer work Benefits: BarBooks, Fastcase, Bulletin	\$125
Proposed: Retired or Emeritus	OSB member over age 65 and fully retired from law practice	Fees	Allows senior attorneys to retain identify as a lawyer without risking suspension from failure to complete annual compliance items; reduces staff time on compliance matters Benefits: BarBooks and Bulletin	\$125
	-----o r----- 50-year members who have retired from practice	None	Reduces projected budget impact as more 50-year members continue in active practice -- (Currently fees are waived for 50-year members regardless of status) Benefits: BarBooks and Bulletin	\$0

Compliance notes:

Members who are at least age 65 and fully retired may apply for exemption to the bar's email requirement, in which case they receive regulatory notices by mail.

Members who are at least age 65 and certify they are fully retired are exempt from MCLE requirements but must re-certify every three years.

From: Don Friedman [mailto:don_friedman@yahoo.com]
Sent: Monday, November 09, 2015 3:58 PM
To: Sylvia Stevens; Helen Hirschbiel
Cc: Richard G. Spier; Terry Wright
Subject: Proposed Committe Material

Sylvia and Helen, Please find attached the draft "Table of Contents" and some summary data on accelerators. I have been working with the ABA to produce this material.

My current thinking is that I would attend the Committee meeting November 20, get 10 minutes on the agenda and ask the Committee to recommend up to \$2,000 for a report following the Table on Contents. I have talked with Susan Filstiner from Lewis and Clark and she had a couple ideas for who might assist me with the needed research. The research assistant is what the money is for; my time is on a volunteer basis.

Let me know what you think please.

Don Friedman

[503 756-1116](tel:5037561116)

Incubator Stats and Summary

- There are 55 programs spanning 26 states, the Dominican Republic and Pune, India.
 - 54 are posted online but 2 are no longer operational and are therefore not included in the total count; however, this figure does include 3 additional programs that are not posted online but are currently operational.
 - There are (approximately) 10 additional programs I have identified that are in varying levels of development.
- Programs typically run between 1 and 2 years and often there is flexibility as to when the participant should “graduate.” Many of the programs operate in stages; for instance, in 3 six-month sessions.
- The number of participants varies greatly – some have as few as 2 participants and some have up to 20 at any given time.
- In the majority of programs, participants operate their own independent law firms as opposed to being a part of a single law firm together.

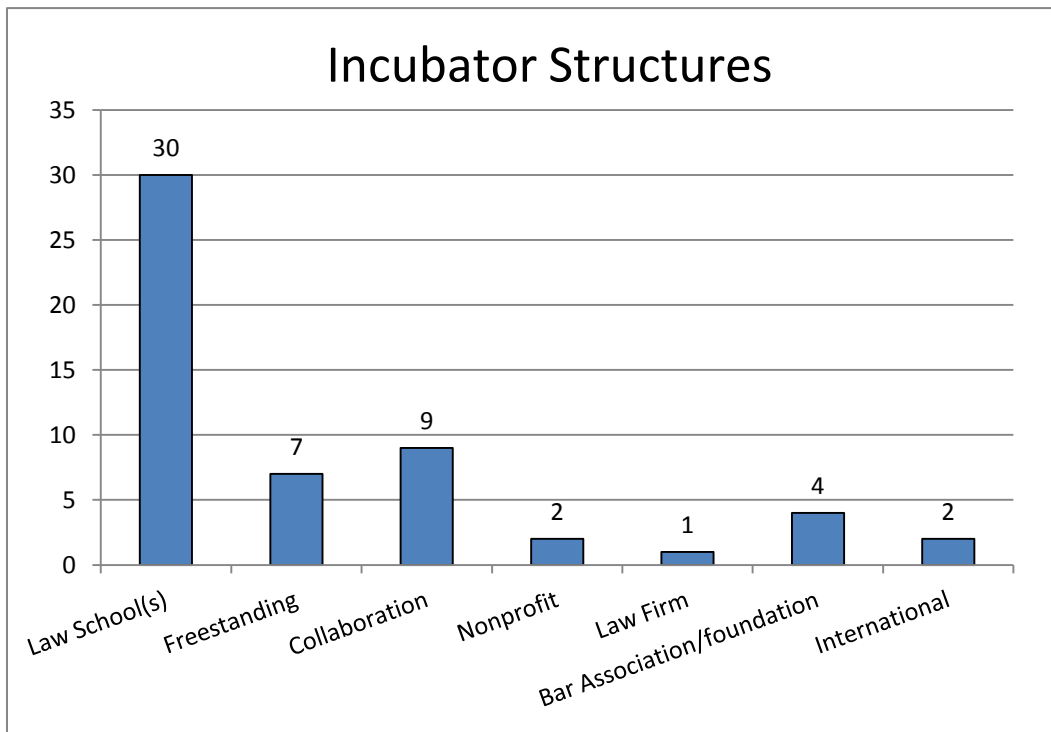


Fig. 1: Number of programs broken down by operating entity. Note that there are programs that indicated they receive funding from a bar association or foundation (Fig. 5) but are not officially operating under a bar.

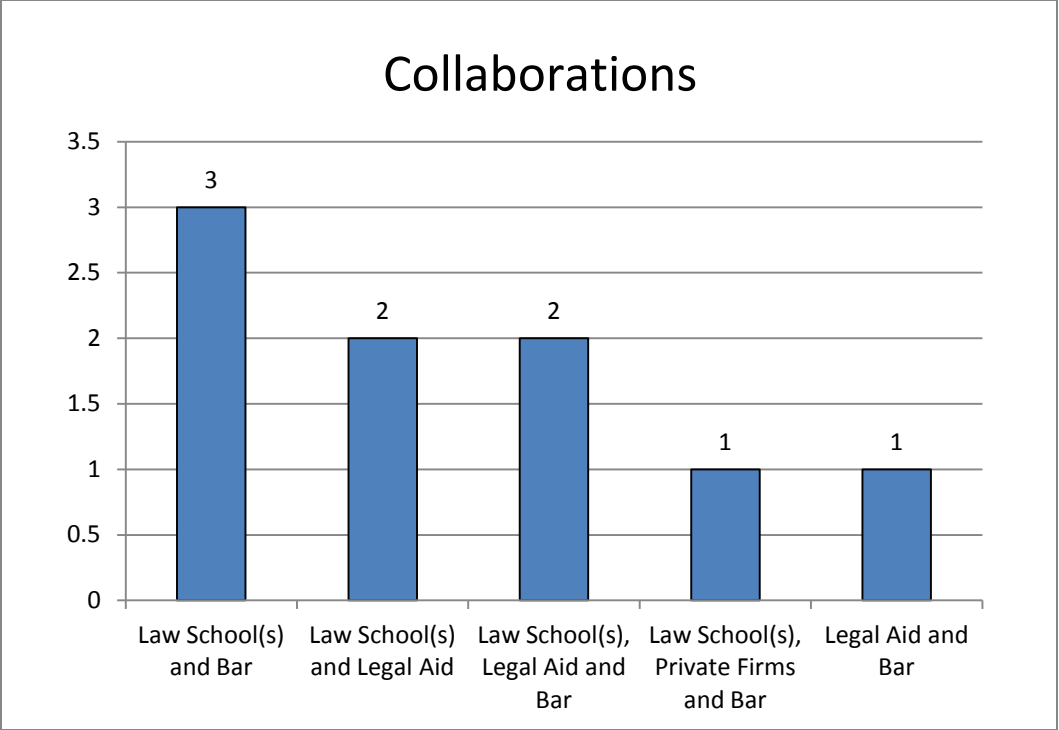


Fig. 2: Collaborations from Fig. 1 broken down by the various operating entities.

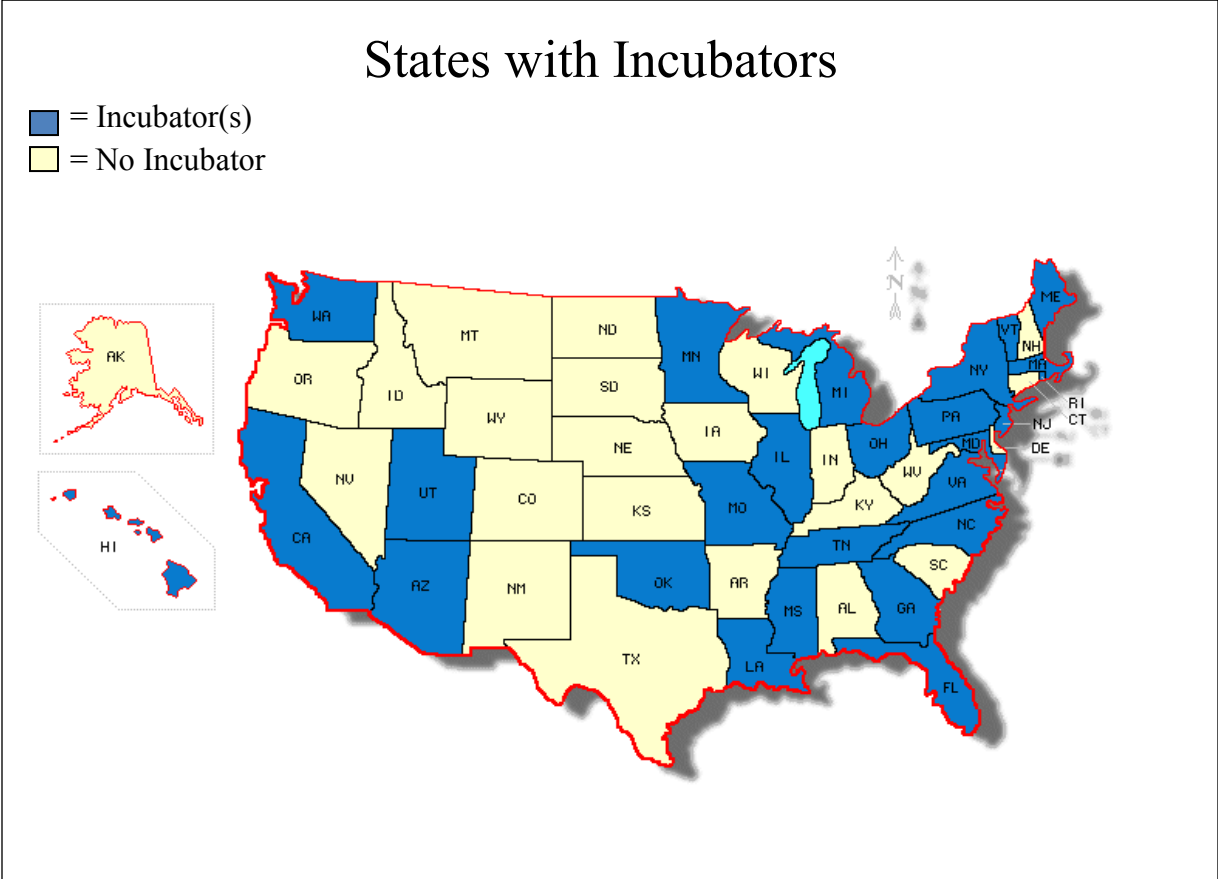


Fig. 3: Map showing which states have incubator programs. Note that this figure includes Florida; however, the Florida program is currently non-operational. The analyses in Figures 1-2 and 4-5 do not include the FL program.

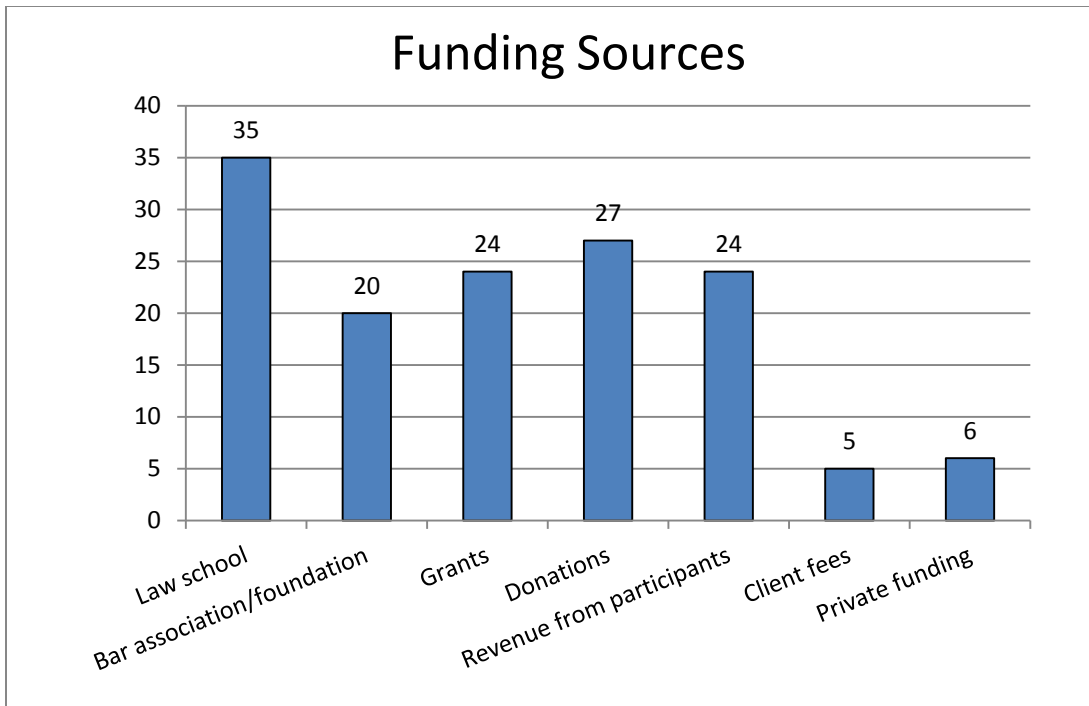


Fig. 4: Number of programs that indicated it receives at least some funding from a given source. Note that there is overlap as many programs receive funding from a combination of multiple sources.

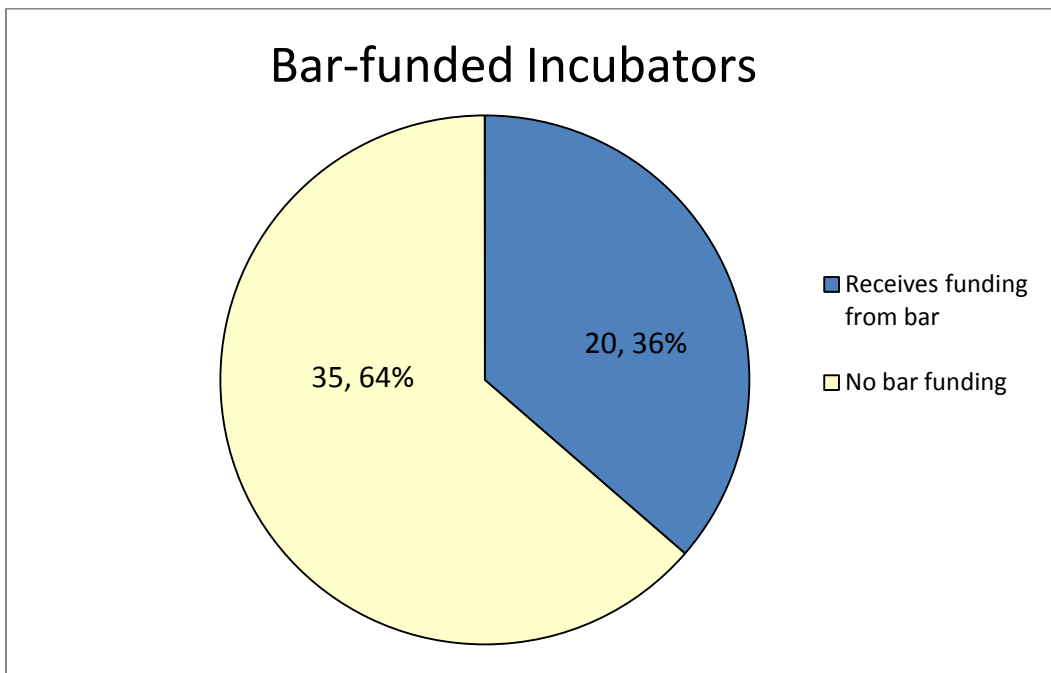


Fig. 5: Percentage of programs that indicated they receive at least some funding from a bar association or foundation.



Fig. 6: Number of programs that indicated it provides a particular resource to participants.

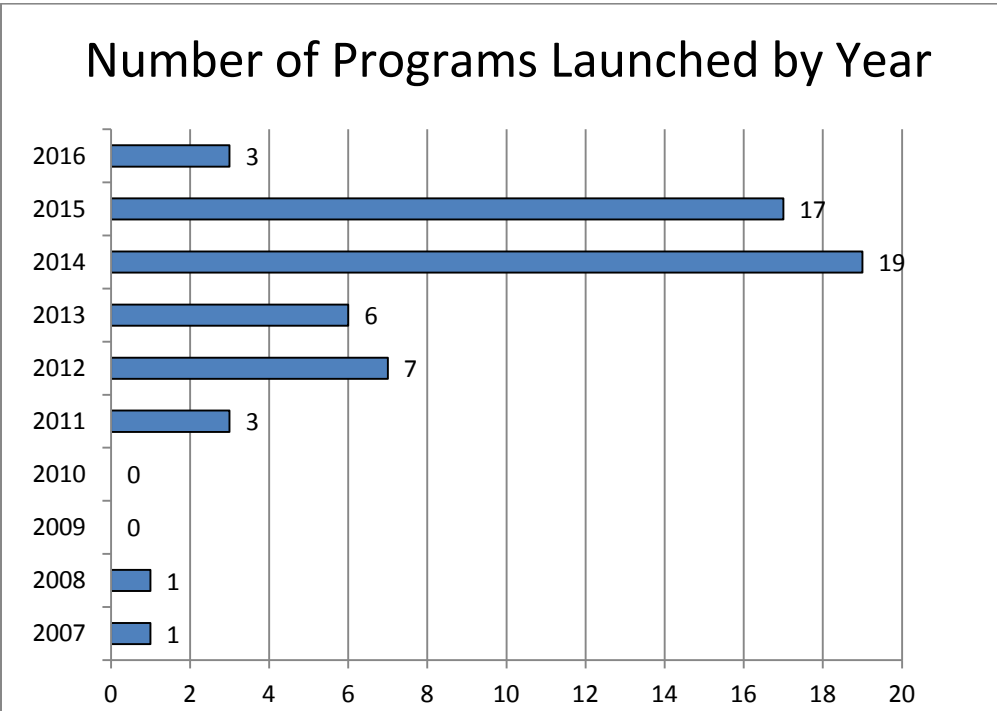


Fig. 7: Number of programs launched by year. Note that this chart, unlike the others (with the exception of Fig. 3 and the inclusion of FL) includes the two non-operational programs posted online thus making the total number of programs 57.

Table of Contents
Incubator/Accelerator Survey

- I. Introduction
- II. Summary survey of existing programs
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 - Program metrics
- IV. Options/Recommendations for Oregon

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: November 20, 2015
Memo Date: November 4, 2015
From: Sylvia Stevens, Emilee Preble, Anna Zanolli
Re: Staff Response to Knowledge Base Task Force Report

Action Recommended

No action recommended at this time.

Background

The Knowledge Base Task Force (KBTF) was established by the Board of Governors in response to a resolution passed at the 2012 House of Delegates meeting. The task force was given the following assignment:

- Identify written materials that could be included in the Knowledge Base,
- Explore the feasibility of a single database for searching the materials,
- Develop a “business plan” for creating and implementing the database that includes the direct and indirect costs and anticipated time line for completion, and
- Recommend to the BOG whether the project should go forward.

The KBTF report recommends that the bar create a single online comprehensive search engine and include all new OSB materials and as much archived OSB material as possible. The report recognizes that the bar’s current efforts to implement a new association management software platform will provide the basis for accessing available OSB content, while technological, financial and political considerations will serve as guidelines for determining what content can be included in a comprehensive knowledge base.

While not mentioned in the KBTF report, the PLF’s recent development of a new website provides a contemporary interface for access to the PLF content and a new OSB interface is in development along with the bar’s new AMS platform. Both the PLF and OSB will continue to look for opportunities to find information that can be shared by both entities—e.g., select PLF publications have been integrated into the BarBooks library.

Merging all content from the OSB, PLF, OSB sections and other bar groups into a single database with a shared search engine is not a practical solution. Rather, focusing attention and resources on the optimization of the respective data sources—so each can be easily searched by current industry standard search engines, such as Google—and increasing clarity and communication to OSB members about where different resource materials and information are located, are current and ongoing efforts within both the bar and the PLF.

We also have concerns about the KBTF’s recommendation for creation of a searchable archive for “selected list serve messages.” The objective is to make available to all OSB

members the wisdom and expertise of section members. While we agree that many section list serves are a source of valuable practical help, the scope of the proposal is daunting. First, many sections believe that their list serves are a valuable benefit of section membership and should be available only to their section members. Second, and perhaps most important, the KBTF does not suggest who would curate the list serves to determine which messages are worth archiving.

In conclusion, it is staff's view that existing and planned enhancements to our software already do or soon will provide sufficient access (and search functionality) to bar and PLF written materials, and that the marginal benefit to members that would result from implementing the KBTF recommendations does not justify that significant investment of additional time and resources that would be required.

OREGON STATE BAR

Knowledge Base Task Force Report

Date: September 21, 2015
From: James Oberholtzer
Re: Report to the Board of Governors

Introduction

Opportunity. The OSB and its affiliate organization, the PLF, generate a wide variety of written materials useful (and some essential) in the practice of law in the state of Oregon. Wider dissemination of curated information in a standardized format that can be accessed easily by OSB members would improve the quality of service provided to the public. The advent of digital communication, particularly widespread use of the internet, has dramatically increased the participation of OSB members on the internet and lowered the cost of the distribution through digital delivery.

Quick, convenient access to the knowledge in these materials can raise the quality of practice of law across the state. Large law firms often have internal digital knowledge bases that serve this purpose for them. These recommendations present the opportunity for solos, disabled, members of small law firms, in small towns and outlying areas to have access to OSB materials around the clock regardless of distance or other barriers to access.

Current Situation. The bar currently provides a body of knowledge on its website and provides access to this information through navigation tools and search engines. The task force recommends expanding the curated data sources on the bar's website and increasing the capabilities of the search engine to increase the bar's support of our members in their practice of law.

OSB Published Materials. Currently the bar publishes the following areas of information on its website:

For Lawyers:

- Online directory of members that is updated daily with current contact information
- BarBooks™
- Bulletin Archive
- Career Center
- Fastcase™
- Judicial Vacancies
- Legal Ethics Opinions
- OSB Group Listings
- OSB Rules & Regulations
- SLAC Info
- Surveys and Reports
- Volunteer Opportunities
- CLE Seminars

Bar Programs:

Diversity & Inclusion, Fee Arbitration/Mediation, Legal Services Program, Legislative/Public Affairs, Loan Repayment Assistance Program, Oregon Law Foundation, Pro Bono.

Member Groups:

Board of Governors, Committees, House of Delegates, Local Bars, Oregon New Lawyers Division, OSB Sections (including links to individual section websites), Professionalism Committee, Volunteer Opportunities.

About The Bar:

Bar mission, functions and values, ADA Notice, Contact Info, Copyright Notice, Directions to the Bar, Meeting Room Rentals, OSB Job Opportunities, Privacy Policy, Staff Directory, Terms of use.

Licensing/Compliance:

Admissions; Client Assistance Office; Client Security Fund; IOLTA Certification; Lawyer Discipline; MCLE; Member Fee FAQ; New Lawyer Mentoring Program; Professional Liability Fund; Status Changes; Unlawful Practice of Law.

The member portion of the website provides a dashboard with links and information customized to the logged in member:

Regulatory notifications with links to fee payment; IOLTA certification; MCLE reporting; member profile and demographic information; communication preferences; PLF exemptions; fee payments; proof of coverage. Access to section rosters, newsletter archives, and list serves are also provided in the member portion of the website.

The balance of the website contains information for the public:

Lawyer Referral Service; Legal Information Topical Index; Juror Handbook; Finding The Right Lawyer; Hiring A Lawyer; Lawyers Fees; Client Assistance Office; Public Records Request; Unlawful Practice of Law; Fee Arbitration/Mediation; Client Security Fund; Volunteer Opportunities for the Public.

In addition, valuable information is often shared on Section list-serves. The PLF publishes a variety of materials and practice aids on its website (www.osbplf.org).

Additional resources are found on Fastcase™ and the Career Center, two third-party providers accessible through the bar's website.

The OSB has a large archive of past publications in a variety of digital formats. Until recently, written materials were published in digital formats optimized for paper distribution. Most archived materials are in these formats. For the last fifteen years, most OSB materials, produced by the bar, have been created in digital formats that are optimized for digital publication for viewing over the internet. But, not in many cases for searching in a database.

Access. Currently, access is available in hard copy, through a variety of unconnected search engines, and as downloadable pdfs.

OSB members receive a hard copy of the monthly *Bar Bulletin*. It is also published in OSB website and searchable by the OSB website engine. BarBooks™ is searchable by all members on the website by its own BarBooks engine. Section newsletters are often available on Section websites; some are searchable by native engines on each Section website. The bar maintains a searchable archive of many section newsletters on the main site, behind the member login using the OSB search engine.

CLE presentations are available to members who attend the CLE either in person, concurrently over the internet or at a later date through the website. CLE materials are available in hard copy or digital copy. The bar will be adding new CLE materials to the main website where they can be searched using the OSB search engine. List-serve messages are exchanged by email to Section members.

A general archive of list-serve messages is not maintained so it is not possible to search for list-serve messages. PLF materials are searchable on the PLF website by its engine.

A Google search engine is used for retrieving access to most areas of information on the OSB website. A proprietary search engine was built to retrieve information in the BarBooks™ and Ethics Opinions, and section newsletter areas of the site. Both the Google and proprietary search engines deliver both web pages and other document formats, with the section newsletter library limited to the pdfs of available issues. Section list serve messages are not archived, curated or included in the website database.

The current OSB website search function operates with basic search parameters:

1. Search terms. The search terms must be a simple word or phrase.
2. Search function. The search matches the search terms with the content of the database records. The user cannot limit the search to a subset of the database; for example, date range, designated materials or other subsets of data. The search does not allow for gaps between words (e.g., search term #1 within 25 words of search term #2).
3. Returns.
 - a. The search returns a series of return message composed of 4 to 5 lines of information:
 - i. A title for the document returned
 - ii. The file format of the document
 - iii. An excerpt from the document showing the search terms in bold
 - iv. A link to the document on the OSB website
 - b. The messages are ordered in terms of relevance (frequency that the search term appears in a document).
 - c. The user cannot search the found set to find a subset of the records.

Some Section websites are also searchable by native search engines (within the Section website) limited to the Section website. In addition, some Sections have made their materials searchable by a general Google internet search. Other Section materials are not searchable.

CLE materials and list serve messages are not searchable. PLF materials do not appear in online Google searches.

Recommendations

Key Recommendations. The Task Force recommends that the OSB take the following actions:

1. Create by July 1, 2016 a single online comprehensive search engine for all current and selected archived OSB and PLF materials (excluding list serve messages).
2. Create by July 1, 2016 a message archive for selected list serve messages and make it searchable in by the comprehensive search engine.

Specific Recommendations.

1. Establish a standard comprehensive search engine software capable of maintenance and upgrades. Avoid custom designed software.
2. Solicit participation of Sections to make their materials available in the comprehensive search engine.
3. Include new and archived CLE materials in the comprehensive search engine.
4. Establish parameters for the search terms for comprehensive search engine, including:
 - a. Filters for search terms to limit searches (establish advance search parameters and filters)
5. Establish parameters for the returns from a search:
 - a. sufficient information to evaluate document
 - b. Ranking by users of utility of a document
 - c. Reviews by users of utility of a document
 - d. Suggestions of related documents that users who found the initial documents also used.

Challenges to Implementing Recommendations.

A comprehensive search engine that delivers information from the OSB, PLF and Sections will be a challenge to achieve while these materials are located on multiple systems and servers. Steps can be taken to identify bodies of information that should be curated and added to the bar's website and desired improvements for the Google search engine currently used to deliver the data on the bar's website can be priced and compared to other options.

Most importantly, the OSB is in the process of acquiring an association management software system that will provide a centralized database of bar information. The systems under consideration contain modern search engines that will enhance the ability to make the available information accessible to our membership. These systems could be concurrently evaluated on how they could assist or impede the effort to open up OSB material to the members using the internet.

Specific Issues:

1. Technological.
 - a. Legacy records from each digital era are in a variety of formats with varying degrees of difficulty in using with modern search software.
 - b. The legacy search software programs have some limitations on converting records to new search software.
 - c. Integration of existing billing, member demographic and other OSB databases with new search software.
2. Financial.
 - a. Costs of conversion of existing legacy records from various eras.
 - b. Cost of new search software.
 - c. Installation and integration of new search software into existing systems including website and
3. Political.
 - a. Section Newsletters. Some Sections do not want to share their Section materials to non-Section members. One key objection is that Section members have paid a fee to join the Section and have access to the materials.
 - b. Section List serves. Section list serves contain a wide variety of messages. The current rule (and expectation) is that the messages are distributed only to the members of the section list serves. This closed list feature is valued by many list serve users. In order to preserve this feature, the author of a list serve comment should have the election to authorize the republication of a list serve message to a wider audience (possibly in the form of an OSB Blog open to members).

Conclusion

In the digital world there are two things: content and access. OSB already does the difficult thing: it produces high quality content. It only needs to add access. It has already started this process. It should broaden its efforts to produce a single online comprehensive search engine and include all new OSB materials and as much archived OSB material as possible. The benefits to its members and the public can be enormous.

Respectfully submitted,

James Oberholtzer
Chair of the OSB Knowledge Base Task Force

Members of the Committee:

John Gear
Amy Hill
Joseph Kraus

Colin Lebens
Charles Starkey

Staff Liaisons: Sylvia Stevens, Emilee Preble, Anna Zanolli

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: November 20, 2015
From: Sylvia E. Stevens, Executive Director
Re: Discipline System Review Committee Report Implementation

Action Requested

None at this time; this is for the Board's information only.

Discussion

On November 5, Rich Spier, Ray Heysell, Helen Hierschbiel and I discussed the DSRC Report with the Chief Justice and his staff counsel, Lisa Norris-Lampe. After we reviewed some of the Committee's more significant recommendations, our discussion turned to identifying the best approach for eliciting member comment and presenting the report to the Supreme Court.

After discussion, the Chief Justice expressed a preference for deferring submission of the report to the Court until after members have had time to comment and the BOG has decided which of the Committee's recommendations it wishes to forward to the Court. The DSRC Report (and any minority reports) can be published on the OSB web site by the end of November and the comment period can run to the end of January.

The BOG can then use its February meeting to review the DSRC Report and any member comments received, and determine what DSRC recommendations it wishes to recommend to the Supreme Court. The Court will have a special public meeting (probably in March) to review the DSRC Report, member comment, and the BOG's recommendations. The Court will then advise which recommendations it favors.

Staff will then proceed to draft amendments to the BRs to implement the favored recommendations. A realistic goal for presentation of the rule amendments to the BOG is the August 2016 meeting. Presumably the Court would act on the proposed rules promptly, adopting them with an effective date of January 1, 2017.

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KENDRA M. MATTHEWS
also admitted in Washington]

WHITNEY P. BOISE

October 22, 2015

R. Ray Heysell
Hornecker Cowling Hassen
717 Murphy Rd.
Medford, OR 97504
rrh@roguelaw.com

Dear Mr. Heysell:

On behalf of the current State Professional Responsibility Board, I am seeking your help. The Bar's Board of Governors (BOG) is about to consider changes to Oregon's attorney disciplinary procedure. To have impact, you must express your opinion regarding these proposals to your BOG representative prior to the BOG's November 20, 2015, meeting.

The Disciplinary System Review Committee (DSRC), a Bar committee established to study the ABA Report following its 2014 review of Oregon's discipline system, expects to submit its recommendations to the BOG in November. The DSRC proposes dramatic and significant changes that will fundamentally alter the role of the State Professional Responsibility Board (SPRB) and the nature of its relationship to the Disciplinary Counsel's Office (DCO). The tenor of many of the changes negatively impacts protection of the public, the pre-eminent purpose of Oregon's attorney discipline system. Because the DSRC proposals significantly diminish the safeguards in place to protect the public and restrict the impact volunteer lawyers and nonlawyers can have on resolving disciplinary matters, the current SPRB strongly opposes their implementation.

The DSRC recommends eliminating SPRB involvement in:

- settlement of disciplinary proceedings (either informally or through mediation)
- amendment of pleadings
- Title 3 proceedings (temporary suspensions, involuntary transfers to inactive status, proceedings arising out of criminal convictions, and reciprocal discipline proceedings)
- appeal decisions

Complainants would no longer have a right to appeal a Disciplinary Counsel (DCO) dismissal of a complaint to the SPRB, nor could accused attorneys ask the SPRB to reconsider its vote to file a formal complaint.

Essentially, once the SPRB authorizes the filing of a formal proceeding on a complaint, DCO would have prosecutorial discretion to conduct the matter to conclusion with no further input from the SPRB.

The only DSRC-proposed expansion of SPRB authority is the addition of grounds upon which a complaint can be dismissed even in the face of demonstrable misconduct. The net effect is to shift the focus of the SPRB from shaping the outcomes of cases that are pursued against lawyers to enlarging the circumstances under which no discipline will be sought even though misconduct occurred.

Both the public and the legal profession have benefited from Oregon's long history of hands-on service by the SPRB's lawyers and nonlawyers. The ABA defines the ultimate goal of an effective disciplinary system as "protecting and advancing the public's interest in a well regulated bar."⁹³ The present SPRB unanimously believes that reduction of its role does just the opposite by eliminating many of the checks designed to protect the public. Furthermore, removing the ongoing participation of the SPRB, with its geographic and practice area diversity, eliminates the protections to the process provided by a practitioner's knowledge of a specific area of the law and an understanding of local practices.

In addition to reducing the SPRB's role, the DSRC proposes to fundamentally alter the relationship between the SPRB and DCO by eliminating the SPRB's ability to communicate confidentially with the DCO about recommendations on a particular case.

Currently, for each matter presented, DCO provides SPRB in advance of each meeting a detailed memorandum that include factual recitations from the complainant's and the accused lawyer's perspective, ethics analysis, specific recommendations about rule violations and (in many cases) seeks settlement authority for sanctions. SPRB meetings are not public – they are opportunities for the SPRB to consult with DCO and decide whether

⁹³ ABA Report, p. 9.

cases should move forward or be dismissed, largely on the basis of reviewing these memoranda (with the entire file made available to the presenting SPRB member). The DSRC would require these memoranda be provided to the accused lawyer, who would then have an opportunity to respond, in advance of their delivery to the SPRB.

Because respondents already receive any and all materials submitted by the complainant, are informed in DCO's first letter which rules of professional conduct are implicated by the alleged conduct, and have ample opportunity to provide information and legal argument in response during the investigatory stage, the principle reason for requiring delivery of these memoranda is to provide a window into DCO attorney work product and what would be privileged legal advice in a civil litigation context. We believe this recommendation is counterproductive. No lawyer can adequately function if required to give opposing counsel his/her work product and legal analysis.

The DSRC jettisons the "probable cause" standard on which ethics charges can be authorized in favor of "cause for formal complaint." This novel phrase incorporates a "reasonable belief that the case can be proved under the clear and convincing standard." The ABA lodged no objection to "probable cause." It is unclear what effect this new standard might have on the number of disciplinary cases filed. It will likely mean that cases linger longer in investigation in order to assure "clear and convincing" corroborative evidence before authority to file is sought.

The DSRC has gone down other procedural paths not recommended by the ABA, with the net effect of complicating procedures leading up to a hearing without increasing efficiency, accountability, consistency, or transparency to the public.

The DSRC proposed changes put the protection of the public from unethical legal behavior in jeopardy. Without the checks and balances provided by the SPRB, the disciplinary system would only be as strong as Disciplinary Counsel who would be much more vulnerable to political pressure from strong forces within the legal community. The SPRB makes DCO independent by actively participating in ultimate decisions related to attorney discipline. Presently, rather than being answerable to strong special interests, DCO is accountable to the SPRB.

R. Ray Heysell
October 22, 2015
Page 4

What are you being asked to do?

Decide for yourself whether you believe the SPRB's role as it functioned during your tenure should continue. If the answer is yes, mark your calendar on November 13 to contact your Board of Governors representative(s) and express your opinion. By that time, the DSRC report will likely be posted on the Bar's website as a part of the BOG's agenda. Here is a link to the webpage where BOG agendas are posted:

http://www.osbar.org/leadership/bog/bog_mtg.html

In the meantime, make other lawyers aware that changes are being discussed that could impact member involvement in decision-making at the ground level of the attorney discipline system and invite them to educate themselves by going to the Bar's website to view the ABA recommendations and materials pertaining to the DSRC.⁹⁴

Thank you in advance for time and interest.

Sincerely,



Whitney Boise
Chair, State Professional Responsibility Board

⁹⁴ Minutes for meetings are available on the Bar's website, as a part of each meeting's materials, here:
<http://bog11.homestead.com/DSRC/Homepage.pdf>

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WHITNEY P. BOISE

November 5, 2015

Richard G. Spier, JD, Mediator
2536 N.E. 28th Ave.
Portland, OR 97212-4916
rspier@spier-mediate.com

Dear President Spier:

As Chair of the State Professional Responsibility Board, I have been asked by my colleagues on the SPRB to convey our concerns regarding the recommendations being made by the Disciplinary System Review Committee (DSRC).

Recognizing that every set of rules can be improved upon, the SPRB was hopeful that the work done by the ABA team in reviewing Oregon's lawyer discipline system would encourage positive change. Speaking frequently of protection of the public, transparency, and seeking to increase efficiency, the ABA report was guided by admirable principles. Unfortunately, the DSRC has taken a different course. Its recommendations do not highlight public protection; my colleagues and I believe they speak more to lawyer protection.

Going far beyond the ABA, the DSRC proposes dramatic and significant changes that will fundamentally alter the SPRB's role, authority, and the nature of its relationship to Disciplinary Counsel. The expressed intent of these changes is to aid lawyers, often to the detriment of the complainants and public at large.

A major change recommended by the DSRC is to do away with the "probable cause" standard on which ethics charges can be authorized in favor of "cause for formal complaint." This novel phrase incorporates a "reasonable belief that the case can be proved under the clear and convincing standard." The ABA lodged no objection to "probable cause." It is unclear what effect this new standard might have on the number of disciplinary cases filed. It will likely mean that cases linger longer in investigation in order to assure "clear and convincing" corroborative evidence before authority to file is sought.

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In addition to reducing the SPRB's role, the DSRC proposes to fundamentally alter the relationship between the SPRB and DCO by eliminating the SPRB's ability to communicate confidentially with the DCO about recommendations on a particular case.

Currently, for each matter presented, DCO provides SPRB in advance of each meeting a detailed memorandum that include factual recitations from the complainant's and the accused lawyer's perspective, ethics analysis, specific recommendations about rule violations and (in many cases) seeks settlement authority for sanctions. SPRB meetings are not public – they are opportunities for the SPRB to consult with DCO and decide whether cases should move forward or be dismissed, largely on the basis of reviewing these memoranda (with the entire file made available to the presenting SPRB member). The DSRC would require these memoranda be provided to the accused lawyer, who would then have an opportunity to respond, in advance of their delivery to the SPRB.

Because respondents already receive any and all materials submitted by the complainant, are informed in DCO's first letter which rules of professional conduct are implicated by the alleged conduct, and have ample opportunity to provide information and legal argument in response during the investigatory stage, the principle reason for requiring delivery of these memoranda is to provide a window into DCO attorney work product and what would be privileged legal advice in a civil litigation context. We believe this recommendation is counterproductive. No lawyer can adequately function if required to give opposing counsel his/her work product and legal analysis.

Complainants would also no longer have a right to appeal a Disciplinary Counsel (DCO) dismissal of a complaint to the SPRB, nor could accused attorneys ask the SPRB to reconsider its vote to file a formal complaint.

Essentially, once the SPRB authorizes the filing of a formal proceeding on a complaint, DCO would have prosecutorial discretion to conduct the matter to conclusion with no further input from the SPRB.

The only DSRC-proposed expansion of SPRB authority is the addition of grounds upon which a complaint can be dismissed even in the face of demonstrable misconduct. The net effect is to shift the focus of the SPRB from shaping the outcomes of cases that are pursued against lawyers to enlarging the circumstances under which no discipline will be sought even though misconduct occurred.

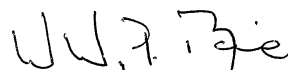
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Both the public and the legal profession have benefitted from Oregon's long history of hands-on service by the SPRB's lawyers and nonlawyers. The ABA defines the ultimate goal of an effective disciplinary system as "protecting and advancing the public's interest in a well regulated bar."¹ The present SPRB unanimously believes that reduction of its role does just the opposite by eliminating many of the checks designed to protect the public. Furthermore, removing the ongoing participation of the SPRB, with its geographic and practice area diversity, eliminates the protections to the process provided by a practitioner's knowledge of a specific area of the law and an understanding of local practices.

We urge the Board of Governors to take a close look at each recommendation being made by the DSRC and examine it from the standpoint of whether it promotes protection of the public or enhances efficiency or effectiveness of Oregon's lawyer discipline system. We submit that most of what is proposed does neither.

Before the DSRC recommendations are distributed to a wider audience for comment, consider whether they make the right statement about the Bar's commitment to the foregoing principles. If they do not – and we believe they do not – consider examining the ABA report, gleaning which recommendations help to streamline the system limiting needless delay in the disciplinary process without losing the checks and balances provided by the SPRB. Without the protections afforded by the SPRB, the disciplinary system is only as strong as Disciplinary Counsel who will be much more vulnerable to political pressure from strong forces within the legal community. The SPRB makes DCO independent by actively participating in ultimate decisions related to attorney discipline. Presently, rather than being answerable to strong special interests, DCO is accountable to the SPRB.² The SPRB stands ready to support such an endeavor that limits needless delay in the process while protecting the safeguards provided by the SPRB.

Sincerely,



Whitney Boise
Chair, State Professional Responsibility Board

¹ ABA report, p. 9.

² I have attached letters written to the Disciplinary System Review Committee from former Chairpersons of the SPRB, expressing their concerns to changes in the present disciplinary system in Oregon. I encourage you to contact these individuals.

From: [Richard Spier](#)
To: [Sylvia Stevens](#); [Camille Greene](#)
Subject: FW: Concerns regarding the DSRC recommendations
Date: Tuesday, November 10, 2015 3:26:25 PM

To add to exhibit.

From: Michael Gentry [mailto:michaelgentry04@comcast.net]
Sent: Tuesday, November 10, 2015 2:43 PM
To: rspier@spier-mediate.com; theresa.kohlhoff@gmail.com; john@mansfieldlaw.net;
mlevelle@sussmanshank.com; paramfjord@stoel.com; jross@stollberne.com
Cc: Whitney Boise
Subject: Concerns regarding the DSRC recommendations

Board of Governors President Spier and other Board members, I am taking this opportunity to add my concerns to those expressed by others relating to the pending recommendations of the Disciplinary System Review Committee which I understand will be presented soon to the BOG for consideration and action. I am the immediate past Chair of the Bar's State Professional Responsibility Board. Previously I submitted my comments on the ABA team recommendations but have not yet done so regarding the subsequent (and differently-directed) DSRC recommendations. I have read the November 5, 2015 letter from current SPRB Chair Whitney Boise to President Spier which I understand will be made available to the entire Board, and strongly concur with his statements and concerns so will not belabor you by repeating them here.

Thank you for your consideration of the various concerns that have been raised.

Mike Gentry

From Lawrence (Larry) Matasar larry@pdxlaw.com (Portland) OSB 742092

I have reviewed the ABA Committee's Report on the Lawyer Discipline System and am writing to make a few comments concerning their recommendations about the SPRB.

I was a member of the SPRB in 1997-2000 and I was the Chair in 1999-2000. Since then, I have represented several lawyers in disciplinary proceedings and in criminal cases. I have also represented other accused professionals, such as physicians and real estate agents, in disciplinary proceedings. I believe it would be a big mistake to limit the function of the SPRB to only making probable cause determinations, as recommended at page 49 of the Report.

The Report appreciates the important role of the SPRB, at page 49, where it notes that making the initial probable cause determination to prosecute an Oregon lawyer for misconduct is "a crucial function in the system." However, the Report recommends that the SPRB's role should be limited to making this initial probable cause determination, and the Report further recommends that the Disciplinary Counsel take over the historical SPRB functions of negotiating and approving settlements, authorizing diversion, and dismissing allegations. See pages 38 and 49-50.

In my view, for all the same reasons that the SPRB is better suited than the Disciplinary Counsel to make the initial probable cause determination, the SPRB is also better suited to make the key continuing determinations such as how to settle a case and when to dismiss a case. The SPRB is made up of a broad group of experienced Oregon lawyers from different regions and from different practice areas. I can't imagine why the ABA Committee wants to trade the judgment of the SPRB, with its broad experience with Oregon law and Oregon lawyers, for the judgment of a single person who may have just been hired from another state.

It may be that the Committee believes that the duties of continuing responsibility for the resolution of disciplinary cases are too great a burden for SPRB members. For example, also on page 49, the Committee notes, "the dedicated volunteers comprising the SPRB," and the Committee suggests that the SPRB act in panels of three to expedite the process. But I have no reason to believe that the SPRB members are unable to cope with their workload, and the SPRB continues to be made up of the very best Oregon lawyers.

Of course I understand that many of the people who the ABA Committee interviewed complained about delay in the Oregon system. And I agree that as much delay as possible should be eliminated. But there are many factors that cause delay in the disciplinary process, not only the SPRB. In my view, disciplinary counsel, the accused, and the accused's counsel are all typically more responsible for delay than the SPRB.

Thus, I strongly disagree with the Committee's recommendations to limit the SPRB's role in the resolution of filed cases. Please feel free to distribute this email and also feel free to contact me or suggest that others contact me if you believe it would be helpful.

From Peter Chamberlain peter@chamberlainmediation.com (Portland)(OSB 781668)

I was surprised and somewhat distressed to learn that the future of the SPRB may be in jeopardy. I served on the SPRB for four years and was chair my last year in 2012. Prior to that, I served for many years, on a somewhat sporadic basis, as Bar Counsel, prosecuting several lawyer discipline cases along with disciplinary counsel.

I am sure I do not know all the details relating to what has given rise to the scrutiny that the SPRB, and or disciplinary counsel's office, is currently under. I am aware of the short-lived tenure of Jeff Sapiro's replacement and, to a certain extent, the turmoil it engendered. I am also generally aware of the ABA's role in reviewing our system and making some recommendations.

More importantly, due to my experience as outlined above, I am aware of the following facts:

1. The SPRB is not, and in my experience never has been, a "rubber stamp" for disciplinary counsel's office. The SPRB is populated by very dedicated practitioners who give generously

of their time and talent in an effort to assure that lawyer discipline is handled fairly and properly for the benefit of the public and the bar itself. In every meeting I attended over four years,

[I think I did miss one] I observed SPRB members scrutinizing the recommendation of disciplinary counsel's work. This scrutiny was not out of doubt about their work product. The

scrutiny was out of a desire to get it right. Most of the time, we did.

2. The SPRB is not, and should not be, simply a "grand jury" for discipline cases. The lawyers

and public members on the board provide some real life experience and knowledge that disciplinary counsel's office relies upon, and needs, to help it in its very important work.

The SPRB's role is, and should be, not just in the realm of the charging decision but also in its role of making recommendations as to case resolutions (settlements, dismissals, probation,

and the decision to appeal, or not).

3. Disciplinary counsel, likewise, are not "out to get" lawyers. They provide a very important

service--again, to the public and to the bar--to protect and preserve the integrity of our profession. I have worked with many current and former disciplinary counsel. All of them have

been fair minded, dedicated, intelligent and hard working lawyers.

Thank you for your time. I hope that the process in which you are engaged results in improving

the disciplinary process and maintains the SPRB's important role in that process.

From Martin Hansen Meh@francishansen.com (Bend)(OSB 800526)

I recently learned of the Bar's task force formed to study the future role for the SPRB in disciplinary matters affecting the Oregon State Bar. Given what I believe is the vital nature of the SPRB function, I would like to offer a few of my thoughts that you can take to the task force.

I have been a practicing attorney for nearly 40 years. During that time I have had an opportunity to try cases in nearly every county within Oregon on a wide variety of civil issues. Also during these years, I served on a number of both Bar and other related committees ranging from the Council on Court Procedures, numerous Bar committees and also served as Chair of the SPRB. While I value all of my Bar work over the years and think of it as rewarding, I can say without reservation that my years on the SPRB gave me the most professional satisfaction of all. This stems from what I perceive as the very unique role that the SPRB serves in the Bar's disciplinary process.

The SPRB serves a function that is vitally important in the proper application and enforcement of Oregon's Rules of Professional Conduct. I mean no disrespect whatsoever to the Bar's Disciplinary Counsel whose day to day job is the processing of complaints against Oregon lawyers or their role in shepherding those cases to either dismissal or trial. However, I believe it would be a mistake to rely entirely on the Bar's hired Disciplinary Counsel as the sole enforcement mechanism for the RPCs. I base this opinion on a number of factors. First, the Bar Disciplinary Counsel often has a relatively limited range of experience in their legal background before joining the Bar. While this does not prevent them from competently performing their job, I have seen first hand how the wide range of experienced attorneys on the SPRB can bring even more focus and more thorough analysis to the cases brought before it by Disciplinary Counsel.

Second, the grand jury function served by the SPRB provides not only a level of fairness in the enforcement of the RPCs but also a high level of competence and thoroughness ensuring that those Rules are properly applied and only enforced when appropriate. I can recall in my years on the SPRB the countless hours spent by myself and my other Board members in reviewing, analyzing and critiquing the cases brought before us in preparation for the monthly SPRB meetings. While the Bar Counsel's work in giving us the file was already extensive, the work in reviewing and analyzing those files by both the assigned attorney and then the Board as a whole raised the level of analysis of each file to a level that was second to none and questioned by no one. While often times the action proposed by Disciplinary Counsel was supported by the SPRB, I can think of a number of times where the SPRB provided a level of critique and analysis that changed the direction of where a particular file was headed. Even when the file changed in direction in this fashion, both the SPRB members and the Bar Counsel who had the file in the first place always felt comfortable that the new direction was both competent and fair and the proper application of Oregon's RPCs.

Simply put, the independent analysis and review by the SPRB, I believe, is a vital function that the Oregon State Bar should preserve and make every effort to protect. With the SPRB in place, Oregon attorneys can feel confident that, should their conduct come into question, multiple eyes with decades of experience will analyze and review the charges before any action is either taken or not taken by the Bar. A member of the public who feels they have been wronged by an attorney and who turns to the Bar should feel comfortable that this same level of experience and analysis will be applied to their claim so that no single person will make a decision on their file but rather that a group of experienced practitioners will ensure that the file receives the proper resolution.

If you have any questions concerning the matters I raised in this letter, feel free to contact me. Thank you for giving me the chance to express the strong feelings I have in support of the Bar's continued utilization of the SPRB.

Michael Gentry

As a past member and immediate past Chair of the State Professional Responsibility Board, I've read the ABA report and recommendations ("the Report") and wish to offer my comments for whatever consideration the task force subcommittee may deem appropriate in connection its analysis of the portion of the Report pertaining to the function of the SPRB.

The Report is exhaustive and detailed in its analysis of Oregon's lawyer discipline system and contains a number of recommendations for revamping of the relative roles of Disciplinary Counsel/Disciplinary Counsel's Office and the SPRB, among others. The comments in this email are solely my personal views and opinions stemming from my long involvement as Bar Counsel and my recent service on the SPRB. Prior to the issuance of this Report, various SPRB members advocated for no changes in any of the present SPRB rules, and I understand and respect those positions and endorsed many of them and was neutral on others. After review of the Report, I agree with some of the recommended changes but also believe that others of the recommendations are not warranted and not in the best interests of serving the public, the accused lawyers and the Bar.

Overview.

The Report recommends (pp. 49-50) that with certain exceptions vesting functions in the SPRB Chair, the SPRB's role should be limited to those akin to a Grand Jury, to determine probable cause for institution of a formal complaint on specific charges based upon a review of the investigation conducted by the Disciplinary Counsel's office. The Report bases that view on its conclusion that the SPRB's current functions cause three detrimental results: delay in the disciplinary process, inconsistent results and unnecessary and resource intensive redundancies. I recognize that I am not privy to the input the ABA consultation team received from all sources that lead to these judgment calls, and I certainly agree that those expressed concerns are appropriate to evaluate and address as needed. However, in my view the importance of a level of "volunteer" involvement by the SPRB in some of the functions analyzed by the Report has been undervalued and that the benefits of Oregon's level of volunteer involvement will be lost by implementing some of the Report's recommendations. Both as Bar Counsel and as an SPRB member, I had numerous occasions to talk with complainants, witnesses and accused attorneys about aspects of the disciplinary process, and a common theme emerging from those discussions was that a significant number of those parties viewed the involvement of the SPRB (both the volunteer attorneys from various disciplines and the public members) in functions beyond the initial probable cause determination as a good thing, adding a sense of credibility and impartiality to the process. Even many of the accused attorneys, who often viewed the disciplinary proceeding against them as overzealous action by "the Bar", conceded that the involvement of the SPRB in various post-charging functions had a leavening impact on their views. I believe that this is an important consideration in evaluating the current system.

Specific recommendations.

SPRB Chair consideration of complainant appeals from Disciplinary Counsel dismissals. The Report (p. 49) recommends that the Chair retain this duty and it is appropriate.

SPRB Chair approval of admonitions. This recommendation (p. 49) also seems appropriate and timely.

Reports to the District Attorney and initiation of temporary suspension proceedings. The Report recommends (pp. 38, 50-51) that these functions be performed by Disciplinary Counsel without involvement of the SPRB. I agree that this shift in function may speed up the process and that in my view SPRB involvement is not necessary since those actions are "ministerial" and mandated by the initial SPRB decision authorizing formal charges based on the requisite alleged criminal conduct or the filing of an accusatory instrument against the lawyer for the commission of a misdemeanor involving moral turpitude or a felony or upon a finding of guilt.

Adding a Bar Rule limiting requests to reconsider a probable cause decision. The Report's recommendation (p. 51) is appropriate and welcomed; during my tenure on the SPRB that concern and suggestion was discussed several times as a material aid to expediting the disciplinary process.

Training for SPRB members. Certainly, the SPRB can discharge its role only if its members are knowledgeable on the rules and case law regarding the applicable standards for evaluating whether particular alleged facts constitute chargeable violations. In my experience on the SPRB, the submissions from the assigned Assistant Disciplinary Counsel before each monthly meeting included analyses of the involved rules and case law specific to the particular accused attorney's conduct, and commonly the assigned SPRB member reviewed for himself or herself the underlying rules and case law to confirm (or sometimes vary from) the ADC's recommendations. And contrary to the feeling (p. 51; but perhaps that was a general observation not meant to be attributed to the SPRB members) that determination of probable cause was often confused with adjudicating the merits of a case, during my tenure at least there was conscious and scrupulous observation to the separateness of those two functions.

As to the specific training recommendations (pp. 51-52), I agree that if the resources can be provided given budgetary and personnel requirements, orientation sessions and training sessions are helpful if practical in scope. Knowing the breadth and variety of charges and factual situations that came before the SPRB during my four years, I question the practicality and effectiveness of a "covers all relevant caselaw and ethics opinions" and "includes across-the-board expert guest speakers" yearly training session (pp. 51-52). I do endorse the suggestion that the orientation/training materials provided to all SPRB members include a covers-all compendium of that caselaw and those ethics opinions; I had access to a then-current compendium along that line during my year as Chair in connection with some complaints that by Rule were referred to the Chair for initial disposition, and found it very helpful. If the resources are available to periodically update that compendium as needed, I suspect that all SPRB members would be happy to have that resource available. As I noted above, the ADC's specific disciplinary proceedings submissions before each meeting were very focused on the relevant caselaw and implicated Rules and ethics opinions, so I do not perceive a "void". And again, if sufficient meeting time, resources and personnel are available, my view is that the most helpful educational aspect on "charges involving expert issues" would be to bring in a particular expert at the meeting at which the particular matter is being considered by the SPRB rather than at a yearly training session months before the reality of the need arises.

SPRB size and composition. While I'm not certain of the motivation, I can see no downside to the recommendation (p. 49) increasing the number of public members to four (given the current eight attorney members). I'm not privy to the "recruitment process" but assume, and would hope, that a sufficient number and variety of willing public member candidates exist. And in light of the stated laudable goal (p. 49) of consistency of result, I'm a bit puzzled by the recommendation (*ibid.*) that the SPRB operate in four (assuming 12 members) three-member panels. Presumably the motivation is reduction in delay, one of the other stated goals, but unless the panels are going to meet more often than monthly I'm a bit uncertain on how panelization will further that goal. It was not my impression during my four years that the number of then-ready matters was so great that all could not be timely included, and given appropriate attention, in the monthly SPRB meetings.

Discretionary no further action dismissals. The Report (p. 50) recommends elimination of the current provision giving the SPRB discretion to direct the Disciplinary Counsel to take no further action on a complaint if the SPRB determines that the dismissal would further the interests of justice and not be harmful to the interests of the client or the public. I believe that this recommendation should not be adopted. I recognize that it is not part of the probable cause determination function, but as stated above, in my view this is one area where the importance of the "broader than the Bar" input by the SPRB should be retained, and that on balance the importance of having that leavening input was not sufficiently considered in the Report. In addition, the Report urges (*ibid.*) that any consideration of an accused attorney's prior discipline record should be prohibited unless directly related to the allegations in the complaint under consideration. Perhaps this is a wording issue, but in practice the SPRB (at least during my tenure) looked at the record but did not "consider" it (in the sense of including any particular prior discipline in the deliberative process) unless it fit within that requirement. I'm certainly in favor of a tweaking of the language to conform to that practice if there is a sense that the rule contemplates or allows unrelated consideration.

Reciprocal discipline. The report recommends (p. 51) that the SPRB's role in reciprocal discipline be eliminated, shifting all aspects to the Disciplinary Counsel. Part of the reciprocal discipline analysis involves determining whether the apparently applicable Oregon Rules are identical to the other-state rules for which the attorney was disciplined, and if not, whether the established facts/findings contained in the other-state proceeding established a violation of the related Oregon rule. In my view, that aspect of the analysis is properly a function of the SPRB.

Discipline on Consent. In my view, while others involved in the SPRB process may disagree, the recommendation (pp. 38-9) makes sense (particularly in light of the several layers of subsequent required approval); I believe that SPRB involvement is not essential and that the change likely will serve to reduce delay on consent discipline matters (though few in number from past history).

Mediation. Under the current rule, the SPRB decides whether to mediate the charges in a formal complaint. The Report (p. 51) recommends that this decision be vested in the Disciplinary Counsel. I think the question closely resembles the Discipline on Consent question, albeit lacking the several subsequent layers of review. I recognize that each mode of resolution may result in a strategic decision by Disciplinary Counsel to abandon one or more charges upon which the SPRB previously has found probable cause to exist, and that each may be viewed as difficult to reconcile with the reasoning in the view (below) that the SPRB should remain involved in the amendment process. In these two instances, I suggest that the benefits from a timely resolution of charges and resultant savings in Disciplinary Counsel office staff time and energy swing the balance.

Diversion. My sense is that this recommendation (pp. 38, 39) is more problematic. I recall instances where the potential violations and underlying factual allegations as presented to the SPRB at its monthly meeting did not justify consideration of diversion, but after discussion the SPRB determined that some potential violations lacked probable cause and the remaining charges and related factual allegations did precipitate consideration of diversion. So while I can't say that the SPRB's involvement on probable cause determinations is always the precursor, it is clear to me anyway that elimination of the SPRB across the board in those determinations is not justified and in abrogation of its primary role.

Amendments to complaints adding or dismissing charges. This recommendation (pp. 38, 40) may make arguable sense if one accepts the premise that the sole function of the SPRB should be to make an initial probable cause decision. My view is that the SPRB's role is and should be a continuing one on the related issues of adding or dropping charges. It seems to me that if developments during the case reveal evidence that suggests that additional charges should be added or existing charges should be deleted, those issues necessarily involve a probable cause (or lack of probable cause) evaluation and determination, the core function of the SPRB. Perhaps expedited approaches could be fashioned to minimize any delay in making those determinations, but I believe that elimination of the SPRB role in that decision would be ill-advised.

Respectfully submitted,

Mike Gentry

Michael J. Gentry
OSB 710688

April 24, 2015

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: November 20, 2015
From: Sylvia E. Stevens, Executive Director
Re: ABA Issues Paper on Legal Services Providers

Action Requested

The ABA Commission on the Future of Legal Services is seeking comments on its Issues Paper Concerning New Categories of Legal Services Providers. Comments are due by December 15, 2015.

Discussion

The Commission is tasked with examining new approaches to the delivery of legal services that are not constrained by traditional models and that are rooted in the essential values of protecting the public. As part of that work, the Commission has issued a paper and is seeking feedback on whether US jurisdictions should be encouraged to create new categories of judicially recognized and regulated legal services providers (LSPs) who would provide discrete and limited legal tasks with the goal of improving access to legal services.

ABA COMMISSION ON THE FUTURE OF LEGAL SERVICES

Issues Paper Concerning New Categories of Legal Services Providers *October 16, 2015*

The ABA Commission on the Future of Legal Services has not decided at this time whether to propose any resolutions concerning the issues described in this paper.

I. Executive Summary

The ABA Commission on the Future of Legal Services is seeking feedback on whether United States jurisdictions should be encouraged to create new categories of judicially-authorized-and-regulated legal services providers (hereafter LSP or LSPs) to perform discreet and limited legal tasks with the goal of improving access to legal services.

The Commission's efforts in this area are guided by the growing experience with LSPs in various United States jurisdictions. Examples include federally-authorized legal services providers; courthouse navigators in New York; courthouse facilitators in California and Washington State; limited practice officers in Washington State; limited license legal technicians in Washington State; and document preparers in Arizona, California, and Nevada. In each of these instances, the LSPs are intended to facilitate greater access to legal services and the justice system.

The Commission developed this issues paper to elicit broad-based feedback, including from consumers of legal services, on whether more supreme courts should be encouraged to authorize and regulate these kinds of LSPs for discrete, limited legal tasks. To be clear, the focus of this issues paper is on courts creating new categories of LSPs and concomitant rules and regulations to ensure their education, oversight, and accountability.¹ As a result, the concept discussed here is consistent with the long-standing ABA policy in support of state-based judicial regulation of the legal profession and the practice of law by licensed lawyers.

II. The Access to Justice Gap in the United States

Access to affordable legal services is critical in a society that depends on the rule of law. Yet legal services are growing more expensive, time-consuming, and complex. Many who need legal advice cannot afford to hire a lawyer and are forced to represent

¹ This paper does not address a separate, but related, issue: the extent to which existing and largely unregulated online legal services providers should be subject to regulation by judicial authorities.

themselves. Even those who can afford a lawyer often do not use one because they do not recognize their problem as having a legal solution or they prefer less expensive alternatives. For those whose legal problems require use of the courts, but who cannot afford a lawyer, the underfunding of our court systems further aggravates the access to justice crisis, as court programs designed to assist these individuals may be cut or not implemented in the first place.

Numerous studies over many decades reveal that cost is a significant impediment to accessing legal services for most low and moderate income Americans, especially when they face significant civil legal problems.² Millions in need of representation cannot afford to hire a lawyer. For example, in New York State alone, “some 1.8 million litigants in civil matters” do not have representation when addressing the “core essentials of life—housing, family matters, access to health care and education, and subsistence income.”³ Deborah Rhode documents in her research that “[a]ccording to most estimates, about four-fifths of the civil legal needs of the poor, and two- to three-fifths of the needs of middle-income individuals, remain unmet.”⁴ In other words, as Jordan Furlong puts it, “the legal market, viewed in its entirety, is like an iceberg, 85% hidden below the surface. Lawyers have concerned themselves only with the small fraction above water. Everyone else is down there on their own, holding their breath.”⁵

III. Addressing the Access to Justice Gap

In August 2014, as a response to the escalating access to justice crisis in the United States, the American Bar Association created the [Commission on the Future of Legal Services](#).⁶ The Commission is charged with examining how legal services are delivered in the United States and recommending innovations to improve the delivery of, and the public’s access to, those services. In order to advance this mandate, the Commission created six

² See, e.g., Legal Services Corporation, *Documenting the Justice Gap in America: The Current Unmet Civil Needs of Low Income Americans* (2009), available at

http://www.lsc.gov/pdfs/dcoumenting_the_justice_gap_in_america_2009.pdf; Roderick B. Mathews & Juan Carlos Botero, *Access to Justice in the United States Findings from the Newly Released Rule of Law Index of the World Justice Project*, WORLD JUSTICE PROJECT (2010), available at http://worldjusticeproject.org/sites/default/files/486481access_to_justice_in_the_united_states_virginia_lawyer_12-10.pdf; Rebecca L. Sandefur, *ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY* (2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2478040.

³ Task Force to Expand Access to Justice to Civil Legal Services in New York, *Report to the Chief Judge of the State of New York* at 2 (Nov. 2014) available at <https://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS%20TaskForce%20Report%202014.pdf>. Notably, this number has decreased from 2.3 million in 2010, due to a series of access-to-justice programs launched in New York State, including the implementation of a court navigator program, discussed below in Part IV of this memorandum. See *id.*

⁴ DEBORAH RHODE, *ACCESS TO JUSTICE* 3 (2004).

⁵ Jordan Furlong, *The Incidental Lawyer*, LAW21 (April 24, 2014), available at <http://www.law21.ca/2014/04/incidental-lawyer/>.

⁶ The Commission consists of prominent lawyers from a wide range of practice settings as well as judges, academics, and other professionals who have important perspectives and expertise on the delivery and regulation of legal services in the United States. The Commission roster is available [here](#).

Working Groups. Additional information about the Commission, including descriptions of the Commission’s six Working Groups, can be found on the Commission’s [website](#).

As part of its charge, the Commission engaged in extensive research and review of judicially-authorized-and-regulated LSPs, other than lawyers, who are already delivering legal services in various United States jurisdictions. The Commission also studied regimes for such providers that were legislatively enacted to ensure that it had a complete picture of the landscape for such professionals. While recognizing that the use of LSPs is only one potential option to address unmet legal needs, this issues paper describes the Commission’s research on LSPs and seeks feedback on the desirability and viability of broader adoption and regulation of LSPs by judicial authorities throughout the U.S. as one way to address the access to justice crisis.

IV. The Expanding Range of Legal Services Providers

The phrase “legal services providers” does not currently have a widely shared meaning, but the Commission believes that it may usefully refer to fully licensed lawyers as well as those who deliver legal services on a more limited basis with or without lawyer supervision.⁷ The focus of this issues paper is on the judicial creation of categories of LSPs other than lawyers.⁸

A growing number of United States jurisdictions have authorized LSPs other than lawyers to help address the unmet need for legal services,⁹ and additional jurisdictions are considering doing so.¹⁰ As the Washington Supreme Court observed in implementing the Limited Practice Rule for Limited License Legal Technicians, “there are people who need only limited levels of assistance that can be provided by non-lawyers.”¹¹ The Commission studied and considered six examples of already-existing LSPs:

- (1) **Federally-Authorized LSPs.** There is a wide range of legislatively authorized LSPs serving in federal courts and agencies. For example, bankruptcy petition preparers assist debtors in filing necessary legal paperwork in the United States

⁷ This definition of “legal services providers” is analogous to the definition of “health care provider,” which includes both doctors and other categories of professionals who are authorized to deliver health care services. *See, e.g.*, 29 CFR 825.125.

⁸ Again, to be clear, this paper does not address whether existing and largely unregulated online legal services providers should be subject to regulation by judicial authorities.

⁹ *See* Robert J. Derocher, *Mind the Gap: Bar Associations Work Toward a ‘Watershed Moment’ for Legal Services*, AMERICAN BAR ASSOCIATION, available at http://www.americanbar.org/publications/bar_leader/2014-15/september-october/mind-gap-bar-associations-work-toward-watershed-moment-for-legal-services.html.

¹⁰ *See* Robert Ambrogi, *Who says you need a law degree to practice law?*, THE WASHINGTON POST (Mar. 13, 2015), available at https://www.washingtonpost.com/opinions/closing-the-justice-gap/2015/03/13/a5f576c8-c754-11e4-aa1a-86135599fb0f_story.html.

¹¹ Wash. Exec. Order No. 25700-A-1005 (June 15, 2012), <http://www.courts.wa.gov/content/publicUpload/Press%20Releases/25700-A-1005.pdf>.

Bankruptcy Court.¹² Bankruptcy petition preparers are only permitted to populate forms; additional services may constitute the unauthorized practice of law.¹³ Notably, “research on lay specialists who provide legal representation in bankruptcy and administrative agency hearings finds that they generally perform as well or better than attorneys.”¹⁴

Other examples of federal agencies utilizing the services of those who would fall under the umbrella of LSPs include the Department of Justice (DOJ), the Department of Homeland Security (DHS), the Equal Employment Opportunity Commission (EEOC), the Internal Revenue Service (IRS), the Patent and Trademark Office (PTO), and the Social Security Administration (SSA). Both the Board of Immigration Appeals, within DOJ, and U.S. Citizenship and Immigration Services, within DHS, permit accredited representatives who are not licensed lawyers to represent aliens in immigration proceedings.¹⁵ Individuals who are not licensed to practice law may represent claimants before the EEOC in mediations, although they are not entitled to fees if an adverse finding is made against the employer.¹⁶ Several types of professionals in addition to lawyers are authorized to practice before the IRS subject to special regulations, including certified public accountants, enrolled agents, enrolled retirement plan agents, low income taxpayer clinic student interns, and unenrolled return preparers.¹⁷ Patent agents are authorized to practice before the PTO on a limited basis—for preparing and filing patent applications (and amendments to applications) as well as rendering opinions as to the patentability of inventions.¹⁸ The SSA permits individuals who are not licensed to practice law to represent claimants. Representatives may obtain information from the claimant’s file, assist in obtaining medical records to support a claim, accompany a claimant to interviews/conferences/hearings, request reconsideration of SSA determinations, and assist in the questioning of witnesses at SSA hearings as well as receive copies of SSA determinations.¹⁹

¹² See Penalty for Persons Who Negligently or Fraudulently Prepare Bankruptcy Petitions, 11 U.S.C § 110, available at <http://www.gpo.gov/fdsys/pkg/USCODE-2011-title11/html/USCODE-2011-title11-chap1-sec110.htm>; National Association of Bankruptcy Petition Preparers, available at <http://nabpp.com/>.

¹³ See *Bankruptcy Petition Preparer Guidelines*, UNITED STATES TRUSTEE CENTRAL DISTRICT OF CALIFORNIA (March 1, 2014), available at http://www.justice.gov/sites/default/files/ust-regions/legacy/2014/03/10/bbp_guidelines.pdf.

¹⁴ Deborah L. Rhode, *Enhancing Access to Justice Through Alternative Regulatory Frameworks* (working draft) (citing Herbert Kritzer, LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK 76, 108, 148, 190, 201 (1998)). A more recent report, however, warns of potential abuse by bankruptcy preparers who do not adhere to the federal law requirements. See Increased Use of Bankruptcy Preparers Raises Concerns (2012), available at <http://www.uscourts.gov/news/2012/06/18/increased-use-bankruptcy-petition-preparers-raises-concerns>. One way to address this is for a supreme court to certify all document preparers, including federal bankruptcy petition preparers, as does Arizona. *Id.*

¹⁵ See 8 C.F.R. §§ 292.2 & 1292.2, available at <http://www.justice.gov/eoir/recognition-and-accreditation-program>.

¹⁶ See <http://www.eeoc.gov/>.

¹⁷ See http://www.irs.gov/publications/p947/ar02.html#en_US201410_publink1000148593.

¹⁸ See <http://www.uspto.gov/learning-andresources/ip-policy/becoming-practitioner>.

¹⁹ See <http://www.socialsecurity.gov/representation/index.htm>.

(2) Courthouse Navigators (New York, Arizona). New York’s judicially created courthouse navigator program, launched in 2014, prepares “college students, law students and other persons deemed appropriate ... to assist unrepresented litigants, who are appearing” in housing court in nonpayment, civil, and debt proceedings.²⁰ Courthouse navigators are not permitted to give legal advice and do not give out legal information except with the approval of the Chief Administrative Judge of the Courts.²¹ The duties of courthouse navigators include using computers located in the courthouse to retrieve information, researching information about the law, collecting documentation needed for individual cases, and responding to a judge’s or court attorney’s questions about the case.²² The program is volunteer-based and operates under the supervision of a court navigator program coordinator.

The main goals of the program are to “help litigants who do not have an attorney have a productive court experience through offering non-legal support” and to give people (often students) practical experience as well as an opportunity to help people in need, make new contacts, and interact with lawyers and judges.²³ In 2014, 301 navigators were trained to provide services through 14 training meetings.²⁴ The Housing Court Navigators contributed about 3,400 pro bono hours to the program and helped approximately 2,000 unrepresented tenants and landlords and the Civil Court Navigators assisted over 1,300 litigants.²⁵

Arizona launched a similar initiative in 2015—the Court Navigator Pilot Program.²⁶ Over 80 percent of the time in Arizona, individuals are faced with the challenge of representing themselves in family court disputes.²⁷ According to Arizona’s 2015 Commission on Access to Justice Report, the program will “help guide the self-represented litigant in efficiently completing the family court process.”²⁸ The court will train and supervise undergraduates from Arizona State University to serve in this role.²⁹

(3) Courthouse Facilitators (California, Washington State). Courthouse facilitators provide unrepresented individuals with information about court

²⁰ See http://www.courts.state.ny.us/courts/nyc/housing/rap_prospective.shtml.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ See *New York State Courts Access to Justice Program Providing New Pathways to Legal Services, Assistance and Information* (2014), available at http://www.nycourts.gov/ip/nyaj2j/pdfs/NYA2J_2014report.pdf.

²⁵ *Id.*

²⁶ *Arizona Commission on Access to Justice Report to the Arizona Judicial Council* (March 26, 2015), available at <http://www.azcourts.gov/Portals/74/ACAJ/ReportACAJ.pdf>.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

procedures and legal forms in family law cases.³⁰ In California, the Judicial Council administers the program by “providing funds to these court-based offices, which are staffed by licensed attorneys.”³¹ The California Family Code mandates that a licensed lawyer with expertise in litigation or arbitration in the area of family law work with the family law facilitator to oversee the work of the facilitator and to deal with matters that require a licensed attorney throughout the process.³² Courthouse facilitators are governed by California Family Code, which established an office for facilitators in over 58 counties in California.³³ California’s Advisory Committee on Providing Access and Fairness has been given the task of implementing a plan to give greater courthouse access to litigants who are unable to obtain representation.³⁴ Courthouse facilitators are one of the options for litigants without such representation.³⁵ While courthouse facilitators are not permitted to provide legal advice, they help to refer unrepresented clients to legal, social services, and alternative dispute resolution resources.³⁶ More than 345,000 individuals visit the family law facilitators’ offices throughout California each year.³⁷

Washington State has an analogous program established by the Washington Supreme Court, with oversight from the Family Courthouse Facilitator Advisory Committee. The committee is charged with establishing minimum qualifications and administering continued training requirements for courthouse facilitators.³⁸ During 2007, facilitators statewide conducted approximately 57,000 customer sessions and made 108,000 customer contacts.³⁹ The vast majority of facilitator program customers report being very satisfied with the services they receive. Nine out of ten customers agree that they feel more knowledgeable and prepared immediately after a visit with a facilitator, and 82% say they have more trust and confidence in the courts.⁴⁰ Facilitator-assisted litigants report more positive court

³⁰ For a description of Washington courthouse facilitators, see http://www.courts.wa.gov/committee/?fa=committee.home&committee_id=108. For California, see <http://www.courts.ca.gov/selfhelp-facilitators.htm>.

³¹ *Family Law Facilitators*, PROGRAMS FOR SELF-REPRESENTED LITIGANTS FACT SHEET (May 2015), available at <http://www.courts.ca.gov/documents/proper.pdf>. See also CAL. FAM. CODE § 10002 (West 1997).

³² *Id.*

³³ *Family Law Facilitators*, PROGRAMS FOR SELF-REPRESENTED LITIGANTS FACT SHEET (May 2015), available at <http://www.courts.ca.gov/documents/proper.pdf>.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Background, Policy, and Services of the Child Support Commissioner and Family Law Facilitator Program*, available at

http://www.courts.ca.gov/documents/Program_Background_Policy_and_Services.pdf.

³⁸ See Wash. Gen. R. 27 (2002), available at

http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=gr&ruleid=gagr27.

³⁹ WASHINGTON’S COURTHOUSE FACILITATOR PROGRAMS FOR SELF-REPRESENTED LITIGANTS IN FAMILY LAW CASES: SUMMARY REPORT (2008), available at

<http://www.courts.wa.gov/wscsr/docs/Courthouse%20Facilitator%20Program.pdf>.

⁴⁰ *Id.*

experiences, are more satisfied with court proceedings, outcomes, and choice of representation, and have more trust and confidence in the courts than unassisted self-represented litigants.⁴¹ Moreover, nearly all judicial officers and administrators associated with a facilitator program indicate that the program has a positive impact on self-represented litigants, improves access to justice and the quality of justice, and increases court efficiency.⁴² The biggest challenges facing facilitator programs include program funding, managing self-represented litigants' needs for legal advice, and ongoing facilitator training.⁴³

(4) Limited Practice Officers (Washington State). The Washington Supreme Court authorizes certification of limited practice officers to select and complete real estate closing documents.⁴⁴ The Limited Practice Board was created to oversee the administration of limited practice officers and ensure that officers comply with the Limited Practice Rule, APR 12.⁴⁵ Limited practice officers are not permitted to provide legal advice or representation.⁴⁶

(5) Limited License Legal Technicians (Washington State). The Limited License Legal Technician (LLLT) is authorized and regulated by the Washington Supreme Court and is “the first independent paraprofessional in the United States that is licensed to provide some legal advice.”⁴⁷ To become a LLLT, one must successfully “complete an education that includes both community college level courses ... and law school level courses for the practice area education...” Prior to licensure, the prospective LLLTs must complete 3,000 hours of work under the supervision of a licensed attorney; they must pass three exams prior to licensure (including a professional responsibility exam); and they must carry malpractice insurance.⁴⁸ The first LLLTs are licensed in the area of family law.⁴⁹

(6) Document Preparers (Arizona, California, and Nevada). The California legislature implemented a legal documentation assistant program in 2000,

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See *Limited Practice Officers*, WASHINGTON STATE BAR ASSOCIATION, available at <http://www.wsba.org/Licensing-and-Lawyer-Conduct/Limited-Licenses/Limited-Practice-Officers>.

⁴⁵ *Id.*

⁴⁶ See Wash. Admission to Practice Rule 12 (1999). The Admission to Practice Rules are subject to approval and modification by the Supreme Court of Washington on recommendation from the Washington State Bar Association, available at

http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=APR&ruleid=gaapr12.

⁴⁷ Paula Littlewood, *The Practice of Law in Transition*, NW LAWYER at 13 (July-August 2015).

⁴⁸ *Id.*

⁴⁹ While not part of the Commission's study, it also should be recognized that several foreign jurisdictions have implemented various forms of LSPs, including Canada and England/Wales. See *CBA Legal Futures Initiative*, THE CANADIAN BAR ASSOCIATION, available at

http://www.cbafutures.org/CBA/media/mediafiles/PDF/Reports/FuturesExecSum_Recommendations.pdf; See also Legal Services Act, 2007, c. 29 (U.K.), available at <http://www.statutelaw.gov.uk/content.aspx?LegType=All+Primary&PageNumber=3&NavFrom=2&parentActiveTextDocId=3423426&ActiveTextDocId=3423429&filesize=4184>.

providing the public with “an experienced professional who is authorized to prepare legal documents” and to assist “‘self-help’ clients” to “handle their own legal matters without the cost of an attorney.”⁵⁰ Uncontested divorces, bankruptcies, and wills are examples of areas in which California’s LDAs are permitted to work.⁵¹ These LDAs are not permitted to give legal advice or represent a client in the courtroom.⁵² They often have knowledge, professional experience, and education similar to that of paralegals.⁵³ The program includes minimum educational and competency requirements.

The Arizona Supreme Court adopted a certification program for legal document preparers in 2003.⁵⁴ Arizona mandates that all certified LDAs satisfy minimum education and testing requirements as well as attend a minimum of ten hours of approved continuing education each year.⁵⁵ Moreover, LDAs in Arizona are regulated by the Arizona Code of Judicial Administration,⁵⁶ and Arizona provides a list that is available to the public of LDAs who have violated the Arizona Code of Judicial Administration.⁵⁷ In these instances, the LDAs have had their certificates either revoked or suspended.⁵⁸

As of March 2014, Nevada offers a similar program.⁵⁹ Like California, the Nevada program is legislatively authorized, but it does not include a minimum educational or competency component. Nevada requires that all legal document preparers be registered with the Secretary of State.⁶⁰ Nevada also has a process for consumers to file complaints and provides a list of suspended and revoked licenses.⁶¹

In addition, many United States jurisdictions are contemplating the adoption of new LSP programs. For example, in December 2014, the Oregon Legal Technicians Task Force recommended to the Oregon State Bar Board of Governors that “it consider the general concept of a limited license for legal technicians as one component of the BOG’s overall

⁵⁰ See *Frequently Asked Questions about Legal Document Assistants*, CALIFORNIA ASSOCIATION OF LEGAL DOCUMENT ASSISTANTS, available at <http://calda.org/visitors/>; See also CAL. BUS. & PROF. CODE § 6400-6456 (1998), available at <http://calda.org/business-professions-codes>.

⁵¹ For a full list of areas in which LDAs specialize, see <http://calda.org/visitors/#WhoAreLDA>

⁵² See *California Legal Document Assistant Frequently Asked Questions*, available at <http://calda.org/visitors/>.

⁵³ *Id.*

⁵⁴ See *Legal Document Preparers*, available at <https://www.azcourts.gov/cld/Legal-Documents-Preparers>.

⁵⁵ *Id.*

⁵⁶ See ARIZ. ADMIN. CODE § 7-201 and § 7.208 (2003).

⁵⁷ See *Arizona Supreme Court-Legal Document Preparer Program*, available at <http://www.azcourts.gov/Portals/26/2014/Revoked%20Suspended%20List%20LDP%207-01-14.pdf>.

⁵⁸ *Id.*

⁵⁹ See *Access to Justice Commission*, STATE BAR OF NEVADA, available at <http://www.nvbar.org/atj>.

⁶⁰ See NEV. REV. STAT. ANN. § 240A.030 (West 2014).

⁶¹ See *Nevada Secretary of State Complaint Filing Process*, available at <http://www.nvsos.gov/index.aspx?page=1353>.

strategy for increasing access to justice.”⁶² In 2013, the California State Bar Board Committee on Regulation, Admission, and Discipline Oversight created a working group that recommended that California offer limited licenses to practice law without the supervision of an attorney, specifically “discrete, technical, limited scope of law activities in non-complicated legal matters in 1) creditor/debtor law; 2) family law; 3) landlord/tenant law; 4) immigration law.”⁶³ Further study is being conducted by the State Bar of California’s Civil Justice Strategies Task Force. Minnesota recently made a similar recommendation,⁶⁴ and other states, including Colorado,⁶⁵ Connecticut,⁶⁶ Florida,⁶⁷ Michigan,⁶⁸ New Mexico,⁶⁹ and Utah⁷⁰ are exploring this sort of expansion of the concept of who can render legal and law-related services and thus who would fall under the proposed categorization of a LSP.

⁶² See OREGON STATE BAR ASSOCIATION LEGAL TECHNICIANS TASK FORCE FINAL REPORT TO THE BOARD OF GOVERNORS (Feb. 13, 2015), available at http://www.bog11.homestead.com/LegalTechTF/Jan2015/Report_22Jan2015.pdf.

⁶³ See Memorandum from Staff, Limited License Working Group, Legal Aid Ass’n of Cal. To Members, Limited License Working Group, Legal Aid Ass’n of Cal. 2 (June 17, 2013). For more details, see the California Bar Limited License Working Group: <http://www.calbar.ca.gov/AboutUs/BoardofTrustees/LimitedLicenseWorkingGroup.aspx>.

⁶⁴ See *Report and Recommendations*, MINNESOTA STATE BAR ASSOCIATION TASK FORCE ON THE FUTURE OF LEGAL EDUCATION (June 2015)(recommending that the MSBA consider establishing a limited-license legal technician certification “to identify a less costly path to a career in legal services and address unmet needs for specific types of legal services”), available at <https://lawyerist.com/lawyerist/wp-content/uploads/2015/06/report-of-the-future-of-legal-education-task-force.pdf>.

⁶⁵ See James Carlson, *Colorado Studying New Limited Legal License*, COLORADO SUPREME COURT (Spring 2015)(stating that “the Colorado Supreme Court Advisory Committee formed a subcommittee to study Washington’s program and make recommendations” regarding Washington’s recent action towards the Limited License Technician program), available at <http://www.coloradosupremecourt.us/Newsletters/Spring2015/Colorado%20studying%20new%20limited%20legal%20license.htm>.

⁶⁶ See *Connecticut Bar Association Task Force on the Future of Legal Education and Standards of Admission Report* (2014) (recommending that non-lawyers be allowed to perform some limited legal services via a post-bachelor’s degree training program that would be more than a paralegal program but less than a JD program), available at http://c.ymcdn.com/sites/www.ctbar.org/resource/resmgr/CT_Lawyer_Volume_25_Public/Pages_from_March_15_-_Reform.pdf

⁶⁷ See Mark D. Killian, *Both Exciting and Scary, The Bar and the Court Look to the Future*, THE FLORIDA BAR NEWS (Feb. 15, 2015), available at <http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/8c9f13012b96736985256aa900624829/e9879a5d551f2bfb85257de70048d3f3!OpenDocument>; See also *Vision 2016*, THE FLORIDA BAR, <http://www.floridabar.org/vision2016>.

⁶⁸ See 21st Century Practice Task Force, STATE BAR OF MICHIGAN, available at <http://www.michbar.org/generalinfo/futurelaw>.

⁶⁹ See *2014 State Plan for the Provision of Civil Legal Services to Low Income New Mexicans*, THE COMMISSION ON ACCESS TO JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW MEXICO (Jan. 2015), available at <http://www.nmbar.org/NmbarDocs/forMembers/ATJ/2014StatePlan.pdf>.

⁷⁰ See *Report and Recommendations on the Future of Legal Services in Utah*, FUTURES COMMISSION OF THE UTAH STATE BAR (2015) (noting that the “Supreme Court’s Task Force on limited legal license technicians is currently examining the potential for people other than lawyers to meet [legal] needs”), available at www.utahbar.org/members/futures/.

Some of these LSPs are recent innovations; others have been in existence for many years. For example, Washington State implemented LPOs over thirty years ago, and document preparers have existed for over a decade in Arizona and California. In contrast, New York’s court navigator program emerged in 2014, and the initial class of Washington LLLTs took their first licensing exam in May 2015. Although their origins and regulatory structures differ, each LSP category is rooted in a common purpose—to make available discreet and cost-effective legal and law-related services to those whose legal problems may not require a legal services provider with a law license.

An important initiative is currently underway to better appreciate the impact of LSPs—the Roles Beyond Lawyers Project—jointly supported by the American Bar Foundation, the National Center for State Courts, and the Public Welfare Foundation.⁷¹ The project researchers have developed conceptual frameworks for both designing and evaluating programs in which people who are not fully qualified attorneys provide assistance that was traditionally only available through lawyers. The frameworks are accessible to jurisdictions seeking to design new programs, and to those seeking to evaluate the efficacy and sustainability of programs currently in operation. In addition, the project researchers are applying the frameworks to their empirical study of two existing programs, New York’s Court Navigators and Washington’s Limited License Legal Technicians. Other jurisdictions that implement various approaches to new categories of licensed LSPs will want to take appropriate steps to establish metrics and gather data, so that they can understand and verify that the addition of new forms of providers have yielded the desired improvements in access to justice and affordability of services.

An approach that is analogous to those cataloged above has been used in the delivery of medical services. Healthcare is now delivered not only by licensed doctors, but also by an increasing array of licensed and regulated providers, such as nurse practitioners, physicians’ assistants, and pharmacists. The “medical profession and nurse practitioners [are] a poignant example of less costly service providers who have become a more widely used, professionalized, and respected component of the health care market.”⁷² These providers supplement the work performed by doctors, but do not replace doctors. Similarly, LSPs are not meant to replace lawyers. They are intended to fill gaps where lawyers have not satisfied existing needs. A number of scholars⁷³ and regulators⁷⁴ predict

⁷¹ This initiative is supported by the Public Welfare Foundation through a grant to the American Bar Foundation. Lead researchers are Thomas Clarke, Vice President for Research and Technology, National Center for State Courts, and Rebecca Sandefur, Associate Professor of Sociology and Law, University of Illinois at Urbana-Champaign and Faculty Fellow, American Bar Foundation. For more information, see Rebecca L. Sandefur & Thomas M. Clarke, *Increasing Access to Justice Through Expanded “Roles Beyond Lawyers”*: Preliminary Evaluation and Classification Frameworks, AMERICAN BAR FOUNDATION (April 2015), available at http://www.americanbarfoundation.org/uploads/cms/documents/rbl_evaluation_and_program_design_frameworks_4_12_15.pdf.

⁷² Jack P. Sahl, *Cracks in the Profession’s Monopoly Armor*, 82 *FORDHAM L. REV.* 2635, 2662 (2014)(citation and quotation omitted).

⁷³ See, e.g., Benjamin Barton, *GLASS HALF FULL: THE DECLINE AND REBIRTH OF THE LEGAL PROFESSION* 235 (2015)(“If significant numbers [become LLLTs] and charge less that would certainly help access to justice for the middle class.”); Brooks Holland, *The Washington State Limited License Legal Technician*

that LSPs will improve access to legal services by offering assistance to those in need at a lower cost than lawyers. These predictions are based on the assumption that paraprofessionals in the legal market, like those in other fields, will be able to offer services at lower price points because their cost of doing business will be lower, largely because they will have lower educational costs to amortize.

In addition to facilitating increased access to legal services by reducing costs, the creation of LSPs has other possible benefits. First, it shifts the regulatory focus at the state level away from the difficult task of defining the practice of law and toward a more productive focus on determining who should be authorized to deliver legal services of various kinds and how they should be regulated. Second, as recognized by the ABA Task Force on the Future of Legal Education, certification or licensure as an LSP can be a less expensive path to a career in legal services for those who are unable or unwilling to devote the time and expense required to obtain a traditional law license.⁷⁵ Third, LSPs can serve as a point of access to lawyers for matters that fall outside of the competence and authorized scope of the LSPs' practice.

The Commission does not endorse any particular category of LSP. Jurisdictions that wish to move in this direction might consider ways to harmonize their approaches with existing models and regulations to assure greater uniformity and provide LSPs with greater mobility across jurisdictional lines. In all cases, the Commission urges that any new categories of LSPs be guided by the regulatory objectives identified in the Commission's proposed [Resolution and Report to the House of Delegates on the Development of Model Regulatory Objectives](#), including those objectives focused on the development of proper client protection mechanisms.

V. Conclusion

The Commission seeks comments on two issues: (1) whether the concept and definition of "legal services providers" should include lawyers and non-lawyers; and (2) whether state judicial authorities should be encouraged to create new categories of judicially-

Practice Rule: A National First in Access to Justice, 82 MISS. L.J. SUPRA 75, 90 n.62, 120 (2013), http://mississippilawjournal.org/wp-content/uploads/2013/02/3_Holland_Final.pdf (observing that "the access to justice gap might be partially closed by allowing nonlawyers to engage in a specified range of activities subject to regulatory oversight")(citations omitted).

⁷⁴ See, e.g., Stephen R. Crossland & Paula C. Littlewood, *The Washington State Limited License Legal Technician Program: Enhancing Access to Justice and Ensuring the Integrity of the Legal Profession*, 65 S.C. L. REV. 611, 613 (2014) (explaining that Washington State's LLLT program was designed "address access-to-justice issues for those who cannot afford attorneys").

⁷⁵ See *Task Force on the Future of Legal Education Final Report*, AMERICAN BAR ASSOCIATION at 24-25, ("The J.D. program seeks to develop professional generalists, whose services can be costly. ... However, many people today cannot afford the services of these professional generalists or may not need legal services calling for their degree of training. There is ... a need for ... professionals who are qualified to provide limited law-related services without the oversight of a lawyer."), *available at* http://www.americanbar.org/groups/professional_responsibility/taskforceonthefuturelegaleducation.html. While the Commission recognizes the findings of the Task Force Report, it takes no position regarding the recommendations contained in the Report.

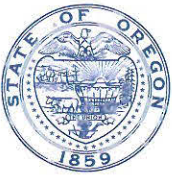
The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

authorized-and-regulated legal services providers to perform discreet and limited legal tasks in an effort to facilitate greater access to justice. The Commission is especially interested in receiving: (1) materials describing other LSP programs; (2) data and evidence about the effectiveness of LSP programs including usage, cost-savings, and customer satisfaction; and (3) information about challenges or obstacles presented by LSP programs.

The Co-Chairs of the Regulatory Opportunities Working Group, Paula Littlewood and Chief Justice Barbara Madsen, welcome your feedback. Should you have questions, please contact Paula Littlewood at paulal@wsba.org; the Commission's Chair, Judy Perry Martinez, at jpmartinez6@gmail.com; and the Commission's Vice Chair, Andrew Perlman, at aperlman@suffolk.edu. We are eager to receive and incorporate your input. Any responses to the questions posed in this paper, as well as any comments on related issues, should be directed by **December 31, 2015** to:

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Comments received may be posted to the Commission's website.



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October 9, 2015

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OCT 13 2015

**Oregon State Bar
Executive Director**

Sylvia Stevens
Executive Director
OSB Board of Governors
PO Box 231935
Tigard OR 97281-1935

Re: Workers' Compensation Board/Hearings Division/Attorney Fees
Schedule of Attorney Fees (ORS 656.388(4))

Ms. Stevens:

The legislature adopted House Bill (HB) 2764 (2015), which is effective January 1, 2016, and amends several statutes that concern attorney fees under the Workers' Compensation Law. A number of those statutory amendments effect practices and procedures involving the Board and its Hearings Division.

On October 6, 2015, the Board Members proposed amendments to various administrative rules to implement HB 2764, most of which concern attorney fee-related procedures. (OAR 438, Division 015). Enclosed are copies of HB 2764 (2015), as well as the Board's Notice of Proposed Rulemaking Hearing, Statement of Need and Fiscal Impact, and its proposed rule amendments.

Pursuant to ORS 656.388(4), the Board's schedule of attorney fees must be established after consultation with the Board of Governors of the Oregon State Bar. This consultation requirement in ORS 656.388(4) applies to the Board's entire schedule of attorney fees. However, the Board of Governors' attention is directed particularly to the 2015 amendments to ORS 656.262(14)(a), which provide that a worker's attorney is entitled to a reasonable fee based upon an hourly rate for actual time spent during the personal or telephonic interview or deposition. *See* HB 2764 § 2. The statute further provides that, after consultation with the Board of Governors of the Oregon State Bar, the Workers' Compensation Board shall adopt rules for the establishment, assessment and enforcement of an hourly attorney fee rate specified in the subsection.

The Board has proposed OAR 438-015-0033 to carry out the amendments to ORS 656.262(14)(a). That rule has been proposed after the Members' consideration of a report from their Advisory Committee (which was composed of workers' compensation



Sylvia Stevens

Re: Workers' Compensation Board/Hearings Division/Attorney Fees
Schedule of Attorney Fees (ORS 656.388(4))

October 9, 2015 – Page 2

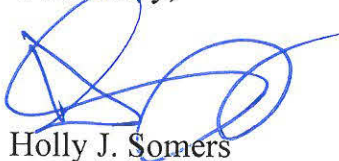
attorneys who represent workers, insurers, and employers, as well as the Board's Presiding Administrative Law Judge). In conducting its deliberations (which included consideration of additional comments from attorneys representing workers and the SAIF Corporation) at public meetings held on September 29 and October 6, 2015, a majority of the Board Members (three out of five Members) decided to propose a rule providing for an attorney fee rate of \$300 per hour, rather than the Advisory Committee's recommendation of \$275 per hour. (Two Board Members disagreed with the majority's proposal, supporting a rate of \$400 per hour.)

In accordance with ORS 656.388(1) and ORS 656.262(14)(a) and in anticipation of the Board's December 4, 2015 rulemaking hearing, the Board refers these proposals to the Board of Governors for their consideration. Any written comments from the Board of Governors may be directed to: Debra L. Young, Rulemaking Hearing Officer, at the address listed below. Those comments must be submitted on or before December 4, 2015. Alternatively, a representative of the Board of Governors may present oral comments at the December 4, 2015 rulemaking hearing, which is scheduled to convene at 10:00 a.m., at the Board's Salem office, 2601 25th St SE, Ste. 150, Salem OR 97302.

Finally, a copy of this letter (and accompanying enclosures) has been directed to Keith Semple, the Chair of the Executive Committee of Workers' Compensation Section for the Oregon State Bar. Mr. Semple, on behalf of the aforementioned organization, may have a position regarding the Board's proposed administrative rules.

If I can address any of your questions, please feel free to contact me.

Yours truly,



Holly J. Somers
Board Chair

RCP:kb

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Enclosures

cc: Keith Semple, Workers' Compensation Section Chair

Enrolled
House Bill 2764

Sponsored by Representatives FAGAN, WILLIAMSON; Representatives BUCKLEY, CLEM, FREDERICK, GOMBERG, KENY-GUYER, KOMP, LININGER, NOSSE, SMITH WARNER, VEGA PEDERSON, WITT (Presession filed.)

CHAPTER

AN ACT

Relating to payments made in workers' compensation claims; creating new provisions; and amending ORS 656.012, 656.262, 656.277, 656.313, 656.382, 656.385, 656.386 and 656.388.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 656.012 is amended to read:

656.012. (1) The Legislative Assembly finds that:

(a) The performance of various industrial enterprises necessary to the enrichment and economic well-being of all the citizens of this state will inevitably involve injury to some of the workers employed in those enterprises;

(b) The method provided by the common law for compensating injured workers involves long and costly litigation, without commensurate benefit to either the injured workers or the employers, and often requires the taxpayer to provide expensive care and support for the injured workers and their dependents; and

(c) An exclusive, statutory system of compensation will provide the best societal measure of those injuries that bear a sufficient relationship to employment to merit incorporation of their costs into the stream of commerce.

(2) In consequence of these findings, the objectives of the Workers' Compensation Law are declared to be as follows:

(a) To provide, regardless of fault, sure, prompt and complete medical treatment for injured workers and fair, adequate and reasonable income benefits to injured workers and their dependents;

(b) To provide a fair and just administrative system for delivery of medical and financial benefits to injured workers that reduces litigation and eliminates the adversary nature of the compensation proceedings, to the greatest extent practicable, **while providing for access to adequate representation for injured workers;**

(c) To restore the injured worker physically and economically to a self-sufficient status in an expeditious manner and to the greatest extent practicable;

(d) To encourage maximum employer implementation of accident study, analysis and prevention programs to reduce the economic loss and human suffering caused by industrial accidents; and

(e) To provide the sole and exclusive source and means by which subject workers, their beneficiaries and anyone otherwise entitled to receive benefits on account of injuries or diseases arising out of and in the course of employment shall seek and qualify for remedies for such conditions.

(3) In recognition that the goals and objectives of this Workers' Compensation Law are intended to benefit all citizens, it is declared that the provisions of this law shall be interpreted in an impartial and balanced manner.

SECTION 2. ORS 656.262 is amended to read:

656.262. (1) Processing of claims and providing compensation for a worker shall be the responsibility of the insurer or self-insured employer. All employers shall assist their insurers in processing claims as required in this chapter.

(2) The compensation due under this chapter shall be paid periodically, promptly and directly to the person entitled thereto upon the employer's receiving notice or knowledge of a claim, except where the right to compensation is denied by the insurer or self-insured employer.

(3)(a) Employers shall, immediately and not later than five days after notice or knowledge of any claims or accidents which may result in a compensable injury claim, report the same to their insurer. The report shall include:

(A) The date, time, cause and nature of the accident and injuries.

(B) Whether the accident arose out of and in the course of employment.

(C) Whether the employer recommends or opposes acceptance of the claim, and the reasons therefor.

(D) The name and address of any health insurance provider for the injured worker.

(E) Any other details the insurer may require.

(b) Failure to so report subjects the offending employer to a charge for reimbursing the insurer for any penalty the insurer is required to pay under subsection (11) of this section because of such failure. As used in this subsection, "health insurance" has the meaning for that term provided in ORS 731.162.

(4)(a) The first installment of temporary disability compensation shall be paid no later than the 14th day after the subject employer has notice or knowledge of the claim, if the attending physician or nurse practitioner authorized to provide compensable medical services under ORS 656.245 authorizes the payment of temporary disability compensation. Thereafter, temporary disability compensation shall be paid at least once each two weeks, except where the Director of the Department of Consumer and Business Services determines that payment in installments should be made at some other interval. The director may by rule convert monthly benefit schedules to weekly or other periodic schedules.

(b) Notwithstanding any other provision of this chapter, if a self-insured employer pays to an injured worker who becomes disabled the same wage at the same pay interval that the worker received at the time of injury, such payment shall be deemed timely payment of temporary disability payments pursuant to ORS 656.210 and 656.212 during the time the wage payments are made.

(c) Notwithstanding any other provision of this chapter, when the holder of a public office is injured in the course and scope of that public office, full official salary paid to the holder of that public office shall be deemed timely payment of temporary disability payments pursuant to ORS 656.210 and 656.212 during the time the wage payments are made. As used in this subsection, "public office" has the meaning for that term provided in ORS 260.005.

(d) Temporary disability compensation is not due and payable for any period of time for which the insurer or self-insured employer has requested from the worker's attending physician or nurse practitioner authorized to provide compensable medical services under ORS 656.245 verification of the worker's inability to work resulting from the claimed injury or disease and the physician or nurse practitioner cannot verify the worker's inability to work, unless the worker has been unable to receive treatment for reasons beyond the worker's control.

(e) If a worker fails to appear at an appointment with the worker's attending physician or nurse practitioner authorized to provide compensable medical services under ORS 656.245, the insurer or self-insured employer shall notify the worker by certified mail that temporary disability benefits may be suspended after the worker fails to appear at a rescheduled appointment. If the worker fails to appear at a rescheduled appointment, the insurer or self-insured employer may suspend payment of

temporary disability benefits to the worker until the worker appears at a subsequent rescheduled appointment.

(f) If the insurer or self-insured employer has requested and failed to receive from the worker's attending physician or nurse practitioner authorized to provide compensable medical services under ORS 656.245 verification of the worker's inability to work resulting from the claimed injury or disease, medical services provided by the attending physician or nurse practitioner are not compensable until the attending physician or nurse practitioner submits such verification.

(g) Temporary disability compensation is not due and payable pursuant to ORS 656.268 after the worker's attending physician or nurse practitioner authorized to provide compensable medical services under ORS 656.245 ceases to authorize temporary disability or for any period of time not authorized by the attending physician or nurse practitioner. No authorization of temporary disability compensation by the attending physician or nurse practitioner under ORS 656.268 shall be effective to retroactively authorize the payment of temporary disability more than 14 days prior to its issuance.

(h) The worker's disability may be authorized only by a person described in ORS 656.005 (12)(b)(B) or 656.245 for the period of time permitted by those sections. The insurer or self-insured employer may unilaterally suspend payment of temporary disability benefits to the worker at the expiration of the period until temporary disability is reauthorized by an attending physician or nurse practitioner authorized to provide compensable medical services under ORS 656.245.

(i) The insurer or self-insured employer may unilaterally suspend payment of all compensation to a worker enrolled in a managed care organization if the worker continues to seek care from an attending physician or nurse practitioner authorized to provide compensable medical services under ORS 656.245 that is not authorized by the managed care organization more than seven days after the mailing of notice by the insurer or self-insured employer.

(5)(a) Payment of compensation under subsection (4) of this section or payment, in amounts per claim not to exceed the maximum amount established annually by the Director of the Department of Consumer and Business Services, for medical services for nondisabling claims, may be made by the subject employer if the employer so chooses. The making of such payments does not constitute a waiver or transfer of the insurer's duty to determine entitlement to benefits. If the employer chooses to make such payment, the employer shall report the injury to the insurer in the same manner that other injuries are reported. However, an insurer shall not modify an employer's experience rating or otherwise make charges against the employer for any medical expenses paid by the employer pursuant to this subsection.

(b) To establish the maximum amount an employer may pay for medical services for nondisabling claims under paragraph (a) of this subsection, the director shall use \$1,500 as the base compensation amount and shall adjust the base compensation amount annually to reflect changes in the United States City Average Consumer Price Index for All Urban Consumers for Medical Care for July of each year as published by the Bureau of Labor Statistics of the United States Department of Labor. The adjustment shall be rounded to the nearest multiple of \$100.

(c) The adjusted amount established under paragraph (b) of this subsection shall be effective on January 1 following the establishment of the amount and shall apply to claims with a date of injury on or after the effective date of the adjusted amount.

(6)(a) Written notice of acceptance or denial of the claim shall be furnished to the claimant by the insurer or self-insured employer within 60 days after the employer has notice or knowledge of the claim. Once the claim is accepted, the insurer or self-insured employer shall not revoke acceptance except as provided in this section. The insurer or self-insured employer may revoke acceptance and issue a denial at any time when the denial is for fraud, misrepresentation or other illegal activity by the worker. If the worker requests a hearing on any revocation of acceptance and denial alleging fraud, misrepresentation or other illegal activity, the insurer or self-insured employer has the burden of proving, by a preponderance of the evidence, such fraud, misrepresentation or other illegal activity. Upon such proof, the worker then has the burden of proving, by a preponderance of the evidence, the compensability of the claim. If the insurer or self-insured employer accepts a

claim in good faith, in a case not involving fraud, misrepresentation or other illegal activity by the worker, and later obtains evidence that the claim is not compensable or evidence that the insurer or self-insured employer is not responsible for the claim, the insurer or self-insured employer may revoke the claim acceptance and issue a formal notice of claim denial, if such revocation of acceptance and denial is issued no later than two years after the date of the initial acceptance. If the worker requests a hearing on such revocation of acceptance and denial, the insurer or self-insured employer must prove, by a preponderance of the evidence, that the claim is not compensable or that the insurer or self-insured employer is not responsible for the claim. Notwithstanding any other provision of this chapter, if a denial of a previously accepted claim is set aside by an Administrative Law Judge, the Workers' Compensation Board or the court, temporary total disability benefits are payable from the date any such benefits were terminated under the denial. Except as provided in ORS 656.247, pending acceptance or denial of a claim, compensation payable to a claimant does not include the costs of medical benefits or funeral expenses. The insurer shall also furnish the employer a copy of the notice of acceptance.

(b) The notice of acceptance shall:

(A) Specify what conditions are compensable.

(B) Advise the claimant whether the claim is considered disabling or nondisabling.

(C) Inform the claimant of the Expedited Claim Service and of the hearing and aggravation rights concerning nondisabling injuries, including the right to object to a decision that the injury of the claimant is nondisabling by requesting reclassification pursuant to ORS 656.277.

(D) Inform the claimant of employment reinstatement rights and responsibilities under ORS chapter 659A.

(E) Inform the claimant of assistance available to employers and workers from the Reemployment Assistance Program under ORS 656.622.

(F) Be modified by the insurer or self-insured employer from time to time as medical or other information changes a previously issued notice of acceptance.

(c) An insurer's or self-insured employer's acceptance of a combined or consequential condition under ORS 656.005 (7), whether voluntary or as a result of a judgment or order, shall not preclude the insurer or self-insured employer from later denying the combined or consequential condition if the otherwise compensable injury ceases to be the major contributing cause of the combined or consequential condition.

(d) An injured worker who believes that a condition has been incorrectly omitted from a notice of acceptance, or that the notice is otherwise deficient, first must communicate in writing to the insurer or self-insured employer the worker's objections to the notice pursuant to ORS 656.267. The insurer or self-insured employer has 60 days from receipt of the communication from the worker to revise the notice or to make other written clarification in response. A worker who fails to comply with the communication requirements of this paragraph or ORS 656.267 may not allege at any hearing or other proceeding on the claim a de facto denial of a condition based on information in the notice of acceptance from the insurer or self-insured employer. Notwithstanding any other provision of this chapter, the worker may initiate objection to the notice of acceptance at any time.

(7)(a) After claim acceptance, written notice of acceptance or denial of claims for aggravation or new medical or omitted condition claims properly initiated pursuant to ORS 656.267 shall be furnished to the claimant by the insurer or self-insured employer within 60 days after the insurer or self-insured employer receives written notice of such claims. A worker who fails to comply with the communication requirements of subsection (6) of this section or ORS 656.267 may not allege at any hearing or other proceeding on the claim a de facto denial of a condition based on information in the notice of acceptance from the insurer or self-insured employer.

(b) Once a worker's claim has been accepted, the insurer or self-insured employer must issue a written denial to the worker when the accepted injury is no longer the major contributing cause of the worker's combined condition before the claim may be closed.

(c) When an insurer or self-insured employer determines that the claim qualifies for claim closure, the insurer or self-insured employer shall issue at claim closure an updated notice of accept-

ance that specifies which conditions are compensable. The procedures specified in subsection (6)(d) of this section apply to this notice. Any objection to the updated notice or appeal of denied conditions shall not delay claim closure pursuant to ORS 656.268. If a condition is found compensable after claim closure, the insurer or self-insured employer shall reopen the claim for processing regarding that condition.

(8) The assigned claims agent in processing claims under ORS 656.054 shall send notice of acceptance or denial to the noncomplying employer.

(9) If an insurer or any other duly authorized agent of the employer for such purpose, on record with the Director of the Department of Consumer and Business Services denies a claim for compensation, written notice of such denial, stating the reason for the denial, and informing the worker of the Expedited Claim Service and of hearing rights under ORS 656.283, shall be given to the claimant. A copy of the notice of denial shall be mailed to the director and to the employer by the insurer. The worker may request a hearing pursuant to ORS 656.319.

(10) Merely paying or providing compensation shall not be considered acceptance of a claim or an admission of liability, nor shall mere acceptance of such compensation be considered a waiver of the right to question the amount thereof. Payment of permanent disability benefits pursuant to a notice of closure, reconsideration order or litigation order, or the failure to appeal or seek review of such an order or notice of closure, shall not preclude an insurer or self-insured employer from subsequently contesting the compensability of the condition rated therein, unless the condition has been formally accepted.

(11)(a) If the insurer or self-insured employer unreasonably delays or unreasonably refuses to pay compensation, **attorney fees or costs**, or unreasonably delays acceptance or denial of a claim, the insurer or self-insured employer shall be liable for an additional amount up to 25 percent of the amounts then due plus any attorney fees assessed under this section. The fees assessed by the director, an Administrative Law Judge, the board or the court under this section shall be *[proportionate to the benefit to the injured worker]* **reasonable attorney fees. In assessing fees, the director, an Administrative Law Judge, the board or the court shall consider the proportionate benefit to the injured worker.** The board shall adopt rules for establishing the amount of the attorney fee, giving primary consideration to the results achieved and to the time devoted to the case. An attorney fee awarded pursuant to this subsection may not exceed ~~[\$3,000]~~ **\$4,000** absent a showing of extraordinary circumstances. The maximum attorney fee awarded under this paragraph shall be adjusted annually on July 1 by the same percentage increase as made to the average weekly wage defined in ORS 656.211, if any. Notwithstanding any other provision of this chapter, the director shall have exclusive jurisdiction over proceedings regarding solely the assessment and payment of the additional amount and attorney fees described in this subsection. The action of the director and the review of the action taken by the director shall be subject to review under ORS 656.704.

(b) When the director does not have exclusive jurisdiction over proceedings regarding the assessment and payment of the additional amount and attorney fees described in this subsection, the provisions of this subsection shall apply in the other proceeding.

(12)(a) If payment is due on a disputed claim settlement authorized by ORS 656.289 and the insurer or self-insured employer has failed to make the payment in accordance with the requirements specified in the disputed claim settlement, the claimant or the claimant's attorney shall clearly notify the insurer or self-insured employer in writing that the payment is past due. If the required payment is not made within five business days after receipt of the notice by the insurer or self-insured employer, the director may assess a penalty and attorney fee in accordance with a matrix adopted by the director by rule.

(b) The director shall adopt by rule a matrix for the assessment of the penalties and attorney fees authorized under this subsection. The matrix shall provide for penalties based on a percentage of the settlement proceeds allocated to the claimant and for attorney fees based on a percentage of the settlement proceeds allocated to the claimant's attorney as an attorney fee.

(13) The insurer may authorize an employer to pay compensation to injured workers and shall reimburse employers for compensation so paid.

(14)(a) Injured workers have the duty to cooperate and assist the insurer or self-insured employer in the investigation of claims for compensation. Injured workers shall submit to and shall fully cooperate with personal and telephonic interviews and other formal or informal information gathering techniques. Injured workers who are represented by an attorney shall have the right to have the attorney present during any personal or telephonic interview or deposition. **If the injured worker is represented by an attorney, the insurer or self-insured employer shall pay the attorney a reasonable attorney fee based upon an hourly rate for actual time spent during the personal or telephonic interview or deposition. After consultation with the Board of Governors of the Oregon State Bar, the Workers' Compensation Board shall adopt rules for the establishment, assessment and enforcement of an hourly attorney fee rate specified in this subsection.**

(b) [*However,*] If the attorney is not willing or available to participate in an interview at a time reasonably chosen by the insurer or self-insured employer within 14 days of the request for interview and the insurer or self-insured employer has cause to believe that the attorney's unwillingness or unavailability is unreasonable and is preventing the worker from complying within 14 days of the request for interview, the insurer or self-insured employer shall notify the director. If the director determines that the attorney's unwillingness or unavailability is unreasonable, the director shall assess a civil penalty against the attorney of not more than \$1,000.

(15) If the director finds that a worker fails to reasonably cooperate with an investigation involving an initial claim to establish a compensable injury or an aggravation claim to reopen the claim for a worsened condition, the director shall suspend all or part of the payment of compensation after notice to the worker. If the worker does not cooperate for an additional 30 days after the notice, the insurer or self-insured employer may deny the claim because of the worker's failure to cooperate. The obligation of the insurer or self-insured employer to accept or deny the claim within 60 days is suspended during the time of the worker's noncooperation. After such a denial, the worker shall not be granted a hearing or other proceeding under this chapter on the merits of the claim unless the worker first requests and establishes at an expedited hearing under ORS 656.291 that the worker fully and completely cooperated with the investigation, that the worker failed to cooperate for reasons beyond the worker's control or that the investigative demands were unreasonable. If the Administrative Law Judge finds that the worker has not fully cooperated, the Administrative Law Judge shall affirm the denial, and the worker's claim for injury shall remain denied. If the Administrative Law Judge finds that the worker has cooperated, or that the investigative demands were unreasonable, the Administrative Law Judge shall set aside the denial, order the reinstatement of interim compensation if appropriate and remand the claim to the insurer or self-insured employer to accept or deny the claim.

(16) In accordance with ORS 656.283 (3), the Administrative Law Judge assigned a request for hearing for a claim for compensation involving more than one potentially responsible employer or insurer may specify what is required of an injured worker to reasonably cooperate with the investigation of the claim as required by subsection (14) of this section.

SECTION 3. ORS 656.277 is amended to read:

656.277. (1)(a) A request for reclassification by the worker of an accepted nondisabling injury that the worker believes was or has become disabling must be submitted to the insurer or self-insured employer. The insurer or self-insured employer shall classify the claim as disabling or nondisabling within 14 days of the request. A notice of such classification shall be mailed to the worker and the worker's attorney if the worker is represented. The worker may ask the Director of the Department of Consumer and Business Services to review the classification by the insurer or self-insured employer by submitting a request for review within 60 days of the mailing of the classification notice by the insurer or self-insured employer. If any party objects to the classification of the director, the party may request a hearing under ORS 656.283 within 30 days from the date of the director's order.

(b) If the worker is represented by an attorney and the attorney is instrumental in obtaining an order from the director that reclassifies the claim from nondisabling to disabling, the director may award the attorney a reasonable assessed attorney fee.

(2) A request by the worker that an accepted nondisabling injury was or has become disabling shall be made pursuant to ORS 656.273 as a claim for aggravation, provided the claim has been classified as nondisabling for at least one year after the date of acceptance.

(3) A claim for a nondisabling injury shall not be reported to the director by the insurer or self-insured employer except:

(a) When a notice of claim denial is filed;

(b) When the status of the claim is as described in subsection (1) or (2) of this section; or

(c) When otherwise required by the director.

SECTION 4. ORS 656.313 is amended to read:

656.313. (1)(a) Filing by an employer or the insurer of a request for hearing on a reconsideration order before the Hearings Division, a request for Workers' Compensation Board review or court appeal or request for review of an order of the Director of the Department of Consumer and Business Services regarding vocational assistance stays payment of the compensation appealed, except for:

(A) Temporary disability benefits that accrue from the date of the order appealed from until closure under ORS 656.268, or until the order appealed from is itself reversed, whichever event first occurs;

(B) Permanent total disability benefits that accrue from the date of the order appealed from until the order appealed from is reversed;

(C) Death benefits payable to a surviving spouse prior to remarriage, to children or dependents that accrue from the date of the order appealed from until the order appealed from is reversed; and

(D) Vocational benefits ordered by the director pursuant to ORS 656.340 (16). If a denial of vocational benefits is upheld by a final order, the insurer or self-insured employer shall be reimbursed from the Workers' Benefit Fund pursuant to ORS 656.605 for all costs incurred in providing vocational benefits as a result of the order that was appealed.

(b) If ultimately found payable under a final order, benefits withheld under this subsection, and attorney fees and costs, shall accrue interest at the rate provided in ORS 82.010 from the date of the order appealed from through the date of payment. The board shall expedite review of appeals in which payment of compensation has been stayed under this section.

(2) If the board or court subsequently orders that compensation to the claimant should not have been allowed or should have been awarded in a lesser amount than awarded, the claimant shall not be obligated to repay any such compensation which was paid pending the review or appeal.

(3) If an insurer or self-insured employer denies the compensability of all or any portion of a claim submitted for medical services, the insurer or self-insured employer shall send notice of the denial to each provider of such medical services and to any provider of health insurance for the injured worker. Except for medical services payable in accordance with ORS 656.247, after receiving notice of the denial, a medical service provider may submit medical reports and bills for the disputed medical services to the provider of health insurance for the injured worker. The health insurance provider shall pay all such bills in accordance with the limits, terms and conditions of the policy. If the injured worker has no health insurance, such bills may be submitted to the injured worker. A provider of disputed medical services shall make no further effort to collect disputed medical service bills from the injured worker until the issue of compensability of the medical services has been finally determined.

(4) Except for medical services payable in accordance with ORS 656.247:

(a) When the compensability issue has been finally determined or when disposition or settlement of the claim has been made pursuant to ORS 656.236 or 656.289 (4), the insurer or self-insured employer shall notify each affected service provider and health insurance provider of the results of the disposition or settlement.

(b) If the services are determined to be compensable, the insurer or self-insured employer shall reimburse each health insurance provider for the amount of claims paid by the health insurance provider pursuant to this section. Such reimbursement shall be in addition to compensation or medical benefits the worker receives. Medical service reimbursement shall be paid directly to the health insurance provider.

(c) If the services are settled pursuant to ORS 656.289 (4), the insurer or self-insured employer shall reimburse, out of the settlement proceeds, each medical service provider for billings received by the insurer or self-insured employer on and before the date on which the terms of settlement are agreed as specified in the settlement document that are not otherwise partially or fully reimbursed.

(d) Reimbursement under this section shall be made only for medical services related to the claim that would be compensable under this chapter if the claim were compensable and shall be made at one-half the amount provided under ORS 656.248. In no event shall reimbursement made to medical service providers exceed 40 percent of the total present value of the settlement amount, except with the consent of the worker. If the settlement proceeds are insufficient to allow each medical service provider the reimbursement amount authorized under this subsection, the insurer or self-insured employer shall reduce each provider's reimbursement by the same proportional amount. Reimbursement under this section shall not prevent a medical service provider or health insurance provider from recovering the balance of amounts owing for such services directly from the worker, unless the worker agrees to pay all medical service providers directly from the settlement proceeds the amount provided under ORS 656.248.

(5) As used in this section, "health insurance" has the meaning for that term provided in ORS 731.162.

SECTION 5. ORS 656.382 is amended to read:

656.382. (1) If an insurer or self-insured employer refuses to pay compensation, **costs or attorney fees** due under an order of an Administrative Law Judge, **the board or the court**, or otherwise unreasonably resists the payment of compensation, **costs or attorney fees**, except as provided in ORS 656.385, the employer or insurer shall pay to the attorney of the claimant a reasonable attorney fee as provided in subsection (2) of this section. To the extent an employer has caused the insurer to be charged such fees, such employer may be charged with those fees.

(2) If a request for hearing, request for review, appeal or cross-appeal to the Court of Appeals or petition for review to the Supreme Court is initiated by an employer or insurer, and the Administrative Law Judge, board or court finds that **all or part of** the compensation awarded to a claimant should not be disallowed or reduced, or, through the assistance of an attorney, that an order rescinding a notice of closure should not be reversed or **all or part of** the compensation awarded by a reconsideration order issued under ORS 656.268 should not be reduced or disallowed, the employer or insurer shall be required to pay to the attorney of the claimant a reasonable attorney fee in an amount set by the Administrative Law Judge, board or *[the]* court for legal representation by an attorney for the claimant at and prior to the hearing, review on appeal or cross-appeal.

(3) If an employer or insurer raises attorney fees, penalties or costs as a separate issue in a request for hearing, request for review, appeal or cross-appeal to the Court of Appeals or petition for review to the Supreme Court initiated by the employer or insurer under this section, and the Administrative Law Judge, board or court finds that the attorney fees, penalties or costs awarded to the claimant should not be disallowed or reduced, the Administrative Law Judge, board or court shall award reasonable additional attorney fees to the attorney for the claimant for efforts in defending the fee, penalty or costs.

(4) If an employer or insurer initiates an appeal to the board or Court of Appeals and the matter is briefed, but the employer or insurer withdraws the appeal prior to a decision by the board or court, resulting in the claimant's prevailing in the matter, the claimant's attorney is entitled to a reasonable attorney fee for efforts in briefing the matter to the board or court.

[3] (5) If upon reaching a decision on a request for hearing initiated by an employer it is found by the Administrative Law Judge that the employer initiated the hearing for the purpose of delay or other vexatious reason or without reasonable ground, the Administrative Law Judge may order the employer to pay to the claimant such penalty not exceeding \$750 and not less than \$100 as may be reasonable in the circumstances.

SECTION 6. ORS 656.385 is amended to read:

656.385. (1) In all cases involving a dispute over compensation benefits pursuant to ORS 656.245, 656.247, 656.260, 656.327 or 656.340, where a claimant finally prevails after a proceeding has commenced, the Director of the Department of Consumer and Business Services, [or] the Administrative Law Judge **or the court** shall require the insurer or self-insured employer to pay a reasonable attorney fee to the claimant's attorney. In such cases, where an attorney is instrumental in obtaining a settlement of the dispute prior to a decision by the director, [or] an Administrative Law Judge **or the court**, the director, [or] Administrative Law Judge **or court** shall require the insurer or self-insured employer to pay a reasonable attorney fee to the claimant's attorney. The attorney fee must be based on all work the claimant's attorney has done relative to the proceeding at all levels before the department **or court**. The attorney fee assessed under this section must be proportionate to the benefit to the injured worker. The director shall adopt rules for establishing the amount of the attorney fee, giving primary consideration to the results achieved and to the time devoted to the case. An attorney fee awarded pursuant to this subsection may not exceed [~~\$3,000~~] **\$4,000** absent a showing of extraordinary circumstances. The maximum attorney fee awarded under this subsection shall be adjusted annually on July 1 by the same percentage increase as made to the average weekly wage defined in ORS 656.211, if any.

(2) If an insurer or self-insured employer refuses to pay compensation due under, **or attorney fees related to**, ORS 656.245, 656.247, 656.260, 656.327 or 656.340 pursuant to an order of the director, an Administrative Law Judge or the court or otherwise unreasonably resists the payment of such compensation **or attorney fees**, the insurer or self-insured employer shall pay to the attorney of the claimant a reasonable attorney fee as provided in subsection (3) of this section. To the extent an employer has caused the insurer to be charged such fees, such employer may be charged with those fees.

(3) If a request for a contested case hearing, review on appeal or cross-appeal to the Court of Appeals or petition for review to the Supreme Court is initiated by an insurer or self-insured employer, and the director, Administrative Law Judge or court finds that **all or part of** the compensation awarded under ORS 656.245, 656.247, 656.260, 656.327 or 656.340 to a claimant, **or attorney fees under this section**, should not be disallowed or reduced, the insurer or self-insured employer shall be required to pay to the attorney of the claimant a reasonable attorney fee in an amount set by the director, [~~the~~] Administrative Law Judge or [~~the~~] court for legal representation by an attorney for the claimant at the contested case hearing, review on appeal or cross-appeal.

(4) If upon reaching a final contested case decision where such contested case was initiated by an insurer or self-insured employer it is found that the insurer or self-insured employer initiated the contested case hearing for the purpose of delay or other vexatious reason or without reasonable ground, the director, [or] Administrative Law Judge **or court** may order the insurer or self-insured employer to pay to the claimant such penalty not exceeding \$750 and not less than \$100 as may be reasonable in the circumstances.

(5) Penalties and attorney fees awarded pursuant to this section by the director, an Administrative Law Judge or the courts shall be paid for by the employer or insurer in addition to compensation found to be due to the claimant.

SECTION 7. ORS 656.386 is amended to read:

656.386. (1)(a) In all cases involving denied claims where a claimant finally prevails against the denial in an appeal to the Court of Appeals or petition for review to the Supreme Court, the court shall allow a reasonable attorney fee to the claimant's attorney. In such cases involving denied claims where the claimant prevails finally in a hearing before an Administrative Law Judge or in a review by the Workers' Compensation Board, then the Administrative Law Judge or board shall

allow a reasonable attorney fee. In such cases involving denied claims where an attorney is instrumental in obtaining a rescission of the denial prior to a decision by the Administrative Law Judge, a reasonable attorney fee shall be allowed.

(b) For purposes of this section, a "denied claim" is:

(A) A claim for compensation which an insurer or self-insured employer refuses to pay on the express ground that the injury or condition for which compensation is claimed is not compensable or otherwise does not give rise to an entitlement to any compensation;

(B) A claim for compensation for a condition omitted from a notice of acceptance, made pursuant to ORS 656.262 (6)(d), which the insurer or self-insured employer does not respond to within 60 days;

(C) A claim for an aggravation made pursuant to ORS 656.273 (2) or for a new medical condition made pursuant to ORS 656.267, which the insurer or self-insured employer does not respond to within 60 days; or

(D) A claim for an initial injury or occupational disease to which the insurer or self-insured employer does not respond within 60 days.

(c) A denied claim shall not be presumed or implied from an insurer's or self-insured employer's failure to pay compensation for a previously accepted injury or condition in timely fashion. Attorney fees provided for in this subsection shall be paid by the insurer or self-insured employer.

(2)(a) If a claimant finally prevails against a denial as provided in subsection (1) of this section, the court, board or Administrative Law Judge may order payment of the claimant's reasonable expenses and costs for records, expert opinions and witness fees.

(b) The court, board or Administrative Law Judge shall determine the reasonableness of witness fees, expenses and costs for the purpose of paragraph (a) of this subsection.

(c) Payments for witness fees, expenses and costs ordered under this subsection shall be made by the insurer or self-insured employer and are in addition to compensation payable to the claimant.

(d) Payments for witness fees, expenses and costs ordered under this subsection may not exceed \$1,500 unless the claimant demonstrates extraordinary circumstances justifying payment of a greater amount.

(3) If a claimant requests claim reclassification as provided in ORS 656.277 and the insurer or self-insured employer does not respond within 14 days of the request, or if the **claimant**, insurer or self-insured employer requests a hearing, review, appeal or cross-appeal to the Court of Appeals or petition for review to the Supreme Court and the Director of the Department of Consumer and Business Services, Administrative Law Judge, board or [the] court finally determines that the claim should be classified as disabling, the director, Administrative Law Judge, board or [the] court may assess a reasonable attorney fee.

(4) In disputes involving a claim for costs, if the claimant prevails on the claim for any increase of costs, the Administrative Law Judge, board, Court of Appeals or Supreme Court shall award a reasonable assessed attorney fee to the claimant's attorney.

[(4)] (5) In all other cases, attorney fees shall be paid from the increase in the claimant's compensation, if any, except as otherwise expressly provided in this chapter.

SECTION 8. ORS 656.388 is amended to read:

656.388. (1) No claim or payment for legal services by an attorney representing the worker or for any other services rendered before an Administrative Law Judge or the Workers' Compensation Board, as the case may be, in respect to any claim or award for compensation to or on account of any person, shall be valid unless approved by the Administrative Law Judge or board, or if proceedings on appeal from the order of the board with respect to such claim or award are had before any court, unless approved by such court. In cases in which a claimant finally prevails after remand from the Supreme Court, Court of Appeals or board, then the Administrative Law Judge, board or appellate court shall approve or allow a reasonable attorney fee for services before every prior forum as authorized under ORS 656.307 (5), 656.308 (2), 656.382 or 656.386. No attorney fees shall be approved or allowed for representation of the claimant before the managed care organization [or

Director of the Department of Consumer and Business Services except for representation at the contested case hearing].

(2) Any claim for payment to a claimant's attorney by the claimant so approved shall, in the manner and to the extent fixed by the Administrative Law Judge, board or such court, be a lien upon compensation.

(3) If an injured worker signs an attorney fee agreement with an attorney for representation on a claim made pursuant to this chapter and additional compensation is awarded to the worker or a settlement agreement is consummated on the claim after the fee agreement is signed and it is shown that the attorney with whom the fee agreement was signed was instrumental in obtaining the additional compensation or settling the claim, the Administrative Law Judge or the board shall grant the attorney a lien for attorney fees out of the additional compensation awarded or proceeds of the settlement in accordance with rules adopted by the board governing the payment of attorney fees.

(4) The board shall, after consultation with the Board of Governors of the Oregon State Bar, establish a schedule of fees for attorneys representing a worker and representing an insurer or self-insured employer, under this chapter. The Workers' Compensation Board shall review all attorney fee schedules biennially for adjustment.

(5) The board shall, in establishing the schedule of attorney fees awarded under this chapter, consider the contingent nature of the practice of workers' compensation law and the necessity of allowing the broadest access to attorneys by injured workers and shall give consideration to fees earned by attorneys for insurers and self-insured employers.

[5] (6) The board shall approve no claim for legal services by an attorney representing a claimant to be paid by the claimant if fees have been awarded to the claimant or the attorney of the claimant in connection with the same proceeding under ORS 656.268.

[6] (7) Insurers and self-insured employers shall make an annual report to the Director of the Department of Consumer and Business Services reporting attorney salaries and other costs of legal services incurred pursuant to this chapter. The report shall be in such form and shall contain such information as the director prescribes.

SECTION 9. Section 10 of this 2015 Act is added to and made a part of ORS chapter 656.

SECTION 10. The claimant's attorney shall be allowed a reasonable assessed attorney fee if:

(1) The claimant's attorney is instrumental in obtaining temporary disability compensation benefits pursuant to ORS 656.210, 656.212, 656.262, 656.268 or 656.325 prior to a decision by an Administrative Law Judge; or

(2) The claimant finally prevails in a dispute over temporary disability compensation benefits pursuant to ORS 656.210, 656.212, 656.262, 656.268 or 656.325 after a request for hearing has been filed.

SECTION 11. Section 10 of this 2015 Act and the amendments to ORS 656.012, 656.262, 656.277, 656.313, 656.382, 656.385, 656.386 and 656.388 by sections 1 to 8 of this 2015 Act apply to orders issued and attorney fees incurred on or after the effective date of this 2015 Act, regardless of the date on which the claim was filed.

Passed by House May 5, 2015

Repassed by House June 10, 2015

.....
Timothy G. Sekerak, Chief Clerk of House

.....
Tina Kotek, Speaker of House

Passed by Senate June 8, 2015

.....
Peter Courtney, President of Senate

Received by Governor:

.....M.,....., 2015

Approved:

.....M.,....., 2015

.....
Kate Brown, Governor

Filed in Office of Secretary of State:

.....M.,....., 2015

.....
Jeanne P. Atkins, Secretary of State

Secretary of State
NOTICE OF PROPOSED RULEMAKING HEARING*
 A Statement of Need and Fiscal Impact accompanies this form.

Dept. of Consumer and Business Services,
 Workers' Compensation Board
 Agency and Division

OAR Chapter 438
 Administrative Rules Chapter Number

Karen Burton	2601 25 th St. SE, Ste. 150, Salem, OR 97302-1280	(503)378-3308
Rules Coordinator	Address	Telephone

RULE CAPTION

Amends OAR 438-005-0035(1) and Division 015 rules to apply HB 2764 (2015) amendments regarding attorney fees.
 Not more than 15 words that reasonably identifies the subject matter of the agency's intended action.

December 4, 2015	10 a.m.	2601 25 th St. SE, Ste. 150, Salem, OR 97302-1280	Debra L. Young
Hearing Date	Time	Location	Hearings Officer

Auxiliary aids for persons with disabilities are available upon advance request.

RULEMAKING ACTION

Secure approval of new rule numbers (Adopted or Renumbered rules) with the Administrative Rules Unit prior to filing.

ADOPT: OAR 438-015-0033, OAR 438-015-0048.

AMEND: OAR 438-005-0035; OAR 438-015-0010, OAR 438-015-0019, OAR 438-015-0025, OAR 438-015-0045, OAR 438-015-0055, OAR 438-015-0065, OAR 438-015-0070, OAR 438-015-0080, OAR 438-015-0110.

REPEAL:

RENUMBER:

AMEND & RENUMBER:

Stat. Auth.: ORS 656.726(5).

Other Auth.:

Stats. Implemented: HB 2764 (2015), ORS 656.012, ORS 656.236(4), ORS 656.262(11)(a), (14)(a), ORS 656.267(3), ORS 656.278(1), ORS 656.289(4), ORS 656.307, ORS 656.308(2), ORS 656.382, ORS 656.386, ORS 656.388, ORS 656.593(1)(a).

RULE SUMMARY

After considering its Advisory Committee's September 23, 2015 report, the Board proposes to adopt and amend Division 015 rules to implement HB 2764 (2015), which amended statutes concerning attorney fees under the Workers' Compensation Law. The Board proposes to: (1) amend OAR 438-005-0035(1) to add the phrase "while providing for access to adequate representation for injured workers" to the Board's policy statement; (2) amend OAR 438-015-0010(2) to reference the new statute providing for assessed attorney fees for obtaining temporary disability benefits (HB 2764 § 9, 10); (3) add OAR 438-015-0019(6) to provide for assessed attorney fees for prevailing over a dispute involving a claim for costs; (4) amend OAR 438-015-0025 to delete references to OAR 438-015-0045 (attorney fees when the claimant requests a hearing regarding temporary disability and prevails) and OAR 438-015-0055(1) (attorney fees when the claimant requests Board review regarding temporary disability and prevails), and add reference to OAR 438-015-0080(3) (approved attorney fees for an award of increased permanent disability by an Own Motion order); (5) add OAR 438-015-0033 to establish procedures concerning an attorney fee under ORS 656.262(14)(a), providing for a reasonable hourly rate for an attorney's time spent during an interview or deposition; (6) amend OAR 438-015-0045 to delete provisions regarding approved attorney fees when the claimant requests a hearing and an Administrative Law Judge (ALJ) awards additional temporary disability benefits and to add provision for award of assessed attorney fee under such circumstances; (7) add OAR 438-015-0048 to provide for assessed attorney fees when the claimant requests a hearing and prevails over a claim reclassification order from the Workers' Compensation Division (WCD); (8) amend OAR 438-015-0055(1)

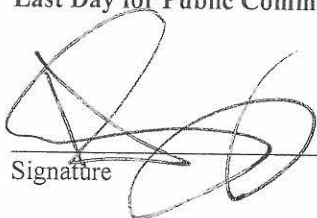
to delete provisions regarding approved attorney fees when the claimant requests Board review and the Board awards additional temporary disability benefits and to add provision for award of assessed attorney fees under such circumstances; (9) add OAR 438-015-0055(6) to provide for assessed attorney fees when the claimant requests Board review and prevails over an ALJ's order regarding a WCD's claim reclassification order; (10) amend OAR 438-015-0065(1) and (3) to include assessed attorney fees when the carrier requests a hearing and the ALJ finds "all or part of" compensation awarded or compensation awarded by the reconsideration order, respectively, should not be disallowed or reduced; (11) add OAR 438-015-0065(2) to provide for assessed attorney fees when the carrier requests a hearing and raises attorney fees, penalties, or costs and the ALJ does not disallow or reduce such awards; (12) amend OAR 438-015-0070(1) and (3) to include assessed attorney fees when the carrier requests Board review and the Board finds "all or part of" compensation awarded or compensation awarded by the reconsideration order, respectively, should not be disallowed or reduced; (13) add OAR 438-015-0070(2) to provide for assessed attorney fees when the carrier requests Board review and raises attorney fees, penalties, or costs and the Board does not disallow or reduce such awards; (14) add OAR 438-015-0070(3) to provide for assessed attorney fees for the claimant's attorney's efforts when the carrier requests Board review of an ALJ's order and the matter is briefed, but the carrier withdraws the appeal before a decision from the Board; (15) amend OAR 438-015-0080(1) and (2) to delete provisions regarding approved attorney fees when an attorney is instrumental in obtaining temporary disability compensation or obtaining a voluntary reopening of an Own Motion claim that results in increased temporary disability compensation, respectively, and to add provision for award of assessed attorney fees under such circumstances; (16) amend OAR 438-015-0080(4) to provide that the Board may allow a fee in excess of the amount prescribed in section (3), which relates to Own Motion permanent disability benefits; (17) amend OAR 438-015-0110, regarding cases involving ORS 656.262(11)(a), to include "attorney fees or costs" in the list of items eligible for assessed attorney fees for unreasonable delay or refusal to pay; (18) amend OAR 438-015-0110(1) to provide: "Considers the proportionate benefit to the claimant"; and (19) amend OAR 438-015-0110(3) to raise the maximum assessed attorney fees under ORS 656.262(11)(a), absent a showing of extraordinary circumstances, from \$3,000 to \$4,000.

Request for public comment: The Board requests public comment on whether other options should be considered for achieving the rules' substantive goals while reducing the negative economic impact of the rule on business.

Pending the hearing, written comments regarding these rules may be submitted for admission into the record by directing such comments by mail, FAX (503-373-1684), e-mail (rulecomments.wcb@state.or.us), or by means of hand delivery to any permanently staffed Board office. The comments may be addressed to the attention of Debra L. Young, Rulemaking Hearing Officer, Workers' Compensation Board, 2601 25th St. SE, Ste. 150, Salem, OR 97302-1280.

December 4, 2015

Last Day for Public Comment (Last day to submit written comments to the Rules Coordinator)



Holly J. Somers
Printed name

10/9/15
Date

*Hearing Notices published in the Oregon Bulletin must be submitted by 5:00 pm on the 15th day of the preceding month unless this deadline falls on a weekend or legal holiday, upon which the deadline is 5:00 pm the preceding workday. ARC 920-2005

STATEMENT OF NEED AND FISCAL IMPACT

A Notice of Proposed Rulemaking Hearing or a Notice of Proposed Rulemaking accompanies this form.

Dept. of Consumer and Business Services,
Workers' Compensation Board

OAR Chapter 438

Agency and Division

Administrative Rules Chapter Number

Amends OAR 438-005-0035(1) and Division 015 rules to apply HB 2764 (2015) amendments regarding attorney fees.

Rule Caption (Not more than 15 words that reasonably identifies the subject matter of the agency's intended action.)

In the Matter of: Adoption of Permanent Amendments to the Rules of Practice and Procedure for Contested Cases under the Workers' Compensation Law, Relating to:

Board Policy (OAR 438-005-0035); General Principles (OAR 438-015-0010); Cost Bill Procedures; Assessed Attorney Fees When the Claimant Prevails in a Cost Bill Dispute (OAR 438-015-0019); Maximum Attorney Fees Out of Compensation (OAR 438-015-0025); Attorney Fee Award Under ORS 656.262(14)(a) (OAR 436-015-0033); Attorney Fees When a Claimant Requests a Hearing on Extent of Temporary Disability (OAR 438-015-0045); Attorney Fees When a Claimant Requests a Hearing on a Claim Reclassification (OAR 438-015-0048); Attorney Fees When a Claimant Requests Review by the Board (OAR 438-015-0055); Attorney Fees When Insurer or Self-Insured Employer Requests a Hearing (OAR 438-015-0065); Attorney Fees When Insurer or Self-Insured Employer Requests or Cross-Requests Review by the Board (OAR 438-035-0070); Attorney Fees in Own Motion Cases (OAR 438-015-0080); Attorney Fees in Cases Involving ORS 656.262(11)(a) (OAR 438-015-0110).

Statutory Authority: ORS 656.726(5).

Other Authority:

Stats. Implemented: HB 2764 (2015), ORS 656.012, ORS 656.236(4), ORS 656.262(11)(a), (14)(a), ORS 656.267(3), ORS 656.278(1), ORS 656.289(4), ORS 656.307, ORS 656.308(2), ORS 656.382, ORS 656.386, ORS 656.388, ORS 656.593(1)(a).

Need for the Rule(s):

The legislature adopted House Bill (HB) 2764 (2015), which amends several statutes that concern attorney fees under the Workers' Compensation Law. A number of those statutory amendments effect practices and procedures involving the Board and its Hearings Division. Those amendments are summarized below.

Section 1 of HB 2764 amends ORS 656.012(2)(b) to add "while providing for access to adequate representation for injured workers" to the objective of providing "a fair and just administrative system for delivery of medical and financial benefits to injured workers that reduces litigation and eliminates the adversary nature of the compensation proceedings, to the greatest extent practicable."

Section 2 of HB 2764 amends ORS 656.262(11)(a) to add "attorney fees or costs" to the phrase "If the insurer or self-insured employer unreasonably delays or unreasonably refuses to pay compensation * * *, or unreasonably delays acceptance or denial of a claim[.]" Thus, under amended ORS 656.262(11)(a), the unreasonable delay or refusal to pay attorney fees or costs can result in a penalty and a penalty-related attorney fee.

Section 2 of HB 2764 further amends ORS 656.262(11)(a) by replacing the phrase "proportionate to the benefit to the injured worker" with "reasonable attorney fees." Thus, the statute directs the Administrative Law Judge (ALJ), the Board, or the court to award "reasonable attorney fees." In addition, a sentence is

added to the statute, which provides that “In assessing fees, the director, an Administrative Law Judge, the board or the court shall consider the proportionate benefit to the worker.” HB 2764 § 2. Finally, ORS 656.262(11)(a) is amended to increase the “statutory maximum” for an assessed attorney fee to \$4,000, absent a showing of extraordinary circumstances. HB 2764 § 2.

Section 2 of HB 2764 also amends ORS 656.262(14)(a) to provide that, if the worker is represented by an attorney in a personal or telephonic interview or deposition, the carrier “shall pay the attorney a reasonable attorney fee based upon an hourly rate for actual time spent during the personal or telephonic interview or deposition.” The amended statute further states that “After consultation with the Board of Governors of the Oregon State Bar, the Workers’ Compensation Board shall adopt rules for the establishment, assessment and enforcement of an hourly attorney fee rate specified in this subsection.” HB 2764 § 2.

Section 5 of HB 2764 amends ORS 656.382(2) to provide that an assessed attorney fee is awardable if the ALJ, Board, or court finds, after a carrier’s appeal of an order, that “all or part of” the compensation awarded to a claimant by the appealed order should not be disallowed or reduced. ORS 656.382(2) is also amended to provide that an assessed attorney fee is awardable if “all or part of” the compensation awarded by a reconsideration order issued under ORS 656.268 should not be reduced or disallowed after a carrier’s appeal of that order. HB 2764 § 5.

In addition, Section 5 of HB 2764 adds a new section (3) to ORS 656.382. This new section provides that if the carrier raises attorney fees, penalties, or costs as a separate issue in a hearing request, request for Board review, or court appeal and the reviewing body finds that such awards should not be disallowed or reduced, the ALJ, Board or court “shall award reasonable additional attorney fees to the attorney for the claimant for efforts in defending the fee, penalty or costs.” HB 2764 § 5.

Section 5 of HB 2764 also includes a new section (4) to ORS 656.382. This provision states that if the carrier initiates an appeal to the Board or the Court of Appeals “and the matter is briefed,” but the carrier withdraws the appeal before a decision by the Board or court, “resulting in the claimant’s prevailing in the matter, the claimant’s attorney is entitled to a reasonable attorney fee for efforts in briefing the matter to the board or court.” HB 2764 § 5.

Section 7 of HB 2764 amends ORS 656.386(3) to include “claimant” in the list of parties who may request a hearing, review, or court appeal of a claim reclassification decision and, if the decision results in a “disabling” reclassification, the ALJ, Board or court “may assess a reasonable attorney fee.” In other words, the statutory amendment provides for an assessed attorney fee award when the claimant successfully appeals from a “non-disabling” classification.

Section 7 of HB 2764 adds new section (4) to ORS 656.386. This new section provides that, in a dispute involving a claim for costs, “if the claimant prevails on the claim for any increase in costs,” the ALJ, Board, or court “shall award a reasonable assessed attorney fee to the claimant’s attorney.” HB 2764 § 7.

Section 8 of HB 2764 amends ORS 656.388(4) by adding the sentence “The Workers’ Compensation Board shall review all attorney fee schedules biennially for adjustment.”

Section 8 of HB 2764 also adds new section (5) to ORS 656.388. This new section requires that the Board “in establishing the schedule of attorney fees awarded under this chapter, consider the contingent nature of the practice of workers’ compensation law and the necessity of allowing the broadest access to attorneys by injured workers and shall give consideration to fees allowed by attorneys for insurers and self-insured employers.” HB 2764 § 8.

Finally, sections 9 and 10 of HB 2764 add a new statute, which provides for a reasonable assessed attorney fee if a claimant's attorney is instrumental in obtaining temporary disability compensation benefits pursuant to ORS 656.210, 656.212, 656.268 or 656.325 prior to a decision by an ALJ or if the claimant prevails in a dispute over temporary disability compensation pursuant to those listed statutes after a hearing request has been filed.

HB 2764 becomes effective January 1, 2016. ORS 171.022. The statutory amendments apply to orders issued and attorney fees incurred on or after January 1, 2016, the effective date of the Act, regardless of the date on which the claim was filed. HB 2764, § 11.

The Members appointed an advisory committee to consider amendments to its rules resulting from HB 2764.¹ The Members also requested that this committee consider a proposal from Chris Moore, Attorney at Law, "that OAR 438-015-0010(4)(g) be changed again to reflect the intent as I understand HB 2764 to require consideration of the contingent nature of claimant attorneys' practices." After two public meetings to review the matter, the committee issued a report on September 23, 2015. On September 29 and October 6, 2015, at public meetings, the Members reviewed and discussed the report and after doing so, and considering comments expressed by practitioners (representing claimants and carriers), carriers, an a representative from the Department of Consumer and Business Services (DCBS), the Members propose the adoption of permanent amendments, as explained below.

OAR 438-005-0035(1)

ORS 656.012 provides the legislative findings and policy of the Workers' Compensation Law. Section (2) of that statute lists the objectives of that Law. Among those objectives, ORS 656.012(2)(b) lists the provision of "a fair and just administrative system for delivery of medical and financial benefits to injured workers that reduces litigation and eliminates the adversary nature of the compensation proceedings, to the greatest extent practicable." Section 1 of HB 2764 amends ORS 656.012(2)(b) to add the phrase: "while providing for access to adequate representation for injured workers."

Consistent with this statutory amendment, the Members propose to add this phrase to the end of the first sentence of OAR 438-005-0035(1) to provide as follows: "It is the policy of the Board to expedite claim adjudication and amicably dispose of controversies, while providing for access to adequate representation for injured workers."

The Members propose to amend the rule in the manner described above. This amendment is presented in Exhibit A, attached and incorporated by reference.

OAR 438-015-0010(2)

Sections 9 and 10 of HB 2764 add a new statute that provides:

"The claimant's attorney shall be allowed a reasonable assessed attorney fee if:

¹ The advisory committee was comprised of the following individuals: Nelson Hall, claimant's practitioner; M. Kathryn Olney, carrier's practitioner; William Replogle, carrier's practitioner; and Marybeth Wosko, claimant's practitioner. Presiding Administrative Law Judge Joy Dougherty served as the facilitator for the committee. The Members extend their grateful appreciation to the committee for their valuable participation in this endeavor.

“(1) The claimant’s attorney is instrumental in obtaining temporary disability compensation benefits pursuant to ORS 656.210, 656.212, 656.262, 656.268 or 656.325 prior to a decision by an Administrative Law Judge; or

“(2) The claimant finally prevails in a dispute over temporary disability compensation benefits pursuant to ORS 656.210, 656.212, 656.262, 656.268 or 656.325 after a request for hearing has been filed.”

Before this amendment, attorney fees for obtaining temporary disability compensation were payable out of the increased compensation. ORS 656.386(4).² Consistent with this new statute, the Members propose the amendment of various rules that provide for “out-of-compensation” attorney fees for services in obtaining increased temporary disability compensation.³ Specifically, the Members propose to amend OAR 438-015-0010(2) to include reference to “House Bill 2764 (2015), sections 9 and 10” in the list of statutory exceptions to the requirement that attorney fees for representing a claimant shall be paid out of the claimant’s compensation award.⁴

The Members propose to amend the rule in the manner described above. This amendment is presented in Exhibit B, attached and incorporated by reference.

OAR 438-015-0019(6)

Section 7 of HB 2764 adds new section (4) to ORS 656.386. This new section provides that, in a dispute involving a claim for costs, “if the claimant prevails on the claim for any increase in costs,” the ALJ, Board, or court “shall award a reasonable assessed attorney fee to the claimant’s attorney.” HB 2764 §7.

Consistent with this amendment, the Members propose to amend OAR 438-015-0019, which addresses “Cost Bill Procedures.” Specifically, the Members propose to add the following phrase to the title of this rule: “Assessed Attorney Fees When the Claimant Prevails in a Cost Bill Dispute.” In addition, the Members propose to add section (6) to this rule, providing that: “In disputes involving a claim for costs, if the claimant prevails on the claim for any increase of costs, the Administrative Law Judge or the Board shall award a reasonable assessed attorney fee to the claimant’s attorney.”

The Members propose to amend the rule in the manner described above. These amendments are presented in Exhibit C, attached and incorporated by reference.

OAR 438-015-0025

As addressed above regarding the proposed amendment to OAR 438-015-0010(2), Sections 9 and 10 of HB 2764 add a new statute that provides for a reasonable assessed attorney fee if: (1) The claimant’s attorney is instrumental in obtaining temporary disability compensation under ORS 656.210, 656.212, 656.262, 656.268, or 656.325 before a decision by an ALJ; or (2) The claimant finally prevails in a dispute over temporary disability compensation under those same statutes after a request for hearing has been filed. Before this statutory amendment, attorney fees for obtaining temporary disability compensation were payable out of increased compensation.

² HB 2764 section 7 renumbers ORS 656.386(4) as ORS 656.386(5).

³ Specifically, as addressed below, the Members propose amending the following rules to implement this new statute: OAR 438-015-0010(2); OAR 438-015-0025; OAR 438-015-0045; OAR 438-015-0055(1); and OAR 438-015-0080(1), (2), (4).

⁴ The statute number will be inserted after it is codified by the Legislative Counsel.

Consistent with this new statute, the Members propose to amend OAR 438-015-0025 (which provides for maximum attorney fees out of compensation) by deleting the references to OAR 438-015-0045 and OAR 438-015-0055(1), which currently provide the maximum dollar amounts for “out-of-compensation” attorney fees for temporary disability benefits awarded by an ALJ and the Board, respectively.⁵

In addition, OAR 438-015-0025 currently references “OAR 438-015-0080,” which addresses attorney fees in Own Motion cases and currently provides the maximum dollar amounts for “out-of-compensation” attorney fees for temporary disability benefits (sections (1) and (2)) and permanent disability benefits (section (3)). The Members propose to amend OAR 438-015-0025 by adding section (3) to OAR 438-015-0080, to specify that “out-of-compensation” attorney fees apply to increased awards for permanent disability benefits in Own Motion cases.⁶

The Members propose to amend the rule in the manner described above. These amendments are presented in Exhibit D, attached and incorporated by reference.

OAR 438-015-0033

Section 2 of HB 2764 amends ORS 656.262(14)(a) to add the following:

“If the injured worker is represented by an attorney, the insurer or self-insured employer shall pay the attorney a reasonable attorney fee based upon an hourly rate for actual time spent during the personal or telephonic interview or deposition. After consultation with the Board of Governors of the Oregon State Bar, the Workers’ Compensation Board shall adopt rules for the establishment, assessment and enforcement of an hourly attorney fee rate specified in this subsection.” HB 2764 § 2.

The advisory committee report expressed concern that “if the only issue raised in a request for hearing was this attorney fee, that it could be argued that jurisdiction [would] rest with the Director.” In their public meetings, after considering this concern, the Members concluded that jurisdiction rests with the Board and its Hearings Division regarding attorney fees pursuant to this new provision in ORS 656.262(14)(a).

The committee’s concern was apparently based on ORS 656.262(11)(a).⁷ However, by its terms, ORS 656.262(11)(a) limits the Director’s “exclusive jurisdiction over proceedings regarding solely the assessment and payment of the additional amount and attorney fees *described in this subsection.*” (Emphasis added).

⁵ As addressed below, the Members also propose to amend OAR 438-015-0045 and OAR 438-015-0055(1) to provide for assessed attorney fees regarding increased temporary disability benefits, in compliance with this new statute.

⁶ In proposing this amendment to OAR 438-015-0025 regarding OAR 438-015-0080, the Members incorporate by this reference their discussion regarding OAR 438-015-0080.

⁷ ORS 656.262(11)(a) provides, in relevant part:

“If the insurer or self-insured employer unreasonably delays or unreasonably refuses to pay compensation, or unreasonably delays acceptance or denial of a claim, the insurer or self-insured employer shall be liable for an additional amount up to 25 percent of the amounts then due plus any attorney fees assessed under this section. * * * *Notwithstanding any other provision of this chapter, the director shall have exclusive jurisdiction over proceedings regarding solely the assessment and payment of the additional amount and attorney fees described in this subsection.* * * *” (Emphasis added).

Because the new provisions in ORS 656.262(14)(a) are not among those described in ORS 656.262(11)(a), the jurisdictional provisions in ORS 656.262(11)(a) would not extend to the amendments to ORS 656.262(14)(a).

In addition, the amendments to ORS 656.262(14)(a) provide that, “[a]fter consultation with the Board of Governors of the Oregon State Bar, *the Workers’ Compensation Board shall adopt rules for the establishment, assessment and enforcement of an hourly attorney fee rate specified in this subsection.*” (Emphasis added). Thus, the statute explicitly directs the Board to establish rules regarding establishment, assessment and enforcement of an hourly attorney fee rate specified in ORS 656.262(14)(a), and that subsection does not address any matter concerning the Director’s jurisdiction.

Considering the effectiveness of OAR 438-015-0019 in implementing the cost bill provisions in ORS 656.386(2), the Members propose providing similar procedures to implement the new attorney fee provisions under ORS 656.262(14)(a). Specifically, the Members propose adding a new rule, OAR 438-015-0033, to provide for “Attorney Fee Award Under ORS 656.262(14)(a).”

Regarding the hourly attorney fee rate under ORS 656.262(14)(a), the advisory committee recommended a reasonable hourly rate of \$275. At its September 29, 2015 public meeting, after extensive deliberation and consideration of public comment, the majority of the Members proposed a reasonable hourly rate of \$300.⁸ Consequently, they propose adding section (1) to OAR 438-015-0033 to provide a reasonable hourly rate of \$300 for an attorney’s actual time spent during a personal or telephonic interview or deposition conducted under ORS 656.262(14)(a).

The Members propose adding section (2) to the rule to provide that, if the claimant is represented by an attorney, the carrier shall pay a reasonable attorney fee award based on the hourly rate in section (1) multiplied by the actual time spent by the attorney during the personal or telephonic interview or deposition conducted under ORS 656.262(14)(a).

The Members also propose section (3), which provides the procedures to obtain the attorney fee in section (2). Specifically, the claimant’s attorney shall submit a bill to the carrier within 30 days of completion of the personal or telephonic interview or deposition that contains, but is not limited to the following: (a) An itemization of the actual time spent by the claimant’s attorney during the interview or deposition; (b) The claimant’s attorney’s signature confirming that the claimed time was actually spent during the interview or deposition under ORS 656.262(14)(a); and (c) A copy of the executed retainer agreement, unless previously provided.

The Members further propose section (4), which provides that, if the parties disagree regarding the attorney’s bill under section (3), a party may request a hearing seeking resolution of that dispute, which shall be made by a final, appealable order.

Finally, the Members propose section (5), which provides that, unless it files a request for hearing, the carrier must pay the attorney fees described in section (3) as an award under this rule within 30 days of its receipt of the bill.

⁸ After considering the committee’s report and testimony from practitioners representing the claimants’ bar and the defense bar, Members Curey and Johnson and Chair Somers proposed a reasonable hourly rate of \$300, whereas Members Weddell and Lanning proposed a reasonable hourly rate of \$400. The Members welcome comments from parties, practitioners, and the general public regarding this issue for inclusion in the record at the December 4, 2015 rulemaking hearing. In this way, the Members can further examine this matter before their ultimate decision regarding the adoption of permanent rule amendments. Such comments may be presented in writing or orally at the rulemaking hearing, as addressed below and in the accompanying “Notice of Proposed Rulemaking Hearing.”

The Members propose to amend the rule in the manner described above. These amendments are presented in Exhibit E, attached and incorporated by reference.

OAR 438-015-0045

As addressed above regarding the proposed amendment to OAR 438-015-0010(2), Sections 9 and 10 of HB 2764 add a new statute that provides for a reasonable assessed attorney fee if: (1) The claimant's attorney is instrumental in obtaining temporary disability compensation under ORS 656.210, 656.212, 656.262, 656.268, or 656.325 before a decision by an ALJ; or (2) The claimant finally prevails in a dispute over temporary disability compensation under those same statutes after a request for hearing has been filed. In contrast, before this statutory amendment, attorney fees for obtaining temporary disability compensation were payable out of increased compensation.

Consistent with this new statute, the Members propose amending OAR 438-015-0045 to delete language providing for ALJ approval of an "out-of-compensation" attorney fee from an award of additional temporary disability benefits and to add language that, if the ALJ awards additional compensation for temporary disability "benefits," the ALJ shall "award a reasonable assessed attorney fee."

The Members propose to amend the rule in the manner described above. These amendments are presented in Exhibit F, attached and incorporated by reference.

OAR 438-015-0048

Section 7 of HB 2764 amends ORS 656.386(3) to include "claimant" in the list of parties who may request a hearing, review, or court appeal of a claim reclassification decision and, if the decision results in a "disabling" reclassification, the ALJ, Board or court "may assess a reasonable attorney fee." Thus, the statutory amendment provides for an assessed attorney fee award when the claimant successfully appeals from a "nondisabling" classification.

Consistent with this amendment, the Members propose to add OAR 438-015-0048 to provide: "If a claimant requests a hearing regarding a claim reclassification order from the Workers' Compensation Division, and the Administrative Law Judge finally determines that the claim should be classified as disabling, the Administrative Law Judge may award a reasonable assessed fee."

The Members propose to amend the rule in the manner described above. This amendment is presented in Exhibit G, attached and incorporated by reference.

OAR 438-015-0055(1), (6)

As addressed above regarding the proposed amendment to OAR 438-015-0010(2), Sections 9 and 10 of HB 2764 add a new statute that provides for a reasonable assessed attorney fee if: (1) The claimant's attorney is instrumental in obtaining temporary disability compensation under ORS 656.210, 656.212, 656.262, 656.268, or 656.325 before a decision by an ALJ; or (2) The claimant finally prevails in a dispute over temporary disability compensation under those same statutes after a request for hearing has been filed. In contrast, before this statutory amendment, attorney fees for obtaining temporary disability compensation were payable out of increased compensation.

Consistent with this new statute, the Members propose amending OAR 438-015-0055(1) to delete language providing for Board approval of an “out-of-compensation” attorney fee from a Board’s award of additional temporary disability compensation and to add language that, if a claimant requests review of an ALJ’s order on the issue of temporary disability compensation and the Board awards additional compensation, the Board shall “award a reasonable assessed attorney fee.”

In addition, as addressed above regarding the proposed amendment to OAR 438-015-0048, section 7 of HB 2764 amends ORS 656.386(3) to include “claimant” in the list of parties who may request a hearing, review, or court appeal of a claim reclassification decision and, if the decision results in a “disabling” reclassification, the ALJ, Board or court “may assess a reasonable attorney fee.” Thus, the statutory amendment provides for an assessed attorney fee award when the claimant successfully appeals from a “non disabling” classification.

Therefore, in addition to the proposed amendment to OAR 438-015-0055(1) addressed above, consistent with this amendment to ORS 656.386(3), the Members propose to amend OAR 438-015-0055 by adding section (6) as follows: “If a claimant requests review of an Administrative Law Judge’s order regarding a claim reclassification order from the Workers’ Compensation Division, and the Board finally determines that the claim should be classified as disabling, the Board may award a reasonable assessed fee.”

The Members propose to amend the rule in the manner described above. These amendments are presented in Exhibit H, attached and incorporated by reference.

OAR 438-015-0065

ORS 656.382(2) provides the circumstances in which an assessed attorney fee is awardable when a carrier initiates a hearing request, request for Board review, or court appeal. Section 5 of HB 2764 amends ORS 656.382(2) to provide that an assessed attorney fee is awardable if the ALJ, Board, or court finds that “all or part of” the compensation awarded to a claimant should not be disallowed or reduced. ORS 656.382(2) is also amended to provide that an assessed attorney fee is awardable if “all or part of” the compensation awarded by a reconsideration order issued under ORS 656.268 should not be reduced or disallowed. HB 2764 § 5.

Consistent with this amendment, the Members propose to amend OAR 438-015-0065(1) to provide that, if a carrier requests a hearing and the ALJ finds that “all or part of” the compensation awarded to the claimant should not be disallowed or reduced, the ALJ shall award a reasonable assessed attorney fee. In addition, the Members propose to amend section (3) of this rule to provide that, if a carrier requests a hearing regarding a reconsideration order, and the ALJ finds that “all or part of” the compensation awarded by the reconsideration order should not be reduced or disallowed, the ALJ shall award a reasonable assessed attorney fee.

Section 5 of HB 2764 also adds a new section (3) to ORS 656.382. This new section provides that if the carrier raises attorney fees, penalties, or costs as a separate issue in a hearing request, request for Board review, or court appeal and the reviewing body finds that such awards should not be disallowed or reduced, the ALJ, Board or court “shall award reasonable additional attorney fees to the attorney for the claimant for efforts in defending the fee, penalty or costs.”

Consistent with this amendment, the Members propose to add a new section (2) to OAR 438-015-0065 to provide:

“If an employer or insurer raises attorney fees, penalties or costs as a separate issue in a request for hearing, and the Administrative Law Judge finds that the attorney fees, penalties or costs awarded to the claimant should not be disallowed or reduced, the Administrative Law Judge shall award reasonable additional attorney fees to the attorney for the claimant for efforts in defending the fee, penalty or costs.”

This proposed change results in renumbering the current sections (2), (3), and (4) as sections (3), (4), and (5), respectively.

The Members propose to amend the rule in the manner described above. These amendments are presented in Exhibit I, attached and incorporated by reference.

OAR 438-015-0070

As addressed above regarding the proposed amendment to OAR 438-015-0065, ORS 656.382(2) provides the circumstances in which an assessed attorney fee is awardable when a carrier initiates a hearing request, request for Board review, or court appeal. Section 5 of HB 2764 amends ORS 656.382(2) to provide that an assessed attorney fee is awardable if the ALJ, Board, or court finds that “all or part of” the compensation awarded to a claimant should not be disallowed or reduced. ORS 656.382(2) is also amended to provide that an assessed attorney fee is awardable if “all or part of” the compensation awarded by a reconsideration order issued under ORS 656.268 should not be reduced or disallowed. HB 2764 § 5.

Consistent with this amendment, the Members propose amending OAR 438-015-0070(1) to provide that, if a carrier requests or cross-requests review of the ALJ’s order and the Board finds that “all or part of” the compensation awarded to the claimant should not be disallowed or reduced, the Board shall award a reasonable assessed attorney fee. The Members also propose to amend section (3) of this rule to provide that, if a carrier requests or cross-requests review of the ALJ’s order regarding a reconsideration order, and the Board finds that “all or part of” the compensation awarded by the reconsideration order should not be disallowed or reduced, the Board shall award a reasonable assessed attorney fee.

As addressed above regarding the proposed amendment to OAR 438-015-0065, section 5 of HB 2764 also adds a new section (3) to ORS 656.382. This new section provides that if the carrier raises attorney fees, penalties, or costs as a separate issue in a hearing request, request for Board review, or court appeal and the reviewing body finds that such awards should not be disallowed or reduced, the ALJ, Board or court “shall award reasonable additional attorney fees to the attorney for the claimant for efforts in defending the fee, penalty or costs.”

Consistent with this amendment, the Members also propose to add a new section (2) to OAR 438-015-0070 to provide:

“If an employer or insurer raises attorney fees, penalties or costs as a separate issue in a request for review, and the Board finds that the attorney fees, penalties or costs awarded to the claimant should not be disallowed or reduced, the Board shall award reasonable additional attorney fees to the attorney for the claimant for efforts in defending the fee, penalty or costs.”

In addition, section 5 of HB 2764 adds a new section (4) to ORS 656.382. This new section provides that if the carrier initiates an appeal to the Board or the Court of Appeals “and the matter is briefed,” but the carrier withdraws the appeal before a decision by the Board or court, “resulting in the claimant’s prevailing in the

matter, the claimant's attorney is entitled to a reasonable attorney fee for efforts in briefing the matter to the board or court." HB 2764 § 5. After deliberation and consideration of public comment, the Members propose to consider that a matter is considered "briefed" when the carrier has filed its initial brief.

Consistent with this amendment, the Members propose adding a new section (3) to OAR 438-015-0070 to provide:

"(a) If an insurer or self-insured employer requests or cross-requests review of the Administrative Law Judge's order and the matter is briefed, but the insurer or self-insured employer withdraws the appeal prior to a decision by the Board, resulting in the claimant's prevailing in the matter, the Board shall award a reasonable assessed fee for the claimant's attorney's efforts in briefing the matter to the Board.

"(b) A matter is considered 'briefed' when the insurer or self-insured employer has filed its initial brief."

These proposed changes result in renumbering the current sections (2), (3), and (4) as sections (4), (5), and (6), respectively.

The Members propose to amend the rule in the manner described above. These amendments are presented in Exhibit J, attached and incorporated by reference.

OAR 438-015-0080(1), (2), (4)

As addressed above regarding the proposed amendment to OAR 438-015-0010(2), Sections 9 and 10 of HB 2764 add a new statute that provides for a reasonable assessed attorney fee if: (1) The claimant's attorney is instrumental in obtaining temporary disability compensation under ORS 656.210, 656.212, 656.262, 656.268, or 656.325 before a decision by an ALJ; or (2) The claimant finally prevails in a dispute over temporary disability compensation under those same statutes after a request for hearing has been filed. In contrast, before this statutory amendment, attorney fees for obtaining temporary disability compensation were payable out of increased compensation.

The advisory committee noted that it could not find language implementing these changes to the Board's Own Motion jurisdiction under ORS 656.278. At their October 6, 2015 public meeting, the Members considered comments from attorneys from the claimants' bar and the defense bar regarding whether sections 9 and 10 of HB 2764 apply to Own Motion claims. The contrasting opinions are summarized below.

For Own Motion "worsened condition" claims and "post-aggravation rights" new/omitted medical condition claims, ORS 656.278(1)(a) and (b), respectively, provide that "the payment of temporary disability compensation in accordance with ORS 656.210, 656.212(2) and 656.262(4) may be provided from the time the attending physician authorizes temporary disability compensation for the hospitalization, surgery or other curative treatment until the worker's condition becomes medically stationary."⁹ Thus, statutory provisions

⁹ ORS 656.210 addresses temporary total disability benefits. ORS 656.212(2) provides: "The payment of temporary total disability pursuant to ORS 656.210 shall cease and the worker shall receive that proportion of the payments provided for temporary total disability which the loss of wages bears to the wage used to calculate temporary total disability pursuant to ORS 656.210." ORS 656.262(4) prescribes the procedures for obtaining temporary disability benefits and certain procedures for terminating such benefits.

relating to temporary disability benefits for Own Motion claims under ORS 656.278(1)(a) and (b) (*i.e.*, ORS 656.210, 656.212(2) and 656.262(4)) are included among those statutory provisions in section (10) of HB 2764, which provide for a reasonable assessed attorney fee if: (1) The claimant's attorney is instrumental in obtaining temporary disability compensation under ORS 656.210, 656.212, 656.262, 656.268, or 656.325 before a decision by an ALJ; or (2) The claimant finally prevails in a dispute over temporary disability compensation under those same statutes after a request for hearing has been filed. This cross-reference of statutes supports a finding that the provisions in section (10) of HB 2764 apply to claims under ORS 656.278(1)(a) and (b).

On the other hand, section (10) of HB 2764 does not reference ORS 656.278. In addition, it explicitly refers to obtaining temporary disability compensation "prior to a decision by an [ALJ]" or finally prevailing in a dispute over temporary disability compensation "after a request for a hearing has been filed." Thus, the statute contemplates the resolution of a dispute regarding temporary disability benefits that is within the Hearings Division's authority under ORS 656.283(1). Because Own Motion claims are within the Board's jurisdiction under ORS 656.278, neither a decision by an ALJ nor a request for hearing are applicable.

After considering this matter, the majority of the Members propose to amend OAR 438-015-0080 to apply sections 9 and 10 of HB 2764 to Own Motion claims.¹⁰ Specifically, they propose amending OAR 438-015-0080(1) and (2) by deleting language that provides for Board approval of an "out-of-compensation" attorney fee from increased temporary disability compensation and adding language that, if an attorney is instrumental in obtaining increased temporary disability compensation or in obtaining a voluntary reopening of an Own Motion claim that results in increased temporary disability compensation, respectively, the Board shall "award a reasonable assessed attorney fee."

The Members also propose amending section (4) to delete the reference to sections (1) and (2) regarding the award of "out-of-compensation" fees in excess of the prescribed amounts. As proposed, section (4) would provide: "The Board may allow a fee in excess of the amount prescribed in section (3) of this rule upon a finding that extraordinary services have been rendered."

The Members propose to amend the rule in the manner described above. These amendments are presented in Exhibit K attached and incorporated by reference.

OAR 438-015-0110

ORS 656.262(11)(a) provides for a penalty and a penalty-related attorney fee under certain circumstances. Section 2 of HB 2764 amends ORS 656.262(11)(a) to add "attorney fees or costs" to the phrase "If the insurer or self-insured employer unreasonably delays or unreasonably refuses to pay compensation * * *, or unreasonably delays acceptance or denial of a claim[.]" Thus, under amended ORS 656.262(11)(a), the unreasonable delay or refusal to pay attorney fees or costs can result in a penalty and a penalty-related attorney fee.

Section 2 of HB 2764 also amends ORS 656.262(11)(a) by replacing the phrase "proportionate to the benefit to the injured worker" with "reasonable attorney fees." Thus, the statute directs the ALJ, the Board, or the court to award "reasonable attorney fees." In addition, a sentence is added to the statute, which provides that

¹⁰ Member Curey did not support these proposed amendments for the reasons summarized above. Chair Somers and Members Johnson, Lanning, and Weddell supported the proposed amendments to OAR 438-015-0080. All Members expressed a willingness to consider further public comment regarding the question of whether the statutory amendments extend to Own Motion-related temporary disability benefits. Those comments may be presented by parties, practitioners, and the general public regarding this issue for inclusion in the record at the December 4, 2015 rulemaking hearing.

“In assessing fees, the director, an Administrative Law Judge, the board or the court shall consider the proportionate benefit to the worker.” Finally, ORS 656.262(11)(a) is amended to increase the “statutory maximum” for the assessed attorney fee to \$4,000, absent a showing of extraordinary circumstances. HB 2764 § 2.

Consistent with this amendment, the Members propose to amend OAR 438-015-0110 to add “attorney fees or costs” to the category of unreasonably delayed or unreasonable refused payments by the carrier that result in the award of an assessed attorney fee by an ALJ or the Board. In addition, the Members propose to change section (1) to read as follows: “Considers the proportionate benefit to the claimant.” Finally, the Members propose to change section (3) to adjust the maximum attorney fee from \$3,000 to \$4,000, absent a showing of extraordinary circumstances.

The Members propose to amend the rule in the manner described above. These amendments are presented in Exhibit L, attached and incorporated by reference. ¹¹

Rulemaking Hearing:

The accompanying “Notice of Proposed Rulemaking Hearing” provides information regarding the December 4, 2015 hearing scheduled regarding these proposed rules. Pending the hearing, written comments regarding these rules may be submitted for admission into the record by directing such comments by mail, Fax (503-373-1684), e-mail (rulecomments.wcb@oregon.gov), or by means of hand-delivery to any permanently staffed Board office. The comments may be addressed to the attention of Debra L. Young, Rulemaking Hearing Officer, Workers’ Compensation Board, 2601 25th St. SE, Ste. 150, Salem, OR 97302-1280.

Documents Relied Upon, and Where They Are Available:

ORS Chapter 656; HB 2764 (2015), and September 23, 2015 Advisory Committee Report (available Monday through Friday, 8:00 am to 5:00 pm, at the Workers’ Compensation Board, 2601 25th St. SE, Ste. 150, Salem, OR 97302-1280).

Fiscal and Economic Impact:

There will probably be impact to workers’ compensation carriers from the increased assessed attorney fees resulting from HB 2764. Nevertheless, any impact is a result of the statutory amendments under HB 2764. The Members invite public comment (written and oral) on these subjects.

¹¹ Finally, as noted above, section 8 of HB 2764: (1) Amends ORS 656.388(4) by adding the sentence “The Workers’ Compensation Board shall review all attorney fee schedules biennially for adjustment”; and (2) Adds new section (5) to ORS 656.388. This new section also requires that the Board “in establishing the schedule of attorney fees awarded under this chapter, consider the contingent nature of the practice of workers’ compensation law and the necessity of allowing the broadest access to attorneys by injured workers and shall give consideration to fees allowed by attorneys for insurers and self-insured employers.” HB 2764 § 8.

In its October 6, 2015 public meeting, the Members reviewed these provisions and considered the advisory committee’s report, as well as comments from attorneys representing claimants’ bar and carriers, a DCBS representative, and an official from the SAIF Corporation. The advisory committee did not recommend any rule changes regarding these statutory amendments. The Members discussed whether to amend OAR 438-015-0010(4), which provides the factors to be considered in “any case where an [ALJ] or the Board is required to determine a reasonable attorney fee.” Members Weddell and Lanning supported adding two of the factors in the amended statute (*i.e.*, the necessity of allowing the broadest access to attorneys by injured workers and the contingent nature of the practice of workers’ compensation law) to OAR 438-015-0010(4). Ultimately, the majority of the Members did not support such an amendment at the present time.

Statement of Cost of Compliance:

1. Impact on state agencies, units of local government and the public (ORS 183.335(2)(b)(E)):

As addressed above, implementation of HB 2764 will probably result in increased assessed attorney fees, which may impact state agencies and units of local government. It is not anticipated that there would be an impact on the public.

2. Cost of compliance effect on small business (ORS 183.336):

a. Estimate the number of small businesses and types of business and industries with small businesses subject to the rule:

Although an estimated number is presently indeterminate, all small businesses subject to the Workers' Compensation Law, as well as workers' compensation insurers, and self-insured employers would be subject to the proposed rules.

b. Projected reporting, recordkeeping and other administrative activities required for compliance, including costs of professional services:

At this time, there is no basis to say that the impact would be "significantly adverse" (under ORS 183.540) regarding these matters.

c. Equipment, supplies, labor and increased administration required for compliance:

At this time, there is no basis to say the impact would be significant regarding these matters.

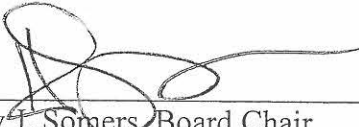
How were small businesses involved in the development of this rule?

Before proposing these amended rules, the Board appointed an advisory committee to recommend changes to the administrative rules resulting from HB 2764. Members of that committee (which held two public meetings) included workers' compensation practitioners and law firms (representing both workers and carriers), as well as workers' compensation insurers (who represent all Oregon employers, which are comprised of both small and large businesses). Likewise, pursuant to ORS 656.712(1), two members of the Board have backgrounds and understanding regarding the concerns of employers.

Administrative Rule Advisory Committee consulted? Yes.

If not, why?

Dated this 9th day of October, 2015.

by: 
Holly J. Somers, Board Chair

WORKERS' COMPENSATION BOARD


Sally Anne Curey, Board Member


Judy L. Johnson, Board Member


Steve Lanning, Board Member


Margaret F. Weddell, Board Member

EXHIBIT A

438-005-0035

Board Policy

(1) It is the policy of the Board to expedite claim adjudication and amicably dispose of controversies, while providing for access to adequate representation for injured workers. In accordance with ORS 656.012(3), these rules shall be interpreted in an impartial and balanced manner. The overriding principle is substantial justice.

(2) With respect to postponement or continuance of hearings under OAR 438-006-0081 and 438-006-0091, substantial justice requires consideration of the relative financial hardship of the parties.

(3) The unrepresented party shall not be held strictly accountable for failure to comply with these rules. Any individual who undertakes to represent a party in proceedings under these rules shall be required to comply with these rules.

(4) It is the policy of the Board to promote the full and complete disclosure of a party's specific position concerning the issues raised and relief requested in a specification of issues under OAR 438-006-0031 and in a response under 438-006-0036. However, it is not the intent of this policy to create binding admissions on behalf of any party, but to clarify the scope of the matters to be litigated.

(5) The Board recognizes the complexity of disputed claims and the time limitations concerning the scheduling and litigation process for such claims. Consistent with this recognition, as factual, medical, and legal aspects of disputed issues evolve, the amendment of issues, relief requested, theories, and defenses may be allowed as prescribed in OAR 438-006-0031(2) and 438-006-0036(2).

Stat. Auth.: ORS 656.726(5)

Stats. Implemented: ORS 656.012

Hist.: WCB 1-1984, f. 4-5-84, ef. 5-1-84; WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2-1995, f. 11-13-95, cert. ef. 1-1-96; WCB 2-2013, f. 12-10-13, cert. ef. 4-1-14

EXHIBIT B

438-015-0010

General Principles

- (1) Attorney fees for an attorney representing a claimant before the Board or its Hearings Division shall be authorized only if an executed attorney retainer agreement has been filed with the Administrative Law Judge or Board.
- (2) Attorney fees for an attorney representing a claimant shall be paid out of the claimant's compensation award except as provided by ORS 656.307, 656.382, *[and]* 656.386, **and House Bill 2764 (2015), sections 9 and 10.**
- (3) An approved fee awarded or allowed to an attorney representing a claimant shall be a lien upon the claimant's compensation.
- (4) In any case where an Administrative Law Judge or the Board is required to determine a reasonable attorney fee, the following factors shall be considered:
 - (a) The time devoted to the case;
 - (b) The complexity of the issue(s) involved;
 - (c) The value of the interest involved;
 - (d) The skill of the attorneys;
 - (e) The nature of the proceedings;
 - (f) The benefit secured for the represented party;
 - (g) The risk in a particular case that an attorney's efforts may go uncompensated; and
 - (h) The assertion of frivolous issues or defenses.
- (5) Percentage limitations on fees established by these rules apply to the amount of compensation paid the claimant exclusive of medical, hospital or other expenses of treatment.

Stat. Auth.: ORS 656.726(5)

Stats. Implemented: ORS 656.307, 656.308(2), 656.382, 656.386, 656.388, HB 2764 (2015) §§ 9, 10
Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2-1989, f. 3-3-89, ef. 4-1-89; WCB 7-1990(Temp), f. 6-14-90, cert. ef. 7-1-90; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90; WCB 3-2001, f. 11-14-01, cert. ef. 1-1-02

EXHIBIT C

438-015-0019

Cost Bill Procedures; Assessed Attorney Fees When the Claimant Prevails in a Cost Bill Dispute

- (1) If a claimant finally prevails against a denial under ORS 656.386(1), the Administrative Law Judge or the Board may order payment of the claimant's reasonable expenses and costs for records, expert opinions, and witness fees incurred in the litigation of the denied claim(s).
- (2) In ordering payment under section (1), an Administrative Law Judge or the Board may award reasonable expenses and costs that the claimant incurred as a result of the litigation of the denied claim(s) under ORS 656.386(1). If the parties stipulate to the specific amount of the reasonable expenses and costs, the Administrative Law Judge's or the Board's award of expenses and costs shall be included in the order finding that the claimant finally prevails against a denied claim(s) under 656.386(1). In the absence of the parties' stipulation, the Administrative Law Judge or the Board may award reasonable expenses and costs as described in section (1), which the claimant may claim by submitting a cost bill under section (3) to the insurer or the self-insured employer, not to exceed \$1,500, unless the claimant demonstrates extraordinary circumstances justifying payment of a greater amount.
- (3) If an order under section (2) does not specify the amount of a reasonable award for expenses and costs, the claimant shall submit, within 30 days after the order under section (2) becomes final, a cost bill to the insurer or self-insured employer. The cost bill, which may be submitted on a form prescribed by the Board, shall contain, but is not limited to, the following information:
 - (a) An itemization of the incurred expenses and costs for records, expert opinions, and witness fees that are due to the denied claim(s); and
 - (b) The claimant's signature confirming that the claimed expenses and costs were incurred in the litigation of the denied claim(s).
- (4) If the parties disagree whether a claimed fee, expense, or cost is reasonable, a party may request a hearing seeking resolution of that dispute. The resolution of disputes under this section shall be made by a final, appealable order.
- (5) Unless a hearing is requested by the insurer or self-insured employer under section (4), payments for witness fees, expenses, and costs shall be made by the insurer or self-insured employer within 30 days of its receipt of the cost bill submitted in accordance with section (3) or within 30 days after the order under section (2) becomes final, whichever is later, and are in addition to compensation payable to the claimant and in addition to attorney fees.

(6) In disputes involving a claim for costs, if the claimant prevails on the claim for any increase of costs, the Administrative Law Judge or the Board shall award a reasonable assessed attorney fee to the claimant's attorney.

Stat. Auth.: ORS 656.726(5)

Stats. Implemented: ORS 656.386(2), (4)

Hist.: WCB 2-2007, f. 12-11-07, cert. ef. 1-1-08; WCB 2-2012, f. 11-13-12, cert. ef. 1-1-13

EXHIBIT D

438-015-0025

Maximum Attorney Fees Out of Compensation

Except in situations where a claimant's attorney fee is an assessed fee, in settlement of disputed claims or claim disposition agreements and in cases under the third-party law, unless there is a finding in a particular case by an Administrative Law Judge or the Board that extraordinary circumstances justify a higher fee, the established fees for attorneys representing claimants are as set forth in OAR 438-015-0040, [438-015-0045,] 438-015-0055[(1),](2), (3), and 438-015-0080(3).

Stat. Auth.: ORS 656.726(5)

Stats. Implemented: ORS 656.236(4), 656.289(4), 656.307, 656.308(2), 656.382, 656.386, 656.388(3), 656.593(1)(a)

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2-1989, f. 3-3-89, ef. 4-1-89; WCB 7-1990(Temp), f. 6-14-90, cert. ef. 7-1-90; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90; WCB 2-2012, f. 11-13-12, cert. ef. 1-1-13

EXHIBIT E

438-015-0033

Attorney Fee Award Under ORS 656.262(14)(a)

(1) In accordance with ORS 656.262(14)(a), a reasonable hourly rate for an attorney's actual time spent during a personal or telephonic interview or deposition conducted under that statute is \$300.

(2) If the claimant is represented by an attorney, the insurer or self-insured employer shall pay a reasonable attorney fee award, which is based upon the hourly rate prescribed in section (1) multiplied by the actual time spent by the attorney during the personal or telephonic interview or deposition conducted under ORS 656.262(14)(a).

(3) To obtain the attorney fee described in section (2), the claimant's attorney shall submit a bill to the insurer or self-insured employer within 30 days of completion of the personal or telephonic interview or deposition. The bill, which may be submitted on a form prescribed by the Board, shall contain, but is not limited to, the following information:

(a) An itemization of the actual time spent by the claimant's attorney during the personal or telephonic interview or deposition;

(b) The claimant's attorney's signature confirming that the claimed time was actually spent during the personal or telephonic interview or deposition conducted under ORS 656.262(14)(a); and

(c) A copy of the executed retainer agreement, unless previously provided.

(4) If the parties disagree regarding the attorney's bill under section (3), a party may request a hearing seeking resolution of that dispute. The resolution of disputes under this section shall be made by a final, appealable order.

(5) Unless it files a request for hearing, the insurer or self-insured employer must pay the attorney fee described in section (3) as an award under this rule within 30 days of its receipt of the bill.

Stat. Auth.: ORS 656.726(5)

Stats. Implemented: ORS 656.262(14)(a)

Hist.:

EXHIBIT F

438-015-0045

Attorney Fees When a Claimant Requests a Hearing on Extent of Temporary Disability

If the Administrative Law Judge awards additional compensation for temporary disability **benefits**, the Administrative Law Judge shall [*approve a fee of 25 percent of the increased compensation, but not more than \$1,500, to be paid out of the increased compensation*] **award a reasonable assessed attorney fee.**

Stat. Auth.: ORS 656.726(5)

Stats. Implemented: ORS 656.307, 656.308(2), 656.382, 656.386, 656.388, HB 2764 (2015) §§ 9, 10

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2-1989, f. 3-3-89, ef. 4-1-89; WCB 1-1998, f. 11-20-98, cert. ef. 2-1-99

EXHIBIT G

438-015-0048

Attorney Fees When a Claimant Requests a Hearing on a Claim Reclassification

If a claimant requests a hearing regarding a claim reclassification order from the Workers' Compensation Division, and the Administrative Law Judge finally determines that the claim should be classified as disabling, the Administrative Law Judge may award a reasonable assessed fee.

Stat. Auth.: ORS 656.726(5)

Stats. Implemented: ORS 656.386(3)

Hist.:

EXHIBIT H

438-015-0055

Attorney Fees When a Claimant Requests Review by the Board

(1) If a claimant requests review of an Administrative Law Judge's order on the issue of compensation for temporary disability and the Board awards additional compensation, the Board shall [*approve a fee of 25 percent of the increased compensation, provided that the total of fees approved by the Administrative Law Judge and the Board shall not exceed \$5,000*] **award a reasonable assessed attorney fee.**

(2) If a claimant requests review of an Administrative Law Judge's order on the issue of compensation for permanent disability and the Board awards additional compensation, the Board shall approve a fee of 25 percent of the increased compensation, provided that the total of fees approved by the Administrative Law Judge and the Board shall not exceed \$6,000.

(3) If a claimant requests review of an Administrative Law Judge's order on the issue of compensation for permanent total disability and the Board awards additional compensation, the Board shall approve a fee of 25 percent of the increased compensation, provided that the total of fees approved by the Administrative Law Judge and the Board shall not exceed \$16,300.

(4) If a claimant requests review of an Administrative Law Judge's order that upheld a denial of compensability for a claim and the Board orders the claim accepted, the Board shall assess a reasonable attorney fee to be paid by the insurer or self-insured employer to the claimant's attorney.

(5) If a claimant requests review of an Administrative Law Judge's order that upheld a responsibility denial issued under ORS 656.308(2) and the claimant's attorney actively and meaningfully participates in finally prevailing against the responsibility denial, the Board shall award a reasonable assessed fee to be paid by the insurer or self-insured employer who issued the responsibility denial. Absent a showing of extraordinary circumstances, the assessed attorney fee for prevailing over the responsibility denial shall not exceed \$2,500. The maximum attorney fee awarded under this section is subject to an annual adjustment on July 1 as calculated by the Workers' Compensation Division (on behalf of the Director) by the same percentage increase as made to the average weekly wage defined in ORS 656.211, if any. Before July 1 of each year, the Board, by bulletin, will publish the maximum fee, after adjusting the fee by the same percentage increase, if any, to the average weekly wage. Dollar amounts will be rounded to the nearest whole number.

(6) If a claimant requests review of an Administrative Law Judge's order regarding a claim reclassification order from the Workers' Compensation Division, and the Board finally determines that the claim should be classified as disabling, the Board may award a reasonable assessed fee.

Stat. Auth.: ORS 656.726(5)

Stats. Implemented: ORS 656.307, 656.308(2), 656.382, 656.386, 656.388, HB 2764 (2015) §§ 9, 10
Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 1-1998, f. 11-20-98, cert. ef. 2-1-99; WCB 1-2009, f. 10-7-09, cert. ef. 1-1-10; WCB 2-2012, f. 11-13-12, cert. ef. 1-1-13

EXHIBIT I

438-015-0065

Attorney Fees When Insurer or Self-Insured Employer Requests a Hearing

(1) If an insurer or self-insured employer requests a hearing or otherwise seeks a reduction in compensation and the Administrative Law Judge finds that **all or part of** the compensation awarded to the claimant should not be disallowed or reduced, the Administrative Law Judge shall award a reasonable assessed fee to the claimant's attorney.

(2) If an employer or insurer raises attorney fees, penalties or costs as a separate issue in a request for hearing, and the Administrative Law Judge finds that the attorney fees, penalties or costs awarded to the claimant should not be disallowed or reduced, the Administrative Law Judge shall award reasonable additional attorney fees to the attorney for the claimant for efforts in defending the fee, penalty or costs.

[(2)] **(3)** If an insurer or self-insured employer requests a hearing regarding a reconsideration order rescinding a notice of closure, and the Administrative Law Judge finds that the reconsideration order should not be reversed, the Administrative Law Judge shall award a reasonable assessed fee to the claimant's attorney.

[(3)] **(4)** If an insurer or self-insured employer requests a hearing regarding a reconsideration order, and the ALJ finds that **all or part of** the compensation awarded by the reconsideration order issued under ORS 656.268 should not be reduced or disallowed, the Administrative Law Judge shall award a reasonable assessed fee to the claimant's attorney.

[(4)] **(5)** If an insurer or self-insured employer requests a hearing regarding a claim reclassification order from the Workers' Compensation Division, and the Administrative Law Judge finally determines that the claim should be classified as disabling, the Administrative Law Judge may award a reasonable assessed fee.

Stat. Auth.: ORS 656.726(5)

Stats. Implemented: ORS 656.382, 656.386, 656.388

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 1-2009, f. 10-7-09, cert. ef. 1-1-10

EXHIBIT J

438-015-0070

Attorney Fees When Insurer or Self-Insured Employer Requests or Cross-Requests Review by the Board

(1) If an insurer or self-insured employer requests or cross-requests review of the Administrative Law Judge's order and the Board finds that **all or part of** the compensation awarded to the claimant should not be disallowed or reduced, the Board shall award a reasonable assessed fee to the claimant's attorney.

(2) If an employer or insurer raises attorney fees, penalties or costs as a separate issue in a request for review, and the Board finds that the attorney fees, penalties or costs awarded to the claimant should not be disallowed or reduced, the Board shall award reasonable additional attorney fees to the attorney for the claimant for efforts in defending the fee, penalty or costs.

(3)(a) If an insurer or self-insured employer requests or cross-requests review of the Administrative Law Judge's order and the matter is briefed, but the insurer or self-insured employer withdraws the appeal prior to a decision by the Board, resulting in the claimant's prevailing in the matter, the Board shall award a reasonable assessed fee for the claimant's attorney's efforts in briefing the matter to the Board.

(b) A matter is considered "briefed" when the insurer or self-insured employer has filed its initial brief.

[(2)] (4) If an insurer or self-insured employer requests or cross-requests review of the Administrative Law Judge's order regarding a reconsideration order rescinding a notice of closure, and the Board finds that the reconsideration order should not be reversed, the Board shall award a reasonable assessed fee to the claimant's attorney.

[(3)] (5) If an insurer or self-insured employer requests or cross-requests review of the Administrative Judge's order regarding a reconsideration order, and the Board finds that **all or part of** the compensation awarded by the reconsideration order issued under ORS 656.268 should not be reduced or disallowed, the Board shall award a reasonable assessed fee to the claimant's attorney.

[(4)] (6) If an insurer or self-insured employer requests or cross-requests review of the Administrative Law Judge's order regarding a claim reclassification order from the Workers' Compensation Division, and the Board finally determines that the claim should be classified as disabling, the Board may award a reasonable assessed fee.

Stat. Auth.: ORS 656.726(5)

Stats. Implemented: ORS 656.382, 656.386, 656.388

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 1-2009, f. 10-7-09, cert. ef. 1-1-10

EXHIBIT K

438-015-0080

Attorney Fees in Own Motion Cases

(1) If an attorney is instrumental in obtaining increased temporary disability compensation, the Board shall [*approve a fee of 25 percent of the increased compensation, but not more than \$1,500, to be paid out of the increased compensation*] **award a reasonable assessed attorney fee.**

(2) If an attorney is instrumental in obtaining a voluntary reopening of an Own Motion claim that results in increased temporary disability compensation, the Board shall [*approve a fee of 25 percent of the increased compensation, but not more than \$1,500, to be paid out of the increased temporary disability compensation resulting from the voluntary reopening*] **award a reasonable assessed attorney fee.**

(3) If the Board awards additional compensation for permanent disability, the Board shall approve a reasonable attorney fee in the amounts prescribed in OAR 438-015-0040, payable out of the increased compensation.

(4) The Board may allow a fee in excess of the amount[s] prescribed in section[s] (1) through (3) of this rule upon a finding that extraordinary services have been rendered.

Stat. Auth.: ORS 656.726(5)

Stats. Implemented: ORS 656.267(3), 656.278(1), 656.386, 656.388, HB 2764 (2015) §§ 9, 10

Hist.: WCB 5-1987, f. 12-18-87, ef. 1-1-88; WCB 2-1989, f. 3-3-89, ef. 4-1-89; WCB 2-1990, f. 1-24-90, cert. ef. 2-28-90; WCB 7-1990(Temp), f. 6-14-90, cert. ef. 7-1-90; WCB 11-1990, f. 12-13-90, cert. ef. 12-31-90; WCB 1-1998, f. 11-20-98, cert. ef. 2-1-99; WCB 2-2001, f. 11-14-01, cert. ef. 1-1-02; WCB 2-2003, f. 7-10-03, cert. ef. 9-1-03; WCB 2-2007, f. 12-11-07, cert. ef. 1-1-08

EXHIBIT L

438-015-0110

Attorney Fees in Cases Involving ORS 656.262(11)(a)

If the Director, an Administrative Law Judge, the Board, or the Court find that the insurer or self-insured employer unreasonably delayed or unreasonably refused to pay compensation, **attorney fees or costs**, or unreasonably delayed acceptance or denial of a claim an assessed attorney fee shall be awarded in a reasonable amount that:

- (1) [*Is*] **Considers the** proportionate [*to the*] benefit to the claimant;
- (2) Takes into consideration the factors set forth in OAR 438-015-0010(4), giving primary consideration to the results achieved and to the time devoted to the case; and
- (3) Does not exceed [*\$3,000*] **\$4,000**, absent a showing of extraordinary circumstances. The maximum attorney fee awarded under this section is subject to an annual adjustment on July 1 as calculated by the Workers' Compensation Division (on behalf of the Director) by the same percentage increase as made to the average weekly wage defined in ORS 656.211, if any. Before July 1 of each year, the Board, by bulletin, will publish the maximum fee, after adjusting the fee by the same percentage increase, if any, to the average weekly wage. Dollar amounts will be rounded to the nearest whole number.

Stat. Auth.: ORS 656.726(5)

Stats. Implemented: ORS 656.262(11)(a)

Hist.: WCB 3-2003, f. 12-12-03 cert. ef. 1-1-04; WCB 1-2009, f. 10-7-09, cert. ef. 1-1-10; WCB 2-2012, f. 11-13-12, cert. ef. 1-1-13

To be posted.

Summary of 2015 House of Delegates Actions November 6, 2015

Passed

Increase 2016 Active Membership Fees (BOG Resolution No. 1)

In Memoriam (BOG Resolution No. 2)

Veterans Day Remembrance extending gratitude to those serving in the military service and offering condolences to the families of those who have died in service to their country (BOG Resolution No.3)

Support for Adequate Funding for Legal Services to Low-Income Oregonians (Delegate Resolution No. 1)

Failed

Excluded from Preliminary Agenda

Provide for Intoxilyzer Devices at OLCC Licensed Establishments (Delegate Resolution No. 2)

LEGAL OPPORTUNITIES COORDINATOR'S REPORT

Summary and Recommendations

Note: Any or all of these recommendations could probably be implemented within the next two years. Some are more controversial than others. Those are marked with an *. The author agrees with all of the recommendations, except those marked with a double**.

Alternatives to Lawyer Representation

*The Bar should continue to pursue the issue of LLLT's. Under this scheme, new lawyers could work closely with LLLT's, who would refer the new lawyer cases too complicated for the LLLT to handle. Undoubtedly, LLLT's will be working with clients who otherwise would not seek representation.

The Bar could develop and implement a self-represented forms projects, housed at the Bar. This could be a money-making proposition, depending on the structure developed.

Bar Admissions

*Adopt California rule, before applicants can sit for the bar exam:

An applicant has to have completed 15 hours of practical skills requirements in law school; and

An applicant is required to provide 50 hours of pro bono representation while in law school or within one year of bar admission.

(The California model also includes 10 hours of CLE focusing on basic skills and ethics, or participation in Bar-certified mentoring program, within one year of bar admission.)

**Adopt New York rule requiring 50 hours of pro bono work before license is granted

Can include some time in law school

*Develop a pilot project between the BBX and one or more law schools similar to the Rhode Island model in which a student enters a particular track at the beginning of law school that is heavily oriented skills oriented. Upon successful completion and graduation, graduates are admitted to the Bar without having to take the Rhode Island Bar exam

Bulletin

Designate one issue a year focusing on issues of interest/usefulness to new lawyers

Designate one issue a year focusing on rural practice

Buying/Selling Law Practices

Develop a web page focusing on this issue, and include suggestions for alternative methods/suggestions

The Bar should sponsor a “law practice fair” at least once a year at which new lawyers and lawyers interested in selling their practices could meet and discuss possibilities. While retiring lawyers in rural areas should be encouraged to participate in person, the Bar should make Skype/GoogleHangOuts or other technology available. The “meet and greet” portion could be preceded by a CLE (for which participants would receive CLE credit) discussing alternative methods to set up a buy/sell arrangement

Campaign for Equal Justice/Legal Aid Funding

The Bar should continue to support CEJ financially, and continue to encourage its members and member groups to do so as well.

Funding for legal services programs, including those providing representation for clients above the legal aid guidelines, should continue to be a legislative priority.

CLE's

Amend Rules to allow CLE credit for programs on marketing, law office management, creating and sustaining virtual law offices, and the like

Add more CLE programming to include above topics (perhaps asking the PLF to include more of these topics, and dropping their afternoon of specific case type presentations)

Create CLE's focusing on discrete task (“unbundled”) representation and alternative fee structures (flat fee, modified contingency), and sliding scale representation

Convene a meeting each year to include all Oregon entities offering or contemplating offerings in the next year to coordinate timing and to avoid repetition

Designate a point person at the Bar to monitor and coordinate between CLE program and their offering organizations

Develop presentations once or twice a year from lawyers who have created alternative delivery structures (i.e. Pacific Crest Legal, Middle Class Law)

Encourage Sections to develop and present basis CLE's in their speciality areas, allowing new lawyers to attend at a reduced cost

Package CLE's in one- to two- hour segments covering discrete topics and make individual segments available as webcasts

County Bar Associations

Encourage all local bars to have at least two meetings or social events a year directed at lawyers in their first two years of practice, the timing to coincide with bar swearing in ceremonies.

Employment Announcements

Create a "one stop" employment announcement website, available to all Oregon lawyers free of charge

Create a centralized website for contract lawyers to connect with lawyers and firms needing contract lawyers, allowing both entities to post their skills and needs

External Proposals

Given the number of individuals interested in and developing proposals for new lawyer employment (Judge Aiken, Judge Walters, Governor Kulongoski), the Bar should designate a Bar staff member to be a "point person" to coordinate these proposals, to the extent possible, given the public stature of those making proposals

Incubator/Accelerator Programs

*The Bar should work with interested parties and law schools to develop an incubator program, to include rural practice

Law Schools and Legal Education

Encourage each law school in Oregon to create a niche in legal market, whether it be mentoring, technology, etc., with technical assistance provided by the Bar to the extent possible.

*Work with law schools to create skills-based programs for law students who take the bar exam in February of their third year, leaving approximately two months of legal education remaining for them.

Materials

The Bar should and/or PLF should continue to develop and keep updated written materials for setting up law practices, especially focusing on access to justice.

The Bar should adapt the Colorado Bar's manual oriented toward new lawyers and access to justice

Review all materials (Tele-law, pamphlets) provided to the public to assess whether the materials adequately address those matters the public needs.

Mentoring

The Bar should develop and post on line a comparison chart showing all mentorships available in Oregon, their sponsors, and their respective goals and structures. To the extent possible, mentorship programs should be consolidated, perhaps to create on-going mentorships that move from one phase of law practice to another.

Continue the New Lawyer Mentoring Program, perhaps to add a voluntary pro bono project

New Lawyers Section

The Bar should continue to support the New Lawyers Section, but may want to "tweak" it in some ways. For example, the BOG should determine how much of Bar dues should be contributed toward purely social events as compared to networking events, and the Section may want to divert resources from CLE's (which are well covered elsewhere) toward other activities which would assist new lawyers in developing their practices and professional identities.

ORPC

*Adopt Model Rule 6.1, identifying an aspirational standard for lawyers doing pro bono work, perhaps with modification to include reduced fee cases

Pro Bono

Sign on to the ABA's proposal to provide pro bono information on line, and develop a reward system for lawyers who contribute a certain amount of time to answering questions

Public Relations

The Bar should create a public relations campaign addressing the availability of low cost legal services to appropriate populations

The Bar should develop a campaign to assist the public in identifying when they have a legal problem and what a lawyer (or LLLT) can assist them with

Broaden the public relations campaign the Bar has to highlight Lawyer Referral, pro bono, and modest means.

Rural Practice

The BOG should make supporting rural practice a priority, sending the message to the membership of the importance of rural lawyers, rural law practice, and the opportunities available to lawyers in rural areas

The Bar should develop a video to be streamed on its website featuring rural practice, possibly to include interviews with judges about the joys of rural practice.

*Modify LRAP rules to prioritize awards to lawyers in rural areas of the state

Encourage urban lawyers to provide sliding scale representation to rural clients through creative use of technology

Expand the availability of funds to provide grants to law students gaining experience in rural areas through the Diversity and Inclusion program, and create other opportunities through other Bar programs.

Determine if it would be feasible to provide small grants to lawyers moving to rural areas to set up law practices.

Sections

Sections should be encouraged to make more seasoned members available to newer lawyers to assist with individual cases

Encourage Sections with yearly CLE's to include informal networking (see for example this year's Labor and Employment Law Section CLE at Salishan which includes breakfast for new lawyers to meet with more experienced lawyers regarding issues of interest)

Encourage larger sections to develop monthly informal networking opportunities, possibly with at least one located out of the Portland metro area

Encourage sections to offer scholarships to annual conference (i.e. Labor and Employment and Litigation Sections)

Senior/Retired Lawyers and Judges

*The Bar should create at least an informal "senior" section, with the specific purpose of providing newer lawyers an in-road to the profession. The lawyers provided should be at or near retirement so that they have more free time available to assist newer lawyers.

Those lawyers with "active pro bono" membership status should be encouraged to co-counsel pro bono cases with newer lawyers

*Retired judges should be included in this group to provide litigation advice and coaching regarding individual cases being handled by new lawyers.

Technical Assistance

*The Bar should provide technical assistance or provide materials available to new lawyers wanting create non-profit legal organizations providing legal services to

WebSites

Create a web page specifically oriented toward law students

Create a web page for new lawyers, including as many links as possible, including to PLF materials especially their forms library, and ABA materials

Create a web page summarizing all programs currently in place in Oregon (and maybe elsewhere?) regarding new lawyers and access to justice Section)

IMPLICIT BIAS

CLE

January 22, 2016

In the PORTLAND U of O WHITE STAG BUILDING

SCHEDULE

8:30-9:00 AM	REGISTRATION AND BAGEL BREAKFAST Art Exhibition: The Black Portlanders , Intisar Abioto	11:30-12:00	BEST PRACTICES PANEL I: HIRING, MENTORING AND RETENTION OF ATTORNEYS OF COLOR Hon. Darleen Ortega, Oregon Court of Appeals Clarence Belnavis, Fisher & Philips, LLP Banafsheh Violet Nazari, Nazari Law Pro. Erik J. Girvan, University of Oregon Law	2:30-3:30	ZOOM IN: MICROAGGRESSIONS AND DISABILITY Documentary Film and Discussion Barbara J. Diamond, Diamond Law
9:00-9:15	WELCOMING REMARKS Prof. Henry H. Drummonds, Lewis & Clark Law School			3:30-4:30	Best Practices Panel II: HIRING, MENTORING AND RETENTION OF LGBTQ AND DISABLED ATTORNEYS Dana L. Sullivan, Buchanan, Angeli, Altschul & Sullivan, LLP Lin Hendler, Attorney at Law Talia Stoessel, Bennett, Hartman, Morris & Kaplan LLC. Prof. Erik J. Girvan, University of Oregon Law School
9:15-10:30	THE SCIENCE OF BIAS Prof. Erik J. Girvan, University of Oregon Law School				
10:30-11:30	REVEAL MOMENTS: MICROAGGRESSIONS AND RACE & ETHNICITY Professor Roberta Hunte, Portland State University Kenya Budd, Consultant Documentary Film and Discussion	12:30-1:30 PM	CATERED LUNCH Luncheon Speaker: Hon. Adrienne Nelson, Multnomah County Circuit Court	4:30-5:30	EVALUATIONS VIDEO TESTIMONIALS SOCIAL HOUR
		1:30-2:30	WHAT ARE YOU? MICROAGGRESSIONS & LGBTQ Documentary Film and Discussion Jess Guerriero, MSW Barbara J. Diamond, Diamond Law		

Cost: \$150 PER PERSON / 6 CLE CREDITS

Please contact us at least 14 days in advance to make arrangements to make this event accessible to you. We welcome attendance by everyone!



IMPLICIT BIAS



Registration Form

JANUARY 22, 2016 8:30 TO 5:30 PM

UO WHITE STAG BUILDING, 70 NW COUCH ST, PORTLAND, OR 97209

NAME	OSB NO.
STREET ADDRESS	CITY/STATE/ZIP
PHONE	EMAIL

CURRENT TABLE HOSTS:

CATHY HIGHET,
 FRANCIE NEVILL,
 ARUNA MASIH,
 TED HEID,
 JIM YOCOM,
 MARK JOHNSON ROBERTS,
 LIANI REEVES,
 STEVE GOLDBERG,
 HON. JOHN ACOSTA,
 HON. MARTHA WALTERS,
 HON. ROBERT DURHAM,
 MARIANN HYLAND,
 HON. SUZANNE CHANTI,
 HON. DAVID SCHUMAN,
 DERILY BECHTHOLD,
 EMILY TEMPLIN FOX,
 MOLLY JO MULLEN,
 SUSAN COURNOYER,
 EMILEE S. PREBLE,
 LOUISE HANSEN, TIFFANY RAY,
 HON. ANGEL LOPEZ
 JON PATTERSON
 ERIOUS JOHNSON
 DUANE BOSWORTH
 HON. DAVID SCHUMAN

COST: \$150 PER PERSON. *LOW INCOME AND STUDENT RATES AVAILABLE. FOR MORE INFORMATION CONTACT BARBARA@DIAMONDLAW.ORG*

MEAL OPTIONS (SELECT ONE)

- VEGAN
- VEGETARIAN
- CHICKEN
- BEEF
- PORK
- FISH



ACCOMMODATION REQUESTS?

- SIGN LANGUAGE INTERPRETER
- AUDIO DESCRIPTION FOR FILMS
- EVENT PROGRAM INFORMATION IN ALTERNATE FORMAT
- SPECIAL SEATING LOCATION
- ALLERGIES/SPECIAL FOOD NEEDS
- OTHER ACCOMMODATIONS (PLEASE SPECIFY)

RETURN THIS FORM WITH PAYMENT TO:

DIAMOND LAW, 1500 NE IRVING, SUITE 575, PORTLAND, OR 97232. MAKE CHECKS OUT TO DIAMOND LAW.
MATERIALS WILL BE MAILED TO YOU IN PDF FORMAT



HAVE QUESTIONS? LENA@DIAMONDLAW.ORG 503 229-0400 (EXTENSION #2)

CANCELLATION: TUITION FOR CANCELLATIONS PRIOR TO JANUARY 1, 2016 WILL BE REFUNDED MINUS A \$25 CANCELLATION FEE.



Oregon State Bar
Meeting of the Board of Governors
September 11, 2015
Open Session Minutes

The meeting was called to order by President Richard Spier at 12:30 p.m. on September 11, 2015. The meeting adjourned at 3:10 p.m. Members present from the Board of Governors were James Chaney, Guy Greco, R. Ray Heysell, Theresa Kohlhoff, John Mansfield, Audrey Matsumonji, Vanessa Nordyke, Per Ramfjord, Kathleen Rastetter, Joshua Ross, Kerry Sharp, Michael Levelle, Charles Wilhoite, Timothy Williams and Elisabeth Zinser. Not present were Ramon A. Pagan and Travis Prestwich. Staff present were Sylvia Stevens, Helen Hirschbiel, Rod Wegener, Dawn Evans, Kay Pulju, Susan Grabe, Mariann Hyland, Dani Edwards, Kateri Walsh, Charles Schulz, and Camille Greene. Also present was Carol Bernick, PLF CEO; Robert Newell, PLF BOD; Karen Clevering, ONLD Chair, and Jovita Wang, ABA YLD Delegate.

1. Report of Officers & Executive Staff

A. Report of the President

As written. Mr. Spier informed the board of the nominating process for the 2016 President-elect. The nominating committee will present their recommendation to the board at the October 9, 2015 special open session.

Mr. Spier asked the board to approve the new executive director's contract.

Motion: Mr. Mansfield moved, Mr. Heysell seconded, and the board voted unanimously to approve the contract as presented.

B. Report of the President-elect

Mr. Heysell reported on the August meeting of the National Conference of Bar Presidents, including a thought-provoking roundtable discussion entitled "Disruptive Innovators."

C. Report of the Executive Director

As written. Ms. Stevens also updated the board on the staff visits to several section executive committee meetings to discuss changes to section CLEs. She told the board to expect the report of the Knowledge Base Task Force in November. Ms. Stevens also announced that she will retire as a PERS employee on November 30, 2015 and work as a non-PERS employee for the month of December.

D. Director of Regulatory Services

Ms. Evans reported on staff changes in Regulatory Services due to Mary Cooper's retirement and Linn Davis' promotion.

E. Director of Diversity & Inclusion

Ms. Hyland reported that Christopher Ling was hired to fill the Diversity & Inclusion Coordinator position. OLIO was successfully held in Hood River last month and their BOWLIO event will take place in November. The online version of the Diversity Storywall went live this week.

F. MBA Liaison Reports

Ms. Kohlhoff reported that she updated the MBA Board on September 2, 2015 and answered questions about the bar's financial picture.

G. Oregon New Lawyers Division Report

In addition to the written report, Ms. Clevering reported on the ONLD's cruise which was well-attended by law-student liaisons and judges. ONLD won 2nd place for the ABA YLD Member Services Award for their loan repayment resources on the ABA webpage. The ONLD anti-bias rule resolution was tabled at the ABA Annual meeting, pending the ABA's standing committee on ethics makes a further proposal. ONLD would like to work with the BOG on ABA YLD suggestions for rural lawyers.

2. Professional Liability Fund

Ms. Bernick reported on the PLF bi-annual defense panel conference, including a compliment from one attendee about the excellent job the PLF is doing in getting younger lawyers trained up to try cases as first chair. The PLF leads in this area.

Ms. Bernick presented the proposed 2016 PLF Budget and Annual Assessment. The budget includes a 3% salary pool and continues the \$200,000 contribution to BarBooks; there is no change in the assessment for 2016. **[Exhibit A]**

Motion: Mr. Mansfield moved, Ms. Matsumonji seconded, and the board voted unanimously to approve the budget and assessment as presented.

Ms. Bernick reported on and asked the board to approve minor changes to the 2016 PLF Primary, Excess and ProBono Coverage Plans. **[Exhibit B]**

Motion: Ms. Zinser moved, Mr. Wilhoite seconded, and the board voted unanimously to approve the coverage plans as presented.

Ms. Bernick presented the June 30, 2015 PLF Financial Statements. The BOG complimented her on the clarity of the statements.

3. OSB Committees, Sections and Councils

A. MCLE Committee

Ms. Hirschbiel asked the board to consider the request of the committee to amend the MCLE Rules and Regulations to clarify the accreditation criteria for child and elder abuse reporting programs. **[Exhibit C]**

Motion: Mr. Greco moved, Mr. Heysell seconded, and the board voted unanimously to approve the committee recommendation.

Ms. Hirschbiel asked the board to consider the request of the committee to eliminate the "accredited sponsor" category, reciprocal accreditation, and the requirement that applications

be reviewed within 30 days. These changes are designed to add clarity, and simplify the accreditation process, especially in light of the new association management software.

[Exhibit D]

Motion: Mr. Greco moved, Ms. Nordyke seconded, and the board voted unanimously to approve the committee recommendation.

B. Ethics Committee

Ms. Hirschbiel asked the board to consider the request of the committee to adopt the proposed amendments to several formal ethics opinions. **[Exhibit E]**

Motion: Mr. Levelle moved, Ms. Matsumonji seconded, and the board voted unanimously to approve the revised opinions.

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

A. Appellate Screening Special Committee

Mr. Ross reviewed the process for the two current vacancies. The application process closes today. They expect approximately 40 applications and are formulating the interview questions. Former Chief Judge Mary Dietz is working with the committee on the process this year.

B. Awards Special Committee

Mr. Spier presented the committee's recommendations for awards recipients. **[Exhibit F]**

Motion: Mr. Greco moved, Ms. Zinser seconded, and the board voted unanimously to approve the committee's recommended awards recipients.

C. Board Development Committee

Ms. Matsumonji presented the committee's recommendations for appointments to the PLF Board of Directors: Public Member Tom Newhouse and Attorney Appointment Molly Jo Mullen.

Motion: The board voted unanimously to approve the committee motion on recommended PLF appointments.

Ms. Matsumonji informed the board on the committee's discussion about nominating members for the Board of Bar Examiners. The committee has concerns about the lack of practice area diversity and also about reappointment for multiple terms. Rather than nominate candidates this year, the Committee recommends informing the BBX of its concerns going forward.

[Exhibit G]

Motion: Mr. Ross moved, Mr. Sharp seconded, and the board voted unanimously to approve the letter from Mr. Spier to the BBX regarding nomination of board members.

D. Budget and Finance Committee

Ms. Kohlhoff gave a general committee update and opened discussion about 2016 member fees. The committee will make a specific recommendation regarding 2016 member fees to the board at the October 9, 2015 special open session.

E. Governance and Strategic Planning Committee

Mr. Heysell asked the board to consider the proposed revisions to the bar's Fee Arbitration Rules. The revisions re-name the Fee Arbitration Rules as the Fee Dispute Resolution Rules, and create a permanent Fee Mediation Program at the bar. **[Exhibit H]**

Motion: The board voted unanimously to adopt the Fee Dispute Resolution Rules, with the correction of the \$7,500 to \$10,000 in Rule 4.5.

Mr. Heysell asked the board to consider the committee recommendation that all board members be issued board email addresses, effective January 1, 2016, to conduct board business.

Motion: The board voted unanimously in favor of issuing OSB email addresses to BOG members for use in connection with BOG business.

Mr. Heysell asked the board to consider the committee recommendation that the Executive Director's title be changed to Chief Executive Officer/Executive Director effective January 1, 2016, with the understanding that "Executive Director" will be dropped as soon as the Bar Act references can be changed.

Motion: The board voted unanimously to change the Executive Director's title to Chief Executive Officer/Executive Director.

Mr. Heysell asked the board to consider the committee recommendation to approve a new pro bono program to provide online pro bono services which should be particularly helpful to clients in remote areas and will provide more opportunities for lawyers. **[Exhibit I]**

Motion: The board voted unanimously to approve the committee motion.

F. Public Affairs Committee

Mr. Mansfield and Ms. Grabe updated the board on the interim legislative session activities.

5. Other Action Items

Ms. Edwards presented various appointments to the board for approval. **[Exhibit J]**

Motion: Mr. Wilhoite moved, Mr. Ramfjord seconded, and the board voted to approve the appointments. Mr. Williams abstained.

Mr. Spier presented Ms. Wright's Legal Opportunities Coordinator Summary Report which included recommendations from the recent "Stakeholders Meeting." The Governance & Strategic Planning Committee will address these recommendations at future meetings.

Ms. Zinser gave a report on the first two chapters of "Relevant Lawyer." **[Exhibit K]**
Mr. Mansfield volunteered to report on the next two chapters at the next board meeting.

Mr. Greco suggested and Mr. Heysell confirmed that there is no current need to conduct a survey to assess member's view of OSB programs. Mr. Wilhoite suggested the bar survey the membership's thinking on a regular, periodic basis as part of its responsibility for program review.

Mr. Spier asked for a BOG member to volunteer as liaison to the Board of Bar Examiners, pursuant to the bylaws adopted in July 2015. No one volunteered so Mr. Spier call on board members in the near future.

Ms. Stevens asked the board to revisit the decision made without a quorum on July 24 regarding repurposing the Members' Room to accommodate nursing mothers and members with health needs that require a private, hygienic space. She shared an email from the Legal Heritage Interest Group urging retention of as much of the current furnishings as possible.

Motion: Mr. Greco moved, Ms. Matsumonji seconded, that the board delegate the entire issue to the Executive Director. Ms. Kohlhoff opposed the motion; all others voted yes.

6. Consent Agenda

Motion: Mr. Chaney moved, Mr. Mansfield seconded, and the board voted unanimously to approve the consent agenda of past meeting minutes.

7. Closed Session (Executive Session pursuant to ORS 192.660(1)(f) and (h)) General Counsel/UPL Report – see CLOSED Minutes

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

**Oregon State Bar
Board of Governors Meeting
September 11, 2015
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

Ms. Hirschbiel informed the board of non-action items.

In the matter of *Lauren Paulson v. Oregon State Bar et al* (Ninth Circuit Court of Appeals), upon request from Mr. Spier, Ms. Hirschbiel will distribute the decision from the Ninth Circuit which recently upheld the trial court's dismissal of Mr. Paulson's complaint. She will also distribute to the board Mr. Paulson's petition he filed for reconsideration.

B. Other Items

Ms. Hirschbiel informed the board of other items.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: September 11, 2015
Memo Date: August 24, 2015
From: Carol J. Bernick, PLF CEO
Re: 2016 PLF Assessment and Budget

Action Recommended

Approve the 2016 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 \$3,500 (unchanged from 2015). The attached materials contain the proposed budget and recommendations concerning the assessment.

The highlights of the budget include a 3% salary pool and a \$200,000 contribution to the OSB for BarBooks. The overall increase to the 2016 budget is 2.59 percent higher than the 2015 budget. The main reasons for the increases are the 3% salary increase and related benefits costs, increased costs associated with overhauling and promoting the Excess Plan and employee training and travel.

Attachments

August 12, 2015

To: PLF Finance Committee (Dennis Black, Chair; Tim Martinez, Ira Zarov) and PLF Board of Directors

From: Carol J. Bernick, Chief Executive Officer
Betty Lou Morrow, Chief Financial Officer

Re: 2016 PLF Budget and 2016 PLF Primary Assessment

I. Recommended Action

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

1. Approve the 2016 PLF budget as attached.
2. Recommend to the Board of Governors that the 2016 PLF Primary Program assessment remain at \$3,500, which is the same as it has been for the past five years.

II. Executive Summary

1. Both the Executive Director of the Bar and we recommend a 3.0% increase to the salary pool. We are also recommending a 0.7% increase for individual salary reclassifications. Medical benefits are projected to increase in 2016 by an approximate 5%.
2. Loss Prevention had a retirement in 2015 in addition to .5FTE new hire. In 2015 the Claims department replaced a claims secretary who retired in 2014. Accounting and Administration remained at the same FTE as 2015.
3. The actuarial rate study estimates a cost of \$2,730 per lawyer for new 2016 claims, remaining the same from 2015. As in the past, this budget includes a factor of \$150 per attorney for adverse development of pending claims; and a margin of \$573 per attorney to cover unfunded operations.

III. 2016 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" attorneys. We project 6,950 full-pay attorneys for 2016. Over the five years ending 2014, the average annual growth of full-pay attorneys was .92 percent. For 2015, we are projecting a 2.1% decrease in the number of "full pay" attorneys from 2015 budget. The addition of a third year of new attorney discounts contributes to this decrease. Nonetheless, we have chosen to use a flat growth rate (the same 6950 full-pay attorneys) for our 2016 budget.

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 2012, primarily because of competition from commercial carriers. Covered attorneys at Excess dropped 5.6% from 2012 to 2013; 4.5% 2013 to 2014; and a 4.2% year to date decline from 2014 to 2015. However the 2016 plan year will mark the introduction of factor based underwriting. It is difficult to accurately predict how this will impact the total premium for 2016. Therefore we are forecasting the number of covered attorneys and premiums will remain flat from 2015. We recognize that some firms will drop coverage as their premiums increase to match their risk profile. However through increased marketing (both general and targeted) we are forecasting adding new firms equal to the rate at which we may lose them.

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. Each department is indicated net of Excess staff allocations (explained below):

	<u>2015 Projections</u>	<u>2016 Budget</u>
Administration	6.92 FTE	6.92 FTE
Claims	19.81 FTE	19.81 FTE
Loss Prevention (includes OAAP)	14.05 FTE	14.05 FTE
Accounting	7.05 FTE	7.05 FTE
Excess Allocations	<u>3.60 FTE</u>	<u>3.60 FTE</u>
Total	51.43 FTE	51.43 FTE

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. Salary and benefit allocations are based on an annual review of the time PLF staff spends on Excess Program activities. These allocations are reviewed and adjusted each year. The Excess Program also pays for some direct costs, including printing and reinsurance travel.

Primary Program Revenue

Projected assessment revenue for 2016 is based upon the \$3,500 basic assessment paid by an estimated 6950 attorneys.

Investment returns have fallen short of forecasts for the first six months of 2015. The average annual rate of return for 2015 is projected to be approximately 3.42% versus the budgeted 4.6%. Investment results have been volatile in 2015 thus far. For the 2016 budget we have forecast an individual rate for each fund using a 3-10 period trailing return, depending on the information available. This has provided an overall budgeted return for 2016 of 4.96%. Again, RVK and the Investment Committee have been included in discussion about an appropriate rate of return for 2016. RVK feels that the 4.96% rate is a conservative, but appropriate forecast rate.

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, along with investment results are the major factors in determining the Primary Program's positive/negative in-year net position.

For any given year, financial statement claims expense includes two factors – (1) the cost of new claims and (2) any additional upward (or downward) adjustments to the estimate of claims liabilities reflecting positive or adverse claims development for those 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 adverse claims development

Our projections of claim costs for 2015 include the actual claim count of 422 claims at June 30, 2015 valued at \$21,000 per new claim, in addition to 430 claims for the final six months of 2015¹ (6950 covered parties with a claims frequency of 12.25%) valued at \$22,000 per new claim. The

¹ Although we have budgeted 885 new claims for 2015, as of August 10, 2015 we are tracking at 815.

\$21,000 cost per claim level increased to \$22,000 at the recommendation of the PLF actuaries. The \$150 per attorney factor for adverse claims developments will remain as budgeted for 2015. This is a conservative estimate as the June 30, 2015 correction was nearly \$1 million to accommodate worse than expected indemnity claims development. We believe there will be an offsetting correction in the second half of 2015. However, we are leaving the estimates as indicated because of the unpredictable nature of claims development.

Primary Program new claims expense for 2016 was based on figures calculated from the actuarial rate study. The study assumed a frequency rate of 11.83% for 2015 claims. Because this results in an annual claim count much lower than what we have seen the last several years, we are assuming the frequency (claim) rate will increase somewhat as 2015 progresses so we have used a frequency level of 12.00 for 2016 claims. Therefore, 6,950 attorneys with a 12% claims frequency equates to 834 claims. When these claims are multiplied by the average cost of claims, the total claims liability for 2016 is \$18,348,000.

We will continue to use a factor of \$150 per attorney to cover adverse development of pending claims. If the claims do not develop adversely, this margin could offset negative economic events, or help the PLF reach the net position goal. The pending claims budget for adverse development is equal to \$1,042,000 (\$150 times the estimated 6,950 full pay attorneys).

Salary Pool for 2016

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.

In consultation with Sylvia Stevens, a three percent cost of living increase is recommended for 2016. The salary pool also includes a 0.7% management tool for individual merit increases and reclassifications. The bulk of the salary reclassification amount reflects either the reclassification of relatively recently hired 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 period.

As a point of reference, one percent in the salary pool represents approximately \$44,000 in PLF salary expense and \$16,000 in PLF benefit costs. The total cost of the 3.7% salary pool is slightly more than one half of one percent of total expenses (0.56%).

Benefit Expense

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

The employer contribution rates for PERS have both increased and decreased for the biennium beginning July 2015. The rates for Tier 1 and 2 employees will increase from 17.66% to 20.51%. For OPSRP employees the rates will decrease from 14.84% down to 14.01%. In 2016 the PLF will have 11 employees in Tier 1 or 2; and 43 employees in the OPSRP plan.

Unlike most 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.

Capital Budget Items

The major capital purchases in 2016 will be new servers for our IT infrastructure and new computers for most staff.

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 was 2014. Including 2015, all IT infrastructure purchases have been made as scheduled. Most staff will receive a new desktop computer, again in keeping with a five year plan created by the IT department in 2014.

Other Primary Operating Expenses with Changes from 2015 +/- 10%

Professional Services have decreased over projected 2015 by about 12%. The majority of this decrease is due to attorney and professional fees (i.e. for website development) from 2015 that will not be incurred in 2016.

Auto, Travel, and Training are higher due to increased budgets for the promotion of the PLF generally and the Excess program specifically. Additionally the general market cost of travel is expected to increase.

Loss Prevention Programs have increases due to recent hires with accompanying training and travel budgets; the production of two additional handbooks; lease increases; and general expense increases.

Defense Panel Program happens only bi-annually, hence no budget for 2016.

General Information

OSB Bar Books includes a \$200,000 contribution to the OSB Bar Books. The PLF Board of Directors believes there is loss prevention value in free access for lawyers in Oregon to Bar Books via the internet. The expectation is this access has the potential to reduce future claims.

Contingency for 2016 has been set at 1.5%. 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. However, the contingency fund has not been accessed in either 2013 or 2014, hence we are decreasing the contingency to the stated level of 1.5%.

Total Operating Expenses and the Assessment Contribution to Operating Expenses

Page one of the budget shows 2015 projected Primary Program operating costs to be 1.2% lower than the 2015 budget amount.

The 2016 Primary Program operating budget is 3.9% percent higher than the 2015 projections and 2.6% percent higher than the 2015 budget. The main reasons for the increases are the 3% salary increase and related benefits costs; increased costs associated with PLF primary and excess program promotion; and increased staff training.

Excess Program Budget

Participation in the Excess Program has declined since 2011 because of competition from commercial carriers. Staff has worked with AON and the reinsurers to create a more competitive premium structure as well as mining additional claims data for more meaningful analysis by both the PLF and the reinsurers. The results of this updated premium structure will become more apparent through the 2016 plan year underwriting process. Because the impact is still unknown, we are budgeting for a flat increase to premiums for 2016.

The major revenue item for the Excess Program is ceding commissions. These commissions represent the portion of the excess premium that the PLF retains. The commissions are based upon a percentage of the premium charged, with commissions varying depending on the coverage limits. Most of the excess premium is turned over to reinsurers who cover the costs of excess claims. We currently project ceding commission of \$762,000 for 2016. This represents an expectation of the commission remaining flat from expected 2015 levels.

After three or four years from the start of a given plan year, the two reinsurance treaties covering the first \$5 million of coverage 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 2015 projections or 2016 budget.

Excess investment earnings are calculated using a formula that allocates investment revenue based on contribution to cash flow from the Excess program.

The major expenses for the Excess Program are salary, benefits, and operations allocations from the Primary Program.

IV. Actuarial Rate Study for 2016

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 2016 average claim cost per attorney. It relies heavily on the analysis contained in the actuaries' claim liability study as of June 30, 2015. The rate study calculates only the cost of new 2016 claims. It does not consider adjustments to pending claims, investment results, or administrative operating costs.

The actuaries estimate the 2016 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 a number of points on a graph. It is very difficult to choose an appropriate trend because the small amount and volatility of data, and 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 claim starting point such as 1987 or a very high claim 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 full pay attorneys. For the indicated amount the actuaries have used a 2016 claims frequency rate of 13 percent and \$21,000 as the average cost per claim (severity), identical in both aspects to 2015. The actuaries prefer the result found with this second method. Their indicated average claim cost is \$2,730 per attorney. This amount would only cover the estimated funds needed for 2016 new claims.

It is necessary to calculate a provision for operating expenses not covered by non-assessment revenue. As can be seen in the budget, the estimate of non-assessment revenue does not cover the budget for operating expenses. The 2016 shortfall is about \$573 per lawyer, down from \$586 in 2015. The actuaries discuss the possibility of having a margin (additional amount) in the calculated assessment. On pages 8 of their report, the actuaries list pros and cons for having a margin in the assessment.

V. Staff Assessment Recommendation

The operating margin of \$573 per lawyer, in addition to the claim cost per attorney of \$2,730, would achieve an assessment of \$3,303. We feel that it is appropriate to include an additional factor of \$150 per attorney for adverse development of pending claims. This allows for a budget of about

\$1.04 million for adverse development of pending claims. An assessment of \$3,500 would allow a projected budget profit of about \$952,044.

Given the factors discussed above, the PLF staff feels that the current Primary Program assessment should be maintained for the remainder of 2015. Additionally, we recommend setting the 2016 Primary Program assessment at \$3,500.

DRAFT

The Finance Committee will discuss the actuarial report during its telephone conference meeting at 11:00 a.m. on August 12, 2015 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 20, 2015.

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**OREGON STATE BAR
PROFESSIONAL LIABILITY FUND
2016 PRIMARY PROGRAM BUDGET**
Presented to PLF Board of Directors on August 20, 2015

	<u>2013 ACTUAL</u>	<u>2014 ACTUAL</u>	<u>2015 BUDGET</u>	<u>2015 PROJECTIONS</u>	<u>2016 BUDGET</u>
<u>Revenue</u>					
Assessments	\$25,042,533	\$24,668,300	\$24,867,500	\$24,325,465	\$24,325,000
Installment Service Charge	391,097	378,008	335,000	391,000	400,000
Investments and Other	4,364,988	2,418,326	2,472,882	2,171,405	3,347,495
Total Revenue	<u>\$29,798,618</u>	<u>\$27,464,633</u>	<u>\$27,675,382</u>	<u>\$26,887,870</u>	<u>\$28,072,495</u>
<u>Expenses</u>					
Provision for Claims					
New Claims	\$17,427,049	\$19,595,940	\$18,576,023	\$18,322,000	\$18,348,000
Pending Claims	\$664,998	(\$987,534)	\$1,065,750	\$1,042,500	\$1,042,500
Total Provision for Claims	<u>\$18,092,047</u>	<u>\$18,608,406</u>	<u>\$19,641,773</u>	<u>\$19,364,500</u>	<u>\$19,390,500</u>
Expense from Operations					
Administration	\$2,348,769	\$2,348,769	\$2,565,414	\$2,633,503	\$2,641,457
Accounting	805,336	805,336	801,989	758,479	856,619
Loss Prevention	2,016,547	2,016,547	2,234,762	2,123,477	2,244,500
Claims	2,488,569	2,488,569	2,684,938	2,669,255	2,759,324
Total Operating Expense	<u>\$7,659,221</u>	<u>\$7,659,221</u>	<u>\$8,287,103</u>	<u>\$8,184,715</u>	<u>\$8,501,900</u>
Contingency	0	0	248,613	0	127,529
Depreciation	166,575	164,678	169,800	156,859	189,540
Allocated to Excess Program	<u>(1,135,160)</u>	<u>(1,145,155)</u>	<u>(1,008,049)</u>	<u>(1,026,172)</u>	<u>(1,089,018)</u>
Total Expenses	<u>\$24,782,683</u>	<u>\$25,287,150</u>	<u>\$27,339,240</u>	<u>\$26,679,903</u>	<u>\$27,120,451</u>
Net Income (Loss)	<u>\$5,015,935</u>	<u>\$2,177,484</u>	<u>\$336,142</u>	<u>\$207,967</u>	<u>\$952,044</u>
Number of Full Pay Attorneys	7,093	7,104	7,105	6,950	6,950

CHANGE IN OPERATING EXPENSES:

Increase from 2015 Budget 2.59%

Increase from 2015 Projections 3.88%

**OREGON STATE BAR
PROFESSIONAL LIABILITY FUND
2016 PRIMARY PROGRAM BUDGET
CONDENSED STATEMENT OF OPERATING EXPENSE
Presented to PLF Board of Directors on August 20, 2015**

<u>Expenses</u>	<u>2013 ACTUAL</u>	<u>2014 BUDGET</u>	<u>2015 BUDGET</u>	<u>2015 PROJECTIONS</u>	<u>2016 BUDGET</u>
Salaries	\$4,145,086	\$4,189,074	\$4,387,818	\$4,392,352	\$4,589,868
Benefits and Payroll Taxes	1,457,187	1,486,255	1,653,606	1,540,419	1,675,126
Professional Services	331,128	325,775	381,792	431,900	380,792
Auto, Travel & Training	92,557	109,931	151,450	134,200	168,900
Office Rent	521,138	512,379	520,065	512,379	527,865
Office Expense	133,569	155,121	157,850	161,250	171,050
Telephone (Administration)	48,675	49,326	49,560	51,000	51,500
L P Programs	373,908	483,532	488,894	446,665	503,906
OSB Bar Books	200,000	200,000	200,000	200,000	200,000
Defense Panel Program	9,970	1,915	64,422	67,500	0
Insurance	71,471	38,344	41,894	42,000	41,894
Library	32,659	31,741	39,000	29,500	31,500
Memberships & Subscriptions	21,458	22,469	28,000	35,000	36,500
Interest & Bank Charges	5,213	56,088	122,752	114,500	123,000
Total Operating Expenses	<u>\$7,444,018</u>	<u>\$7,661,949</u>	<u>\$8,287,103</u>	<u>\$8,158,665</u>	<u>\$8,501,900</u>
Allocated to Excess Program	<u>(\$1,105,104)</u>	<u>(\$1,120,789)</u>	<u>(\$987,350)</u>	<u>(\$1,001,806)</u>	<u>(\$1,064,814)</u>
Full Time Employees	43.88	49.53	51.28	51.43	51.43
Number of Full Pay Attorneys	7,093	7,104	7,105	6,950	6,950
Non-personnel Expenses	\$1,841,746	\$1,986,620	\$2,245,679	\$2,225,894	\$2,236,906
Allocated to Excess Program	<u>(\$278,874)</u>	<u>(\$270,406)</u>	<u>(\$270,823)</u>	<u>(\$270,406)</u>	<u>(\$282,589)</u>
Total Non-personnel Expenses	<u>1,562,872</u>	<u>1,716,214</u>	<u>1,974,856</u>	<u>1,955,488</u>	<u>1,954,317</u>

CHANGE IN OPERATING EXPENSES:

Increase from 2015 Budget 2.59%

Increase from 2015 Projections 4.21%

**OREGON STATE BAR
PROFESSIONAL LIABILITY FUND
2016 PRIMARY PROGRAM BUDGET
ADMINISTRATION**

Presented to PLF Board of Directors on August 20, 2015

<u>Expenses</u>	<u>2013 ACTUAL</u>	<u>2014 ACTUAL</u>	<u>2015 BUDGET</u>	<u>2015 PROJECTIONS</u>	<u>2016 BUDGET</u>
Salaries	\$641,274	\$684,773	\$728,240	\$729,415	\$749,009
Benefits and Payroll Taxes	238,566	233,366	261,411	253,959	262,448
Staff Travel	21,363	37,354	23,050	41,100	46,000
Board of Directors Travel	35,514	35,244	46,150	44,500	48,650
Training	8,947	13,651	12,000	12,000	12,000
Investment Services	28,018	28,095	40,000	38,500	40,000
Legal Services	13,738	11,461	10,000	20,000	10,000
Actuarial Services	19,731	24,209	29,300	33,000	34,300
Information Services	136,221	83,788	111,000	82,000	96,000
Electronic Record Scanning	47,086	44,859	65,000	60,000	65,000
Other Professional Services	63,734	110,564	100,492	175,800	112,492
OSB Bar Books	200,000	200,000	200,000	200,000	200,000
Office Rent	521,138	512,379	520,065	512,379	527,865
Equipment Rent & Maint.	38,672	45,047	48,000	49,500	53,000
Dues and Memberships	21,458	22,469	28,000	35,000	36,500
Office Supplies	51,661	70,597	70,000	67,000	69,000
Insurance	71,471	38,344	41,894	42,000	41,894
Telephone	48,675	49,326	49,560	51,000	51,500
Printing	7,629	11,472	10,000	15,000	17,500
Postage & Delivery	33,400	27,482	28,350	29,750	31,550
NABRICO - Assoc. of Bar Co.s	10,959	7,680	18,650	12,100	13,750
Bank Charges & Interest	5,213	56,088	122,752	114,500	123,000
Repairs	2,207	523	1,500	0	0
Miscellaneous	0	0	0	15,000	0
Total Operating Expenses	<u>\$2,266,674</u>	<u>\$2,348,769</u>	<u>\$2,565,414</u>	<u>\$2,633,503</u>	<u>\$2,641,457</u>
 Allocated to Excess Program	 <u>(\$430,857)</u>	 <u>(\$461,595)</u>	 <u>(\$433,228)</u>	 <u>(\$442,889)</u>	 <u>(\$484,563)</u>
 Administration Department FTE	 8.00	 10.00	 9.00	 9.00	 9.00
 CHANGE IN OPERATING EXPENSES:					
Increase from 2015 Budget		2.96%			
Increase from 2015 Projections		0.30%			

**OREGON STATE BAR
PROFESSIONAL LIABILITY FUND
2016 PRIMARY PROGRAM BUDGET
ACCOUNTING/INFORMATION TECHNOLOGY
Presented to PLF Board of Directors on August 20, 2015**

	<u>2013 ACTUAL</u>	<u>2014 ACTUAL</u>	<u>2015 BUDGET</u>	<u>2015 PROJECTIONS</u>	<u>2016 BUDGET</u>
<u>Expenses</u>					
Salaries	\$584,637	\$576,354	\$539,231	\$546,843	\$598,523
Benefits and Payroll Taxes	199,808	200,385	226,758	184,536	230,596
Travel	544	1,311	5,000	2,500	2,500
Financial Audit	22,600	22,800	26,000	22,600	23,000
Training	<u>1,687</u>	<u>4,487</u>	<u>5,000</u>	<u>2,000</u>	<u>2,000</u>
 Total Operating Expenses	 <u>\$809,276</u>	 <u>\$805,336</u>	 <u>\$801,989</u>	 <u>\$758,479</u>	 <u>\$856,619</u>
 Allocated to Excess Program	 <u>(\$111,674)</u>	 <u>(\$90,264)</u>	 <u>(\$109,142)</u>	 <u>(\$111,205)</u>	 <u>(\$116,260)</u>
 Accounting Department FTE	 5.95	 5.95	 7.95	 7.95	 7.95
 CHANGE IN OPERATING EXPENSES:					
Increase from 2015 Budget		6.81%			
Increase from 2015 Projections		12.94%			

**OREGON STATE BAR
PROFESSIONAL LIABILITY FUND
2016 PRIMARY PROGRAM BUDGET
LOSS PREVENTION (Includes OAAP)**

Presented to PLF Board of Directors on August 20, 2015

	<u>2013 ACTUAL</u>	<u>2014 ACTUAL</u>	<u>2015 BUDGET</u>	<u>2015 PROJECTIONS</u>	<u>2016 BUDGET</u>
<u>Expenses</u>					
Salaries	\$1,065,411	\$1,111,996	\$1,268,556	\$1,240,383	\$1,269,122
Benefits and Payroll Taxes	390,424	423,748	477,312	449,379	471,472
In Brief	46,731	66,468	70,000	55,000	70,000
PLF Handbooks	4,949	45,758	6,000	5,000	9,000
Library	389	997	5,000	500	1,000
Video and Audio Tapes	44,382	33,193	32,000	30,000	30,000
Mail Distribution of Video and Audiotapes	14,607	14,341	14,000	12,000	12,000
Web Distribution of Programs	25,215	58,940	20,000	35,000	35,000
Program Promotion	16,863	16,452	22,000	18,000	22,000
Expense of Closing Offices	3,691	7,330	10,500	14,000	15,000
Facilities	42,828	45,804	47,000	47,000	47,000
Speaker Expense	4,466	(1,362)	5,000	12,000	10,000
Accreditation Fees	1,205	956	1,600	1,200	1,600
Beepers & Confidential Phone	5,110	6,430	5,300	7,000	7,000
Expert Assistance	0	0	5,000	2,500	5,000
Bad Debts from Loans	0	2,325	0	0	0
Memberships & Subscriptions	10,517	11,855	14,150	11,600	14,200
Travel	26,541	30,792	43,600	20,265	35,750
Training	25,420	29,571	42,500	30,450	44,000
Downtown Office	100,992	110,893	141,744	129,200	141,856
Miscellaneous	<u>0</u>	<u>60</u>	<u>3,500</u>	<u>3,000</u>	<u>3,500</u>
 Total Operating Expenses	 <u>\$1,829,743</u>	 <u>\$2,016,547</u>	 <u>\$2,234,762</u>	 <u>\$2,123,477</u>	 <u>\$2,244,500</u>
 Allocated to Excess Program	 <u>(\$209,540)</u>	 <u>(\$225,930)</u>	 <u>(\$120,701)</u>	 <u>(\$124,757)</u>	 <u>(\$125,338)</u>
 Loss Prevention Department FTE (Includes OAAP)	 11.83	 13.58	 14.58	 14.08	 14.08
 CHANGE IN OPERATING EXPENSES:					
Increase from 2015 Budget		0.44%			
Increase from 2015 Projections		5.70%			

OREGON STATE BAR
PROFESSIONAL LIABILITY FUND
2016 PRIMARY PROGRAM BUDGET
CLAIMS DEPARTMENT

Presented to PLF Board of Directors on August 20, 2015

	2013 <u>ACTUAL</u>	2014 <u>ACTUAL</u>	2015 <u>BUDGET</u>	2015 <u>PROJECTIONS</u>	2016 <u>BUDGET</u>
<u>Expenses</u>					
Salaries	\$1,853,764	\$1,815,952	\$1,851,790	\$1,875,710	\$1,973,214
Benefits and Payroll Taxes	628,388	628,756	688,126	652,545	710,610
Training	8,577	4,620	29,000	36,000	36,000
Travel	4,966	5,584	12,600	8,000	8,000
Library & Information Systems	32,659	31,741	39,000	29,500	31,500
Defense Panel Program	<u>9,970</u>	<u>1,915</u>	<u>64,422</u>	<u>67,500</u>	<u>0</u>
Total Operating Expenses	<u>\$2,538,325</u>	<u>\$2,488,569</u>	<u>\$2,684,938</u>	<u>\$2,669,255</u>	<u>\$2,759,324</u>
Allocated to Excess Program	<u>(\$353,033)</u>	<u>(\$343,000)</u>	<u>(\$324,279)</u>	<u>(\$322,955)</u>	<u>(\$338,653)</u>
Claims Department FTE	18.10	20.33	19.40	20.40	20.40
CHANGE IN OPERATING EXPENSES:					
Increase from 2015 Budget		2.77%			
Increase from 2015 Projections		3.37%			

**OREGON STATE BAR
PROFESSIONAL LIABILITY FUND
2016 PRIMARY PROGRAM BUDGET
CAPITAL BUDGET**

Presented to PLF Board of Directors on August 20, 2015

	<u>2013 ACTUAL</u>	<u>2014 ACTUAL</u>	<u>2015 BUDGET</u>	<u>2015 PROJECTIONS</u>	<u>2016 BUDGET</u>
<u>Capital Items</u>					
Furniture and Equipment	\$0	\$0	\$7,000	\$8,000	\$7,000
Telephone	0	0		0	0
Copiers / Scanners	0	0	5,000	2,500	5,000
Audiovisual Equipment	0	0	25,000	0	0
Data Processing					
Hardware	0	0	22,000	25,000	25,000
Software	0	0	6,000	4,000	6,000
PCs, Ipads and Printers	0	0	7,500	7,500	127,450
Leasehold Improvements	<u>0</u>	<u>0</u>	<u>5,000</u>	<u>15,000</u>	<u>10,000</u>
 Total Capital Budget	 <u>\$0</u>	 <u>\$0</u>	 <u>\$77,500</u>	 <u>\$62,000</u>	 <u>\$180,450</u>
 Increase from 2015 budget		132.84%			
Increase from 2015 Projections		191.05%			

**OREGON STATE BAR
PROFESSIONAL LIABILITY FUND
2015 EXCESS PROGRAM BUDGET
Presented to PLF Board of Directors on August 20, 2015**

	<u>2013 ACTUAL</u>	<u>2014 ACTUAL</u>	<u>2015 BUDGET</u>	<u>2015 PROJECTIONS</u>	<u>2016 BUDGET</u>
<u>Revenue</u>					
Ceding Commission	747,993	797,386	760,000	762,000	762,000
Profit Commission	32,069	22,021	0	0	0
Installment Service Charge	41,433	39,808	42,000	41,500	42,000
Other	7,913	21,393	6,900	6,900	6,900
Investment Earnings	<u>330,352</u>	<u>218,440</u>	<u>186,131</u>	<u>60,605</u>	<u>170,879</u>
Total Revenue	<u>\$1,159,760</u>	<u>\$1,099,049</u>	<u>\$995,031</u>	<u>\$871,005</u>	<u>\$981,779</u>
<u>Expenses</u>					
Allocated Salaries	\$599,356	\$621,781	\$621,781	\$621,781	\$586,164
Direct Salaries	73,078	76,929	0	0	0
Allocated Benefits	226,874	228,602	228,602	228,602	196,061
Direct Benefits	24,120	30,051	27,684	0	0
Program Promotion	3,922	8,625	0	7,500	15,000
Investment Services	1,982	1,905	2,500	2,500	2,850
Allocation of Primary Overhead	278,874	270,406	270,823	278,874	282,589
Reinsurance Placement Travel	369	18,120	25,000	20,000	20,000
Training	0	0	500	500	500
Printing and Mailing	4,035	1,947	5,500	5,500	6,500
Other Professional Services	0	16	2,000	2,000	2,000
Software Development	0	0	0	0	0
Total Expense	<u>\$1,212,611</u>	<u>\$1,258,383</u>	<u>\$1,184,390</u>	<u>\$1,167,257</u>	<u>\$1,111,664</u>
Allocated Depreciation	<u>\$30,056</u>	<u>\$24,366</u>	<u>\$20,699</u>	<u>\$16,980</u>	<u>\$17,200</u>
Net Income	<u>(\$82,907)</u>	<u>(\$183,700)</u>	<u>(\$210,058)</u>	<u>(\$313,232)</u>	<u>(\$147,085)</u>
Full Time Employees	1.00	1.00	0.00	0.00	0.00
Number of Covered Attorneys	2,193	2,395	2,140	2,025	2,025
CHANGE IN OPERATING EXPENSES:					
Decrease from 2015 Budget		-6.14%			
Decrease from 2015 Projections		-4.76%			

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: September 11, 2015
Memo Date: August 24, 2015
From: Carol J. Bernick, PLF CEO
Re: 2016 PLF Claims Made Primary Plan, Excess Plan, and Pro Bono Plan

Action Recommended

The Board of Directors (BOD) of the Professional Liability Fund requests that the Board of Governors approve the proposed 2016 PLF Claims Made Plan, Excess Plan, and Pro Bono Plan. There are changes to all three plans.

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.

The PLF convened a work group to do a complete review of the Primary Plan. That group consisted of Madeleine Campbell, Claims Attorney, Bill Earle, coverage counsel for the Fund, Jeff Crawford and Emilee Preble, who run the excess program, and me.

The substantive changes are in Exclusion 2 (Wrongful Conduct), Exclusion 8 (ORPC 1.8 Conflict Letters); Exclusion 10 (Business of Law Practice); and Exclusion 11 (Family Members).

Exclusion 2: Wrongful Conduct

The primary purpose of the changes was to clarify for both the covered parties and the Fund what activities should be excluded.

Exclusion 8: ORPC 1.8 Conflict Letters

The previous language required covered parties to send the PLF copies of their conflict letters and the PLF could deny coverage if the letter was not sent. But we have had situations where letters were properly sent by the covered party and not sent to the PLF and it seemed to be a harsh outcome to deny coverage based on this technicality. This is particularly true given that the PLF does not – and would not – endorse or otherwise approve the form of the letter. By eliminating the requirement that the letter be sent to the PLF (coverage could still be denied if the letter is not sent), we avoid any implication of approval of the form of letter sent to us.

Exclusion 10: Business of Law Practice

These changes are intended to clarify what is the practice of law and what is the business of law. This issue arises most frequently in fee disputes.

Exclusion 11: Family Members

This change makes clear that if a partner does legal work for a family member or a family member's business, not only is there no coverage for that attorney, but there is no coverage for the law firm. This does not prevent a lawyer in your firm from doing work for your family member or his/her business.

Excess Plan: Section XIV – Extended Reporting (ERC)

We changed the ERC eligibility to be discretionary. Although most firms would be offered ERC, we want to have flexibility to deny ERC if facts and circumstances warrant it.

Excess Plan: Rates

Although the rates are not part of the Plan, the PLF is eliminating the current two-tier rate model for a more viable underwriting rating scheme. This change will eliminate the BOG's approval of specific rates and replace it with approval of the rating policy. This will be presented at a future BOG meeting.

This review was useful for the work group and for the Board. It caused us to identify other provisions of the Plan that warrant further review and possible changes, which we will undertake next year.

Attachments:

- 2016 PLF Primary Coverage Plan - Tracked
- 2016 PLF Excess Coverage Plan - Tracked
- 2016 PLF Pro Bono Coverage Plan - Tracked

**OREGON STATE BAR
PROFESSIONAL LIABILITY FUND**

201~~65~~ 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 statutory requirements and to meet the Mission and Goals set forth in Chapter One of the PLF Policies, ~~which includes the Goal~~including, “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.~~

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 and expenses 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~~liabilities, 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~~Examples include, but are not limited to, the following:
- 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 may~~ extend a separate limit under each Plan. In other circumstances, when the CLAIMS are related, the PLF ~~does not so intend~~ will not extend separate limits under each Plan. 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. To aid in interpretation, the following are examples of SAME OR RELATED CLAIMS:

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~~ 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.

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 business enterprise is a COVERED PARTY.

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. **Your Conduct.** 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. **Conduct of Others.** 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. **Your Conduct in a Special Capacity.** 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 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 practice (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~~ provide their clients with ancillary services, either through their own lawyers and staff or through affiliates. These ancillary services ~~can~~ may 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.

The term "BUSINESS TRUSTEE" is used in SECTION III.3 and in SECTION V.5. This covers the ordinary range of activities in which attorneys in the private practice of law are typically engaged. The Plan does not 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.

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.

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 reasonable and necessary CLAIMS EXPENSE ~~incurred~~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 to PLF. ~~*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 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.*~~

SECTION V — EXCLUSIONS FROM COVERAGE

~~[WRONGFUL CONDUCT EXCLUSIONS]~~

1. **Fraudulent Claim Exclusion.** 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. **Wrongful Conduct Exclusion.** This Plan does not apply to any of the following CLAIMS, regardless of whether any actual or alleged harm or damages were intended by YOU:
 - (a) any CLAIM arising out of or in any way connected with YOUR actual or alleged criminal act or conduct;
 - (b) any CLAIM based on YOUR actual or alleged dishonest, knowingly wrongful, fraudulent or malicious act or conduct, or to any such act or conduct by another of which YOU had personal knowledge and in which you acquiesced or remained passive;
 - (c) any claim based on YOUR intentional violation of the Oregon Rules of Professional Conduct (ORPC) or other applicable code of professional conduct, or to any such violation of such codes by another of which you had personal knowledge and in which YOU acquiesced or remained passive.
 - (d) This Plan does not apply to any CLAIM based on or arising out of YOUR non-payment of a valid and enforceable lien if actual notice of such lien was provided to YOU, or to anyone employed in YOUR office, prior to payment of the funds to a person or entity other than the rightful lien-holder.

~~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,~~ lien holder, 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, f~~ 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. Exclusion 2 will apply and the CLAIM will not be covered.

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. **Disciplinary Proceedings Exclusion.** 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. **Punitive Damages and Cost Award Exclusions.** 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, false or unwarranted certification in a pleading, ~~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. It excludes coverage for any monetary sanction arising from an ~~The courts have become increasingly intolerant of attorney's' improper conduct in actions in several areas including trial practice, discovery, and conflicts of interest, such as is described in ORCP 17 and FRCPII. 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. Business Role Exclusion. 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. Business Ownership Interest Exclusion. This Plan does not apply to any CLAIM ~~by or on behalf of~~ based on or arising out 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. **Partner and Employee Exclusion.** 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 are or 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. **ORPC 1.8 Exclusion.** 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 any required written disclosure has been properly executed in compliance with that rule in the form of Disclosure Form ORPC 1 (attached as Exhibit A to this Plan) and has been properly fully executed by YOU and YOUR client prior to the occurrence-business transaction 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 invokes 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. **Investment Advice Exclusion.** 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 Plan has clearly delineated specific activities which that 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 Plan takes into account 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 Plan has attempted to retains 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. Law Practice Business Activities or Benefits Exclusion. This Plan does not apply to any CLAIM:

- a. For any amounts paid, incurred or charged by any COVERED PARTY, as fees, costs, or disbursements, (or by any LAW ENTITY with which the COVERED PARTY was associated at the time the fees, costs or expenses were paid, incurred or charged), including but not limited to fees, costs and disbursements alleged to be excessive, not earned, or negligently incurred, whether claimed as restitution of specific funds, forfeiture, financial loss, set-off or otherwise.
- 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.

In the event the PLF defends any claim or suit that includes any claim within the scope of this exclusion, it will have the right to settle or attempt to dismiss any other claim(s) not falling within this exclusion, and to withdraw from the defense following the settlement or dismissal of any such claim(s).

This exclusion does not apply to any CLAIM based on an act, error or omission by the COVERED PARTY regarding the client's right or ability to recover fees, costs, or expenses from an opposing party, pursuant to statute or contract.

- ~~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~~

~~e. 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~~ does not 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. Family Member and Ownership Exclusion. This Plan does not apply to: (a) any CLAIM based ~~upon on~~ or arising out of ~~YOUR~~ legal services performed by YOU on behalf of YOUR ~~on behalf of YOUR~~ spouse, parent, step-parent, child, step-child, sibling, or any member of ~~YOUR YOUR~~ household, or on behalf of a business entity in which any of them, individually or collectively, have a

controlling interest: or (b) any CLAIM against YOU based on or arising out of another lawyer having provided legal services or representation to his or her own spouse, 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.

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. Benefit Plan Fiduciary Exclusion. 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. Notary Exclusion. 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. Government Activity Exclusion. 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. House Counsel Exclusion. 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. General Tortious Conduct Exclusions. 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. **Unlawful Harassment and Discrimination Exclusion.** 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~~orientation, 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~~not covered under the Plan.

~~[PATENT EXCLUSION]~~

18. **Patent Exclusion.** 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. **Contractual Obligation Exclusion.** 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. Bankruptcy Trustee Exclusion. This Plan does not apply to any CLAIM arising out of YOUR activity (or the activity of someone for whose conduct ~~you~~ YOU are legally liable) as a bankruptcy trustee.

~~[CONFIDENTIAL OR PRIVATE DATA EXCLUSION]~~

22. Confidential or Private Data Exclusion. 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~~ 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~~ 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.

**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.

~~The Plan grants 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 Plan allows for a separate CLAIMS EXPENSE ALLOWANCE for that LAW ENTITY.~~

~~Anti-stacking provisions in the PLF Plan may create hardships for particular COVERED PARTIES who do not purchase excess coverage. Excess coverage provides coverage to -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.

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.~~

~~In the event of a dispute over coverage, Until the dispute over coverage is concluded, the PLF is not obligated to pay any amounts in dispute until the coverage dispute is concluded.~~ 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.

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, t~~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.*~~

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 may~~ 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.

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.

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).

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.

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 an extended reporting period 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-are 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.

SECTION XV — ASSIGNMENT

The interest hereunder of any COVERED PARTY is not assignable.

DRAFT

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.~~

DRAFT

20165

PLF Claims Made Excess Plan

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OREGON STATE BAR PROFESSIONAL LIABILITY FUND

CLAIMS MADE EXCESS PLAN

Effective January 1, 201~~6~~5

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.~~

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.

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.

SECTION III – WHAT IS A COVERED ACTIVITY

The following are COVERED ACTIVITIES:

~~[COVERED PARTY'S CONDUCT]~~

1. **Covered Party's Conduct.** 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. **Conduct of Others.** 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. Covered Party's Conduct in a Special Capacity. 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 reasonable and necessary CLAIMS EXPENSES ~~incurred~~. ~~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.

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.

~~[WRONGFUL CONDUCT EXCLUSIONS]~~

1. **Fraudulent Claim Exclusion.** 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. **Wrongful Conduct Exclusion.** This Excess Plan does not apply to the following CLAIMS, regardless of whether any actual or alleged harm or damages were intended:

(a) Any CLAIM against any COVERED PARTY arising out of or connected with any actual or alleged criminal act or conduct on the part of any COVERED PARTY;

(b) Any CLAIM against any COVERED PARTY based on any actual or alleged dishonest, knowingly wrongful, fraudulent or malicious act or conduct on the part of any COVERED PARTY;

(c) Any CLAIM against any COVERED PARTY based on any COVERED PARTY'S intentional violation of the Oregon Rules of Professional Conduct (ORCP) or any other applicable code of professional conduct; or

(d) Any CLAIM based on or arising out of the non-payment of a valid and enforceable lien if actual notice of such lien was provided to any COVERED PARTY, or anyone employed by the FIRM, prior to the payment of funds to any person or entity other than the rightful lienholder.

Subsections (a), (b) and (c) of this exclusion do not apply to any COVERED PARTY who: (i) did not personally commit, direct or participate in any of the acts or conduct excluded by these provisions; and (ii) either had no knowledge of any such acts or conduct, or who after becoming aware of any such acts or conduct, did not acquiesce or remain passive regarding any such acts or conduct and, upon becoming aware of any such acts or conduct, immediately notified the PLF.

~~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. Disciplinary Proceedings Exclusion. 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. Punitive Damages and Cost Award Exclusions. 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, false or unwarranted certification in a pleading, 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. Business Role Exclusion. 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. Business Ownership Interest Exclusion. This Excess Plan does not apply to any CLAIM ~~by or on behalf~~based on or arising out 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. **Partner and Employee Exclusion.** 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 is or 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. **ORPC 1.8 Exclusion.** 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 any required written disclosure has been properly executed in compliance with that rule in the form of Disclosure Form ORPC 1, attached as Exhibit A to this Excess Plan, and has been properly executed by any COVERED PARTY and his or her client prior to the ~~occurrence-business transaction~~ 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. **Investment Advice Exclusion.** 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. **Law Practice Business Activities or Benefits Exclusion.** This Excess Policy does not apply to any CLAIM:

a. For any amounts paid, incurred or charged by any COVERED PARTY, as fees, costs, or disbursements, (or by any LAW ENTITY with which the COVERED PARTY, THE FIRM, or any other LAW ENTITY was associated at the time the fees, costs or expenses were paid, incurred or charged), including but not limited to fees, costs and disbursements alleged to be excessive, not earned, or negligently incurred, whether claimed as restitution of specific funds, forfeiture, financial loss, set-off or otherwise.

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, THE FIRM, 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 or THE FIRM.

d. In the event the PLF defends any claim or suit that includes any claim within the scope of this exclusion, it will have the right to settle or attempt to dismiss any other claim(s) not falling within this exclusion, and to withdraw from the defense following the settlement or dismissal of any such claim(s).

This exclusion does not apply to any CLAIM based on an act, error or omission by any COVERED PARTY regarding a client's right or ability to recover fees, costs, or expenses from an opposing party, pursuant to statute or contract.

~~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. Family Member and Ownership Exclusion. 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. Benefit Plan Fiduciary Exclusion. 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. Notary Exclusion. 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 EXCLUSION]~~

14. Government Activity Exclusion. 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. House Counsel Exclusion. 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. General Tortious Conduct Exclusions. 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. Unlawful Harassment and Discrimination Exclusion. 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. Patent Exclusion. 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. Contractual Obligation Exclusion. 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~~ a COVERED PARTY or someone for whose conduct ~~any COVERED PARTY~~ ~~YOU~~ are is 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. Bankruptcy Trustee Exclusion. 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. Private Data Exclusion. 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. ~~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.~~

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.

~~[EXCLUDED ATTORNEY EXCLUSION]~~

23. Excluded Attorney Exclusion. 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. Excluded Firm Exclusion. 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. Office Sharing Exclusion. ~~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. Confidential or 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.~~

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.

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.

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.

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.

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~~ may 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.

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.

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).

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.

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, ~~may be eligible 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). Eligibility for any extended reporting coverage is determined by the PLF's underwriting department based on the FIRM's claims experience and other underwriting factors.

Extended Reporting Coverage Period	Additional Assessment
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.

SECTION XV – ASSIGNMENT

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

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.

DRAFT

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~~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(e) 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.

~~201~~ OREGON STATE BAR
PROFESSIONAL LIABILITY FUND

~~2016~~5 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.~~

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 and not otherwise covered under a PLF Claims Made Plan.

3. "CLAIMS EXPENSE" means:

- a. Fees and expenses 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/liabilities, 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~~ Examples include, but are not limited to, the following:

- 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 may~~ extend a separate limit under each Plan. In other circumstances, when the CLAIMS are related, the PLF ~~does not so intend~~ will not extend separate limits under each Plan. 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. To aid in interpretation, the following are examples of SAME OR RELATED CLAIMS:

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.—~~F: 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.~~

1716. "PRO BONO PROGRAM" means the Pro Bono Program shown in the Declarations under the heading "PRO BONO PROGRAM."

1817. "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. e.** 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; and~~

~~**d.** Not otherwise covered by a PLF Claims Made Plan.~~

SECTION II — WHO IS A COVERED PARTY

1. The following are COVERED PARTIES:

~~**a.** YOU~~ The PRO BONO PROGRAM.

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~~ the PRO BONO PROGRAM. 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~~ the PRO BONO PROGRAM, or for a COVERED PARTY'S private practice, employment, or outside activities.

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~~ the PRO BONO PROGRAM has 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. Volunteer Attorney's Conduct. 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~~ the PRO BONO PROGRAM and was acting within the scope of duties assigned to the VOLUNTEER ATTORNEY by ~~YOU~~ the PRO BONO PROGRAM, and

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

~~[CONDUCT OF OTHERS]~~

2. Conduct of Others. 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~~ the PRO BONO PROGRAM; 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~~ [the PRO BONO PROGRAM](#), 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. **Volunteer Attorney's Conduct in a Special Capacity.** 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~~ [the PRO BONO PROGRAM](#) and was acting within the scope of duties assigned to the VOLUNTEER ATTORNEY by ~~YOU~~ [the PRO BONO PROGRAM](#).
- 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~~ [the PRO BONO PROGRAM](#).

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.

The term "BUSINESS TRUSTEE" is used in SECTION III.3 and in SECTION V.5. This covers the ordinary range of activities in which attorneys in the private practice of law are typically engaged. The Plan does not 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.

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.

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~~ [the PRO BONO PROGRAM](#) only if ~~YOU have the PRO BONO PROGRAM has~~ 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 reasonable and necessary CLAIMS EXPENSE ~~incurred~~~~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 to PLF. ~~*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.~~

SECTION V – EXCLUSIONS FROM COVERAGE

~~[WRONGFUL CONDUCT EXCLUSIONS]~~

1. **Fraudulent Claim Exclusion.** 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. **Wrongful Conduct Exclusion.** This Master Plan does not apply to any of the following CLAIMS, regardless of whether any actual or alleged harm or damages were intended by a VOLUNTEER LAWYER:

(a) any CLAIM arising out of or in any way connected with YOURa VOLUNTEER LAWYER's actual or alleged criminal act or conduct;

(b) any CLAIM based on YOURa VOLUNTEER LAWYER's actual or alleged dishonest, knowingly wrongful, fraudulent or malicious act or conduct, or to any such act or conduct by another of which YOUthe VOLUNTEER LAWYER had personal knowledge and in which youthe VOLUNTEER LAWYER acquiesced or remained passive;

(c) any claim based on YOURa VOLUNTEER LAWYER's intentional violation of the Oregon Rules of Professional Conduct (ORPC) or other applicable code of professional conduct, or to any such violation of such codes by another of which youthe VOLUNTEER LAWYER had personal knowledge and in which YOUthe VOLUNTEER LAWYER acquiesced or remained passive.

(d) This Plan does not apply to any CLAIM based on or arising out of YOURa VOLUNTEER LAWYER's non-payment of a valid and enforceable lien if actual notice of such lien was provided to YOUthe VOLUNTEER LAWYER, or to anyone employed in YOURthe VOLUNTEER LAWYER's office, prior to payment of the funds to a person or entity other than the rightful lien-holder.

~~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~~lien holder, 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, f~~or 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, Exclusion 2 will apply and the CLAIM will not be covered.

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. **Disciplinary Proceedings Exclusion.** 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. **Punitive Damages and Cost Award Exclusions.** 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, false or unwarranted certification in a pleading, ~~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 the~~ PRO BONO PROGRAM is sued for punitive damages, ~~YOU are the~~ PRO BONO PROGRAM is not covered for that exposure. Similarly, ~~YOU are the~~ PRO BONO PROGRAM is 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. ~~It excludes coverage for any monetary sanction arising from an~~ The courts have become increasingly intolerant of attorney's' improper conduct actions in several areas including trial practice, discovery, and conflicts of interest, such as is described in OCP 17 and FRCPII. 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 the~~ VOLUNTEER LAWYER's 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.

~~[BUSINESS ACTIVITY EXCLUSIONS]~~

5. **Business Role Exclusion.** 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.

6. **Business Ownership Interest Exclusion.** This Master Plan does not apply to any CLAIM ~~by or on behalf of~~ based on or arising out 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.~~

- 7. **Partner and Employee Exclusion.** 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 are or were a COVERED PARTY is or was~~ 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.^[e1]

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.

- 8. **ORPC 1.8 Exclusion.** 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 ~~any required written disclosure has been properly executed in compliance with that rule in the form of Disclosure Form ORPC-1 (attached as Exhibit A to this Master Plan) and~~ has been

~~properly fully~~ executed ~~by you and your~~ the COVERED PARTY's client ^[e2] prior to the occurrence ~~business transaction~~ 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.~~

9. Investment Advice Exclusion. 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 Master Plan has clearly delineated delineates specific activities which that 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 Master Plan takes into account 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 Master Plan has attempted to retains 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.

~~[PERSONAL RELATIONSHIP AND BENEFITS EXCLUSIONS]~~

10. Law Practice Business Activities or Benefits Exclusion. This Master Plan does not apply to any CLAIM:

- a. For any amounts paid, incurred or charged by any COVERED PARTY, as fees, costs, or disbursements, including but not limited to fees, costs and disbursements alleged to be excessive, not earned, or negligently incurred, whether claimed as restitution of specific funds, forfeiture, financial loss, set-off or otherwise.
- 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
- c. For damages or the recovery of funds or property that have or will directly or indirectly benefit any COVERED PARTY.
- d. In the event the PLF defends any claim or suit that includes any claim within the scope of this exclusion, it will have the right to settle or attempt to dismiss any other

claim(s) not falling within this exclusion, and to withdraw from the defense following the settlement or dismissal of any such claim(s).

This exclusion does not apply to any CLAIM based on an act, error or omission by the COVERED PARTY regarding the client's right or ability to recover fees, costs, or expenses from an opposing party, pursuant to statute or contract.

~~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~~

~~e. — 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~~does not 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.

11. Family Member and Ownership Exclusion. This Master Plan does not apply to: (a) any CLAIM based upon or arising out of a COVERED PARTY'S legal services performed by a COVERED PARTY on behalf of that COVERED PARTY'S on behalf of a COVERED PARTY'S spouse, parent, step-parent, child, step-child, sibling, or any member of that COVERED PARTY'S household, or on behalf of a business entity in which any of them, individually or collectively, have a controlling interest or (b) any CLAIM against a COVERED PARTY based on or arising out of another lawyer having provided legal services or representation to his or her own spouse, 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.

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. Benefit Plan Fiduciary Exclusion. 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. Notary Exclusion. 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. Government Activity Exclusion. 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.

COMMENTS

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.

~~[HOUSE COUNSEL EXCLUSION]~~

15. House Counsel Exclusion. 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.

~~[GENERAL TORTIOUS CONDUCT EXCLUSIONS]~~

16. General Tortious Conduct Exclusions. 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.~~

17. Unlawful Harassment and Discrimination Exclusion. 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 orientation, 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 not covered under the Master Plan.~~

~~[PATENT EXCLUSION]~~

18. **Patent Exclusion.** 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~~ the VOLUNTEER LAWYER was not registered with the U.S. Patent and Trademark Office at the time the CLAIM arose.

19. *Reserved.*

~~[CONTRACTUAL OBLIGATION EXCLUSION]~~

20. **Contractual Obligation Exclusion.** 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 a COVERED PARTY~~ or someone for whose conduct ~~YOU a COVERED PARTY~~ are is 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. Bankruptcy Trustee Exclusion. This Master Plan does not apply to any CLAIM arising out of ~~YOUR~~a COVERED PARTY's activity (or the activity of someone for whose conduct ~~you~~are COVERED PARTY is legally liable) as a bankruptcy trustee.

22. Confidential or Private Data Exclusion. 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.

223. Activities Outside Pro Bono Program Exclusion. 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.~~

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 Plan grants 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 Plan allows for a separate CLAIMS EXPENSE ALLOWANCE for that LAW ENTITY.

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.^[e3]

~~*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.

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.

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.~~

~~In the event of a dispute over coverage, until the dispute over coverage is concluded, the PLF is not obligated to pay any amounts in dispute until the coverage dispute is concluded. 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.~~

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~~ COVERED PARTY 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.~~

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.

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).

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.

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 the PRO BONO PROGRAM](#) is no longer certified as an OSB Pro Bono Program by the Oregon State Bar.

~~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

Meeting Date: September 11, 2015
From: MCLE Committee
Re: Accreditation criteria for child and elder abuse reporting programs

Issue

Amend the MCLE Rules and Regulations to clarify the accreditation criteria for child and elder abuse reporting programs.

Background

In order to assist program sponsors when planning programs, and members when attending programs, the Committee recommends amending the Regulations to MCLE Rule 5 to clarify what is required in order to qualify for child abuse or elder abuse reporting credit.

In 2012, the MCLE Committee instructed staff to strictly interpret Rule 3.2(b) regarding child abuse reporting credit. Per the Committee, in order to qualify for child abuse reporting credit, the program must include an Oregon attorney's requirements to report child abuse and the exceptions to those requirements. However, the rules and regulations were not amended to include this information.

After the elder abuse reporting requirement was approved by the Supreme Court, staff notified sponsors of this new requirement and provided the following information:

In order to qualify for elder abuse reporting credit, the one hour program must include discussion of the reporting requirements for lawyers AND the exceptions to those requirements.

The Committee believes that Rules 3.2(b) and 5.5(a) support this requirement because they require that 1) the program be on the lawyer's duty to report, and 2) the activity include a discussion of the applicable disciplinary rules which, in this case, is the confidentiality rule and how it interfaces with the exceptions to the duty to report. Nonetheless, staff recently had a program sponsor ask where the information above is set forth, as he did not see it in the MCLE Rules and Regulations, the statute, or the amendments to the statute.

Therefore, in order to clarify the meaning of the Rules, the Committee recommends amending the Regulations to MCLE Rule 5 to include the following:

Regulation 5.700 In order to be accredited as a child abuse reporting or elder abuse reporting activity, the one-hour session must include discussion of an Oregon attorney's requirements to report child abuse or elder abuse and the exceptions to those requirements.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: September 11, 2015
From: MCLE Committee
Re: Proposed Rule Four and Regulations to Rule Four Amendments

Issue

In an effort to streamline the MCLE Rules and make the application accreditation process easier and more clearly defined, especially in light of the new association management software, the MCLE Committee recommends amending several rules and regulations regarding the accreditation procedure.

Discussion

First, the Committee recommends eliminating the special category of “accredited sponsors.” There are currently over 6,000 sponsors listed in the MCLE program database. However, only 87 are listed as an accredited sponsor of Oregon CLE activities, including nine that have been added since 2009.

When the MCLE Rules were first approved in the late 1980s, staff believe a distinct differentiation was intended to be made between accredited sponsors and non-accredited sponsors. However, this is not really the case in everyday practice. Although Rule 4.2(a) says accredited sponsors are exempt from the accreditation application requirements, staff cannot update the program database without an application showing title, date, location, etc. of the activity. Therefore, both types must submit accreditation applications. They both must also pay the sponsor fee (same fee applies to both) and report attendance. To the staff’s knowledge, OSB has never had “blanket approval” for any sponsor; all accreditation applications are reviewed. Several well-known national providers of CLE activities, such as the American Law Institute and the American Immigration Lawyers Association, are not accredited sponsors of Oregon CLE activities, and OSB accredits hundreds of these programs each year.

The primary difference is that accredited sponsors have agreed to apply for Oregon CLE accreditation and report attendance for each of its activities an Oregon State Bar member attends. Members attending a program sponsored by a non-accredited sponsor may need to submit the accreditation application themselves if the sponsor does not submit one.

When the MCLE Rules were first implemented and there were only a small number of CLE sponsors, the accredited sponsor status made more sense as OSB members could easily choose to attend programs offered by accredited sponsors and know that the sponsor would handle the paperwork (accreditation application, attendance reporting). Today, however, offering CLE programs is a competitive business. Many non-accredited sponsors handle the

accreditation process the same as accredited sponsors. They could require the OSB member to submit the application, but it is a marketing strategy to advertise that the program has been accredited in certain states. Because members now have so many options when choosing how to spend their CLE dollars, many sponsors know that, accredited sponsor status or not, most members expect the sponsor to handle the paperwork.

Also, Regulation 7.150 requires that sponsors submit an attendance record for their accredited CLE activities so deleting the accredited sponsor status would have no impact on attendance reporting by sponsors.

Because there is no value to retaining the special category of accredited sponsors, the Committee recommends the following rule and regulation amendments be made to clarify that we accredit programs, not sponsors.

Second, the Committee recommends deleting Rule 4.6, which refers to reciprocal accreditation. Many jurisdictions have determined that if a program is approved for Oregon CLE accreditation, that jurisdiction will honor the accreditation. However, Oregon does not automatically recognize accreditation from any jurisdiction. All accreditation applications for CLE activities are reviewed and processed pursuant to our rules, regardless of whether they have been accredited elsewhere. As written, the rule adds nothing to that process.

Finally, the Committee recommends eliminating Regulation 4.300(a), which provides a 30 day window of time for applications to be reviewed and processed or returned for more information. This is an extremely tight deadline during the peak of the compliance cycle when staff is processing compliance reports and accreditation applications. There is a spike in teaching and program accreditation applications received during November and December because many members submit all their accreditation applications at the end of each year. While staff appreciates those members who submit their accreditation applications well before the reporting period ends, they are still required to process those applications within 30 days of receipt. Staff also receives accreditation applications from sponsors for programs that will be held up to six or more months after the applications were received in our office. These, too, must be processed within 30 days.

The Committee recommends deleting any reference to a time frame in which applications must be processed. All applications will continue to be processed in a timely manner. One of the MCLE Program Outcomes for 2015 is to assure prompt and accurate processing of accreditation applications with the measure being a high percentage of accreditation applications that are processed within 30 days of receipt. This will continue to be included in MCLE's Program Outcome/Measure in future years. However, during the peak of the compliance cycle, this change will allow staff to focus on accreditation applications submitted by members whose reporting periods end within a few weeks. These applications should take priority as these members need to know how many credits they are entitled to claim for a CLE activity. It will also allow staff to focus on processing applications from sponsors

for programs held in the last few weeks of the year. These, too, take priority because members are waiting for this information in order to determine if additional credits should be completed before the end of the year. In addition, this change will allow staff to spread out the workflow more evenly throughout the year and eliminate the need to hire temporary help during the peak of the compliance cycle.

Rule Four Accreditation Procedure

4.1 In General.

(a) In order to qualify as an accredited CLE activity, the activity must be given activity accreditation by the MCLE Administrator.

~~(1) CLE activities must be given activity accreditation by the MCLE Administrator, or~~

~~(2) Must be an activity that would qualify as an accredited CLE activity and that is presented or co-presented by an accredited sponsor, or~~

~~(3) Must be accredited pursuant to MCLE Rule 4.6 or pursuant to a reciprocity agreement to which the Oregon State Bar is a party. An accredited CLE activity may take place outside Oregon.~~

(b) The MCLE Administrator shall ~~periodically~~ electronically publish a list of ~~accredited sponsors and~~ accredited programs.

(c) All sponsors shall permit the MCLE Administrator or a member of the MCLE Committee to audit the sponsors' CLE activities without charge for purposes of monitoring compliance with MCLE requirements. Monitoring may include attending CLE activities, conducting surveys of participants and verifying attendance of registrants.

4.2 Sponsor Accreditation.

~~(a) Subject to the provisions of Rule 4.2(c), CLE activities presented by accredited sponsors are automatically accredited. Accredited sponsors are exempt from the activity accreditation application requirements in Rule 4.3(d).~~

~~(b) A sponsor wishing to qualify as an accredited sponsor shall submit an application to the MCLE Administrator containing the information required by these Rules. In determining whether to grant accreditation, the MCLE Administrator shall consider the sponsor's past and present ability and willingness to present CLE activities in compliance with the accreditation standards listed in these Rules.~~

~~(c) Accredited sponsors shall:~~

~~——— (1) Assign the number of credit hours to be allowed for participation in each of their CLE activities, in compliance with these Rules and any Regulations adopted by the BOG.~~

~~2) Pay to the bar the program sponsor fee required by MCLE Regulation 4.350 for each of its CLE activities, which must be paid prior to each CLE activity. An additional program sponsor fee is required prior to any repeat live presentation of a CLE activity.~~

~~(3) Submit reports and information that may be required by these Rules.~~

~~(4) Comply with all of the accreditation standards contained in these Rules.~~

~~(d) The MCLE Administrator may revoke the accredited status of any sponsor that fails to comply with the requirements and accreditation standards of these Rules and any Regulations adopted by the BOG. The MCLE Administrator shall give 28 days' notice of such revocation. Following the expiration of the notice period, that sponsor shall be required to apply for accreditation of each of its CLE activities as provided in Rule 4.3 of these Rules. Review of the MCLE Administrator's revocation shall be pursuant to Rule 8.1 and Regulation 8.100.~~

~~(e) The automatic accreditation given to CLE activities presented or co-presented by accredited sponsors applies only to activities that comply with the accreditation standards contained in these Rules and any Regulations adopted by the BOG.~~

4.3- 2 Group Activity Accreditation.

(a) CLE activities ~~not presented by accredited sponsors shall~~ will be considered for accreditation on a case-by-case basis and ~~shall~~ must satisfy the accreditation standards listed in these Rules for the particular type of activity for which accreditation is being requested.

(b) A sponsor or individual active member may apply for accreditation of a group CLE activity by filing a written application for accreditation with the MCLE Administrator. The application shall be made on the form required by the MCLE Administrator for the particular type of CLE activity for which accreditation is being requested and shall demonstrate compliance with the accreditation standards contained in these Rules.

(c) A written application for accreditation of a group CLE activity submitted by or on behalf of the sponsor of the CLE activity shall be accompanied by the program sponsor fee required by MCLE Regulation 4.3500. An additional program sponsor fee is required for a repeat live presentation of a group CLE activity.

(d) A written application for accreditation of a group CLE activity must be filed either before or no later than 30 days after the completion of the activity. An application received more than 30 days after the completion of the activity is subject to a late processing fee as provided in Regulation 4.3500.

(e) The MCLE Administrator may revoke the accreditation of an activity at any time if it determines that the accreditation standards were not met for the activity. Notice of revocation shall be sent to the sponsor of the activity.

(f) Accreditation of a group CLE activity obtained by a sponsor or an active member shall apply for all active members participating in the activity.

4.4 Credit Hours. Credit hours, ~~whether determined by an accredited sponsor or by the MCLE Administrator,~~ shall be assigned in multiples of one-quarter of an hour. The BOG shall adopt

regulations to assist sponsors in determining the appropriate number of credit hours to be assigned.

4.5 Sponsor Advertising.

(a) Only sponsors of accredited group CLE activities may include in their advertising the accredited status of the activity and the credit hours assigned.

(b) Specific language and other advertising requirements may be established in regulations adopted by the BOG.

4.6 Reciprocal Accreditation.

~~(a) Group CLE activities taking place outside of Oregon may be accredited in Oregon provided:~~

- ~~—— (1) The jurisdiction in which the activity takes place has a MCLE program and MCLE accreditation standards substantially similar to those established by these Rules; and~~
- ~~—— (2) The activity has been accredited by the body administering the MCLE program in the jurisdiction in which the activity takes place.~~

~~(b) For the purposes of accreditation in Oregon, the MCLE Administrator may assign a number of credits attributable to the activity taking place outside Oregon in an amount different from the original amount attributed to the activity by the jurisdiction in which the activity takes place.~~

Regulations to MCLE Rule 4 Accreditation Procedure

4.200 Sponsor Accreditation.

~~(a) Any sponsor seeking accreditation as an accredited sponsor under the MCLE Rules shall submit an application to the MCLE Administrator containing the following information:~~

- ~~—— (i) Specific credentials of the sponsor as to overall qualifications as a provider, continuing legal education experience and the like; and~~
- ~~—— (ii) Date, time, place and program content of previously sponsored programs and/or proposed continuing legal education programs and their compliance with the accreditation standards in MCLE Rule 5.1.~~

~~(b) The MCLE Administrator shall consider the application for accreditation and shall notify the sponsor seeking accreditation within 21 days of the accreditation determination. Review procedures shall be pursuant to MCLE Rule 8.1 and Regulation 8.100.~~

4.300 4.200 Group Activity Accreditation.

~~(a) Applications for accreditation shall be deemed approved unless the MCLE Administrator, within 30 days after receipt of the application, sends a notice that the application is questioned or that additional time is required for approval. The applicant shall have 14 days to respond to the MCLE Administrator's questions. The applicant's response to a questioned application shall be reviewed by the MCLE Administrator and the applicant shall be notified of the decision no later than 21 days after submission of the response.~~

~~(b)~~(a) Review procedures shall be pursuant to MCLE Rule 8.1 and Regulation 8.100.

~~(c)~~ (b) The number of credit hours assigned to the activity shall be determined based upon the information provided by the applicant. The applicant shall be notified via email or regular mail of the number of credit hours assigned or if more information is needed in order to process the application.

4.350 4.300 Sponsor Fees.

(a) A sponsor of a group CLE activity that is accredited for 4 or fewer credit hours shall pay a program sponsor fee of \$40.00. An additional program sponsor fee is required for every repeat live presentation of an accredited activity, but no additional fee is required for a video or audio replay of an accredited activity.

(b) A sponsor of a group CLE activity that is accredited for more than 4 credit hours shall pay a program sponsor fee of \$75. An additional program sponsor fee is required for every repeat live presentation of an accredited activity, but no additional fee is required for a video or audio replay of an accredited activity.

(c) Sponsors presenting a CLE activity as a series of presentations may pay one program fee of \$40.00 for all presentations offered within three consecutive calendar months, provided:

(i) The presentations do not exceed a total of three credit hours for the approved series; and

(ii) Any one presentation does not exceed one credit hour.

(d) A late processing fee of \$40 is due for accreditation applications that are received more than 30 days after the program date. This fee is in addition to the program sponsor fee and accreditation shall not be granted until the fee is received.

(e) All local bar associations in Oregon are exempt from payment of the MCLE program sponsor fees. However, if accreditation applications are received more than 30 days after the program date, the late processing fee set forth in MCLE Regulation 4.350(d) will apply.

4.400 Credit Hours.

(a) Credit hours shall be assigned to CLE activities in multiples of one-quarter of an hour or .25 credits and are rounded to the nearest one-quarter credit.

(b) Credit Exclusions. Only CLE activities that meet the accreditation standards stated in MCLE Rule 5 shall be included in computing total CLE credits. Credit exclusions include the following:

(1) Registration

(2) Non-substantive introductory remarks

(3) Breaks exceeding 15 minutes per three hours of instruction

(4) Business meetings

(5) Programs of less than 30 minutes in length

4.500 Sponsor Advertising.

(a) Advertisements by sponsors of accredited CLE activities shall not contain any false or misleading information.

(b) Information is false or misleading if it:

- (i) Contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading;
- (ii) Is intended or is reasonably likely to create an unjustified expectation as to the results to be achieved from participation in the CLE activity;
- (iii) Is intended or is reasonably likely to convey the impression that the sponsor or the CLE activity is endorsed by, or affiliated with, any court or other public body or office or organization when such is not the case.

(c) Advertisements may list the number of approved credit hours. If approval of accreditation is pending, the advertisement shall so state and may list the number of CLE credit hours for which application has been made.

(d) If a sponsor includes in its advertisement the number of credit hours that a member will receive for attending the program, the sponsor must have previously applied for and received MCLE accreditation for the number of hours being advertised.

If the recommendations listed above are approved by the Board of Governors and Supreme Court (if required), the following rules regarding terms and definitions will also need to be amended.

1.2 Accreditation: The formal process of accreditation of ~~sponsors or~~ activities by the MCLE Administrator.

~~**1.3 Accredited Sponsor:** A sponsor that has been accredited by the MCLE Administrator.~~

1.5 Accredited CLE Activity: An activity that provides legal or professional education to attorneys in accordance with MCLE Rule 5.

FORMAL OPINION NO. 2005-4
Conflicts of Interest, Current Clients:
Advancement of Living Expenses, Bail,
and Travel Expenses to Client

Facts:

Lawyer *A* proposes to advance or guarantee Client *A*'s living expenses pending the outcome of litigation that Lawyer *A* is handling for Client *A*.

Lawyer *B* proposes to advance bail money to Client *B*, along with court-related costs, on the express understanding that Client *B* will remain liable to Lawyer therefor.

Lawyer *C* proposes to pay for Lawyer *C*'s own travel and investigation expenses incurred on Client *C*'s behalf from Lawyer *C*'s own funds.

Questions:

1. Is the proposed conduct of Lawyer *A* ethical?
2. Is the proposed conduct of Lawyer *B* ethical?
3. Is the proposed conduct of Lawyer *C* ethical?

Conclusions:

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

Discussion:

All of the foregoing questions are governed by Oregon RPC 1.8(e):

A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that: (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client. ~~While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the lawyer's client, except that a lawyer may advance or guarantee the expenses of litigation, provided the client remains ultimately liable for such expenses to the extent of the client's ability to pay.~~

This rule must be read in concert with Oregon RPC 1.7(a)(2), which states that a lawyer “shall not” represent a client if

there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Under Oregon RPC 1.7(a)(2), Lawyer *A*’s proposed conduct is unethical. *See In re Brown*, 298 Or 285, 692 P2d 107 (1984). By advancing these expenses, Lawyer *A* would be acquiring an interest in the litigation.

On the other hand, bail appears to be close enough to court-related costs to constitute “expenses of litigation,” which a lawyer may properly advance as long as the client remains liable therefor. Consequently, Lawyer *B*’s proposed conduct does not per se violate Oregon RPC 1.7(a)(2). Nevertheless, advancing significant bail funds, especially in the absence of a strong personal or familial relationship, could result in a personal conflict of interest between lawyer and client pursuant to Oregon RPC 1.7(a)(2). If so, Lawyer *B* could not advance bail funds without, at a minimum, satisfying himself or herself that the requirements of Oregon RPC 1.7(b) could be met and obtaining the necessary conflicts waiver. *See* ABA Formal Op No 04-432.

Lawyer *C*’s conduct is permissible. Indeed, such an assumption of investigative expenses is commonplace in contingent fee litigation.

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

COMMENT: For additional information on this general topic and other related topics, see THE ETHICAL OREGON LAWYER §§3.42–3.44 and chapter 8 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §36 (2003); and ABA Model Rules 1.7(b), 1.8(e).

FORMAL OPINION NO. 2005-70

Lawyer Changing Firms: Duty of Loyalty

Facts:

Lawyer is an associate or partner at Firm *A*. Lawyer is considering leaving Firm *A* and going to Firm *B*.

Questions:

1. Before Lawyer ~~leaves~~notifies Firm *A*, may Lawyer inform clients for whom Lawyer does work at Firm *A* of Lawyer's intention to go to Firm *B*?
2. If Lawyer leaves Firm *A* and joins Firm *B*, may Lawyer take the files of clients for whom Lawyer has done or is doing work?
3. After Lawyer leaves, may Lawyer personally contact clients for whom Lawyer did work while at Firm *A* to solicit their business for Firm *B*?

Conclusions:

1. See discussion.
2. Yes, qualified.
3. Yes, qualified.

Discussion:

1. *Contact with Clients While Still at Firm A.*

The primary duty of all lawyers is the fiduciary duty that lawyers owe to their clients. *Cf.* OSB Formal Ethics Op No 2005-26. Depending on the nature and status of Lawyer's work, this duty may well mean that advance notification is necessary to permit the clients to decide whether they wish to stay with Firm *A*, to go with Lawyer to Firm *B*, or to pursue some other alternative.

~~On the other hand, Lawyer also~~However, Lawyer's fiduciary duty to Firm *A* may require Lawyer to give notice to Firm *A* of Lawyer's intent to change firms prior to contacting clients of Firm *A*. See Penn Ethics Op 2007-300 (noting a departing lawyer may have a duty to notify old firm prior to substantive discussion about association with another firm). As this duty depends on specific facts, we cannot say whether the duty of advance notice exists here.¹

¹ For example, while Lawyer would generally notify Firm *A* before contacting clients, Lawyer might not notify Firm *A* if Lawyer believes Firm *A* will engage in obstructive conduct preventing Lawyer from contacting clients or transitioning to Firm *B*. If Lawyer is able to notify Firm *A* in advance, Lawyer and Firm *A* may send a joint notice to clients to permit clients to decide how to continue their representation. Some states require joint notification to clients from both old firm and departing lawyer. See Virginia Rule 5.8; Florida Rule 4-5.8. We do not express an opinion about whether joint notification is required in Oregon.

Lawyer owes duties to Firm A, Lawyer's current firm, arising out of the contractual, fiduciary, or agency relationship between Lawyer and Firm A. This contractual, fiduciary, or agency duty may be violated if, while still being compensated by Firm A, Lawyer endeavors to take clients away from Firm A. Cf. OSB Formal Ethics Op No 2005-60; ABA Formal Ethics Op No 99-414 (1999); *Joseph D. Shein, P.C. v. Myers*, 576 A2d 985 (Pa 1990); *Adler, Barish, Daniels, Levin v. Epstein*, 393 A2d 1175, 1182–1186 (Pa 1978).² If Lawyer's conduct would, under the circumstances, amount to "conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law" in violation of Oregon RPC 8.4(a)(3), Lawyer would be subject to discipline. Absent specific facts, we cannot say whether that would be the case here.

Regardless of the contractual, fiduciary, or agency relationship between Lawyer and Firm A, however, it is clear under Oregon RPC 8.4(3) that Lawyer may not misrepresent Lawyer's status or intentions to others at Firm A. See *In re Smith*, 315 Or 260, 843 P2d 449 (1992); *In re Murdock*, 328 Or 18, 968 P2d 1270 (1998) (although not expressly written, implicit in disciplinary rules and in duty of loyalty arising from lawyer's contractual or agency relationship with his or her law firm is duty of candor toward that law firm). Cf. *In re Hiller*, 298 Or 526, 694 P2d 540 (1985); *In re Houchin*, 290 Or 433, 622 P2d 723 (1981).

2. *Control over Client Files and Property.*

Oregon RPC 1.15-1(a), (d), and (e) provide, in pertinent part:

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession separate from the lawyer's own property. Funds, including advances for costs and expenses and escrow and other funds held for another, shall be kept in a separate "Lawyer Trust Account" maintained in the state where the lawyer's office is situated, ~~or elsewhere with the consent of the client or third person.~~ Each lawyer trust account shall be an interest bearing account in a financial institution selected by the lawyer or law firm in the exercise of reasonable care. Lawyer trust accounts shall conform to ~~Rule 1.15-2~~ the rules in the jurisdictions in which the accounts are maintained. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

....

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall

² Lawyer and Firm A should be aware of their ethical obligations under Oregon RPC 5.6 (prohibiting restrictions on right to practice) and 1.16(d) (lawyer shall take reasonably practicable steps to protect client upon terminating representation). For example, Lawyer and Firm A should not engage in behavior that prejudices client during transfer from Firm A to Firm B.

promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

Pursuant to these sections, and assuming that Firm *A* does not have a valid and enforceable lien on any client property for unpaid fees, Firm *A* must promptly surrender client property to Lawyer, if the clients so request. Cf. [OSB Formal Ethics Op Nos 2005-60, 2005-90, 2005-125](#); [OSB Formal Ethics Op Nos 2005-60, 2005-90, 2005-125](#).³

With respect to any portion of the file that does not constitute client property, it is necessary to consider Oregon RPC 1.16(d):

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers, personal property and money of the client to the extent permitted by other law.

As a practical matter, and assuming again that Firm *A* does not have a valid and enforceable lien, the only way to “protect a client's interests” would be to turn over all parts of the file that a client might reasonably need. See [OSB Formal Ethics Op No 2005-125](#), [Op No 2005-125](#), regarding payment for photocopy costs and the identification of certain documents that may need to be provided to a client who requests them.

³ As noted in [OSB Formal Ethics Op No 2005-60](#), [Op No 2005-60](#), Firm *A* may not insist that clients physically pick up their files in person if Firm *A* receives written directions from the clients to send the files elsewhere. In the period of time before receiving a client's decision about who will handle a matter, neither Firm *A* nor Lawyer should deny each other access to information about a client or a matter that is necessary to protect a client's interests. Cf. Oregon RPC 1.1 (lawyer shall provide competent representation to client; competent representation requires legal knowledge, skill, thoroughness, and preparation reasonably necessary for representation); Oregon RPC 1.3 (lawyer shall not neglect legal matter entrusted to lawyer).

3. *Solicitation of Former Clients.*

~~Lawyers are~~ The Rules of Professional Responsibility generally not ~~prohibited~~prohibit Lawyer from soliciting the clients of other lawyers.⁴ Although in-person or telephone solicitation is generally prohibited by Oregon RPC 7.3(a),⁵ Oregon RPC 7.3(a)(2) contains an exception for former clients, subject to the limitations in Oregon RPC 7.3(b)(3).⁶ Clients for whom Lawyer worked while at Firm A are Lawyer's former clients. Lawyer also may solicit the former clients in writing if the requirements of Oregon RPC 7.1~~(a)-(e)~~⁷ and 7.3 are met.

⁴ Lawyer may have fiduciary obligations to Firm A that may affect Lawyer's ability to solicit clients at certain times. See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 9 (2003).

⁵ Oregon RPC 7.3~~(b)~~^(ba) provides:

~~(b)~~ (ba) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

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

⁶ Oregon RPC 7.3(b) provides:

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

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

⁷ Oregon RPC 7.1 provides:

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

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§7.2, 7.6, 7.39, 11.14–11.15, 12.22, 12.28–12.30 (Oregon CLE 20032006); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 9(3), 16, 33, 43–46 (2003); and ABA Model Rules 1.1, 1.3, 1.15–1.16(d), 7.3(a)–(b), 8.4(c). See also Washington Informal Ethics Advisory Op No 1702 (unpublished).

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

DRAFT

FORMAL OPINION NO. 2005-101

**Unauthorized Practice of Law:
Lawyer as Mediator, Trade Names,
Division of Fees with Nonlawyer**

Facts:

Lawyer and Psychologist would like to form a domestic relations mediation service under the assumed business name of “Family Mediation Center.”

Questions:

1. May Lawyer act as mediator?
2. May Lawyer join with Psychologist to establish a mediation practice?
3. May they use the trade name “Family Mediation Center”?
4. What limitations, if any, exist on the potential allocation of work between Lawyer and Psychologist and on the allocation of fees or profits relating thereto?

Conclusions:

1. Yes.
2. Yes, qualified.
3. Yes, qualified.
4. See discussion.

Discussion:

1. *Lawyers as Mediators.*

Oregon RPC 2.4 provides:

- (a) A lawyer serving as a mediator:
 - _____ (1) shall not act as a lawyer for any party against another party in the matter in mediation or in any related proceeding; and
 - _____ (2) must clearly inform the parties of and obtain the parties’ consent to the lawyer’s role as mediator.
- (b) A lawyer serving as mediator:
 - _____ (1) may prepare documents that memorialize and implement the agreement reached in mediation;
 - _____ (2) shall recommend that each party seek independent legal advice before executing the documents; and
 - _____ (3) with the consent of all parties, may record or may file the documents in court.
- ~~(c) Notwithstanding Rule 1.10, when a lawyer is serving or has served as a mediator in a matter, a member of the lawyer’s firm may accept or continue the~~

~~representation of a party in the matter in mediation or in a related matter if all parties to the mediation give informed consent, confirmed in writing.~~

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

Pursuant to Oregon RPC 2.4, an Oregon lawyer who acts as mediator does not represent any of the parties to the mediation. This is why, among other things, the multiple-client conflict-of-interest rules set forth in Oregon RPC 1.7 do not apply. *Cf.* OSB Formal Ethics Op Nos 2005-94, 2005-46.

As long as Lawyer's conduct is consistent with Oregon RPC 2.4, Lawyer may act as mediator. For example, Lawyer could not, in light of Oregon RPC 2.4(b), draft a settlement agreement on behalf of divorcing spouses and then endeavor to file the parties' settlement agreement of record with the court without first obtaining the consent of the parties.

2. *Joining with a Nonlawyer to Provide Mediation Services.*

Oregon RPC 5.4 provides:

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

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

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

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

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

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

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

_____(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

_____ (2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation, except as authorized by law; or

_____ (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

(e) A lawyer shall not refer a client to a nonlawyer with the understanding that the lawyer will receive a fee, commission or anything of value in exchange for the referral, but a lawyer may accept gifts in the ordinary course of social or business hospitality.

Nonlawyers can and do lawfully act as mediators. In addition, lawyers are at liberty to engage in businesses other than the practice of law. *Cf.* OSB Formal Ethics Op No 2005-10. If the mediation service to be formed by Lawyer and Psychologist does not involve the practice of law, there is no reason Lawyer and Psychologist cannot join together to provide mediation services. Moreover, if the practice of law is not involved, the Oregon RPCs do not govern the nature of the business entity created by Lawyer and Psychologist (e.g., as a partnership, as a jointly owned corporation, or in an employer-employee relationship).

The practice of law involves, among other things, the application of a general body of legal knowledge to the problems of a specific entity or person. Drafting settlement agreements for others constitutes the practice of law. *Cf. In re Jones*, 308 Or 306, 779 P2d 1016 (1989); *Oregon State Bar v. Security Escrows, Inc.*, 233 Or 80, 377 P2d 334 (1962). See also OSB Formal Ethics Op Nos 2005-87 and 2005-20, and sources cited; *Kolker v. Duke City Collection Agency*, 750 F Supp 468 (DNM 1990).

If it is anticipated that the mediation service would involve the practice of law, such as by drafting settlement agreements, then Oregon RPC 5.4(b) and (d) prohibit Lawyer and Psychologist from forming a partnership, or professional corporation, or other association in which Psychologist owns an interest. Oregon RPC 5.5(a) is also relevant:

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.

See also In re Jones, supra. The net result of these provisions is that Lawyer may not aid or assist Psychologist in doing acts that would constitute the practice of law; that Lawyer and Psychologist may not form a partnership that includes the practice of law; that Lawyer may not work as Psychologist's agent or employee in providing legal services to others, and that Lawyer and Psychologist may not jointly own a corporation whose business consists in whole or in part of the practice of law.

3. *Use of a Trade Name.*

If the mediation service would not involve the practice of law, there would be no particular ethical limitation on the use of a trade name other than the general obligation to avoid "conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law." Oregon RPC 8.4(a)(3).

If the business of the mediation service includes the practice of law, attention must also be given to Oregon RPC 7.5(ea).¹ The name “Family Mediation Center” appears to be permissible as a trade name that is not misleading. *Cf. In re Shannon/Johnson*, 292 Or 339, 638 P2d 482 (1982).

4. *Allocation of Profits or Fees.*

If the mediation service would not involve the practice of law, there is no ethical restriction on the allocation of profits or fees.

If the mediation service would involve the practice of law, Lawyer would be prohibited from sharing fees with Psychologist pursuant to Oregon RPC 5.4(a) but could hire Psychologist on a salary basis.² *Cf. OSB Formal Ethics Op Nos 2005-25, 2005-10.*

¹ Oregon RPC 7.5(ea) provides:

~~(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.(e) — A lawyer in private practice:~~

~~(1) shall not practice under a name that is misleading as to the identity of the lawyer or lawyers practicing under such name or under a name that contains names other than those of lawyers in the firm;~~

~~— (2) — may use a trade name in private practice if the name does not state or imply a connection with a governmental agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1; and~~

~~— (3) — may use in a firm name the name or names of one or more of the retiring, deceased or retired members of the firm or a predecessor law firm in a continuing line of succession. The letterhead of a lawyer or law firm may give the names and dates of predecessor firms in a continuing line of succession and may designate the firm or a lawyer practicing in the firm as a professional corporation.~~

As a general proposition, Oregon RPC 7.1 prohibits a lawyer from making any false or misrepresentations or misleading statements, impressions, or expectations in communications about the lawyer or the lawyer’s services.

² Whether there are any ethical or legal limitations with respect to Psychologist’s practice that would prevent Lawyer from owning a part of Psychologist’s practice is a question that we have not been asked to consider and therefore do not consider. *Cf. OSB Formal Ethics Op No 2005-10.*

COMMENT: For additional information on this general topic or other related subjects, see THE ETHICAL OREGON LAWYER §§ 2.18–2.20, 12.3, 12.9–12.11, 12.15, 12.25 (Oregon CLE 2003~~6~~); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 3–4, 9–10 (2003); and ABA Model Rules 2.4, 5.4–5.5, 7.5, 8.4(c).

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

DRAFT

FORMAL OPINION NO. 2005-108
Information About Legal Services:
Dual Professions, Yellow Pages Advertising

Facts:

Lawyer has an active family mediation practice. In addition to advertising this practice under the “Attorneys” section of the Yellow Pages, Lawyer desires to advertise under the “Counselors—Marriage, Family, Child and Individual” section of the Yellow Pages.

Question:

May Lawyer advertise under the “Counselors—Marriage, Family, Child and Individual” section of the Yellow Pages?

Conclusion:

Yes, qualified.

Discussion:

Oregon RPC 7.1(a) provides, in pertinent part:

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

A lawyer shall not make or cause to be made any communication about the lawyer or the lawyer’s firm, whether in person, in writing, electronically, by telephone or otherwise, if the communication:

_____ (1) _____ contains a material misrepresentation of fact or law, or omits a statement of fact or law necessary to make the communication considered as a whole not materially misleading;

_____ (2) _____ is intended or is reasonably likely to create a false or misleading expectation about results the lawyer or the lawyer’s firm can achieve;

_____ (4) _____ states or implies that the lawyer or the lawyer’s firm specializes in, concentrates a practice in, limits a practice to, is experienced in, is presently handling or is qualified to handle matters or areas of law if the statement or implication is false or misleading;

_____ (11) _____ is false or misleading in any manner not otherwise described above; or

_____ (12) _____ violates any other Rule of Professional Conduct or any statute or regulation applicable to solicitation, publicity or advertising by lawyers.

Oregon RPC 7.5(a) and (c) provides:

~~(a) — (a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice~~

~~if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1. A lawyer may use professional announcement cards, office signs, letterheads, telephone and electronic directory listings, legal directory listings or other professional notices so long as the information contained therein complies with Rule 7.1 and other applicable Rules.~~

~~(c) — A lawyer in private practice:~~

~~(2) — may use a trade name in private practice if the name does not state or imply a connection with a governmental agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1. . . .~~

See also OSB Formal Ethics Op No 2005-101 (mediation services generally).

If Lawyer intends to maintain an independent business as a counselor, separate and apart from Lawyer's legal business, Lawyer may do so. OSB Formal Ethics Op No 2005-10. Lawyer's advertising and conduct of that separate business cannot, however, include "conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law." Oregon RPC 8.4(a)(3); *see In re Houchin*, 290 Or 433, 622 P2d 723 (1981); *In re Staar*, 324 Or 283, 924 P2d 308 (1996) (fact that lawyer was not acting as lawyer at time of false swearing in petition for family abuse prevention restraining order did not diminish lawyer's culpability).

If Lawyer intends to advertise *as a lawyer* in the Counselor section of the Yellow Pages, Lawyer may do so if the advertisement is not false or misleading or otherwise in violation of Oregon RPC 8.4(a)(3), 7.1, and 7.5. A person reading an advertisement in the Counselor section of the Yellow Pages would normally be seeking counseling services, not legal services, and would otherwise tend to believe that an advertiser has special qualifications in, and is offering services in, counseling. Accordingly, the advertisement must reflect Lawyer's status as a lawyer offering services as a family mediator.

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

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§ 2.6–2.7, 2.20 (Oregon CLE 2003~~6~~); and ABA Model Rules 7.1, 7.5, 8.4(c). *See also* Washington Informal Ethics Op Nos 1488, 1528 (unpublished).

FORMAL OPINION NO. 2005-109
Letterhead Listing an Out-of-State Law Firm
as “Associated Office”

Facts:

Oregon Law Firm contracts with Washington Law Firm to represent Washington Law Firm’s clients in state and federal litigation in Oregon when permissible. Oregon Law Firm would like to print stationery with its name and address at the top, and with the following at the bottom:

“ASSOCIATED OFFICE: Washington Law Firm, [address and telephone number]”

Similarly, Washington Law Firm would like to put Oregon Law Firm’s name, address, and telephone number at the bottom of its stationery as “Associated Office.”

Questions:

1. May Oregon Law Firm use stationery with Washington Law Firm listed as “Associated Office”?
2. May Oregon Law Firm permit Washington Law Firm to list it as “Associated Office”?

Conclusions:

1. Yes.
2. Yes.

Discussion:

Oregon RPC 7.1 ~~(a)~~ provides, in pertinent part:

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

~~(a) — A lawyer shall not make or cause to be made any communication about the lawyer or the lawyer’s firm, whether in person, in writing, electronically, by telephone or otherwise, if the communication:~~

~~_____ (1) — contains a material misrepresentation of fact or law, or omits a statement of fact or law necessary to make the communication considered as a whole not materially misleading;~~

~~_____ (2) — is intended or is reasonably likely to create a false or misleading expectation about results the lawyer or the lawyer’s firm can achieve;~~

~~_____~~

~~_____ (7) _____ states or implies that one or more persons depicted in the communication are lawyers who practice with the lawyer or the lawyer's firm if they are not;~~

~~_____~~

~~_____ (11) _____ is false or misleading in any manner not otherwise described above; or~~

~~_____ (12) _____ violates any other Rule of Professional Conduct or any statute or regulation applicable to solicitation, publicity or advertising by lawyers.~~

~~_____ Oregon RPC 7.5(a) and (b) provide:~~

~~_____ (a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.~~

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

~~_____ (a) _____ A lawyer may use professional announcement cards, office signs, letterheads, telephone and electronic directory listings, legal directory listings or other professional notices so long as the information contained therein complies with Rule 7.1 and other applicable Rules.~~

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

ABA Formal Ethics Op No 84-351 (1984) provides further guidance:

The basic requirement regarding lawyer advertising . . . is that communications by a lawyer concerning legal services must not be false or misleading. [Citation omitted.] Thus, designation by a lawyer or law firm of another law firm on a letterhead or in any other communication, including any private communication with a client or other person, as "affiliated" or "associated" with the lawyer or law firm must be consistent with the actual relationship. Communication that another law firm is "affiliated" or "associated" is not misleading if the relationship comports with the plain meaning which persons receiving the communication would normally ascribe to those words or is used only with other information necessary adequately to describe the relationship and avoid confusion. An "affiliated" or "associated" law firm would normally mean a firm that is closely associated or connected with the other lawyer or firm in an ongoing and regular relationship. [Footnote omitted.]

. . . .

The type of relationship that is implied by designating another firm as "affiliated" or "associated" is analogous to the ongoing relationship that is required . . . when using the designation "Of Counsel." . . . The relationship must be close and regular, continuing and semi-permanent, and not merely that of forwarder-receiver of legal business. The

“affiliated” or “associated” firm must be available to the other firm and its clients for consultation and advice.

In this case, the “Associated Office” designation is not false or misleading and therefore complies with Oregon RPC 7.1 and 7.5.¹

Because the comparable Washington rules, *see* Washington RPC 7.1 ~~et seq.~~⁵, are to the same effect as the Oregon rules, we need not consider the problems that would be raised if Oregon Law Firm were engaged in a practice that caused Washington Law Firm to violate the Washington ethics rules.

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

¹ If, however, the letterhead were to list the individual lawyers “associated” in addition to or in lieu of the firm names, the jurisdiction in which each lawyer is licensed to practice would have to be shown in order for the letterhead not to be misleading. *Cf.* Oregon RPC 7.5(b); RPC 8.4(a)(3) (prohibiting “conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer’s fitness to practice law”); ~~Oregon RPC 7.5(f) (requiring that jurisdictional limitations be shown when multistate law firm letterheads list individual lawyers).~~

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§2.189–2.22 (Oregon CLE 2003~~6~~); and ABA Model Rules 7.1, 7.5, 8.4(c). *See also* Washington Informal Ethics Op No 1015 (~~unpublished~~).

FORMAL OPINION NO. 2005-120

[REVISED 201507]

**Conflicts of Interest, Former Clients:
Lawyer Changing Firms, Former Prosecutor or Judge,
Disqualification, Screening**

Facts:

The *ABC* law partnership does criminal defense work. Lawyer *A* proposes to leave the partnership and go to work as a deputy district attorney for the state.

Deputy District Attorney *D* proposes to leave the district attorney's office and join with Lawyer *E* and Lawyer *F* to form the *DEF* law partnership. The *DEF* law partnership proposes to represent criminal defendants in criminal cases that would be brought by the district attorney's office.

Circuit Court Judge *G* proposes to leave the bench and join with Lawyer *H* and Lawyer *I* to form the *GHI* law partnership. The *GHI* law partnership proposes to represent or oppose clients who had matters pending before Lawyer *G* while Lawyer *G* was a judge.

Questions:

1. To what extent may Lawyer *A* or other lawyers in the district attorney's office prosecute clients of the *ABC* law partnership?
2. To what extent may Lawyer *D* or other lawyers in the *DEF* law partnership represent criminal defendants in criminal matters?
3. To what extent may Lawyer *G* or other lawyers in the *GHI* law partnership represent or oppose parties who had matters pending before Lawyer *G* when Lawyer *G* was on the bench?

Conclusions:

1. With respect to Lawyer *A*, who is leaving private criminal defense practice to become a deputy district attorney, a three-part answer is appropriate:
 - a. Lawyer *A* cannot prosecute a person who was formerly represented by Lawyer *A* in the same or a substantially related matter, unless the former client and the state give informed consent, confirmed in writing.
 - b. Lawyer *A* cannot prosecute a former client of the *ABC* firm about whom Lawyer *A* obtained confidential information that is material to the matter without the informed consent of the *ABC* firm's former client and the state, confirmed in writing.

- c. Lawyer A's disqualification is not imputed to the other lawyers in the district attorney's office under Oregon RPC 1.11(d).
 2. With respect to Lawyer D, who is leaving the district attorney's office for private criminal defense practice, a similar three-part answer is appropriate:
 - a. Lawyer D cannot defend clients in matters that are the same or substantially related to matters that Lawyer D handled at the district attorney's office, unless the client and the state give informed consent, confirmed in writing.
 - b. Lawyer D cannot defend a client on a matter that was prosecuted by other deputy district attorneys during Lawyer D's tenure in the office if Lawyer D obtained confidential information that is material to the matter, except with the informed consent of the client and the state, confirmed in writing.
 - c. Lawyer D's disqualification will be imputed to the other lawyers in the DEF firm, unless Lawyer D is screened from participating in the matter pursuant to Oregon RPC 1.10(c).
 3. With respect to Lawyer G, who is leaving the bench for private practice, a three-part answer also is appropriate:
 - a. If Lawyer G did not participate personally and substantially as a judge in a matter in which Lawyer G or the GHI firm proposes to represent a party, neither Lawyer G nor other lawyers in the GHI firm would be prohibited from handling the matter.
 - b. If Lawyer G participated personally or substantially in a matter as a judge, Lawyer G cannot work on that matter in private practice without the informed consent of all parties, confirmed in writing.
 - c. Lawyer G's disqualification will be imputed to the other lawyers in the GHI firm, unless Lawyer G is screened from participating in the matter pursuant to Oregon RPC 1.10(c).

Discussion:

I. *Question No. 1 (Private Practice to Government Service).*

A. *Introduction*

When Lawyer A leaves the ABC firm, Lawyer A will have a "former client" relationship with the firm's clients for purposes of Oregon RPC 1.9.¹ See *In re Brandsness*, 299 Or 420,

¹ Oregon RPC 1.9 provides:

427–428, 702 P2d 1098 (1985). Pursuant to Oregon RPC 1.9(a), a lawyer is prohibited from acting adversely to a former client if the current and former matters are the same or substantially related. Matters are “substantially related” if they involve the same transaction or legal dispute or if there is a substantial risk that confidential factual information obtained in the prior representation would materially advance the current client’s position in the new matter. Oregon RPC 1.9(ad); ABA Model Rule 1.9 comment [3].

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless each affected client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

- (1) whose interests are materially adverse to that person; and
- (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter, unless each affected client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

- (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
- (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

(d) For purposes of this rule, matters are “substantially related” if (1) the lawyer’s representation of the current client will injure or damage the former client in connection with the same transaction or legal dispute in which the lawyer previously represented the former client; or (2) there is a substantial risk that confidential factual information as would normally have been obtained in the prior representation of the former client would materially advance the current client’s position in the subsequent matter.

A lawyer also will have a conflict with a client of the lawyer's former law firm, even if the lawyer did no work on the client's matters at the former firm, if the lawyer acquired confidential information material to the current client's matter. Oregon RPC 1.9(b); OSB Formal Ethics Op Nos 2005-11, 2005-17.

If a conflict exists under either Oregon RPC 1.9(a) or (b), the lawyer may proceed with the representation if all affected clients give their informed consent, confirmed in writing.² The duties owed to former clients under ORS 9.460(3) and Oregon RPC 1.6³ are coextensive with the duties under Oregon RPC 1.9. OSB Formal Ethics Op No 2005-17.

² Oregon RPC 1.0(b) and (g) provide:

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. . . . If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

. . . .

(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.

³ Oregon RPC 1.6 provides, in pertinent part:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

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

- (1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;
- (2) to prevent reasonably certain death or substantial bodily harm;
- (3) to secure legal advice about the lawyer's compliance with these Rules;
- (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
- (5) to comply with other law, court order, or as permitted by these Rules: . . . [.]

ORS 9.460(3) requires a lawyer to "[m]aintain the confidences and secrets of the attorney's clients consistent with the rules of professional conduct established pursuant to ORS 9.490."

It follows that, unless a particular prosecution would result in Lawyer *A*'s being adverse to one of Lawyer *A*'s former clients in a matter that is the same or substantially related to Lawyer *A*'s prior representation of the client, or unless Lawyer *A* acquired confidential information about a client represented by another member of Lawyer *A*'s former firm, neither Lawyer *A* nor any other lawyer in the district attorney's office would be disqualified from handling the matter. Even if such a conflict existed, on obtaining informed consent, confirmed in writing, Lawyer *A* and the other lawyers in the office could proceed.⁴ Oregon RPC 1.9(a)–(b).

B. *Determining When a Conflict Exists* .

1. *Former Client Conflicts*.

For purposes of the Oregon RPCs, a “matter” includes “any judicial or other proceeding, application, request for ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties[.]” Oregon RPC 1.0(i). The scope of a matter and the degree of a lawyer's involvement in it depend on the facts of the particular situation or transaction.

⁴ Although all district attorneys' offices represent one client in criminal matters, i.e., the state, each district attorney's office is a separate “firm” for purposes of Oregon RPC 1.7–1.10. The relationship between district attorneys' offices is unlike that between branch offices of a private law firm. *See* ORS 8.610 (governing district attorneys' offices). *Compare Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F2d 1311, 1318 (7th Cir 1978) (branch offices of private firms constitute one “firm” for conflict-of-interest purposes), *with First Small Business Investment Co. v. Intercapital Corp.*, 738 P2d 263, 267 (Wash 1987) (disqualification of one firm on conflict-of-interest grounds would not result per se in disqualification of a separate firm acting as co-counsel).

See also Oregon RPC 1.0(d):

“Firm” or “law firm” denotes a lawyer or lawyers, including “Of Counsel” lawyers, in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a private or public legal aid or public defender organization, a legal services organization or the legal department of a corporation or other public or private organization. Any other lawyer, including an office sharer or a lawyer working for or with a firm on a limited basis, is not a member of a firm absent indicia sufficient to establish a de facto law firm among the lawyers involved.

Absent the required consents, a lawyer who has been directly involved in a client's specific legal proceeding or transaction cannot subsequently represent other clients with materially adverse interests in that same proceeding or transaction. On the other hand, a lawyer who has handled several matters of a type for a client is not thereafter precluded from representing another client in a factually distinct matter of the same type, even if the subsequent client's interests are adverse to the interests of the former client. The underlying question is whether the lawyer's involvement in the matter was such that subsequent representation of another client constitutes a changing of sides in the matter in question. ABA Model Rule 1.9 comment [2].

Matters are "substantially related" within the meaning of Oregon RPC 1.9 if they involve the same matter or transaction or if there "otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." ABA Model Rule 1.9 comment [3]. Under *former* DR 5-105(C), the first of these was referred to as a "matter-specific" conflict, and the latter was referred to as an "information-specific" conflict.

In *In re Brandsness*, which was decided under *former* DR 5-105, the court concluded that lawyer Brandsness had both a matter-specific and an information-specific former client conflict when he represented a husband in dissolution proceedings that included an effort to prevent the wife from continuing to participate in what had been the family business. The court held that, because Brandsness had previously represented both the wife and the husband in the formation and operation of the business, his attempt to preclude her from participating in its operation was sufficiently related to his earlier representation as to constitute a conflict. The court held, however, that the case was at the periphery of such a conflict. *In re Brandsness*, 299 Or at 433. *See also* OSB Formal Ethics Op No 2005-11.

In the situation presented here, if Lawyer *A* endeavored to bring a robbery prosecution against a former client and the robbery appeared to be part of a pattern of robberies, and if Lawyer *A* had previously participated in the defense of the former client in one of those robberies, the new prosecution would be substantially related to Lawyer *A*'s prior defense of the former client and would constitute a former client conflict under Oregon RPC 1.9(a). Conversely, if the robbery defendant previously had been defended by Lawyer *A* in a DUII matter, there would be a conflict only if Lawyer *A* acquired confidential information while representing the former client that could materially advance the prosecution of the robbery case.⁵

2. *Former Firm Conflicts.*

Former client conflicts can arise not only from being formally assigned to work on a matter, but also from less formal contacts. Suppose, for example, that while Lawyer *A* was still

⁵ Confidential information is "information relating to the representation of a client," and includes both information protected by the attorney-client privilege under applicable law and "other information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." Oregon RPC 1.0(f).

at the *ABC* firm, Lawyer *B* had informally sought and obtained Lawyer *A*'s advice with respect to a matter that Lawyer *B* was otherwise handling. Upon Lawyer *A*'s subsequent departure from the *ABC* firm, Lawyer *A* would be prohibited from representing a new client in a matter that is the same or substantially related to the matter Lawyer *B* consulted about if the interests of the former firm's client and Lawyer *A*'s new client are adverse and if Lawyer *A* acquired confidential information material to the new matter. Oregon RPC 1.9(b).

No exhaustive description of what constitutes confidential client information can be given. *Cf.* OSB Formal Ethics Op No 2005-17. Nevertheless, several illustrations may be helpful, and lawyers should be mindful that former client conflicts based on the acquisition of material confidential information can arise from informal exchanges within a firm. If Lawyer *A* was assigned to prosecute a DUII charge against a defendant who had previously been represented by another lawyer at the *ABC* firm, during the course of which representation Lawyer *A* acquired actual knowledge about the defendant's drinking problems, Lawyer *A* would have a former client conflict based on possession of that material information. But if Lawyer *A* had never discussed the details of the *ABC* firm's representation of the defendant and acquired no confidential information material to the DUII prosecution, the fact that Lawyer *A*'s former firm had such information does not disqualify Lawyer *A* from prosecuting the new charge.

C. *Representation with Informed Consent, Confirmed in Writing.*

If a conflict exists with respect to a former client, a lawyer may not proceed without informed consent, confirmed in writing, from both the former client and the current client. Oregon RPC 1.9, 1.11(d)(2)(v); OSB Formal Ethics Op Nos 2005-11, 2005-17. *See also In re Balocca*, 342 Or 279, 296, 151 P3d 154 (2007). This means that, in the absence of informed consent of the former client and the state, Lawyer *A* could not do *any* work on a matter—even preliminary discovery or legal research.

D. *No Imputation of Conflict to Other Members of the District Attorney's Office.*

Under Oregon RPC 1.10(c), "no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9, unless the personally disqualified lawyer is screened from any form of participation or representation in the matter." However, under Oregon RPC 1.10(e), "[t]he disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11." In a situation in which a lawyer becomes a government employee, such as Lawyer *A*'s employment with the district attorney's office, Oregon RPC 1.11(d) controls the analysis regarding imputation of the conflict and screening, if Lawyer *A* is personally disqualified because consent to a conflict is not given.

Oregon RPC 1.11(d) provides, in pertinent part:

- (d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

- (1) is subject to Rules 1.7 and 1.9; and
- (2) shall not:

...

- (iv) either while in office or after leaving office use information the lawyer knows is confidential government information obtained while a public officer to represent a private client.

- (v) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the lawyer's former client and the appropriate government agency give informed consent, confirmed in writing[.]

Oregon RPC 1.11(d) contains no provision that imputes a conflict to other lawyers associated with the disqualified lawyer in a government law firm.⁶ Comment [2] to ABA Model Rule 1.11 explains:

Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

See also 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* §15.3, at 15-10 (3d ed Supp 2005-1) (“woodenly applying the automatic imputation rule that usually governs private law firms would be impractical and against the public interest”).

Therefore, while the Oregon RPCs do not impute Lawyer *A*'s conflicts to other members of the district attorney's office, and so screening is not required, it is prudent to screen Lawyer *A* from those matters in which Lawyer *A* is disqualified. HAZARD & HODES, *supra*, §15.9, at 15-32.

II. *Question No. 2 (Government Service to Private Practice).*

Oregon RPC 1.6, 1.7,⁸ and 1.9 apply to Lawyer *D* (who is transferring from government service to private practice), just as they apply to Lawyer *A* (who is transferring

⁶ Under Oregon RPC 1.11(b), however, a conflict is imputed to other members of a *former* government employee's firm, as will be discussed in Question No. 2.

⁸ Oregon RPC 1.7 provides:

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client;

from private practice to government service). With respect to Lawyer *D*, as with Lawyer *A*, Oregon RPC 1.11 governs the disqualification and imputation analysis, pursuant to Oregon RPC 1.10(e).

Oregon RPC 1.11(a), (b), and (c), which relate to former government lawyers, provide:

- (a) Except as Rule 1.12 or law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:
 - (1) is subject to Rule 1.9(c); and
 - (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.
 - (b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
 - (1) the disqualified lawyer is timely screened from any participation in the matter substantially in accordance with the procedures set forth in Rule 1.10(c); and
 - (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.
-
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer; or
 - (3) the lawyer is related to another lawyer, as parent, child, sibling, spouse or domestic partner, in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter.
- (b) Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:
 - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and
 - (4) each affected client gives informed consent, confirmed in writing.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term “confidential government information” means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter substantially in accordance with the procedures set forth in Rule 1.10(c).

Oregon RPC 1.11(a) prohibits Lawyer *D* from representing criminal defendants in matters in which Lawyer *D* “participated personally and substantially” while a government prosecutor. *See* ABA Formal Ethics Op No 342 (1975) (“substantial responsibility” . . . contemplates a responsibility requiring the official to become personally involved to an important, material degree”); *Cleary v. District Court*, 704 P2d 866, 870 (Colo 1985) (the critical test of improper conduct by former government employees is the requirement that the attorney have “substantial responsibility” in the matter while employed by the government). Thus, if Lawyer *D* did no work on a particular matter or acquired no material confidential information from Lawyer *D*’s “former client” (i.e., the state)⁹ while at the district attorney’s office, neither Lawyer *D* nor the *DEF* law partnership would be limited in the subsequent handling of the matter. If, however, Lawyer *D* worked on a matter or acquired information protected by Oregon RPC 1.6 that is sufficiently capable of adverse use, Oregon RPC 1.6, 1.7, 1.9, and 1.11 would prohibit Lawyer *D* from handling the matter absent informed consent, confirmed in writing.

Lawyer *D* also may be disqualified by the acquisition of “confidential government information” that does not constitute confidential client information. District attorneys and their deputies are public officials. ORS 8.610, 8.760. The reference in Oregon RPC 1.11(c) to information that “the government . . . has a legal privilege not to disclose” may encompass information that would not otherwise constitute confidential client information under Oregon RPC 1.6, but which the government is not required to disclose. *See* HAZARD & HODES, *supra*, §15.8. Absent government consent in the case of government-privileged information, Lawyer *D* may not work on a matter in private practice in which Lawyer *D* had previously acquired “confidential government information.”

Even if Lawyer *D* must be disqualified for the reasons discussed above, imputing Lawyer *D*’s disqualification to the other members of the *DEF* firm can be avoided if Lawyer *D* is screened in accordance with Oregon RPC 1.10(c) and written notice is given promptly to the district attorney’s office as provided in Oregon RPC 1.11(b).

⁹ *See* OSB Formal Ethics Op No 2005-122.

III. *Question No. 3 (Judicial Service to Private Practice).*

Oregon RPC 1.6, 1.7, and 1.9 do not apply to Judge *G* (who is leaving judicial service for private practice) because the litigants who appeared before Judge *G* were not Judge *G*'s clients. Oregon RPC 1.11(a), (c), and (d) also do not apply for that reason. Lawyer *G*'s subsequent representation of litigants is limited, however, by Oregon RPC 1.12(a):

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

The personal-and-substantial-participation requirement means that Lawyer *G* must have become “personally involved to an important, material degree” before Lawyer *G* will be disqualified. *See* ABA Formal Ethics Op No 342, *supra*. What is “important” or “material” varies with the circumstances. In the ordinary course, however, Lawyer *G* must have done something more than review the status of a matter in court or at docket call or permit the entry of a stipulated order before Lawyer *G*'s involvement will be deemed to have been personal and substantial. *See* ABA Model Rule 1.12 comment [1] (personal and substantial participation does not include “remote or incidental administrative responsibility that did not affect the merits”). If Lawyer *G* did not participate personally and substantially in a matter as a judge, neither Lawyer *G* nor the other lawyers in the *GHI* firm would be limited in their handling of the matter.

Oregon RPC 1.12(a) provides, however, that if Lawyer *G* participated personally and substantially as a judge, Lawyer *G* may not work on a matter without the informed consent of all parties, confirmed in writing. Furthermore, Lawyer *G*'s disqualification is imputed to the other members of the firm under Oregon RPC 1.12(c), unless Lawyer *G* is screened from the matter.

Oregon RPC 1.12(c) provides:

- (c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:
 - (1) the disqualified lawyer is timely screened from any participation in the matter substantially in accordance with the procedures set forth in Rule 1.10(c); and
 - (2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.

Thus, if Lawyer *G* is screened in accordance with Oregon RPC 1.10(c) and written notice is provided in accordance with Oregon RPC 1.12(c)(2), the other lawyers in the *GHI* firm may proceed with the representation.

~~Approved by Board of Governors, June 2007.~~

COMMENT: For additional information on this topic and other related subjects, see THE ETHICAL OREGON LAWYER §§9.2–9.5, 9.22–9.23, 14.27 (Oregon CLE 2006); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§121–124, 132–133 (2003); and ABA Model Rules 1.9–1.12.

FORMAL OPINION NO. 2005-153
Information About Legal Services:
Insurer-Employed Lawyers' Firm Name

Facts:

Lawyers *A* and *B* are employees of an insurer and defend insureds' liability claims for the insurer.

Question:

Can *A* and *B* refer to themselves on their letterhead and pleadings as "*A & B, Attorneys at Law*," "*A & B, Attorneys at Law, Not a Partnership*," or "*A and B, Attorneys at Law, an Association of Lawyers*," without disclosing their status as employees of the insurer?

Conclusion:

No.

Discussion:

Oregon RPC 7.1(a) provides:

~~(a) — A lawyer shall not make or cause to be made any communication about the lawyer or the lawyer's firm, whether in person, in writing, electronically, by telephone or otherwise, if the communication:~~

~~— (1) — contains a material misrepresentation of fact or law, or omits a statement of fact or law necessary to make the communication considered as a whole not materially misleading;~~

~~— (11) — is false or misleading in any manner not otherwise described above; or~~

~~— (12) — violates any other Rule of Professional Conduct or any statute or regulation applicable to solicitation, publicity or advertising by lawyers.~~
A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Oregon RPC 7.5 provides, in pertinent part:

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

* * *

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

~~(e) — A lawyer in private practice:~~

~~—(1) — shall not practice under a name that his misleading as to the identity of the lawyer or lawyers practicing under such name or under a name that contains names other than those of lawyers in the firm.~~

~~_____~~

~~—(e) — Lawyers shall not hold themselves out as practicing in a law firm unless the lawyers are actually members of the firm.~~

See also Oregon RPC 8.4(a)(3), which prohibits “conduct involving dishonesty, fraud, deceit or misrepresentation. . . .” In short, and as these and other sections illustrate, lawyers cannot mislead others, whether they are clients or third parties.

Courts in other jurisdictions have held that failure to identify lawyer employees of an insurer is misleading. In *In re Weiss, Healey & Rea*, 536 A2d 266, 268–269 (NJ 1988), the court said:

The question here is whether there is anything deceptive about the use of a name like “A, B & C” to describe the association of lawyer employees of an insurance company. We believe that it is evident that the mere use of the name “A, B & C” does not convey “with accuracy and clarity” the complex set of relationships that distinguish an association of lawyers representing a single insurer and its policyholders from an association of lawyers affiliated for the general practice of law. Yet, what secondary meaning *does* this form of firm name convey to the public? What does it tell us about the “kind and caliber” of legal services rendered by such an association?

We believe that the message conveyed by the firm name “A, B & C” is that the three persons designated are engaged in the general practice of law in New Jersey as partners. Such partnership implies the full financial and professional responsibility of a law firm that has pooled its resources of intellect and capital to serve a general clientele. The partnership arrangement implies much more than office space shared by representatives of a single insurer. Put differently, the designation “A, B & C” does not imply that the associated lawyers are in fact employees, with whatever inferences a client might draw about their ultimate interest and advice. The public, we believe, infers that the collective professional, ethical, and financial responsibility of a partnership-in-fact bespeaks the “kind and caliber of legal services rendered.”

In *Petition of Youngblood*, 895 SW2d 322, 331 (Tenn 1995), construing a rule ~~identical~~ similar to Oregon RPC 7.1 and 7.5 (*former* DR 2-102), the court held that “an attorney-employee is not ‘a separate and independent law firm.’ The representation that the attorney employee is separate and independent from the employer is, at least, false, misleading, and deceptive. It may be fraudulent, depending upon the circumstances under which the representation is made.”

See also California Formal Ethics Op No 1987-91 (1987 WL 109707), which concludes:

In the present context, the use of a firm name, other than “Law Division,” or an equivalent thereof, would be misleading in that clients of the Law Division—i.e., insureds—would be misled as to the relationship between the Insurance Company and its

lawyers. Clients would be unaware that the individual lawyers were employed by the Insurance Company and would assume that the entity was a separate law firm. For this reason, the letterhead used must indicate the relationship between the firm and the Law Division. For example, the letterhead could contain an asterisk identifying the firm as the Law Division for the Insurance Company.

Accordingly, a letterhead or other pleading that does not fully identify Lawyers *A* and *B* as employees of the insurer would be impermissible.

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

DRAFT

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§ 2.7, 2.12, 2.19 (Oregon CLE 2003~~6~~); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 98 (2003); and ABA Model Rules 7.1, 7.5.

[REVISED 2015]

Conflicts of Interest:

Lawyer Functioning in Multiple Roles in Client's Real Estate Transaction

Facts:

Client informs Lawyer that Client would like to buy or sell real estate. Lawyer is willing to represent Client in the transaction and does not represent any other party in the transaction. Lawyer would, however, like to act not only as Lawyer, but also as a real estate agent or broker and as a mortgage broker or loan officer in the transaction.

Question:

May Lawyer serve in all three capacities?

Conclusion:

Yes, qualified.

Discussion:

1. *Potential Limitations of Substantive Law.*

This Committee is authorized to construe statutes and regulations pertaining directly to lawyers, but not to construe substantive law generally. We therefore begin with the observation that if this joint combination of roles is prohibited by substantive law pertaining to real estate agents or brokers, mortgage brokers, or loan officers, Lawyer could not play multiple roles. Similarly, Lawyer would be obligated to meet in full any licensing, insurance, disclosure, or other obligations imposed by the substantive law pertaining to these lines of business. In the discussion that follows, therefore, we assume that there are no such requirements or, alternatively, that Lawyer will meet all such requirements.

2. *Lawyer-Client Conflicts of Interest.*

These facts present the potential for conflicts of interest between the Client and the Lawyer. Oregon RPC 1.7 states, in part:

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client;
 - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer; or
 - (3)
- (b) Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:
- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (4) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and
 - (5) each affected client gives informed consent, confirmed in writing.

Under Oregon RPC 1.7, Lawyer's other business interests in the real estate transaction ~~would-could~~ give rise to a conflict under Oregon RPC 1.7(a)(2) ~~since-because~~ there is a significant risk that these other roles ~~would-might~~ interfere with Lawyer's representation of Client. This would be true whether Lawyer plays the nonlawyer roles as the owner or co-owner of a non-law business or as an employee or independent contractor for such a business. ~~In either instance, Lawyer's interest in fees or income from these other roles, if not also Lawyer's liability concerns from those other roles, would create a significant risk that Lawyer's ability to "exercise independent professional judgment and render candid advice" (Oregon RPC 2.1) would be compromised. Considering an Oregon lawyer's efforts to fulfill his function as both a Lawyer and a realtor, the Supreme Court said:~~

. . . contrary to the accused's argument, the [lawyer's] interest in acquiring a share of the sales commission is not identical to a lawyer's interest in recovering a contingency fee. A lawyer will recover a contingency fee only if the client succeeds in the matter on which the lawyer provides legal representation. In

contrast, the [lawyer's] ability to recover a sales commission did not turn on whether he advanced [his client's] legal interests in the transaction. Indeed, an insistence on protecting [his client's] legal interests could have prevented a sale from closing that, from a broker's perspective, may have made business sense. Therein, we think, lies the problem in the accused's serving as both [his client's] broker and lawyer. In advancing his client's business interests as a broker, the accused may have discounted risks that, as a lawyer, he should counsel his client to avoid or at least be aware of.¹

It follows that ~~if~~ Lawyer ~~can undertake~~undertakes multiple roles ~~only if~~resulting in a conflict, Lawyer ~~can and does~~must comply with each of the requirements of Oregon RPC 1.7(b).² Before we turn to the requirements of Oregon RPC 1.7(b), however, we note that since Lawyer will be doing business with Client in Lawyer's additional roles, it is also necessary to consider the conflict-of-interest limitations in Oregon RPC 1.8(a):

- (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

¹ This opinion has been revised following the Court's opinion, In re Conduct of Spencer, 355 Or 679, 697 (2014), in which the court rejected the suggestion that simultaneously acting as attorney, real estate broker, and mortgage broker would, per se, constitute a current conflict of interest. The court said :

If, as other jurisdictions have held, additional aspects of a real estate transaction (on which the Bar does not rely here) can result in a current conflict under RPC 1.7(a)(2), careful lawyers who seek to serve as both a client's legal advisor and broker in the same real estate transaction would be advised to satisfy the advice and consent requirements of both RPC 1.8(a) and RPC 1.7(b). See ABA Model Rules, Rule 1.8, comment [3] (recognizing that the same transaction can implicate both rules and require that both consent requirements be satisfied).

² As noted above, we have assumed that multiple roles are legally permissible under applicable substantive law and thus need not consider Oregon RPC 1.7(b)(2). And since it is assumed that Lawyer represents Client and only Client, we need not consider Oregon RPC 1.7(b)(3).

- (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.

There is significant overlap between Oregon RPC 1.7(b) and Oregon RPC 1.8(a). For example, both rules would apply whether Lawyer plays the nonlawyer role (or roles) as the owner or co-owner of a non-law business or as an employee or independent contractor for such a business. In addition, both rules require Lawyer to obtain Client's informed consent³ and to confirm that consent in a contemporaneous writing.⁴ See Oregon RPC 1.7(b)(4), 1.8(a)(3).⁵ The informed consent requirements under Oregon RPC 1.8(a)(3) are more stringent, however:

- It is not enough that Lawyer confirm Client's waiver by a writing sent by Lawyer, as would be the case under Oregon RPC 1.7., Lawyer must also receive Client's informed consent "in a writing signed by the client."
- Lawyer's writing must clearly and conspicuously set forth each of the essential terms of each aspect of Lawyer's business relations with Client and the role that Lawyer will play in each such regard, as well as the role that Lawyer will play as Client's Lawyer. This would include, for example, the fees that Lawyer or others would earn in each capacity and the circumstances under which each such fee

³ Oregon RPC 1.0(g) provides:

"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.

⁴ Oregon RPC 1.0(b) provides:

"Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (g) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

⁵ For prior formal opinions citing to both Oregon RPC 1.7(a) and Oregon RPC 1.8(a), see OSB Formal Ethics Op Nos 2005-10 (in addition to lawyer's private practice, lawyer also owns a real estate firm and a title insurance company that occasionally do business with lawyer's clients) and 2005-28 (discussing conflict of interest in representing both sides in adoption).

would be payable (*e.g.*, only upon closing or without regard to closing). It would also include a clear explanation of any limitation of liability provisions that might exist regarding Lawyer's other roles.⁶

- In addition to recommending that Client consult independent counsel, Lawyer must expressly inform Client in writing that such consultation is desirable and must make sure that Client has a reasonable opportunity to secure the advice of such counsel.
- Communications between Lawyer and Client as part of their lawyer-client relationship are subject to Lawyer's duties of confidentiality under Oregon RPC 1.6.6. Communications between Lawyer and Client in other capacities would not be subject to Oregon RPC 1.6⁷, and Lawyer must explain to Client why this distinction is potentially significant.⁸ This explanation must be given whether

⁶ For cases and ethics opinions discussing the general level of disclosure requirements when lawyers do business with clients, see, for example, OSB Formal Ethics Op No 005-32.

⁷ Oregon RPC 1.6 provides:

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
 - (1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;
 - (2) to prevent reasonably certain death or substantial bodily harm;
 - (3) to secure legal advice about the lawyer's compliance with these Rules;
 - (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
 - (5) to comply with other law, court order, or as permitted by these Rules; or
 - (6) in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm. . . .

⁸ See, *e.g.*, *United States v. Huberts*, 637 F2d 630, 639–640 (9th Cir 1980), cert. denied, 451 US 975

Lawyer's multiple roles are carried out from a single office or from physically distinct offices.⁹

Two requirements remain to be discussed. One requirement is that the terms of the business aspects of the transactions between Lawyer and Client be "fair and reasonable" pursuant to Oregon RPC 1.8(a)(1). We assume that this requirement will be met if Client would be unable to obtain the same services from another under more favorable terms. Whether, or to what extent, the "fair and reasonable" requirement could be met if there were other available suppliers at materially lower cost is a subject on which this Committee cannot define any bright-line rule. Other jurisdictions have been more inclined to approve Lawyers' business relations with Clients when the Client is relatively sophisticated. *See, e.g., Atlantic Richfield Co. v. Sybert*, 441 A2d 1079 (Md Ct Spec App 1982) (lawyers who acted as realty brokers for sophisticated corporate seller were not barred from recovering real estate commission); *McCray v. Weinberg*, 340 NE2d 518 (Mass App Ct 1976) (declining to set aside foreclosure of lawyer's mortgage loan, one of a series, to knowledgeable and experienced client).

The other requirement is that Lawyer must "reasonably believe that [Lawyer] will be able to provide competent and diligent representation to" Client under Oregon RPC 1.7(b)(1). This means not only that Lawyer must have the subjective belief that Lawyer can do so, but also that Lawyer's belief must be objectively reasonable under the circumstances. *See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* §126, comment e (2000). Other state bar ethics committees have split on whether such an objectively reasonable belief can exist if, for example, a Lawyer wishes to act both as legal counsel to and insurance agent for a Client or as legal counsel to and securities broker for a Client.¹⁰ We cannot say that it will always be unreasonable for a Lawyer to conclude that the Lawyer can provide competent and

(1981) (lawyer as business agent; no privilege); *United States v. Davis*, 636 F2d 1028, 1043–1044 (5th Cir), cert. denied, 454 US 862 (1981) (lawyer as tax preparer; no privilege); *Diamond v. City of Mobile*, 86 FRD 324, 327–328 (SD Ala 1978) (lawyer as investigator; no privilege); *Neuder v. Battelle Pacific Northwest Nat'l Lab*, 194 FRD 289, 292–297 (DDC 2000) (when corporate lawyer acts in nonlegal capacity in connection with employment decisions, communications between lawyer and corporate representatives not privileged). A variant could arise if Lawyer's role were ambiguous, resulting in Client's inability to carry the burden of proof on lawyer-client privilege. *See Groff v. S.I.A.C.*, 246 Or 557, 565–566, 426 P2d 738 (1967) (person asserting privilege has burden of showing that one asserting privilege and nature of testimony offered are both within ambit of privilege); ORS 40.030(1) (OEC 104(1)).

⁹ The explanation about privilege and confidentiality issues might, for example, include a discussion about the effect that a lack of confidentiality could have on an opposing party's ability to call Lawyer as a witness in any subsequent litigation and thus on Lawyer's ability to represent Client in that litigation in light of the lawyer-witness rule, Oregon RPC 3.7.

¹⁰ *See, e.g., Cal Formal Ethics Op No 1995-140* (lawyer as insurance broker); *NYSBA Formal Ethics Op No 2002-752* (lawyer may not provide real estate brokerage services in the same transaction as legal services); *NYSBA Formal Ethics Op No 2005-784* (lawyer also acting in entertainment management role).

diligent legal advice to a Client while also fulfilling other roles. We note, however, that there will be times when the Lawyer's conflicting obligations and interests will preclude such roles. Cf. *In re Phelps*, 306 Or 508, 510 n 1, 760 P2d 1331 (1988) (lawyer cannot be both counsel to a party in a transaction and escrow for that transaction); OSB Formal Ethics Op No 2005-55 (same).

3. *Additional Caveats and Concluding Remarks.*

Given these numerous and delicate potential issues, one might fairly conclude that multidisciplinary practice means having multiple opportunities to be disciplined. See generally *In re Phillips*, 338 Or 125, 107 P3d 615 (2005) (36-month suspension for violation of multiple provisions in former Code of Professional Responsibility in connection with program to help insurance agents sell insurance products to lawyer's estate planning clients and share in resulting commissions). Nevertheless, it will sometimes, but not always, be permissible for Lawyer to play these multiple roles. The answer will depend on factors including the fairness and reasonableness of the multiple roles, whether it is objectively reasonable to believe that Lawyer can provide competent and diligent representation while playing multiple roles, and whether Lawyer can and does obtain Client's informed consent in a writing signed by the Client. Before concluding this opinion, however, we note three caveats:

- If someone other than Client were to pay Lawyer for the provision of legal services to Client, Lawyer would also have to comply with Oregon RPC 1.8(f).¹¹
- If Lawyer were to endeavor to use Lawyer's role as real estate broker or agent or mortgage broker or loan officer to obtain clients for Lawyer's practice of law, Lawyer would have to comply with applicable advertising and solicitation requirements in Oregon RPC 7.1 *et seq.*¹²

¹¹ Oregon RPC 1.8(f) provides:

A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client gives informed consent;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information related to the representation of a client is protected as required by Rule 1.6.

For an ethics opinion discussing this rule, see OSB Formal Ethics Op No 2005-30 (legal fees paid by insurer).

¹² For the present text and prior formal ethics opinions addressing these requirements, see OSB Formal Ethics Op Nos 2005-106 (lawyer who purchases tax advice business may not use that business to engage

- Lawyers covered by the Oregon State Bar Professional Liability Fund who do not wish to risk losing potentially available legal malpractice coverage should ~~contact the PLF about exclusions that may apply. review Form ORPC 1 and Exclusions 5 and 8 of the PLF 2006 Claims Made Plan, which can be found at page 66 of the 2006 Oregon State Bar Membership Directory, or any later amendments thereto.~~

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directly or indirectly in improper solicitation of legal clients), 2005-101 (lawyer and psychologist may market a joint “Family Mediation Center”), and 2005-108 (lawyer may advertise family mediation service in marriage and family therapy section of Yellow Pages).

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: September 11, 2015
Memo Date: September 10, 2015
From: Kay Pulju, Communications & Public Services Director
Re: Award recommendations for 2015

Action Recommended

Approve the slate of nominees for OSB awards in 2015:

President's Membership Service Award

Judith A. Parker
Simon Whang

President's Public Service Award

Barnes Ellis
Elizabeth Knight
Chanpone Sinlapasai

President's Diversity & Inclusion Award

Hon. John Acosta
Hon. Adrienne Nelson

President's Sustainability Award

Heather Brinton
Ward Greene
Kimberlee Stafford

President's Public Leadership Award

Linda Tomassi

Wallace P. Carson, Jr., Award for Judicial Excellence

Hon. Katherine Tennyson

OSB Award of Merit

William A. Barton

President's Special Award of Appreciation*

Peter Courtney, Floyd Prozanski, Tobias Read and Jennifer Williamson

Background

The ad hoc Awards Committee met by conference call on August 21 to review nomination materials and develop the recommendations detailed above. Members present were: Rich Spier, Guy Greco, Vanessa Nordyke, Ramon Pagán, Tim Williams and Elizabeth Zinser.

* The President's Special Award of Appreciation is a discretionary award of the President of the OSB, with the concurrence of the board, to be presented to one or more people who have made recent outstanding contributions to the bar, the bench and/or the community. Recipients may be lawyers or non-lawyers. The President will present his or her proposed award recipient to the board at the same time the board considers the bar's other awards.

The annual Awards Luncheon will take place on awards will be presented at a luncheon on December 10 at the Sentinel Hotel in Portland.

September 11, 2015

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Richard G. Spier, Portland

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Sylvia Stevens, Tigard

David White
Chair, Board of Bar Examiners
Oregon State Bar
P. O Box 231935
Tigard, OR 97281-1935

Re: Appointments to the Board of Bar Examiners

Dear Mr. White:

The Board of Governors welcomes the opportunity to provide input on the recommendations being made by the Board of Bar Examiners (BBX) to the Supreme Court regarding lawyer and public member appointments to the BBX.

The BBX performs two functions vital to the future of the legal profession in Oregon – evaluating the character and fitness of applicants and administering all aspects of the bar examination. We agree that developing an expertise in both realms requires training, knowledge, and experience. We also strongly believe that both processes are enriched by participation from individuals with a diversity of practice experience and demographic backgrounds. In addition, the Oregon State Bar has a longstanding and well-respected tradition of volunteer service by its members – a tradition that should be supported by affording all of its members opportunities to serve.

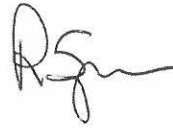
Acknowledging that lawyer member recommendations are drawn from co-graders, the ability to achieve both practice and demographic diversity is only as broad as the co-grader pool. For that reason, we encourage the BBX to take steps to increase the diversity of the pool of co-graders in 2016. In particular, we recommend the BBX consider including more lawyers: from private practice; from medium or large firms; and from locations outside of the Portland and Salem metropolitan areas.

The most recent volunteer recruitment process has reaped an abundance of lawyers enthusiastic to give something back to the profession through service. This is a terrific development and a wonderful opportunity to expand the diversity of the BBX. We note that a number of the volunteers for the BBX appear to be well-qualified to serve as co-graders. There is also ample time in which to seek and obtain any additional information that would enhance the BBX's ability to meaningfully assess who might be optimal candidates.

Finally, we encourage the BBX to consider limiting lawyer members to two terms in order to better balance the need to develop expertise with the benefit that new energy and perspective bring.

We value the important work the BBX performs and look forward to working collaboratively toward our shared goal of insuring that Oregon's lawyer admissions process continues to be held in the highest regard for its professionalism, fairness, and efficiency.

Sincerely yours,



Richard G. Spier
President
Oregon State Bar

cc: Hon. Thomas A. Balmer, Oregon Supreme Court Chief Justice

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Fee ~~Arbitration~~Dispute Resolution Rules

Rules of the Oregon State Bar on Mediation and Arbitration of Fee Disputes

Effective ~~February 2013~~ 2015

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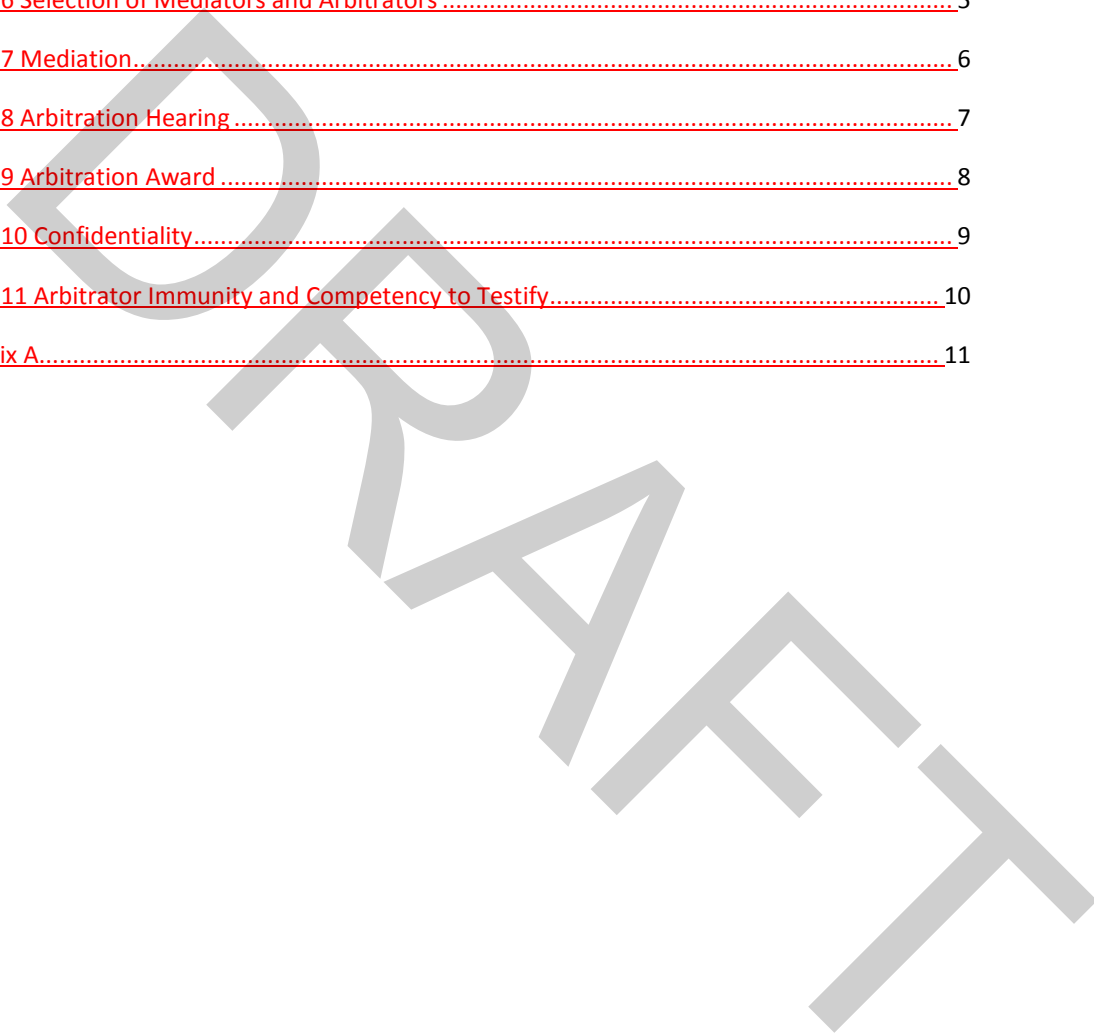
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Section 1 -Purpose

1.1 The purpose of these Rules is to provide ~~for the arbitration of a~~ voluntary method to resolve fee disputes between active members of the Oregon State Bar maintaining offices in Oregon and their clients; between those members and other active members of the Oregon State Bar, and; between active members of a state bar other than Oregon and their clients who either are residents of the state of Oregon or have their principal place of business in Oregon. Parties who agree to participate in this program expressly waive the requirements of ORS 36.600 to 36.740 to the extent permitted by ORS 36.610 except as specifically provided herein.

Section 2 ~~-Mediation and Arbitration Panels; Advisory Committee~~

2.1 ~~General Counsel shall~~The Fee Dispute Resolution Administrator (“Administrator”) shall appoint attorney members to ~~an arbitration panel~~ mediation panels in each board of governors region, from which ~~hearing panels~~ mediators will be selected. The normal term of appointment shall be three years, and a ~~panel member~~ mediation panelist may be reappointed to a further term. All ~~attorney panel members~~ mediation panelists shall be active or active pro bono members in good standing of the Oregon State Bar. ~~Public members~~ with a principal business office in the board of governors region of appointment.

2.2 The Administrator shall appoint attorney and public members to arbitration panels in each board of governors region, from which arbitrators will be selected ~~from individuals who.~~ The normal term of appointment shall be three years, and an arbitration panelist may be reappointed to a further term. All attorney panelists shall be active or active pro bono members in good standing of the Oregon State Bar with a principal business office in the board of governors region of appointment. All public panelists shall reside or maintain a principal business office in the board of governors region of appointment and ~~who are~~ shall be neither active nor inactive members of any bar.

~~2.23~~ General Counsel shall ~~also~~ appoint an advisory committee consisting of at least one attorney panel member from each of the board of governors regions. The advisory committee shall assist General Counsel and the Administrator with training and recruitment of arbitration and mediation panel members, provide guidance as needed in the interpretation and implementation of the fee ~~arbitration~~ dispute rules, and make recommendations to the board of governors for changes in the rules or program.

Section 3 ~~Initiation of Proceedings~~Training

~~3.13.1~~ The Oregon State Bar will offer training opportunities to panelists regarding mediation and arbitration techniques and the application of RPC 1.5 in fee disputes.

3.2 The Administrator may request information about panelists’ prior training and experience and may appoint panelists based on their related training and experience.

Section 4 Initiation of Proceedings

4.1 A mediation proceeding shall be initiated by the filing of a written petition and mediation agreement. The mediation agreement must be signed by one of the parties to the dispute and filed

with General Counsel's Office within 6 years of the completion of the legal services involved in the dispute.

4.2 An arbitration proceeding shall be initiated by the filing of a written petition and ~~an~~ arbitration agreement. The petition must be signed by one of the parties to the dispute and filed with General Counsel's Office within 6 years of the completion of the legal services involved in the dispute.

4.3.2 Upon receipt of ~~the~~ petition and ~~arbitration~~ agreement(s) signed by the petitioning party, ~~General Counsel's Office~~ the Administrator shall forward a copy of the petition and the ~~original arbitration~~ agreement(s) to the respondent named in the petition by regular first-class mail e-mail or facsimile or by such other method as may reasonably provide the respondent with actual notice of the initiation of proceedings. Any supporting documents submitted with the petition shall also be provided to the respondent. If the respondent desires to submit the dispute to mediation or arbitration, the respondent shall sign the ~~original arbitration~~ agreement(s) and return ~~it~~ the agreement(s) to ~~General Counsel's Office~~ the Administrator within twenty ~~one~~ (21) days ~~after of~~ receipt. A twenty ~~one~~ (21) day extension of time to sign and return the petition may be granted by ~~General Counsel~~ the Administrator. Failure to sign and return the ~~arbitration~~ agreement within the specified time shall be deemed a rejection of ~~arbitration~~ the request to mediate or arbitrate.

4.4 A lawyer who is retained by a client who was referred by the OSB Modest Means Program or OSB Lawyer Referral Program may not decline to arbitrate if such client files a petition for fee arbitration.

3.34.5 If the respondent agrees to mediate or arbitrate, ~~General Counsel's Office~~ the Administrator shall notify the petitioner who shall, within twenty ~~one~~ (21) days of the mailing of the notice, pay a filing fee of \$~~5075~~ for claims of less than ~~-\$7500~~ and \$~~75100~~ for claims of ~~-\$7500~~ or more. The filing fee may be waived at the discretion of ~~General Counsel~~ the Administrator based on the submission of a statement of the petitioner's assets and liabilities reflecting inability to pay. The filing fee shall not be refunded ~~if the dispute is settled prior to the issuance of an award or if the parties agree to withdrawal of the petition~~, except on a showing satisfactory to General ~~Counsel's Office~~ Counsel of extraordinary circumstances or hardship.

3.4.6 If ~~arbitration~~ the request to mediate or arbitrate is rejected, ~~General Counsel's Office~~ the Administrator shall notify the petitioner of the rejection and of any stated reasons for the rejection.

3.54.7 The petition, mediation agreement, arbitration agreement and statement of assets and liabilities shall be in the form prescribed by General Counsel, provided however, that ~~the agreement~~ mediation and arbitration agreements may be modified with the consent of both parties and the approval of General ~~Counsel's Office~~ Counsel.

3.64.8 After the parties have signed ~~the a mediation or arbitration~~ agreement ~~to arbitrate~~, if one party requests that ~~the a mediation or arbitration~~ proceeding not continue, ~~General Counsel's Office~~ the Administrator shall dismiss the proceeding. A dismissed proceeding will be reopened only upon agreement of the parties or receipt of a copy of an order compelling arbitration pursuant to ORS 36.625.

Section ~~45~~45 Amounts in Dispute

~~45.1~~45.1 Any amount of fees or costs in controversy may be mediated or arbitrated. The ~~arbitrator(s)~~ may award interest on the amount awarded as provided in a written agreement between the parties or as provided by law, but shall not award attorney fees or costs incurred in the arbitration proceeding. ~~General Counsel's Office~~Administrator may decline to mediate or arbitrate cases in which the amount in dispute is less than \$250.00.

~~45.2~~45.2 The sole issue to be determined in all ~~arbitration~~fee dispute proceedings under these rules shall be whether the fees or costs charged for the services rendered were reasonable in light of the factors set forth in RPC 1.5. ~~Arbitrators may receive any evidence relevant to a determination under this Rule, including evidence of the value of the lawyer's services rendered to the client. An attorney shall not be awarded more than the amount for services billed but unpaid. A client shall not be awarded more than the amount already paid, and may also be relieved from payment of services billed and remaining unpaid.~~

Section ~~5-6~~5-6 Selection of Mediators and Arbitrators

~~5.1~~5.1 Each party to the dispute ~~6.1~~6.1 Each party to a mediation shall receive with the petition and mediation agreement a list of the members of the mediation panel from the board of governors region in which a lawyer to the dispute maintains his or her law office.

~~6.2~~6.2 Each party to an arbitration shall receive with the petition and arbitration agreement a list of the members of the arbitration panel ~~having jurisdiction over the dispute. The arbitration panel having jurisdiction over a dispute shall be that of in~~ the board of governors region in which ~~the a~~ lawyer to the dispute maintains his or her law office, ~~unless the parties agree that the matter should be referred to the panel of another board of governors region.~~

~~5.26.3~~5.26.3 Each party may challenge without cause, and thereby disqualify as mediators or arbitrators, not more than two ~~members of the panel~~panelists. Each party may also challenge any ~~member of the panel~~panelist for cause. Any challenge for cause must be made by written notice to ~~General Counsel~~the Administrator, shall include an explanation of why the party believes the party cannot have a fair and impartial hearing before the ~~member~~panelist, and shall be submitted ~~along~~ with the ~~Petition and Agreement~~required fee. Challenges for cause shall be determined by General Counsel, based on the reasons offered by the challenging party. Upon receipt of the agreement signed by both parties, the Administrator shall select the appropriate number of panelists from the list of unchallenged panelists to hear a particular dispute.

~~5.3~~5.3 Upon receipt of the arbitration agreement signed by both ~~6.4~~6.4 All mediations shall be mediated by one lawyer panelist selected the board of governors region in which a lawyer to the dispute maintains his or her law office. ~~The Administrator shall give the parties, General Counsel shall select the appropriate number of arbitrators from the list of unchallenged members-~~ notice of the panel to hear a particular dispute. ~~mediator's appointment.~~

~~6.5~~6.5 Disputed amounts of less than ~~\$7,500~~\$10,000 shall be arbitrated by one ~~panel member~~lawyer panelist. Disputed amounts of ~~\$7,500~~\$10,000 or more shall be arbitrated by three ~~panel members~~ (subject to Rule 5.4). ~~panelists, including two lawyer arbitrators and one public arbitrator.~~ If three

(3) arbitrators are appointed, ~~General Counsel~~ the Administrator shall appoint one lawyer ~~member~~ arbitrator to serve as chairperson. ~~Notice of appointment shall be given by the General Counsel~~ The Administrator shall appoint panelists from the board of governors region in which a lawyer to the dispute maintains his or her law office. The Administrator shall give notice of appointment to the parties. ~~of the appointment.~~ Regardless of the amount in controversy, the parties may agree that one lawyer arbitrator hear and decide the dispute.

~~5.4~~ If three arbitrators cannot be appointed in a ~~particular case~~ fee dispute from the arbitration panel of the board of governors region in which a dispute involving ~~\$7,500~~ 10,000 or more is pending, the dispute shall be arbitrated by a single arbitrator. If, however, any party files a written objection with ~~General Counsel~~ the Administrator within ten (10) days after receiving notice that a single arbitrator will be appointed under this subsection, two (2) additional arbitrators shall be appointed, ~~under the procedures set out in subsection 5.5.~~

~~5.5.6~~ Any change or addition in appointment of mediators or arbitrators shall be made by ~~General Counsel~~ the Administrator. ~~When appropriate,~~ When necessary, the Administrator may appoint mediators or arbitrators ~~can be appointed by the General Counsel from the arbitration panel of a different board of governors region. When necessary, General Counsel may also select a region other arbitrators, provided that~~ than the board of governors region in which a lawyer members are active members in good standing of to the Oregon State Bar, ~~dispute maintains his or her law office.~~

~~5.6.7~~ Before accepting appointment, ~~an~~ a mediator or arbitrator shall disclose to the parties and, if applicable, to the other arbitrators, any known facts that a reasonable person would consider likely to affect the impartiality of the mediator or arbitrator in the proceeding. ~~Arbitrators~~ Mediators and arbitrators have a continuing duty to disclose any such facts learned after appointment. After disclosure of facts required by this rule, the mediator or arbitrator may be appointed or continue to serve only if all parties to the proceeding consent; in the absence of consent by all parties, ~~General Counsel's Office~~ the Administrator will appoint a replacement mediator or arbitrator and, if appropriate, extend the time for the hearing.

~~6.8~~ In the absence of consent by all parties, no person appointed as a mediator may thereafter serve as an arbitrator for the same fee dispute.

Section ~~6-7~~ Mediation

~~7.1~~ The mediator shall arrange a mutually agreeable date, time and place for the mediation. The mediator shall provide notice of the mediation date, time and place to the parties and to the Administrator not less than 14 days before the mediation, unless the notice requirement is waived by the parties.

~~7.2~~ The mediation shall be held within ninety (90) days of appointment of the mediator by the Administrator. Upon request of a party, or upon his or her own determination, the mediator may adjourn, continue or postpone the mediation as the mediator determines necessary.

~~7.3~~ Any communications made during the course of mediation are confidential to the extent provided by law. ORS 36.220. Mediations are not public meetings; the mediator has the sole discretion to allow persons who are not parties to the mediation to attend the proceedings.

7.4 If the parties reach a settlement in mediation, the mediator may draft a settlement agreement consistent with RPC 2.4 to memorialize the parties' agreement.

7.5 At the conclusion of the mediation, the mediator shall notify the Administrator if the fee dispute was resolved. The mediator shall not provide a copy of the settlement agreement to the bar.

Section 8 Arbitration Hearing

~~68.1~~ The chairperson or sole arbitrator~~(s) appointed~~ shall determine a convenient time and place for the arbitration hearing to be held. The chairperson or ~~single~~sole arbitrator shall provide written notice of the hearing date, time and place to the parties and to ~~General Counsel's Office~~the Administrator not less than 14 days before the hearing. Notice may be provided by regular first class mail, e-mail, or facsimile or by such other method as may reasonably provide the parties with actual notice of the hearing. Appearance at the hearing waives the right to notice.

~~68.2~~ The arbitration hearing shall be held within ninety (90) days after appointment of the arbitrator(s) by ~~General Counsel~~Administrator, subject to the authority granted in subsection ~~68.3~~.

~~68.3~~ The arbitrator or chairperson may adjourn the hearing as necessary. Upon request of a party to the arbitration for good cause, or upon his or her own determination, the presiding arbitrator ~~or chairperson~~ may postpone the hearing from time to time.

~~68.4~~ Arbitrators shall have those powers conferred on them by ORS 36.675. The chairperson or the sole arbitrator shall preside at the hearing. The chairperson or the sole arbitrator may receive any evidence relevant to a determination under Rule 5.2, including evidence of the value of the lawyer's services rendered to the client. He or she shall be the judge of the relevance and materiality of the evidence offered and shall rule on questions of procedure. He or she shall exercise all powers relating to the conduct of the hearing, and conformity to legal rules of evidence shall not be necessary. Arbitrators shall resolve all disputes using their professional judgment concerning the reasonableness of the charges made by the lawyer involved.

~~68.5~~ The parties to the arbitration are entitled to be heard, to present evidence and to cross-examine witnesses appearing at the hearing. Any party to an arbitration may be represented at his or her own expense by a lawyer at the hearing or at any stage of the arbitration.

~~68.6~~ On request of any party to the arbitration or any arbitrator, the testimony of witnesses shall be given under oath. When so requested, the chairperson or sole arbitrator may administer oaths to witnesses testifying at the hearing.

~~68.7~~ Upon request of one party, and with consent of both parties, the panel or sole arbitrator may decide the dispute upon written statements of position and supporting documents submitted by each party, without personal attendance at the arbitration hearing. The chairperson or sole arbitrator may also allow a party to appear by telephone if, in the sole discretion of the chairperson or sole arbitrator, such appearance will not impair the ability of the arbitrator(s) to determine the matter. The party desiring to appear by telephone shall bear the expense thereof.

~~68.8~~ If any party to an arbitration who has been notified of the date, time and place of the hearing but fails to appear, the chairperson or sole arbitrator may either postpone the hearing or proceed

with the hearing and determine the controversy upon the evidence produced, notwithstanding such failure to appear.

68.9 Any party may have the hearing reported at his or her own expense. In such event, any other party to the arbitration shall be entitled to a copy of the reporter's transcript of the testimony, at his or her own expense, and by arrangements made directly with the reporter. As used in this subsection, "reporter" may include an electronic reporting mechanism.

68.10 If during the pendency of an arbitration hearing or decision the client files a malpractice suit against the lawyer, the arbitration proceedings shall be either stayed or dismissed, at the agreement of the parties. Unless both parties agree to stay the proceedings within 14 days of the arbitrator's receipt of a notice of the malpractice suit, the arbitration shall be dismissed.

Section ~~7-9~~ Arbitration Award

79.1 An arbitration award shall be rendered within thirty (30) days after the close of the hearing unless General Counsel, for good cause shown, grants an extension of time.

79.2 The arbitration award shall be made by a majority where heard by three members, or by the sole arbitrator. The award shall be in writing and signed by the members concurring therein or by the sole arbitrator. The award shall state the basis for the panel's jurisdiction, the nature of the dispute, the amount of the award, if any, the terms of payment, if applicable, and an opinion regarding the reasons for the award. Awards shall be substantially in the form shown in Appendix A. An award that requires the payment of money shall be accompanied by a separate statement that contains the information required by ORS 18.042 for judgments that include money awards.

9.3 Arbitrator(s) may award interest on the amount awarded as provided in a written agreement between the parties or as provided by law, but shall not award attorney fees or costs incurred in the fee dispute proceeding. An attorney shall not be awarded more than the amount for services billed but unpaid. A client shall not be awarded more than the amount already paid, and may also be relieved from payment of services billed and remaining unpaid.~~7-3~~

9.4 The original award shall be forwarded to ~~General Counsel~~the Administrator, who shall mail certified copies of the award to each party to the arbitration. ~~General Counsel~~The Administrator shall retain the original award, together with the original fee dispute agreement ~~to arbitrate~~. Additional certified copies of the agreement and award will be provided on request. The OSB file will be retained for six years after the award is rendered; thereafter it may be destroyed without notice to the parties.

7-49.5 If a majority of the arbitrators cannot agree on an award, they shall so advise ~~General Counsel~~the Administrator within 30 days after the hearing. ~~General Counsel~~The Administrator shall resubmit the matter, de novo, to a new panel within thirty days.

7-59.6 The arbitration award shall be binding on both parties, subject to the remedies provided for by ORS 36.615, 36.705 and 36.710. The award may be confirmed and a judgment entered thereon as provided in ORS 36.615, 36.700 and ORS 36.715.

9.7.6 Upon request of a party and with the approval of General Counsel for good cause, or on General Counsel's own determination, the arbitrator(s) may be directed to modify or correct the

award for any of the following reasons:

- a. there is an evident mathematical miscalculation or error in the description of persons, things or property in the award;
- b. the award is in improper form not affecting the merits of the decision;
- c. the arbitration panel or sole arbitrator has not made a final and definite award upon a matter submitted; or
- d. ~~or~~ to clarify the award.

Section 8 ~~Public Records and Meetings~~10 Confidentiality

810.1 The arbitration resolution of a fee dispute through ~~General Counsel's Office~~the Oregon State Bar Fee Dispute Resolution Program is a private, contract dispute resolution mechanism, and not the transaction of public business.

810.2 Except as provided in paragraph **810.4** below, or as required by law or court order, all electronic and written records and other materials submitted by the parties to General Counsel's Office, or to the arbitrator(s), mediators or arbitrators, and any award rendered by the arbitrator(s), shall not be subject to public disclosure, unless all parties to an arbitration agree otherwise. ~~General Counsel~~The Oregon State Bar considers all electronic and written records and other materials submitted by the parties to General Counsel's Office, or to the arbitrator(s), mediators or arbitrators, to be submitted on the condition that they be kept confidential.

~~8.3 Arbitration~~**10.3 Mediations and arbitration** hearings are closed to the public, unless all parties agree otherwise. Witnesses who will offer testimony on behalf of a party may attend ~~the~~an arbitration hearing, subject to the chairperson's or sole arbitrator's discretion, for good cause shown, to exclude witnesses.

810.4 Notwithstanding paragraphs **810.1**, **810.2**, and **810.3**, lawyer mediators and arbitrators shall inform the Client Assistance Office when they know, based on information obtained during the course of an arbitration proceeding, that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.

810.5 Notwithstanding paragraphs ~~8.1, 810.1, 10.2,~~ and **810.3**, and **810.4**, all electronic and written records and other materials submitted to General ~~Counsel~~Counsel's Office or to the arbitrator(s), mediators or arbitrators during the course of the proceeding, and any award rendered by the arbitrator(s), shall be made available to the Client Assistance Office and/or Disciplinary Counsel for the purpose of reviewing any alleged ethical violation in accordance with BR 2.5 and BR 2.6.

810.6 Notwithstanding paragraphs **810.1**, **810.2**, **810.3** and **810.4**, General ~~Counsel~~Counsel's Office may disclose to
 _ the Client Assistance Office or to Disciplinary Counsel, upon the Client Assistance Office's or
 _ Disciplinary Counsel's request, whether a fee arbitrationdispute resolution proceeding involving a particular

lawyer is pending, the current status of the proceeding, and, at the conclusion of ~~the~~
an arbitration proceeding, in whose favor the arbitration award was rendered.

810.7 Notwithstanding paragraphs **810.1**, **810.2** and **810.3**, if any lawyer whose employment was secured through the Oregon State Bar Modest Means Program or Lawyer Referral Program refuses to participate in fee arbitration, ~~General Counsel~~the Administrator shall notify the administrator of such program(s).

10.8 Mediators and parties who agree to participate in this program expressly waive the confidentiality provisions of ORS 36.222 to the extent necessary to allow disclosures pursuant to Rule 7.5, 10.4, 10.5 and 10.6.

Section ~~9~~ Arbitrator11 Immunity and Competency to Testify

911.1 Pursuant to ORS 36.660, arbitrators shall be immune from civil liability to the same extent as a judge of a court of this state acting in a judicial capacity. All other provisions of ORS 36.660 shall apply to arbitrators participating in the Oregon State Bar ~~fee arbitration~~dispute resolution program.

Appendix A

**Oregon State Bar
Fee Arbitration**

) Case No.

Petitioner)

v.)

) Arbitration Award

Respondent)

)

Jurisdiction

Nature of Dispute

Amount of Award

Opinion

Award Summary

The arbitrator(s) find that the total amount of fees and costs that should have been charged in this matter is: _____ \$

~~of fees and costs that should have been charged in this matter is: _____ \$~~

Of which the Client is found to have paid: \$

For a net amount due of: _____ \$

Accordingly, the following award is made: \$

Client shall pay Attorney the sum of: _____ \$

(or)

Attorney shall refund to Client the sum of: \$

(or)

Nothing further shall be paid by either attorney or client.

/Signature(s) of Arbitrator(s)

OREGON STATE BAR

Governance and Strategic Planning Committee Agenda

Meeting Date: September 11, 2015
From: Sylvia E. Stevens, Executive Director
Re: ABA On-line Pro Bono Program

Issue

The American Bar Association Pro Bono Committee wants to build and maintain a fifty state interactive pro bono website that low-income persons can log onto, pose legal questions and get answers from volunteer lawyers licensed in the state in which the person resides. The ABA would like a decision from the OSB whether it wants to participate by November 15.

Background

For a complete history of this project, please see the attached memo from the ABA Pro Bono Committee, and a review by George T. “Buck” Lewis, a partner at Baker Donelson, the firm leading the fundraising efforts for the undertaking, and the Chair of the ABA Pro Bono Committee’s Technology Sub-committee. The site will be paid for by private fundraising, and may also include a nominal yearly fee of between \$1,000 and \$2,500 per year. The OSB would be expected to engage in volunteer recruitment, some local site overview (such as a weekly review for unanswered questions—forwarding those questions to identified volunteers), and marketing of the site to the public. The ABA, through its private fundraising, would pay for site maintenance, programming, hosting, security, etc.

Bar staff Cathy Petrecca, Pro Bono Coordinator, attended a webinar on the site and has also forwarded to Mr. Lewis questions raised by the Pro Bono Committee. The OSB Pro Bono Committee has not yet had a chance to vote on whether or not to support this concept, but will do so prior to the next BOG meeting.

This program is modeled on a site launched by the Tennessee Bar Association and the Tennessee Alliance for Legal Services in 2011, with approximately 100 volunteers. Since that time, they’ve answered over 8,000 questions. Unsurprisingly, in Tennessee they’ve found that 40 to 60% of the questions are family law questions. Recruiting volunteers has not been a problem and experience has shown them that this program is a good gateway for volunteers, rather than a cannibalization of existing volunteers from other programs.

Generally, the site is straightforward: after a series of eligibility questions, an eligible user posts a legal question. Volunteers review the questions (which can be sorted by the volunteer into areas of law; alternatively, the volunteer can request that queries in certain areas of law be emailed to him/her), decide whether to take on that question, and then engage with the user. The volunteer lawyer and user/client determine whether the question and answer develops into a dialogue. Users/clients are forewarned that this is not meant to evolve into a long term lawyer/client relationship.

Users who do not qualify (the ABA plans to set the eligibility qualifications at 250% of federal poverty guidelines) are informed of alternatives identified by the OSB, such as the lawyer referral service, self-help materials, etc.

For those attorneys who do not have PLF, NLADA will provide free coverage for attorneys while they are on-site doing work. Coverage would stop if they go off-line and develop an on-going relationship with the client.

The national site will require the identification of the opposing party for attorneys to do a conflict check.

Tennessee estimates that one staff member spends about three to five hours a week on the program, reviewing the questions, emailing volunteers, reviewing data, etc. The ABA expects to be able to provide metrics by legal categories for each state.

Anyone interested in reviewing the Tennessee site can find it at www.ONLINETNJJUSTICE.org. Similar sites may be found at www.Alabamalegalanswers.org; www.Indianalegalanswers.org; www.MNlegaladvice.org; www.SClawanswers.org and www.WVonlinelegal.org.

Attached documents include the two memos from Mr. Lewis, the proposed contract, and a letter from the President of the LSC supporting the program.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: September 11, 2015
Memo Date: August 27, 2015
From: Danielle Edwards, Director of Member Services
Re: Appointments to the HOD an UPL Committee

Action Recommended

The following bar groups have vacant seats. Consider appointments to these groups as requested by the committee officers and staff liaisons.

Background

House of Delegates

Region 1 member, **David M. Rosen** (101952), resigned his position on the HOD when he became Deschutes County Bar President. His term in that position recently ended and he is seeking appointment to a vacant region 1 HOD seat.

Region 5 public member, **Paresh Patel**, is requesting reappointment to the House of Delegates. Mr. Patel is the founder and CEO of a payment technology business in Portland and chairman of the Pacific NW Federal Credit Union.

Recommendations: David M. Rosen, region 1 delegate, term expires 4/16/2018

Paresh Patel, region 5 public member, term expires 4/17/2017

Unlawful Practice of Law Committee

One member resigned from the UPL Committee and the officers and staff recommend the appointment of **Jacob Kamins** (094017). The committee is in need of a prosecutor and Mr. Kamins is with the Benton County DA's Office.

Recommendation: Jacob Kamins, member, term expires 12/31/2018

Haskins, Paul, Editor. The Relevant Lawyer: Reimagining the Future of the legal Profession

A project of the ABA Standing Committee on Professionalism

Introduction:

For the legal profession to endure, lawyer professionalism must endure, in particular access to justice. Navigating the future requires careful thought about the dynamic forces and trends that will shape it. Authors give outward and prospective perspectives on the rapidly changing legal services landscape.

Twenty chapters in five clusters:

I. Transformation

1. "Saving Atticus Finch: The Lawyer and the Legal Service Revolution." Accommodate new forms of legal service delivery.
2. "The Legal Industry of Tomorrow Arrived Yesterday: How Lawyers Must Respond." Regulate legal services in new areas while removing constraints that obstruct progress.
3. "Alternative Legal Service Providers: Filling the Justice Gap." The Limited License Legal Services Technician (LTTT) in Washington State.
4. "Client Change: The Age of Consumer Self-Navigation." Embrace the reality of new toolboxes; work with clients to sort out what they can do, and what the lawyer should do.

II. Equity

5. "Women Lawyers: Big Firm Attrition—Small Firm Gains." Women lawyers find structural and cultural barriers in large firms but opportunities for satisfaction and balance in small firms.
6. "Diversity and Inclusion as Filters for Envisioning the Future." Inclusive thinking and acting will become a successful lawyer's core competency—essential to success in practice and life.

III. Practice Settings

7. "The Future of Virtual Law Practice." Internet-based technology will help firms to offer efficient and affordable solutions and play a major part in reducing the access to justice gap.
8. "Large Law Firms: A Business Model, a Service Ethic." Mastering technology, business sophistication, and global markets will drive profitability by serving clients and society better.
9. "Indie Lawyering." A solo practice pathway is emerging as consumers seek individualized, community-centered & sustainable products; lift barriers to interstate practice and advertising.
10. "The Soldier-Lawyer and the Challenge of Perceiving Right Action." The nature of world conflicts requires military lawyers to apply professional expertise and organizational & national values.

IV. Regulation

11. "The Shift to Institutional Law Practice." Regulatory reform needs to register and discipline practices (not just individuals), lower practice barriers, allow non-lawyers to invest in law firms.
12. "Globalization and Regulation." Regulatory reform likely will include expansion to all legal service providers, less focus on geography in virtual practice world, rationalization of systems.
13. "A Sea Change in England." The impacts of regulatory reform in 2007 that allows up to 25% of legal services by non-lawyers and permits "alternative business practices" suggest that the future belongs to firms open to innovation and adaptation.
14. "The Australian Experiment: Out with the Old, in with the Bold." Regulatory change focused on an institution's versus an individual's conduct saw a dramatic drop in disciplinary complaints.
15. "Canada: The Road to Reform." Reforms include new regulations allowing lawyers to do work in other provinces and to serve clients from other provinces for up to 100 days/year.

V. Development

16. "Legal Education: Learning What Lawyers Need." Law school and continuing education must adapt with emphasis on practical skills, accreditation/regulation flexibility to encourage specialized and innovative programs, and alignment of cost with lawyer compensation.
17. "Mentoring: No App for That." Only face-to-face mentoring by experienced lawyers can help new generations of lawyers to emerge professionally; the need is intensifying.
18. "Social Media: Here Today, Here Tomorrow." Can promote practice, enhance legal skills and professional network, and strengthen cases. Avoid embarrassment; evolve ethical rules.
19. "Professionalism as Survival Strategy." Professionalism principles and programs must prevail through all the disruptive changes for the legal profession's identity to endure as '...the force that advances the rule of law and brings order to society and commerce...'
20. "Bar Associations: Tapping the Wisdom of the Young." Engage and give meaningful roles more quickly to younger lawyers, use technology; retool the business of bars to address rising risks.

TRANSFORMATION

Chapter 1: "Saving Atticus Finch: The Lawyer and the Legal Services Revolution," by Frederic S. Ury. Former President of National Conference of Bar Presidents, member ABA Commission on Legal Ethics 20/20, and chair of ABA Committee on Professionalism.

Ury Argued: The legal profession is in the midst of disruptive change and must adapt.

- Atticus Finch represented the model country lawyer whose profession was more of a calling than a business, and he had the respect of the whole community. The legal profession must remain just that – a profession.
- But, to remain primarily self-regulated it must adapt to the disruptive forces of change.
- Legal business model is dying.
- We have an oversupply of lawyers when 85 % of people with legal problems either can't afford or don't know they need legal services.
- Lawyers need to lead and the Bar needs to take bold action to establish the direction of legal services in the new global economy of fading borders and when technology equals power.
- Technology has increased the pace of practice and clients insist on 24/7 accessibility.
- The future depends on how much value lawyers can add to the Internet no-cost forms and advice.
- Internet services will become more robust as artificial intelligence technologies are introduced.
- Non-lawyer ownership of firms is nothing new, i.e. Axiom and law offices captive to a single client large insurance company.
- Internet-Centered Economy: Legal service providers are accessible, inexpensive and easy to use, and are owned by non-lawyers.
 - Not just commoditized services but dispute resolution websites owned by non-lawyers.
 - Lawyers compete with a disadvantage – they don't have access to venture capital and are constrained by outdated regulations.
- The control of legal work for many corporations has shifted to in-house counsel, legal outsourcing, and online dispute resolution to reduce costs.
- Risk of Losing the Right to Self-Regulate: While physicians and accountants are heavily regulated by government agencies, lawyers are in the last of the self-regulated professions.

- Hold on to the capacity to control the destiny of the profession or it will be lost.
- Key dangers:
 - Failure to participate
 - Looking the other way
 - Continuing in “our graceful state of monopoly

Ury Proposed:

1. Regulate entities rather than individual lawyers.
2. Permit and enable multidisciplinary practices that provide consumers one-stop shopping.
3. In stages, allow non-lawyer ownership of firms, i.e. by computer and social network experts.
4. License and regulate paralegals/legal technicians to provide commoditized work at lower cost, independent of attorneys.
5. Establish a 2-year master’s degree in law practice between a paralegal and a Juris Doctorate.
6. Make ABA/AALS accreditation requirements flexible enough to permit law schools to experiment with different kinds of programs and to differentiate themselves.

Concluding assertions:

- Only the profession of law safeguards the rights of ALL of our citizens. [Reaction: A justified claim]
- *Law has a history of achievement that cannot be matched by any other profession or business.* [Reaction: Very subjective and unwise assertion; unnecessarily elitist; *graceful state of monopoly?*]

Chapter 2: “The Legal Industry of Tomorrow Arrived Yesterday: How Lawyers Must Respond” by Stephen Gillers. Law Professor, NYU; author of casebook Regulation of Lawyers, 10th ed. 2015

Gillers Argued: Information technology and global trade are disrupting the business of law.

- The “geocentric” model for regulating lawyers can’t survive.
 - The focus of much practice is federal law which is little tested on state bar exams.
 - Differences in state law are less pronounced.
 - Specialization rather than local license is the defining credential.
 - Cyberspace enables lawyers anywhere to counsel clients anywhere easily and cheaply and to access libraries and documents from anywhere.
 - Physical office space is less important; some bar ethics opinions recognize virtual law offices
- Exclusivity of the traditional law firm is vanishing.
 - No longer are traditional law firms the only ones to offer legal services for profit.
 - Axiom and others offer experienced lawyers on an ‘as-needed’ basis to corporate clients, the lawyers working from home with proprietary software.
 - They can raise money in capital markets but traditional firms cannot.
- Lawyers are becoming invisible, such as via LegalZoom and Rocket Lawyer offering complex products enabling consumers to generate a form on line for tasks requiring legal knowledge.
 - These websites do not name the lawyers who contribute.
 - The companies are largely unregulated.
- Many legal services are form-driven, prompting the emergence of legal technicians, and Washington State’s experiment with Limited License Legal Technicians.
- Another new entrant is the legal process outsourcing, LPOs (Pangea3 and Integreon) sending work off for inexpensive legal service by persons who may not be admitted to a U.S. bar or any bar.

- Insularity and denial threaten the profession's values and impedes progress for access to justice.
- For the most part lawyers regulate lawyers. Deference to the Bar makes sense when rules are in the spirit of public service. Sometimes, however, rules or resistance to rules are driven by self-interest rather than client interest. Examples:
 - Support of minimum-fee schedules which impeded competition.
 - Opposition to mandatory malpractice insurance, claiming cost would increase fees.
 - Resistance to a rule that would require non-contingency fee agreements be in writing.
- Predictions are made on the floors of Houses of Delegates with no empirical support.
- The profession has lacked leadership in the face of change. Examples of interest group politics and institutional capture of the regulator by the regulated:
 - Lawyers trying (unsuccessfully) to restrict the Supreme Court's holding that legal advertising enjoys commercial speech protection.
 - ABA and 48 bars challenged the efforts of unions and other large organizations to use the purchasing power of members to lower legal fees for routine services.

Gillers Proposed:

1. Reexamine rules on cross-border practice, looking at more liberal rules of Canada and the EU.
2. Push all states to implement rules to reflect what lawyers actually do in our national legal economy, as the ABA Multijurisdictional Practice Commission proposed at the turn of the 21st Century.
3. Conduct more study to identify the conditions under which lawyers should be permitted to eliminate physical office and practice in VLOs.
4. Develop rules that permit LLLTs to practice, balancing the goal of competence with the needs of those now priced out of the legal marketplace.
 - a. Conduct studies to calibrate proper scope of work of LLLTs
 - b. Define the education and testing requirements for LLLTs
5. Enact rules that regulate the document production companies, so risks are managed while facilitating access to legal knowledge at low cost.
6. Either through legislation or court rule, protect clients who turn to litigation funders.
 - a. The lawyer may have conflicts of interest in advising a client objectively about a funder.
 - b. Set limits on how much a funder can earn in personal injury actions, much like limits on contingency fees.
7. Rather than changing only in reluctant response to realities or external pressures (i.e., lawmakers filling the void), bars should lead change thereby protecting the tradition of judicial authority that insulates the legal profession from political influence.

**Oregon State Bar
Special Open Session of the Board of Governors
October 6, 2015
Minutes**

President Richard Spier called the meeting to order at 8:30 a.m. on October 6, 2015. The meeting adjourned at 8:45 a.m. Members present from the Board of Governors were Jim Chaney, Guy Greco, Ray Heysell, Theresa Kohlhoff, John Mansfield, Vanessa Nordyke, Ramón A. Pagán, Travis Prestwich, Per Ramfjord, Josh Ross, Kerry Sharp, Michael Levelle, Charles Wilhoite, Tim Williams and Elisabeth Zinser. Not present were Audrey Matsumonji and Kathleen Rastetter. Staff present were Sylvia Stevens, Susan Grabe and Camille Greene.

1. Call to Order and Roll Call

Mr. Spier determined there was a quorum.

2. Appellate Screening Committee Recommendation

Mr. Ross outlined the committee process and asked the board to approve the committee's list of "highly qualified" Court of Appeals and/or Supreme Court candidates to recommend to Governor Kate Brown. **[Exhibit A]**

Motion: On committee motion, the board voted unanimously to send the list as recommended to Governor Kate Brown.

October 6, 2015

Board of Governors*President*

Richard G. Spier, Portland

President-elect

R. Ray Heysell, Medford

Region 1

Timothy L. Williams, Bend

Region 2

James C. Chaney, Eugene

Region 3

R. Ray Heysell, Medford

*Region 4*Guy B. Greco, Newport
Ramón A. Pagán, Hillsboro*Region 5*Theresa M. Kohlhoff, Portland
Michael D. Levelle, Portland
Johnathan E. Mansfield, Portland
Per A. Ramfjord, Portland
Joshua L. Ross, Portland
Richard G. Spier, Portland*Region 6*Vanessa A. Nordyke, Salem
Travis S. Prestwich, Salem*Region 7*

Kathleen J. Rastetter, Oregon City

*Public Members*Audrey T. Matsumonji, Gresham
Kerry L. Sharp, Lake Oswego
Charles A. Wilhoite, Portland
Elisabeth Zinser, Ashland**Executive Director**

Sylvia Stevens, Tigard

Governor Kate Brown
State Capitol Building
900 Court St. NE, Suite 254
Salem, OR 97301

Dear Governor Brown:

The Oregon State Bar's Appellate Selection Committee has completed its process of reviewing the applications of candidates who have applied for appointment to the Oregon Court of Appeals and/or the Oregon Supreme Court and who agreed to disclose their application materials to the OSB. Pursuant to OSB Bylaws, the Committee has conducted an in-depth review of each application and candidate, including in-person interviews of all candidates who opted to participate in the process. (*Judge Suzanne B. Chanti chose to not participate in the OSB's process.)

The Committee's review process is intended to provide you with relevant, reliable, and descriptive information to better inform your appointment decision. As instructed by OSB Bylaws, our recommendation of candidates as "highly qualified" is based on "the statutory requirements of the position, as well as information obtained in the review process, and the following criteria: integrity, legal knowledge and ability, professional experience, cultural competency, judicial temperament, diligence, health, financial responsibility, and public service." A "highly qualified" recommendation is intended to be objective, and the Committee's failure to recommend a candidate as "highly qualified" is not a finding that the person is unqualified. Candidates have applied for either one, or both, of the positions on the two courts. To the extent a candidate applied for both positions, a "highly qualified" recommendation is intended to reflect the candidate's ability to serve on either court.

The Board of Governors is pleased that members from around the state, including a public member, serve on the Appellate Selection Committee. Hon. Mary Deits, former Chief Judge of the Oregon Court of Appeals, also volunteered her time as a Committee member during this review process, for which the Board of Governors is especially grateful. We also deeply appreciate the assistance and leadership of your counsel and your office during this process.

Pursuant to OSB Bylaw 2.703, the Oregon State Bar Board of Governors has approved the following list of candidates deemed "highly qualified" for appointment to the Court of Appeals and/or Supreme Court:

Allen, Beth A.
Aoyagi, Robyn E.
Armstrong, Rex E.
Bloom, Benjamin M.
Bunch, William D.
Crowther, Joshua B.
DeHoog, Roger J.
Duncan, Rebecca
Ferry, David O.
Hadlock, Erika L.
Mooney, Josephine H.
Nakamoto, Lynn R.
Ortega, Darleen R.
Rastetter, Kathleen J.
Russo, Jolie A.
Shorr, Scott
Sykora, Alycia N.

The Board of Governors appreciates that there were many qualified candidates for the positions and that the review process presented a challenging task. According to OSB Bylaw 2.700, a press release will be issued with the list of the “highly qualified” candidates and the results will be posted on the OSB webpage. Also pursuant to OSB Bylaws, we will gladly respond to any requests from your office as to whether certain other candidates meet a “qualified” standard.

Sincerely,

Richard Spier
OSB President

Joshua Ross
OSB Board of Governors
Appellate Selection Committee Chair

Cc: Ben Souede, General Counsel, Office of the Governor
Misha Isaak, Deputy General Counsel, Office of the Governor

**Oregon State Bar
Special Open Session of the Board of Governors
October 9, 2015
Minutes**

President Richard Spier called the meeting to order at 4:12 p.m. on October 9, 2015. The meeting adjourned at 4:54 p.m. Members present from the Board of Governors were Jim Chaney, Guy Greco, Ray Heysell, Theresa Kohlhoff, John Mansfield, Audrey Matsumonji, Vanessa Nordyke, Ramón A. Pagán, Travis Prestwich, Per Ramfjord, Kathleen Rastetter, Josh Ross, Kerry Sharp, Michael Levelle, Charles Wilhoite, Tim Williams and Elisabeth Zinser. Staff present were Sylvia Stevens, Helen Hirschbiel, Rod Wegener, Dawn Evans, Susan Grabe, Kateri Walsh, Dani Edwards, Camille Greene and Theresa Wright, Legal Opportunities Coordinator. Also present was Carol Bernick, PLF CEO.

1. Call to Order

Mr. Spier called the meeting to order.

2. Board Development Committee - 2016 BOG Public Member Appointment

Ms. Matsumonji asked to board to approve the Board Development Committee's recommendation to appoint one of five candidates interviewed for the Board of Governors Public Member position beginning January 1, 2016. The committee motion recommended Robert Gratchner for board approval.

Motion: On committee motion, the board voted unanimously to appoint Robert Gratchner to the Board of Governors Public Member position beginning January 1, 2016.

3. Budget & Finance Committee - 2016 Budget

On behalf of the Committee, Mr. Heysell asked the board to approve the Budget & Finance Committee's proposed budget for 2016. The budget is premised on a \$50 increase in the annual membership fee (to be submitted to the HOD), offset by a reduction in the Client Security Fund assessment of \$30. The 2016 budget also includes a salary pool of 3%.

Motion: On committee motion, the board voted to place the member fee resolution on the 2015 HOD agenda for approval at the November 6, 2015 meeting. The motion passed 17-1. All board members voted in favor with the exception of Ms. Kohlhoff, who was opposed. **[Exhibit A]**

4. Approve 2015 HOD Agenda

Mr. Spier presented the preliminary HOD agenda. **[Exhibit B]**

Motion: On motion of the Budget & Finance Committee, the board voted unanimously to include the BOG Resolution to increase the annual membership fee. M. Heysell volunteered to present the resolution.

Motion: Mr. Prestwich moved, Mr. Levelle seconded, and the board voted unanimously to include the BOG Veteran's Day Resolution. Mr. Sharp volunteered to present the resolution.

Motion: Mr. Cheney moved, Mr. Greco seconded, and the board voted unanimously to include the CEJ Resolution supporting Adequate Funding for Legal Services.

Motion: The board voted unanimously to exclude from the preliminary agenda the delegate resolution on Intoxilyzer Devices at OLCC Licensed Establishments.

Mr. Spier asked whether any BOG members were interested in presenting the In Memoriam resolution. Mr. Chaney, Ms. Rastetter and Ms. Nordyke volunteered.

5. Approve E.D.'s Accrued Vacation Hours Carry-over

Ms. Hirschbiel presented Ms. Stevens' request to carryover unused vacation hours for use in December.

Motion: Ms. Zinser moved, Mr. Pagan seconded, and the board voted unanimously to approve Ms. Stevens vacation carry-over into December 2015.

6. Request to co-Sponsor ABA President's Visit

Mr. Spier presented Mr. Harnden's request for OSB, with the MBA, to co-sponsor ABA President Paulette Brown's visit on October 26, 2015 at which she will be launching her national pro-bono campaign. **[Exhibit C]**

Motion: Mr. Levelle moved, Ms. Matsumonji seconded, and the board voted to sponsor the ABA President's visit for \$1,000. The motion passed 17-1. Mr. Prestwich voted no, all other voted yes.

7. Donation to CEJ Laf-off

Ms. Stevens presented Ms. Hansberger's request for the board to donate \$1000 to the CEJ Laf-Off.

Motion: The board voted unanimously to support the CEJ Laf-Off with a \$1,000 donation.

8. Recognition of Charles Wilhoite by Urban League of Portland

Mr. Spier informed the board of Mr. Wilhoite's recognition by the Urban League of Portland for his service. The board recognizes and appreciates Mr. Wilhoite's service to the Urban League of Portland.

9. Legal Publications Author Recognition Reception

Mr. Spier encouraged the board to attend the reception recognizing Legal Publications Authors at the Bar Center following the BOG meeting.

This resolution is pending 10/9/15 decision made by BOG on 2016 Budget...

Resolution No. XXX: Increase 2016 Active Membership Fees by \$50. (Board of Governors Resolution No. 1)

Whereas, the OSB Board of Governors is charged by ORS 9.080(1) with the executive functions of the Oregon State Bar, which includes assuring there are adequate resources for bar operations; and

Whereas, the annual membership fee is established by the Board of Governors and any increase over the amount established for the prior year must be approved by a majority of delegates voting thereon at the annual meeting of the House of Delegates, pursuant to ORS 9.191(1); and

Whereas, the annual membership fee has not been increased since 2006; and

Whereas, the Board of Governors has determined that an increase is required to maintain the current level of programs and services; now, therefore, be it

Resolved, that the 2016 Oregon State Bar membership be for active members be increased by \$XX.

<i>Membership Category</i>	<i>If paid by February 1, 2016</i>	<i>If paid after February 1 but by March 2, 2016</i>	<i>If paid after March 2, 2016</i>
Active members admitted in any jurisdiction before 1/1/13	\$537.00	\$587.00	\$637.00
Active members admitted in any jurisdiction on or after 1/1/13	\$453.00	\$503.00	\$553.00
Inactive members	\$125.00	\$150.00	\$175.00
Active pro bono members	\$125.00	\$125.00	\$125.00

Background

The Board of Governors takes very seriously its obligation to use the bar's resources wisely, especially since most of the bar's annual revenue comes from the mandatory annual membership fees. Over the last ten years, the BOG has continued and improved operations without an active membership fee increase. During that time, and despite significant investment losses during the Great Recession, the Bar acquired the current OSB Center, made BarBooks a benefit of membership (with help from an annual PLF contribution), and has embarked on the acquisition of new organizational management software. Also during that period, non-personnel costs have been reduced by \$XXXX and, with the implementation of a new business model for Lawyer Referral, the Referral & Information Program has gone from an annual expense of approximately \$250,000 to being self-supporting.

Despite these accomplishments, however, it has become clear to the BOG that the current level of programs and services cannot be maintained without an increase in the annual membership fee. To offset the impact of the fee increase, the BOG has reduced the Client Security Fee assessment from \$45 to \$15.

Oregon State Bar
2015 House of Delegates Meeting

Oregon State Bar Center
16037 SW Upper Boones Ferry Road
Tigard, Oregon 97224
503.620.0222
Friday, November 6, 2015
10:00 a.m.

Oregon State Bar

Dear Oregon State Bar Member:

I am pleased to invite you to the 2015 OSB House of Delegates meeting, which will begin at **10:00 a.m.** on **Friday, November 6, 2015**, at the Oregon State Bar Center.

The preliminary agenda for the meeting includes resolutions to increase the annual membership fee, to support adequate funding for low-income legal services, and to honor of veterans and service personnel.

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.

If you have questions concerning the House of Delegates meeting, please contact Camille Greene, Executive Assistant, by phone at 503-431-6386, by e-mail at cgreene@osbar.org, or toll free inside Oregon at 800-452-8260 ext 386. Remember that delegates are eligible for reimbursement of round-trip mileage to and from the HOD meeting. Reimbursement is limited to 400 miles and expense reimbursement forms must be submitted within 30 days after the meeting.

I look forward to seeing you at the HOD Meeting on November 6, and I thank you in advance for your thoughtful consideration and debate of these items.



Richard G. Spier, OSB President

OREGON STATE BAR

2015 House of Delegates Meeting AGENDA

Oregon State Bar Center, 16037 SW Upper Boones Ferry Road, Tigard, Oregon 97224
 10:00 a.m., Friday, November 6, 2015
 Presiding Officer: Richard G. Spier, OSB President

Reports

- | | |
|---|---|
| <p>1. Call to Order
<i>Rich Spier</i>
<i>OSB President</i></p> <p>2. Adoption of Final Meeting Agenda
<i>Rich Spier</i>
<i>OSB President</i></p> <p>3. Report of the President
<i>Rich Spier</i>
<i>OSB President</i></p> | <p>4. Comments from the Chief Justice of the Oregon Supreme Court
<i>Thomas A. Balmer, Chief Justice</i>
<i>Oregon Supreme Court</i></p> <p>5. Report of the Board of Governors Budget and Finance Committee & Notice of 2016 Annual Fees
<i>Theresa Kohlhoff, Chair</i>
<i>BOG Budget and Finance Committee</i></p> <p>6. Overview of Parliamentary Procedure
<i>Alice M. Bartelt, Parliamentarian</i></p> |
|---|---|

Resolutions

- | | |
|--|--|
| <p>7. Increase 2016 Active Membership Fees (Board of Governors Resolution No. 1)
<i>Presenter:</i>
<i>Theresa Kohlhoff, BOG, Member</i></p> <p>8. In Memoriam (Board of Governors Resolution No. 2)
<i>Presenter:</i>
<i>Audrey Matsumonji, BOG, Public Member</i></p> <p>9. Veterans Day Remembrance (Board of Governors Resolution No. 3)
<i>Presenter:</i>
<i>Kerry Sharp, BOG, Public Member</i></p> | <p>10. Support for Adequate Funding for Legal Services to Low-Income Oregonians (Delegate Resolution No. 1)
<i>Presenters:</i>
<i>Kathleen Evans, HOD, Region 6</i>
<i>Gerry Gaydos, HOD, Region 2</i>
<i>Ed Harnden, HOD, Region 5</i></p> <p style="text-align: center;"><u>Resolution Excluded from Preliminary Agenda</u></p> <p>11. Provide for Intoxilyzer Devices at OLCC Licensed Establishments (Delegate Resolution No. 2)
<i>Presenters:</i>
<i>Danny Lang HOD, Region 3</i></p> |
|--|--|

Notice of 2016 Annual Fees

The Oregon State Bar annual membership fees and assessments for 2016 (including the Client Security Fund and Diversity and Inclusion Assessments) are as follows:

Membership Category	If paid by February 1, 2016	If paid after February 1 but by March 2, 2016	If paid after March 2, 2016
Active members admitted in any jurisdiction before 1/1/14	\$537.00	\$587.00	\$637.00
Active members admitted in any jurisdiction on or after 1/1/14	\$453.00	\$503.00	\$553.00
Inactive members	\$125.00	\$150.00	\$175.00
Active pro bono members	\$125.00	\$125.00	\$125.00

Resolutions

**7. Increase 2016 Active Membership Fees
(Board of Governors Resolution No. 1)**

Whereas, the OSB Board of Governors is charged by ORS 9.080(1) with the executive functions of the Oregon State Bar, which includes assuring there are adequate resources for bar operations; and

Whereas, the annual membership fee is established by the Board of Governors and any increase over the amount established for the prior year must be approved by a majority of delegates voting thereon at the annual meeting of the House of Delegates, pursuant to ORS 9.191(1); and

Whereas, the annual membership fee has not been increased since 2006; and

Whereas, the Board of Governors has determined that an increase is required to maintain the current level of programs and services; now, therefore, be it

Resolved, that the 2016 Oregon State Bar membership be for active members be increased by \$XX.

<i>Membership Category</i>	<i>If paid by February 1, 2016</i>	<i>If paid after February 1 but by March 2, 2016</i>	<i>If paid after March 2, 2016</i>
Active members admitted in any jurisdiction before 1/1/13	\$537.00	\$587.00	\$637.00
Active members admitted in any jurisdiction on or after 1/1/13	\$453.00	\$503.00	\$553.00
Inactive members	\$125.00	\$150.00	\$175.00
Active pro bono members	\$125.00	\$125.00	\$125.00

*Presenter: Theresa Kohlhoff
Board of Governors, Member*

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

Resolved, That the OSB House of Delegates and members assembled stand for a moment of silence in honor of the members of the Oregon State Bar who have died since the 2014 House of Delegates Meeting.

Laila E. Aarnas	Lynda A. Clark	Hon. Robert Jones	James P. O'Neal
Hon. Philip T. Abraham	Shannon K. Connall	Thomas A. Kennedy	Michelle I. Pauly
Richard H. Allen	Des Connall	Peter R. Knipe	Walter H. Pendergrass
Arthur R. Barrows	Debra Deem	David B. Larsen	Lester L. Rawls
David S. Barrows	Michael J. Dooney	James P. Leahy	Steve Rissberger
William R. Barrows	Edward Ray Fechtel	Hon. Winfrid K.F. Liepe	John Leslie Roe
William O. Bassett	Douglas M. Fellows	Margaret M. Maginnis	Matthew C. Runkle
Marc D. Blackman	Barbara H. Fredericks	Michael V. Mahoney	William A. Sabel
Joseph A. Brislin Jr	George C. Fulton	Lisa A. Maybee	Ross M. Shepard
James W. Britt III	Joel A. Gallob	Daniel T. McCarthy	Herman F. Smith
Nancy Elizabeth Brown	Caroline D. Glassman	William S. McDonald	Monica A. Smith
Franklyn N. Brown	James B. Griswold	Lee J. McFarland	Scott D. Sonju
Ellen P. Bump	Hon. Harl H. Haas	Rodney W. Miller	Harvard P. Spigal
John H. Buttler	Samuel A. Hall Sr	Robert Mix	Garth F. Steltenpohl
Victor Calzaretta	Lloyd G. Hammel	Richard H. Muller	Sharon C. Stevens
David F. Cargo	John N. Harp Jr	Stephen B. Murdock	Randolph J. Stevens
Richard R. Carney	Eric Haws	C. Richard Neely	Robert H. Thomson
Robert R. Carney	Donald E. Heisler	Robert J. Neuberger	Harold Uney
Lawrence Lee Carter	Loren D. Hicks	Gregory A. Nielson	Hon. Darrell J. Williams
James Casby	Hon. Ralph M. Holman	Hon. Albin W. Norblad	Gerald Williams
Kelly WG Clark	James H. Huston	Hon. Jack F. Olsen	M. Keith Wilson

Presenter: Audrey Matsumonji
Board of Governors, Public Member

9. Veterans Day Remembrance
(Board of Governors Resolution No. 3)

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: Kerry Sharp
Board of Governors, Public Member

Support of Adequate Funding for Legal Services for Low-Income Oregonians
(Delegate Resolution No. 1)

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

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

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

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);

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;

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;

Whereas, Oregon currently has 1 legal aid lawyer for every 8,900 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;

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, 2005–2014). This resolution is similar to the resolution passed in 2014, but provides updates on the ratio of legal aid lawyers to Oregonians eligible for legal aid services.

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. About 35% 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 130,000 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 were negative 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

The BOG has excluded the following item from the agenda pursuant to OSB Bylaw 3.4 and HOD Rule 5.5.

**10. Provide for Intoxilyzer Devices at OLCC Licensed Establishments
(Delegate Resolution No. 2)**

Whereas, ORS 813.010 is the Oregon Statute prohibiting "Driving Under the Influence".

Whereas, it is difficult, without testing, to determine the Blood Alcohol Content Level of a person;

Whereas, Establishments Licensed by the OLCC are also prohibited from serving *Visibly Intoxicated Persons*;

Whereas, violation of ORS 813.010 is a Class A Misdemeanor and may also result in the offense being charged as a Felony;

Whereas, it is well known and acknowledged that driving under the influence of Alcohol results in far too many Deaths, Serious Injuries, and Substantial Collision Damages;

Whereas, it is not unlawful to consume Alcoholic Beverages and operate a Motor Vehicle;

Whereas, newer technology makes it possible to quickly obtain a Breath Test Result using Intoxilyzer type device;

Whereas, the Insurance Industry would benefit from fewer Claims arising from "Alcohol Related Motor Vehicle Accidents";

Whereas, fewer Alcohol Related Motor Vehicle Accidents would result in lower Insurance Premiums upon the reduction of DUII related accidents;

Whereas, the Oregon Judicial Department would realize a fiscal benefit by the reduction in number of DUII Cases filed; Jury Trials; and related matters such as Diversion Proceedings.

Whereas, availability in Real Time of a Person's Blood Alcohol Content will serve as a deterrent and Crime Prevention Measure;

Whereas, making available Intoxilyzer type devices in Establishments licensed to serve Alcoholic Beverages would forcibly provide Patrons, Servers, and the Establishments with an objective indication of impairment in addition to relying upon *Visible Intoxication*;

Whereas, in Advancement of the Science of Jurisprudence [pursuant to Section 1.2 - Purposes of the By-Laws of the Oregon State Bar] involve matters of Moral and Legal Interest of the Oregon State Bar Members; now, therefore, be it

Resolved, that the House of Delegates recommend and encourage the Board of Governors, in the furtherance of the improvement of the Administration of Justice to recommend to Oregon Legislature a study of statistics and Oregon Administrative Rules regulating the Establishment serving of Alcoholic Beverages to study implementation of incentives or requirements the Intoxylizer type devices be available for use by Patrons during hours when Alcoholic Beverages are served, so as to make available the means and methods for determining a Patron's Blood Alcohol Content in addition to reliance upon *Visible Intoxicated*.

Financial Impact

No fiscal impact upon Oregon State Bar. Funding for implementation may be obtained from revenues from Alcoholic Beverage taxes and/or OLCC Licensee Permit Fees.

Note: Oregon Judicial Department savings noted above would likely offset cost of implementation.

Presenter:
Danny Lang, HOD, Region 3

DRAFT

Sylvia Stevens

From: Ed Harnden
Sent: Tuesday, September 29, 2015 9:34 AM
To: Sylvia Stevens; Guy Walden
Cc: Traci Ray
Subject: ABA President Brown's Visit

Sylvia & Guy-

We are excited to welcome the ABA President to Portland on October 26th. We have a great breakfast with Managing Partners and Bar Leaders planned, as well as a CLE and Reception in the afternoon. Judge Nelson and Traci Ray have made all of the arrangements, and I have been asked to fundraise. It would be wonderful if the OSB and MBA could be listed as co-sponsors of the visit, and we would welcome your attendance and promotion of the events.

Would the OSB and MBA be willing to co-sponsor at the \$1,000 level each? Your sponsorship would be greatly appreciated and we would place your logos on all of the invitations (that are set to go out asap) and thank you at each event.

Please let me know if you have any questions.

Ed Harnden
Managing Partner

BARRAN LIEBMAN LLP
601 SW 2nd Avenue, Suite 2300
Portland, Oregon 97204
Direct 503.276.2101
Fax 503.274.1212
Email eharnden@barran.com

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OREGON STATE BAR
Client Security - 113
For the Nine Months Ending September 30, 2015

Description	September 2015	YTD 2015	Budget 2015	% of Budget	September Prior Year	YTD Prior Year	Change v Pr Yr
REVENUE							
Interest	\$520	\$4,079			\$247	\$1,768	130.8%
Judgments	27,500	28,200	1,000	2820.0%	100	750	3660.0%
Membership Fees	1,305	662,606	693,500	95.5%	2,115	661,244	0.2%
TOTAL REVENUE	29,325	694,885	694,500	100.1%	2,462	663,762	4.7%
EXPENSES							
SALARIES & BENEFITS							
Employee Salaries - Regular	2,507	24,705	32,600	75.8%	2,433	22,662	9.0%
Employee Taxes & Benefits - Reg	1,096	8,565	11,900	72.0%	644	8,292	3.3%
TOTAL SALARIES & BENEFITS	3,603	33,270	44,500	74.8%	3,077	30,953	7.5%
DIRECT PROGRAM							
Claims	1,385	66,917	250,000	26.8%	5,000	23,044	190.4%
Collection Fees	1,500	1,593	1,500	106.2%	30	1,057	50.7%
Committees	28	70	250	28.1%			
Travel & Expense		1,760	1,400	125.7%		1,123	56.8%
TOTAL DIRECT PROGRAM EXPENSE	2,913	70,341	253,150	27.8%	5,030	25,223	178.9%
GENERAL & ADMINISTRATIVE							
Office Supplies			150				
Photocopying		5	50	9.6%		34	-86.0%
Postage	12	124	300	41.2%	35	269	-54.1%
Professional Dues		200	200	100.0%		200	
Telephone	50	237	150	158.2%		50	375.9%
Training & Education			600				
Staff Travel & Expense		734	974	75.4%		478	53.7%
TOTAL G & A	62	1,300	2,424	53.6%	35	1,031	26.0%
TOTAL EXPENSE	6,578	104,911	300,074	35.0%	8,142	57,208	83.4%
NET REVENUE (EXPENSE)	22,748	589,975	394,426		(5,680)	606,554	-2.7%
Indirect Cost Allocation	2,527	22,743	30,319		1,357	12,213	86.2%
NET REV (EXP) AFTER ICA	20,221	567,232	364,107		(7,037)	594,341	-4.6%
Fund Balance beginning of year		619,965					
Ending Fund Balance		1,187,197					

OREGON STATE BAR
Client Security - 113
For the Ten Months Ending October 31, 2015

Description	October 2015	YTD 2015	Budget 2015	% of Budget	October Prior Year	YTD Prior Year	Change v Pr Yr
REVENUE							
Interest	\$507	\$4,586			\$306	\$2,074	121.2%
Judgments	100	28,300	1,000	2830.0%	100	850	3229.4%
Membership Fees	10,342	672,948	693,500	97.0%	12,555	673,799	-0.1%
TOTAL REVENUE	10,949	705,834	694,500	101.6%	12,961	676,723	4.3%
EXPENSES							
SALARIES & BENEFITS							
Employee Salaries - Regular	2,507	27,212	32,600	83.5%	2,433	25,095	8.4%
Employee Taxes & Benefits - Reg	801	9,366	11,900	78.7%	847	9,139	2.5%
TOTAL SALARIES & BENEFITS	3,308	36,577	44,500	82.2%	3,280	34,234	6.8%
DIRECT PROGRAM							
Claims	100	67,017	250,000	26.8%		23,044	190.8%
Collection Fees	66	1,659	1,500	110.6%	74	1,131	46.7%
Committees		70	250	28.1%			
Travel & Expense		1,760	1,400	125.7%		1,123	56.8%
TOTAL DIRECT PROGRAM EXPENSE	166	70,507	253,150	27.9%	74	25,297	178.7%
GENERAL & ADMINISTRATIVE							
Office Supplies			150				
Photocopying		5	50	9.6%		34	-86.0%
Postage	6	130	300	43.3%	2	272	-52.2%
Professional Dues		200	200	100.0%		200	
Telephone		237	150	158.2%		50	375.9%
Training & Education			600				
Staff Travel & Expense		734	974	75.4%		478	53.7%
TOTAL G & A	6	1,306	2,424	53.9%	2	1,033	26.4%
TOTAL EXPENSE	3,480	108,390	300,074	36.1%	3,357	60,565	79.0%
NET REVENUE (EXPENSE)	7,470	597,444	394,426		9,605	616,158	-3.0%
Indirect Cost Allocation	2,527	25,270	30,319		1,357	13,570	86.2%
NET REV (EXP) AFTER ICA	4,943	572,174	364,107		8,248	602,588	-5.0%
Fund Balance beginning of year		619,965					
Ending Fund Balance		1,192,140					

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: November 20, 2015
From: Sylvia E. Stevens, Executive Director
Re: CSF Committee Awards—May-November 2015

Action Requested

None, this is for the BOG's information only.

Discussion

The Client Security Fund Committee makes final decisions on awards of less than \$5,000. Listed below are awards made by the committee at its May, September and November meetings:¹

WOOD (Hassel)	\$1,000.00
WOOD (Waller)	525.00
GRUETTER (Koutsopolis)	1,484.98
BERTONI (Lyons)	3,000.00
GERBER (Hendershot)	4,000.00
TOTAL	10,009.00

¹ The CSF Committee did not meet in July; this report was inadvertently omitted from the BOG's June meeting agenda.

> From: MGrable <mgrable@grablelaw.com<<mailto:mgrable@grablelaw.com>>>
> Date: September 30, 2015 at 7:53:31 PM PDT
> To: president@osb.org<<mailto:president@osb.org>>
> Cc: shantke@grablelaw.com<<mailto:shantke@grablelaw.com>>, Evan Hansen
> <ehansen@grablelaw.com<<mailto:ehansen@grablelaw.com>>>

> Subject: Comment on midyear report

> Dear Mr. Spier,

>

> The section of your Midyear Report covering rural and small-town
> practice really hit home. I have been practicing in Pendleton for over 35
> years; finding qualified attorneys to cross the Cascades has always been a
> challenge. Only during the recession did we have a respectable pool of
> applicants.

>

> Our firm is currently searching for an associate, with discouraging
> results, despite our offering mentorship for a new attorney, very reasonable
> billing requirements, a competitive salary and benefits.

>

> Yes, the work is here; unfortunately, new attorneys are not.

>

>

> _____
> Michele Grable | Attorney at Law | Grable, Hantke & Hansen, LLP
> 334 SE Second Street | P.O. Box 1760 | Pendleton, OR 97801
> Tel: (541) 276-1851 | Fax: (541) 276-3146 | e-mail:
> mgrable@grablelaw.com<<mailto:mgrable@grablelaw.com>>



October 26, 2015

President Richard Spier
Oregon State Bar Oregon State Bar
P.O. Box 231935
Tigard, OR 97281-1935

RECEIVED

OCT 30 2015

**Oregon State Bar
Executive Director**

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James J. Sandman

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Victor B. Maddox
Louisville, KY

Laurie Mikva
Chicago, IL

Fr. Pius Pietrzyk, OP
Zanesville, OH

Julie A. Reiskin
Denver, CO

Gloria Valencia-Weber
Albuquerque, NM

Dear President Spier:

The Legal Services Corporation (LSC) is pleased to announce its intention to award grants and contracts to provide effective and economical delivery of high quality civil legal services to eligible low-income individuals in your state. Grants will be awarded in January 2016.

As part of LSC's FY 2016 grants process, a Request for Proposals (RFP) to deliver civil legal services in designated service areas was announced in the Federal Register on March 27, 2015 (80 Fed. Reg. 16461). This RFP was also announced in newspapers, bar journals, and on the Internet. In addition, in accordance with LSC's multi-year funding policy, recipients of 2-year or 3-year grants that began in calendar years 2014 or 2015 are required to file grant renewal applications to receive funding for calendar year 2016 grants.

LSC has received applications pursuant to the RFP or the grant renewal process for the provision of civil legal services to eligible low-income individuals in your state or jurisdiction. A listing of all potential recipients, by state and jurisdiction, is attached.

We are providing thirty days to give interested parties an opportunity to comment on the proposed grant. The Notice of Intent to award grants was published in the Federal Register during the week of October 26, 2015.

Please contact Reginald Haley, of LSC's Office of Program Performance, at 202.295.1545, or by e-mail at haley@lsc.gov if you have any questions about this matter.

Sincerely,


James J. Sandman
President

Attachment



LEGAL SERVICES COPORATION
Notice of Intent to Award Grants Effective January 1, 2016
(Amounts shown are estimates and are subject to change)

Listed below are the grant applicants that filed qualified grant applications for LSC calendar year 2016 grant awards. Grants will be awarded so that each service area is served; however, none of the listed organizations is guaranteed an award.

The amounts below reflect the funding amounts for 2015 grant awards to each service area. These amounts will change based on the 2016 census adjustment and the final FY2016 appropriation.

LSC will post all updates and/or changes to this notice at <http://www.grants.lsc.gov/grants-grantee-resources>. Please visit <http://www.grants.lsc.gov/grants-grantee-resources> regularly for updates on the LSC grants process.

Please email inquiries regarding this matter to the LSC Competition Service Desk at competition@lsc.gov.

Thank you.

Name of Applicant Organization	State	Service Area	Estimated Annualized 2016 Funding
Alaska Legal Services	AK	AK-1	\$ 659,864
Alaska Legal Services	AK	NAK-1	\$ 542,139
Legal Services Alabama	AL	AL-4	\$ 5,972,421
Center For Arkansas Legal Services	AR	AR-7	\$ 2,183,008
Legal Aid of Arkansas	AR	AR-6	\$ 1,495,419
American Samoa Legal Aid	AS	AS-1	\$ 222,147
Community Legal Services	AZ	AZ-3	\$ 5,017,450
Community Legal Services	AZ	MAZ	\$ 148,510
DNA-People's Legal Services	AZ	AZ-2	\$ 428,253
DNA-People's Legal Services	AZ	NAZ-5	\$ 2,615,849
Southern Arizona Legal Aid	AZ	AZ-5	\$ 2,121,481
Southern Arizona Legal Aid	AZ	NAZ-6	\$ 638,976
Bay Area Legal Aid	CA	CA-28	\$ 4,203,084
California Indian Legal Services	CA	CA-1	\$ 24,492

Name of Applicant Organization	State	Service Area	Estimated Annualized 2016 Funding
California Indian Legal Services	CA	NCA-1	\$ 885,652
California Rural Legal Assist.	CA	CA-31	\$ 4,766,159
California Rural Legal Assist.	CA	MCA	\$ 2,640,544
Central California Legal Services	CA	CA-26	\$ 2,838,996
Greater Bakersfield Legal Assist	CA	CA-2	\$ 1,018,963
Inland Counties Legal Services	CA	CA-12	\$ 4,676,508
Legal Aid Society of Orange County	CA	CA-19	\$ 3,514,880
Legal Aid Society of San Diego	CA	CA-14	\$ 2,793,238
Legal Aid Foundation of Los Angeles	CA	CA-29	\$ 5,746,726
Legal Services of Northern California	CA	CA-27	\$ 3,650,471
Neighborhood Legal Services of Los Angeles County	CA	CA-30	\$ 3,767,240
Colorado Legal Services	CO	CO-6	\$ 4,402,360
Colorado Legal Services	CO	MCO	\$ 148,559
Colorado Legal Services	CO	NCO-1	\$ 96,270
Pine Tree Legal Assistance	CT	NCT-1	\$ 15,693
Statewide Legal Services of Connecticut	CT	CT-1	\$ 2,430,737
Neighborhood Legal Services Program of the District of Columbia	DC	DC-1	\$ 754,494
Legal Aid Bureau	DE	MDE	\$ 24,834
Legal Services Corporation of Delaware	DE	DE-1	\$ 689,992
Bay Area Legal Services	FL	FL-16	\$ 3,274,589
Coast To Coast Legal Aid of So. Florida	FL	FL-18	\$ 1,959,338
Community Legal Services of Mid-Florida	FL	FL-15	\$ 4,086,748
Florida Rural Legal Services	FL	FL-17	\$ 3,759,690
Florida Rural Legal Services	FL	MFL	\$ 898,346
Legal Services of Greater Miami	FL	FL-5	\$ 3,221,428
Legal Services of North Florida	FL	FL-13	\$ 1,512,808
Three Rivers Legal Services	FL	FL-14	\$ 2,028,848
Atlanta Legal Aid Society	GA	GA-1	\$ 3,669,473
Georgia Legal Services Program	GA	GA-2	\$ 7,713,271
Georgia Legal Services Program	GA	MGA	\$ 392,175
Guam Legal Services	GU	GU-1	\$ 250,355
Legal Aid Society of Hawaii	HI	HI-1	\$ 1,213,720
Legal Aid Society of Hawaii	HI	NHI-1	\$ 229,627
Iowa Legal Aid	IA	MIA	\$ 37,740
Iowa Legal Aid	IA	IA-3	\$ 2,506,246
Idaho Legal Aid Services	ID	ID-1	\$ 1,460,374
Idaho Legal Aid Services	ID	MID	\$ 186,963
Idaho Legal Aid Services	ID	NID-1	\$ 65,127
LAF (Legal Assist Foundation. Metro. Chicago)	IL	IL-6	\$ 5,804,915
LAF (Legal Assist Foundation. Metro. Chicago)	IL	MIL	\$ 249,699
Land of Lincoln Legal Assist. Foundation.	IL	IL-3	\$ 2,511,505

Name of Applicant Organization	State	Service Area	Estimated Annualized 2016 Funding
Prairie State Legal Services	IL	IL-7	\$ 3,650,736
Indiana Legal Services	IN	IN-5	\$ 6,558,725
Indiana Legal Services	IN	MIN	\$ 113,731
Kansas Legal Services	KS	KS-1	\$ 2,623,776
Appalachian Res. & Def. Fund of Kentucky	KY	KY-5	\$ 1,534,297
Kentucky Legal Aid	KY	KY-9	\$ 1,140,900
Legal Aid of The Blue Grass	KY	KY-10	\$ 1,479,070
Legal Aid Society	KY	KY-2	\$ 1,324,022
Acadiana Legal Services Corp	LA	LA-10	\$ 1,471,883
Legal Services of North Louisiana	LA	LA-11	\$ 1,415,964
Southeast Louisiana Legal Services Corporation	LA	LA-13	\$ 2,845,567
Community Legal Aid	MA	MA-10	\$ 1,399,287
Northeast Legal Aid	MA	MA-4	\$ 774,370
South Coastal Counties Legal Services	MA	MA-12	\$ 860,641
Volunteer Lawyers Project of the Boston Bar	MA	MA-11	\$ 1,902,693
Legal Aid Bureau	MD	MD-1	\$ 3,725,595
Legal Aid Bureau	MD	MMD	\$ 90,943
Pine Tree Legal Assistance	ME	ME-1	\$ 1,104,061
Pine Tree Legal Assistance	ME	MMX-1	\$ 124,933
Pine Tree Legal Assistance	ME	NME-1	\$ 64,612
Pending receipt and review of grant proposals ¹	MI	MI-13	\$ 4,368,810
Legal Aid of Western Michigan	MI	MI-15	\$ 2,217,766
Legal Services of Eastern Michigan	MI	MI-14	\$ 1,626,693
Legal Services of Northern Michigan	MI	MI-9	\$ 815,225
Michigan Advocacy Program	MI	MI-12	\$ 1,637,057
Michigan Advocacy Program	MI	MMI	\$ 602,101
Michigan Indian Legal Services	MI	NMI-1	\$ 165,020
Anishinabe Legal Services	MN	NMN-1	\$ 239,566
Cent Minnesota Legal Services	MN	MN-6	\$ 1,675,663
Legal Aid Serv. of N.E. Minn.	MN	MN-1	\$ 439,057
Legal Services of Northwest Minnesota Corp.	MN	MN-4	\$ 336,144
S. Minn. Regional Legal Services	MN	MMN	\$ 200,128
S. Minn. Regional Legal Services	MN	MN-5	\$ 1,547,664
Legal Aid of Western Missouri	MO	MMO	\$ 81,487
Legal Aid of Western Missouri	MO	MO-3	\$ 1,939,623
Legal Services of Eastern Missouri	MO	MO-4	\$ 1,999,642
Legal Services of Southern Missouri	MO	MO-7	\$ 1,690,050
Mid-Missouri Legal Services Corporation	MO	MO-5	\$ 445,273

¹ LSC reopened the grant application process for the MI-13 service area in Michigan on September 22, 2015. Grant proposals are due October 23, 2015. LSC will publish the notice of intent to award funding for the MI-13 service area in November 2015.

Name of Applicant Organization	State	Service Area	Estimated Annualized 2016 Funding
Micronesian Legal Services	MP	MP-1	\$ 1,255,539
Mississippi Center For Legal Services	MS	MS-10	\$ 2,653,869
Mississippi Center For Legal Services	MS	NMS-1	\$ 83,330
North Mississippi Rural Legal Services	MS	MS-9	\$ 1,747,289
Montana Legal Services Association	MT	MMT	\$ 54,599
Montana Legal Services Association	MT	MT-1	\$ 953,302
Montana Legal Services Association	MT	NMT-1	\$ 159,616
Legal Aid of North Carolina	NC	MNC	\$ 536,104
Legal Aid of North Carolina	NC	NC-5	\$ 10,616,211
Legal Aid of North Carolina	NC	NNC-1	\$ 218,781
Legal Services of North Dakota	ND	ND-3	\$ 447,577
Legal Services of North Dakota	ND	NND-3	\$ 270,032
Southern MN Regional Legal Services	ND	MND	\$ 115,945
Legal Aid of Nebraska	NE	MNE	\$ 42,294
Legal Aid of Nebraska	NE	NE-4	\$ 1,524,974
Legal Aid of Nebraska	NE	NNE-1	\$ 33,135
Legal Advice & Referral Center	NH	NH-1	\$ 742,908
Central Jersey Legal Services	NJ	NJ-17	\$ 1,095,631
Essex-Newark Legal Services Project	NJ	NJ-8	\$ 831,986
Legal Services of Northwest Jersey	NJ	NJ-15	\$ 389,039
Northeast New Jersey Legal Services	NJ	NJ-18	\$ 1,632,392
South Jersey Legal Services	NJ	MNJ	\$ 120,687
South Jersey Legal Services	NJ	NJ-12	\$ 681,325
South Jersey Legal Services	NJ	NJ-16	\$ 1,247,913
DNA-People's Legal Services	NM	NM-1	\$ 189,219
DNA-People's Legal Services	NM	NNM-2	\$ 22,773
New Mexico Legal Aid	NM	MNM	\$ 87,360
New Mexico Legal Aid	NM	NM-5	\$ 2,568,653
New Mexico Legal Aid	NM	NNM-4	\$ 465,776
Nevada Legal Services	NV	NNV-1	\$ 133,300
Nevada Legal Services	NV	NV-1	\$ 2,689,598
Legal Aid Society of Mid-New York	NY	MNY	\$ 276,872
Legal Aid Society of Mid-New York	NY	NY-22	\$ 1,586,522
Legal Aid Society of Northeastern New York	NY	NY-21	\$ 1,235,643
Legal Assistance of Western New York	NY	NY-23	\$ 1,668,875
Legal Services of The Hudson Valley	NY	NY-20	\$ 1,623,879
Legal Services For New York City	NY	NY-9	\$ 11,120,280
Nassau/Suffolk Law Services	NY	NY-7	\$ 1,162,634
Neighborhood Legal Services	NY	NY-24	\$ 1,194,326
Community Legal Aid Services	OH	OH-20	\$ 1,942,738
Legal Aid of Western Ohio	OH	MOH	\$ 126,002

Name of Applicant Organization	State	Service Area	Estimated Annualized 2016 Funding
Legal Aid of Western Ohio	OH	OH-23	\$ 3,018,102
Legal Aid Society of Cleveland	OH	OH-21	\$ 2,180,522
Legal Aid Society of Greater Cincinnati	OH	OH-18	\$ 1,640,696
Ohio State Legal Services	OH	OH-24	\$ 3,505,040
Legal Aid Services of Oklahoma	OK	MOK	\$ 62,596
Legal Aid Services of Oklahoma	OK	OK-3	\$ 4,213,616
Oklahoma Indian Legal Services	OK	NOK-1	\$ 820,795
Legal Aid Services of Oregon	OR	MOR	\$ 557,181
Legal Aid Services of Oregon	OR	NOR-1	\$ 185,053
Legal Aid Services of Oregon	OR	OR-6	\$ 3,596,884
Laurel Legal Services	PA	PA-5	\$ 632,369
Legal Aid of Southeastern Pennsylvania	PA	PA-23	\$ 1,111,687
MidPenn Legal Services	PA	PA-25	\$ 2,309,547
Neighborhood Legal Services Association	PA	PA-8	\$ 1,396,409
North Penn Legal Services	PA	PA-24	\$ 1,850,007
Northwestern Legal Services	PA	PA-26	\$ 696,354
Philadelphia Legal Assist. Center	PA	MPA	\$ 165,788
Philadelphia Legal Assist. Center	PA	PA-1	\$ 2,738,694
Southwestern Pennsylvania Legal Services	PA	PA-11	\$ 421,409
Community Law Office	PR	PR-2	\$ 221,282
Puerto Rico Legal Services	PR	MPR	\$ 290,819
Puerto Rico Legal Services	PR	PR-1	\$ 11,127,089
Rhode Island Legal Services	RI	RI-1	\$ 950,613
South Carolina Legal Services	SC	MSC	\$ 197,851
South Carolina Legal Services	SC	SC-8	\$ 5,504,311
Dakota Plains Legal Services	SD	NSD-1	\$ 935,989
Dakota Plains Legal Services	SD	SD-4	\$ 385,715
East River Legal Services	SD	SD-2	\$ 385,575
Legal Aid Society of Middle TN and the Cumberlands	TN	TN-10	\$ 3,077,716
Legal Aid of East Tennessee	TN	TN-9	\$ 2,408,494
Memphis Area Legal Services	TN	TN-4	\$ 1,421,775
West Tennessee Legal Services	TN	TN-7	\$ 693,812
Legal Aid of Northwest Texas	TX	TX-14	\$ 8,649,058
Lone Star Legal Aid	TX	TX-13	\$ 10,283,901
Texas Riogrande Legal Aid	TX	MSX-2	\$ 1,692,033
Texas Riogrande Legal Aid	TX	NTX-1	\$ 31,374
Texas Riogrande Legal Aid	TX	TX-15	\$ 10,260,847
Utah Legal Services	UT	MUT	\$ 67,848
Utah Legal Services	UT	NUT-1	\$ 82,473
Utah Legal Services	UT	UT-1	\$ 2,346,659
Blue Ridge Legal Services	VA	VA-19	\$ 784,252

Name of Applicant Organization	State	Service Area	Estimated Annualized 2016 Funding
Central Virginia Legal Aid Society	VA	MVA	\$ 157,757
Central Virginia Legal Aid Society	VA	VA-18	\$ 1,111,038
Legal Aid Society of Eastern Virginia	VA	VA-16	\$ 1,145,838
Legal Services of Northern Virginia	VA	VA-20	\$ 1,254,701
Southwest Virginia Legal Aid Society	VA	VA-15	\$ 716,020
Virginia Legal Aid Society	VA	VA-17	\$ 850,074
Legal Services of The Virgin Islands	VI	VI-1	\$ 164,978
Legal Services Law Line of Vermont	VT	VT-1	\$ 486,833
Northwest Justice Project	WA	MWA	\$ 730,121
Northwest Justice Project	WA	NWA-1	\$ 285,566
Northwest Justice Project	WA	WA-1	\$ 5,393,583
Legal Action of Wisconsin	WI	MWI	\$ 91,069
Legal Action of Wisconsin	WI	WI-5	\$ 3,886,718
Wisconsin Judicare	WI	NWI-1	\$ 155,502
Wisconsin Judicare	WI	WI-2	\$ 1,024,320
Legal Aid of West Virginia	WV	WV-5	\$ 2,253,495
Legal Aid of Wyoming	WY	WY-4	\$ 416,828
Legal Aid of Wyoming	WY	NWY-1	\$ 173,227

From: [Michael Moore](#)
To: [OSB President](#)
Subject: President's Message
Date: Thursday, September 10, 2015 9:45:57 AM

Dear Rich,

I would like to comment on the "CLEs and Sections" part of your report. Especially, I noted your comment, "The board's goal is to enable the bar to offer useful CLEs, but on the basis that the program starts to pay for itself, which has not been the case for many years." I have the following comments:

1. Costs. Costs can be allocated in various ways. For example, some general administrative expenses could be allocated to the CLE activity. Depending upon the allocations, the program's cost could be substantially influenced. I tend to think more about the benefits than the costs.
2. Membership Benefits. The CLE program keeps me in contact with the OSB. I would prefer that a reasonable part of my dues be used to support the CLE program. Meeting to acquire the benefits of a CLE program helps to build a cohesive bar.
3. Competitors. By making the support of our CLE program an important part of our basic bar dues, we can gain a substantial edge over competitors. Amenities at the programs give the occasions an added sense of importance.
4. Focus. Program content relevant and responsive to Oregon law builds useful knowledge in our members. Providing current and accurate information about law unique to Oregon should be a competitive edge for our programs.
5. Materials. I save program materials. Some of them remain relevant for many years. Good text, not "power point slides," with useful forms help my knowledge and efficiency. The best materials speak to the environment in which most of us practice.

Thank you for your service.

Regards,

Mike

Michael M. Moore
MOORE & BALLARD
2002 Pacific Avenue
Forest Grove, OR 97116
Telephone: (503) 357-3191
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tax treatment of the transaction or matter that is the subject of the communication and that the communication does not consider or provide any conclusion with respect to any additional issues; and (3) this communication may not be used, and cannot be used for the purpose of (a) avoiding penalties imposed under the United States Internal Revenue Code, or (b) promoting, marketing or recommending to another person as to any tax-related matter.

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We represent clients - large and small - in the organization and operation of businesses and charitable organizations; in estate planning and administration, including guardianship and conservatorship estates; and in real property transactions.

From: [Richard Spier](#)
To: [Camille Greene](#)
Subject: FW: Thank You: Breakfast with the ABA President
Date: Monday, October 26, 2015 10:07:46 AM

Camille, info exhibit for BOG agenda. Thanks!

From: Traci Ray [mailto:tray@barran.com]
Sent: Monday, October 26, 2015 9:56 AM
To: Traci Ray
Cc: Adrienne.NELSON@ojd.state.or.us; Edwin A. Harnden
Subject: Thank You: Breakfast with the ABA President

Thank you for attending the breakfast with ABA President Paulette Brown this morning – your time was greatly appreciated and the welcome for Paulette was really wonderful. Also, a big shout out to our sponsors, the OSB, MBA and OWLS, for making President Brown’s visit accessible to so many (we have over 90 scheduled to attend the CLE on Implicit Bias at 1pm today!) and for helping showcase our fantastic local bar to the ABA.



Sincerely-
Traci

Traci Ray, Esq. | Executive Director

Barran Liebman LLP | Employment, Labor & Benefits Law Firm
601 SW Second Avenue, Suite 2300 | Portland, Oregon 97204
Direct (503) 276-2115 | tray@barran.com

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SANDRA A. HANSBERGER
EXECUTIVE DIRECTOR
sandy@cej-oregon.org

September 11, 2015

Rod Wegener
Chief Financial Officer
Oregon State Bar
PO Box 231935
Tigard OR 97281

RECEIVED

SEP 18 2015

**Oregon State Bar
Executive Director**

Re: CEJ Audit and Executive Director Report

Dear Rod:

Enclosed is a copy of our CEJ Audit and Executive Director Report for the fiscal year that ended on March 31, 2015. Although our audit says "draft" it was adopted by our Board of Directors last week. (I'm recycling). Our Annual Report this year was distributed electronically and can be found on our website. When I receive some printed copies, I will send one over.

The Campaign for Equal Justice and Oregon's legal aid programs greatly appreciate the support we receive from the Oregon State Bar and the Oregon Law Foundation in trying to make access to justice a reality for poor and elderly Oregonians. There were some successes on the funding front this year as some of our 2014 Task Force on Legal Aid Funding recommendations were implemented: passage of the cy pres bill (residual class action funds); \$600,000 in state general fund money; several major grants from the Meyer Memorial Trust; and \$1.2 million in our annual fund drive. Of course, despite these successes, funding remains a challenge as legal aid programs continue to balance about 80 different sources of funding. We do not expect to see significant revenue from cy pres for at least five years.

For our 25th annual fund drive, which began on September 2 and runs through March 31, 2016, our board has set an ambitious goal---\$1.5 million, a 25% increase. We're looking forward to the challenge!

We believe we are good stewards of the Bar's contributions and hope we can count on your continued support and partnership. As always, thank you again and please do not hesitate to contact me if you have any questions.

Sincerely,

Sandra A. Hansberger
Executive Director

c: ✓ Sylvia Stevens (enclosures previously provided)
Judith Baker (enclosures previously provided)
Gerry Gaydos, CEJ Board President (enclosures previously provided)
Helen Hirschbiel (with enclosures)

620 SW Fifth Ave Suite 1226 Portland Oregon 97204
503.295.8442 www.cej-oregon.org

Thomas A. Balmer
Chief Justice



OREGON SUPREME COURT

1163 State Street
Salem, OR 97301-2563
Phone: 503.986.5717
Fax: 503.986.5730
Oregon Relay Service: 711
Thomas.Balmer@ojd.state.or.us

October 15, 2015

Stephanie Tuttle
Chair, Oregon Board of Bar Examiners
DOJ Criminal Justice Division
610 Hawthorne Ave SE Ste 210
Salem OR 97301

By hardcopy and email

Re: Uniform Bar Examination (UBE)

Dear Stephanie:

I thought the OCLEAB meeting last month was useful and interesting. The Board of Bar Examiners, the law schools, and courts – as well as the organized bar -- share the responsibility for shepherding law students through completion of their legal education, admission to the bar, and getting off to a good start as new lawyers. It is essential for us to share information, ideas, and best practices towards those ends, and I look forward to continuing those annual meetings – hopefully supplemented by more informal efforts throughout the year.

One topic we discussed briefly at the OCLEAB meeting was the possible transition to the UBE. After further considering our discussion, I am writing to express my view that Oregon should make the transition to the UBE. As you know, 18 states -- including Washington, Idaho, and New York -- have adopted (or soon will adopt) the UBE. That strong trend addresses the need for young lawyers in our mobile and interactive economy to have the same type of license portability as do lawyers who have practiced for five or more years, and who are permitted to apply for reciprocal admission under Rule for Admission 15.05. The job market for young lawyers is challenging – and yet we face of a growing unmet need for legal services in some geographic areas and for some potential clients. The portability opportunities that the UBE offers will help young lawyers find work more efficiently and expeditiously, which in turn should improve the number of lawyers available to assist clients in need.

Letter to Stephanie Tuttle
October 15, 2015
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As we have discussed, a transition to the UBE would result in the transfer of some control over the Oregon Bar exam to the National Conference of Bar Examiners (NCBE), and several members of the Board understandably expressed concern about that result. In large part, however, the Oregon Bar exam already primarily utilizes NCBE-developed components -- including the entire MBE and MPT, as well as at least some of the six essay questions. Even with the UBE in place, the Board would continue in its role respecting the far more important aspects of administering the exam -- that is, determining eligibility; grading and establishing pass scores; and conducting applicant character and fitness reviews. Indeed, even with most of the current Oregon bar exam components derived from the NCBE, Oregon has maintained its high standard for bar passage, and a transition to the UBE would not impact the process for establishing that standard.

Concern also has been expressed about an anticipated influx of out-of-state lawyers and the effect that such a change might have on the culture of Oregon practice. I practiced in two other states before returning to Oregon, and I have handled cases in half a dozen others. I treasure the civility, community, and pragmatic approach to practice that we have in Oregon. But I think we can preserve those values -- and teach them to lawyers, younger and older, who want to practice in Oregon. While it is possible that Oregon may experience some growing pains in a transition to the UBE, there are steps we can take to mitigate potential problems. The Board's UBE Work Group has recommended that, in addition to a sufficient UBE score, an incoming lawyer from another jurisdiction should be required to complete a CLE course on current Oregon Bar exam topics not covered on the UBE (federal and state administrative law, federal income tax, and Oregon civil procedure, evidence, and ethics). And the Work Group recommended a required CLE component emphasizing the culture of practice in the Oregon State Bar, including our emphasis on professionalism and promoting the integrity of the legal system. I am confident that Oregon judges and lawyers will continue to ensure that new colleagues adhere to the highest standards of ethics and professionalism, even with the addition of UBE-admitted lawyers.

I recognize that the Board has spent a good deal of time discussing and debating a potential transition to the UBE, and I greatly appreciate each member's careful consideration of the issue. At the end of our meeting last month, it was not clear to me, however, whether the Board intended to set a timeline for reaching a recommendation decision. As the Work Group noted, if Oregon were to make a transition to the UBE, the

Letter to Stephanie Tuttle
October 15, 2015
Page 3

Oregon law schools would benefit from a definitive decision on that question sooner rather than later, so that the schools and students can adjust curriculum and course planning as needed. (It is my understanding, at this juncture, that the three Oregon law schools all support the transition to the UBE, viewing it as a positive change for the future lawyers enrolled in their schools.) For those reasons, I think the Board should move this issue ahead without unnecessary delay.

I applaud the work of the Board of Bar Examiners on this issue, as well as the Board's long-standing dedication to the high standards that govern the practice of law in Oregon. If I can provide any additional information, please let me know.

Sincerely,

A handwritten signature in black ink that reads "Thomas A. Balmer". The signature is written in a cursive style with a large initial 'T' and 'B'.

Thomas A. Balmer
Chief Justice

cc by email: Richard Spier
Ray Heysell
Sylvia Stevens
Helen Hierschbiel
David White
Dean Curtis Bridgeman
Dean Jennifer Johnson
Dean Michael Moffitt
Lisa Norris-Lampe

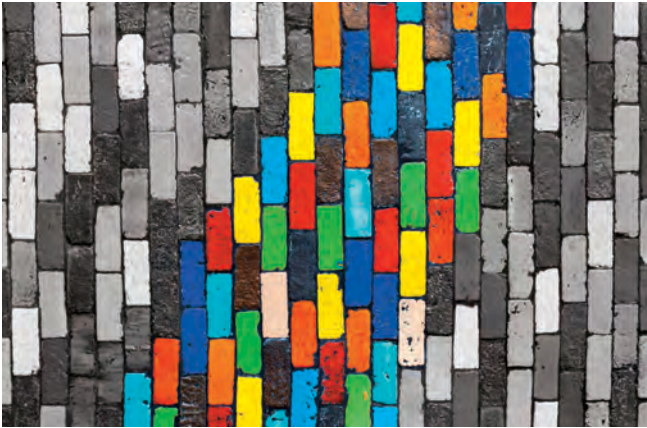


2015

Report on the State
of the Legal Market

*The Center for the Study of the Legal Profession at the Georgetown University Law Center and Thomson Reuters Peer Monitor are pleased to present this 2015 Report setting out our views of the dominant trends impacting the legal market in 2014 and key issues likely to influence the market in 2015 and beyond.*¹

Introduction - The Benefits of Taking a Longer View



Hockey legend Wayne Gretzky once explained the secret to success in his sport by noting that "A good hockey player plays where the puck is. A great hockey player plays where the puck is going to be."

Gretzky's observation has often been cited for its obvious relevance to the process of business strategy, and it seems particularly apt for law firm leaders in the current environment. In the six and a half years since the onset of the Great Recession, the market for legal services has changed in fundamental -- and probably irreversible -- ways. Perhaps of greatest significance has been the rapid shift from a sellers' to a buyers' market, one in which clients have assumed control of all of the

fundamental decisions about how legal services are delivered and have insisted on increased efficiency, predictability, and cost effectiveness in the delivery of the services they purchase. This shift in the dynamics of the market, coupled with at best modest growth in the demand for legal services, the decision of many corporate clients to shift more legal work in-house, the growing willingness of clients to disaggregate services among many different service providers, and the growth in market share of non-traditional competitors, have all combined to produce a much more intensely competitive market for legal services than existed prior to 2008.

Over the past five years, law firms have responded to these market changes in a variety of ways. They have become more adept at responding to RFPs and participating in competitive selection processes; they have become more proficient in developing and working under project budgets and in responding to client demands for alternative fee arrangements² and they have begun to develop project management capabilities as well as the skills needed to partner with other providers in disaggregated service settings. For the most part, however, these changes have been in response to specific client pressures. They have not generally resulted from law firms themselves taking a longer range view of the changes impacting the legal market and restructuring their services to meet likely client expectations in the future. In other words, to use the Wayne Gretzky metaphor, they represent playing where the puck is and not where it is going to be.

¹ The Center for the Study of the Legal Profession and Thomson Reuters gratefully acknowledge the participation of the following persons in the preparation of this Report: from the Center for the Study of the Legal Profession -- James W. Jones, Senior Fellow (lead author) and Milton C. Regan, Jr., Professor of Law and Co-Director; and from Thomson Reuters Peer Monitor -- Jennifer Roberts, Sr. Analyst, Client Management & Thought Leadership.

² An "alternative fee arrangement" is generally defined as an engagement in which fees are set without reference to hourly based billing rates.

The importance of this distinction was illustrated recently in a presentation by David Morley, the Worldwide Senior Partner of Allen & Overy LLP ("A&O"), about the strategic redesign of his firm to meet the future demands of a rapidly changing legal market. Speaking at the 13th Annual Law Firm COO & CFO Forum presented by the Thomson Reuters Legal Executive Institute in October, Morley explained that, after extensive consultations with its clients,³ A&O decided this past summer to redesign itself as a "hybrid firm" consisting of five separate organizations with legal services at its core. The components of the new firm -- which is being designed to provide "hybrid legal solutions for clients" -- includes the A&O law firm, Peerpoint (a contract lawyer service), A&O Consulting (offering hybrid solutions for legal problems), A&O Derivative Services (for on-line legal services), and the A&O Legal Services Centre (Belfast) (for document review services).⁴ All components of the new structure are technologically linked to the law firm, and A&O intends to market the components together (as appropriate) in making proposals to clients. The new strategy reflects the firm's strong conviction that such a hybrid, multidisciplinary approach to legal issues will be essential in the future to meet client demands for increased efficiency and cost effectiveness in the delivery of legal services. It is a good example of playing where the puck is going to be.

Clearly, the strategy adopted by A&O will not be right for every firm, but the process it used -- carefully looking at the way its market was changing and placing strategic bets on the changes it needed to make to remain competitive and successful for the long run -- is a process every firm should follow. Interestingly, most leaders of law firms of any significant size recognize that fundamental change is needed in the way their firms deliver and price legal services, but in practice there remains an astonishing lack of urgency in moving on these issues. For example, respondents in the Altman Weil 2014 Law Firms in Transition survey⁵ overwhelmingly agreed that focus on improved practice efficiency will be a permanent trend in the legal market going forward (93.8 percent), as will more intense price competition (93.8 percent), more commoditized legal work (88.6 percent), and increased competition from non-traditional service providers (82.3 percent).⁶ And yet, among the same respondents, only 39.4 percent said their firms had changed their strategic approach to achieving efficiency in the delivery of legal services, and only 29.5 percent said they had significantly changed their approach to pricing strategy.⁷ The obvious question is why?

In the sections that follow, we will look at the changed market realities that drive the need for firms to take a longer range and more strategic view of their market positions, will review some of the factors that may contribute to the evident resistance in many firms to embrace the changes that the market demands, and will consider the possibility that the resistance to change across the legal market may be at least partially attributable to the way we currently measure law firm performance. We begin, however, with a review of the performance of U.S. law firms in 2014.

³ The results of these consultations have been summarized in a special report, "Unbundling a Market -- The Appetite for New Legal Services Models" published by Allen & Overy in May 2014, and available on the firm's website.

⁴ A sixth component -- an entity that would offer managed legal services (e.g., the outsourcing of some or all of corporate in-house law department functions) -- was also identified by Allen & Overy as a strategic opportunity, but that component has evidently not been included in the current "hybrid organization" rollout.

⁵ The 2014 Law Firms in Transition: An Altman Weil Flash Survey (the "AW 2014 Law Firms Survey") included responses from managing partners and chairs of 304 U.S. law firms, including 42 percent of both 2013 NLJ 350 firms and 2013 Am Law 200 firms.

⁶ AW 2014 Law Firms Survey at 16-17, 22.

⁷ *Id.* at 18, 23.

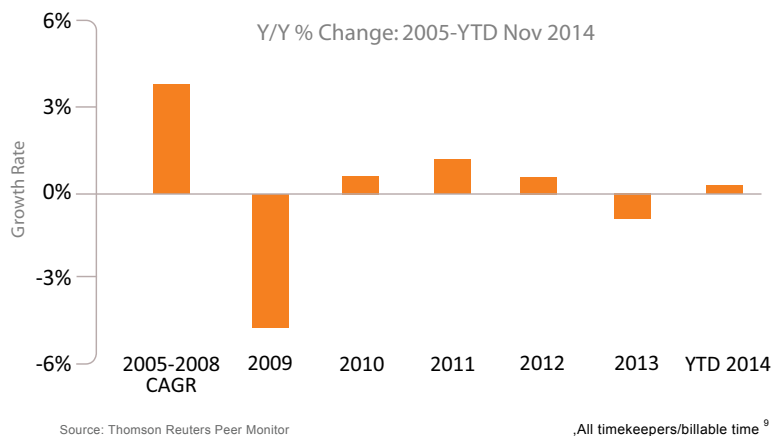
Current State of the Legal Market - By the Numbers

By most indicators, law firm financial performance in 2014 appeared modestly better than in 2013. Demand growth for law firm services finished the year in positive territory as contrasted with 2013 when demand actually declined. As a result, revenue growth across the market was stronger than in the previous year, though persistent challenges remain. In particular, productivity has continued to decline, reflecting law firms' ongoing difficulty in striking the right balance between headcount and anticipated demand growth. Similarly, realization rates have continued to fall as clients have consistently pushed back on even modest rate increases. And firms have needed to maintain strict discipline to keep expense growth at acceptable levels. Although results differed for individual firms -- and some firms (as described below in our discussion of market segmentation) performed well above market averages -- on the whole 2014 was a year of only modest improvement for firms across the market.

Demand Growth

Demand for law firm services grew modestly (under 0.5 percent) in 2014, as tracked by Thomson Reuters Peer Monitor.⁸ As shown in Chart 1 below (which tracks performance on a year-to-date basis through November 2014), while this year's demand growth is a clear improvement over last year (when demand growth was negative), it does not represent a significant improvement in the overall pattern for the past five years. Indeed, since the collapse in demand in 2009 (when growth hit a negative 5.1 percent level), demand growth in the market has remained essentially flat to slightly negative.

Chart 1 - Growth in Demand for Law Firm Services



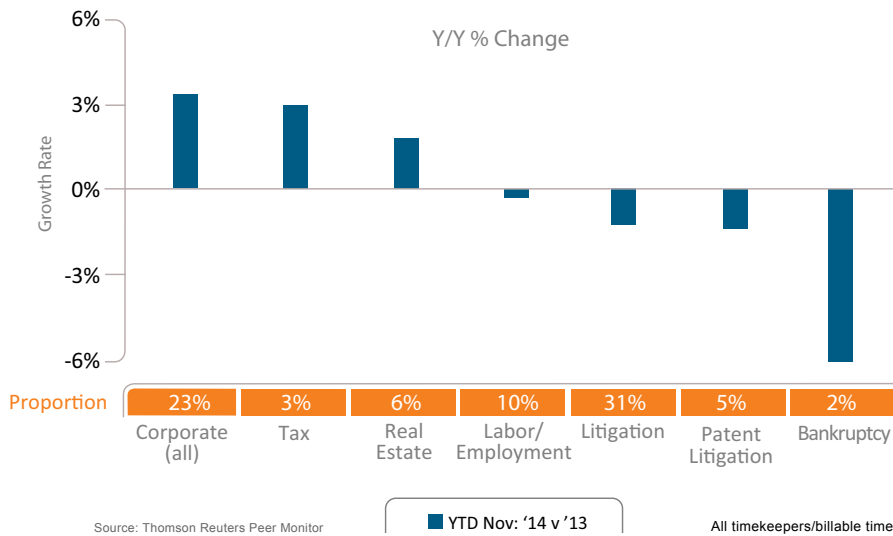
As shown in Chart 2 below, demand growth during the past year has been driven by a resurgence of transactional activity, as reflected in healthy growth in general corporate, tax, and real estate practices. Significantly, demand growth in litigation -- which comprises about one-third of all practice activities across the market -- remained negative, as it has been more or less since the beginning of the recession in 2008.¹⁰

⁸ Thomson Reuters Peer Monitor data ("Peer Monitor data") are based on reported results from 149 law firms, including 51 Am Law 100 firms, 46 Am Law 2nd 100 firms, and 52 additional firms. For present purposes, "demand for law firm services" is viewed as equivalent to total billable hours recorded by firms included in a particular data base.

⁹ All non-contingent hours worked.

¹⁰ Demand growth in litigation practices did turn positive for a brief period in late 2011 and early 2012, but then returned to the downward trend seen since 2008.

Chart 2 - Demand Growth by Practices

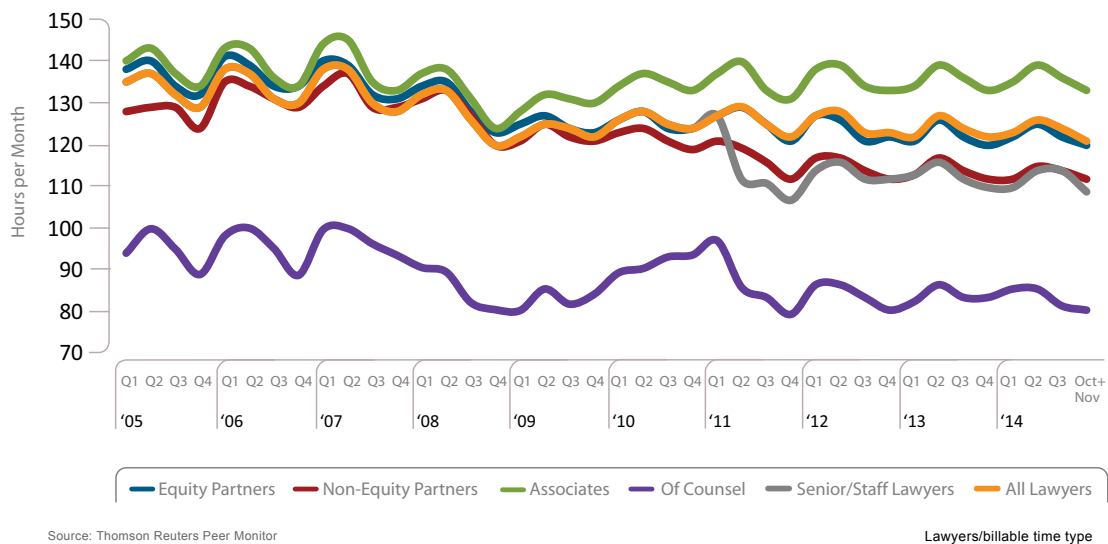


Productivity

During 2014 (as of November), the number of lawyers in U.S. firms grew by about 1.4 percent or about 1 percent more than the growth rate in demand. Consequently, productivity¹¹ across the market remained slightly negative.

As can be seen in Chart 3 below, this continued a pattern that we have seen for the last several years. Indeed, according to Peer Monitor data through November 2014, productivity for the market as a whole has been on an overall downward trend for the past 15 quarters. With the exception of associates, where there has been some improvement in productivity, though not quite back to pre-recession levels, other categories of lawyer timekeepers -- including equity partners, non-equity partners, of counsel, and senior/staff counsel -- have consistently remained between 100 and 200 hours per person per year lower than in 2007.

Chart 3 - Productivity (Hours per Lawyer) by Category



¹¹ Productivity is defined as the number of hours (billable time type only) worked by lawyers divided by the total number of lawyers.

Rates and Realization

Consistent with past practices, firms continued to raise their rates in 2014, albeit at a fairly modest level of 3.1 percent. And, also consistent with past experience, clients continued to push back, keeping strong pressure on firm realization rates.

Chart 4 below shows the rate progression as tracked in the Peer Monitor data base from the first quarter of 2005 through November 2014. As can be seen, over this ten-year period, firms increased their standard rates by 35.9 percent from an average of \$348 per hour to \$473 (or an average increase of about 3.6 percent per year). At the same time, reflecting mounting client push back to these rate hikes, the collected rates achieved by law firms increased by a somewhat more modest 28.2 percent over the ten-year period, from an average of \$304 per hour to \$390 (or an average increase of about 2.8 percent per year). As a result, law firm realization rates -- *i.e.*, the percentages of work performed at a firm's standard rates that are actually billed to and collected from clients -- declined steadily during the period.

As show in Chart 5 below, billing realization fell from 93.5 percent to 86.7 percent over the ten-year period, while collected realization declined from 92.7 percent to 83.0 percent. The latter figure is the lowest collected realization rate on record, having dropped below the previous low of 83.3 percent recorded in Q1 and Q2 2014. To put the magnitude of this decline in perspective, consider that the near 10 percent drop in collected realization means firms are losing almost \$10 million for every \$100 million in recorded time.

Chart 4 - Rate Progression

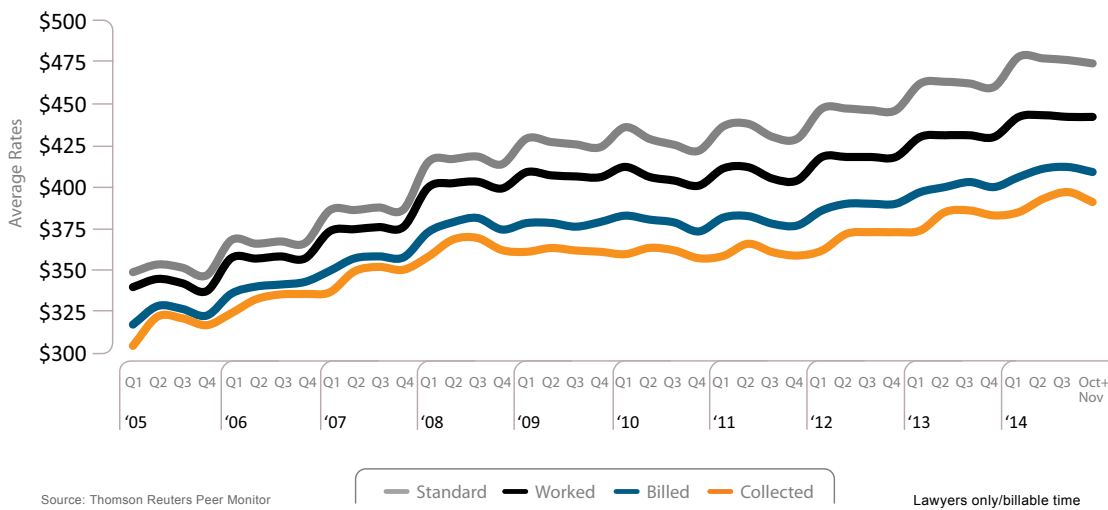
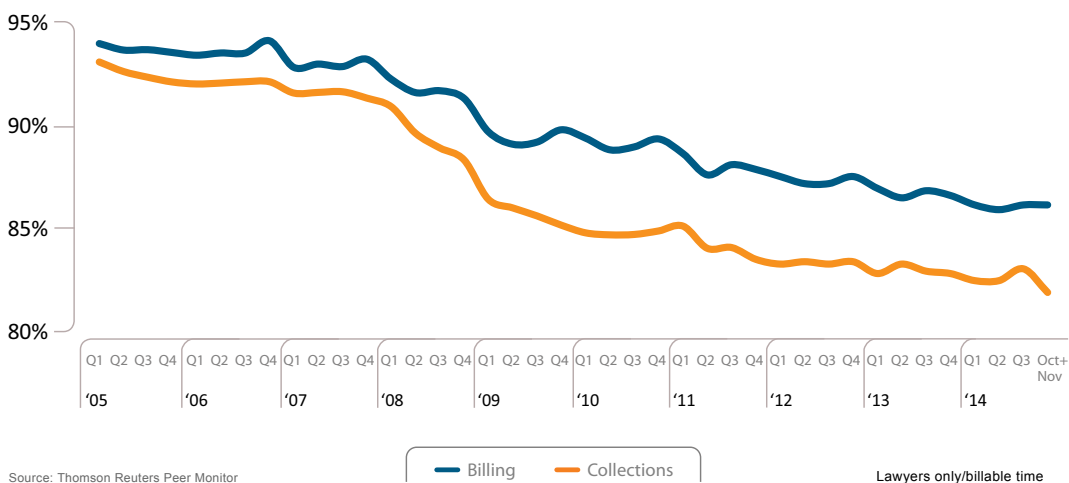


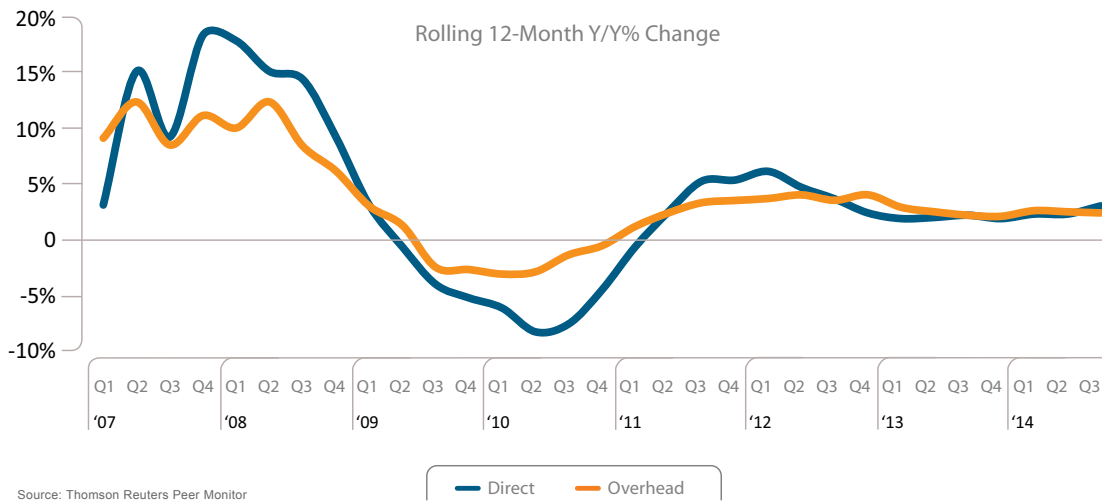
Chart 5 - Billed and Collected Realization against Standard



Expenses

Since the beginning of the economic downturn in mid-2008, law firms have aggressively managed their expenses -- both direct and indirect ¹² -- reducing them dramatically from pre-recession levels. As shown in Chart 6 below, the initial cuts in 2009 and 2010 were very deep -- induced no doubt by panicked reactions to the economic crisis -- and were not sustainable over the long term. Consequently, expenses began to rise again in 2011. Since that time, however, firms have done a reasonably good job of managing expenses effectively, with the result that both direct and indirect expenses are now growing at annual rates of less than 3 percent.

Chart 6 - Expense Growth

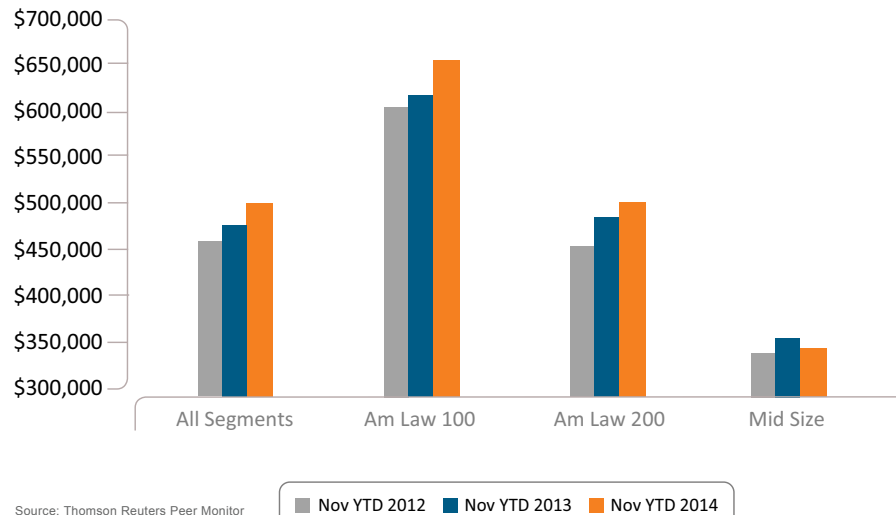


Profits per Partner

Despite only modest demand growth, flat to slightly declining productivity, and continuing pressure on realization, law firms did see a modest improvement in profits per partner ("PPP") during 2014. For the market as a whole, PPP was up by 3.1 percent over 2013, clearly an improvement over the 1.0 percent growth in the preceding year. The growth in PPP was not evenly distributed however. As can be seen in Chart 7 below, Am Law 100 firms saw their PPP grow by some 5.1 percent, while Am Law Second 100 firms saw improvement of only 3.4 percent, and midsized firms experienced a decline of 0.4 percent in PPP. This is reflective of a growing market segmentation that is addressed later in this Report.

¹² Direct expenses refer to those expenses related to fee earners (primarily the compensation and benefits costs of lawyers and other timekeepers). Indirect expenses refer to all other expenses of the firm (including occupancy costs, technology, administrative staff, etc.)

Chart 7 - Profit per Partner (November YTD)



Changed Market Dynamics

The financial performance of law firms over the past year reflects several fundamental changes in market dynamics that have become increasingly evident since 2008. These changes include a shift in the buying habits of business clients, a persistent softness in the market for litigation services, the increasing presence of new non-traditional competitors in the legal services sector, and a growing market segmentation that is rapidly separating high performing firms from the majority.

Shifts in the Buying Habits of Business Clients

Although the general economy began to recover in 2010 from the effects of the Great Recession, we have seen continuing weak demand growth for law firm services. Indeed, from 2010 through 2013, demand growth was less than half of pre-2008 levels.¹³ In 2013, business spending on law firms expressed in nominal dollars was \$6.4 billion, or 3.7 percent, below 2008 levels.¹⁴ If expressed in inflation-adjusted dollars, however, the picture is considerably worse.

In the ten years since 2004 (years that included four years of the pre-recession boom period), business spending on legal services grew from \$159.4 billion to \$168.7 billion, a modest improvement of 5.8 percent spread over a ten-year period. But, if expressed in inflation-adjusted dollars, the same spending fell from \$159.4 billion to \$118.3 billion, a precipitous drop of 25.8 percent.¹⁵

It is an intriguing question whether or when the demand for law firm services will rebound to anything like pre-recession levels. Some observers argue that such a rebound is inevitable and what we are seeing in the current market is merely a reflection of the fact that law firm services are a trailing indicator of economic activity. Other observers are not so sure, pointing out the demand growth in the boom years just prior to the economic collapse in 2008 might well have been an aberration and that current performance may in fact represent a more normal growth pattern for the legal services market. Regardless of which of these perspectives ultimately proves correct, it is increasingly clear that the buying habits of business clients¹⁶ have shifted in a couple of significant ways that have adversely impacted the demand for law firm services.

¹³ Aric Press, "Big Law's Reality Check," *The American Lawyer*, Nov. 2014, p. 41.

¹⁴ *Id.* at 42.

¹⁵ *Id.*

¹⁶ According to U.S. Census Bureau estimates, the business sector accounts for about 66 percent of all spending in the U.S. legal services market, or some \$169 billion out of a total of \$255 billion in 2013. *Id.* at 41.

First, over the past few years there has been a clear shifting of significant amounts of legal work away from law firms to in-house legal staffs. In the Altman Weil 2014 Chief Legal Officers Survey, some 43 percent of CLOs reported they intend to increase their in-house workforce during the coming year;¹⁷ over 26 percent plan to decrease their use of outside counsel (with only 14 percent planning to increase such use);¹⁸ and almost 86 percent said they would shift work to in-house legal staff in the event of a reduction in the use of outside counsel.¹⁹ Among respondents, almost 40 percent also reported they had in fact shifted law firm work to their in-house legal staff within the past 12 months, and over 33 percent said they had also reduced the amount of work sent to outside counsel.²⁰ Consistent with these latter findings, the Association of Corporate Counsel ("ACC") reported that, among more than 1,200 corporate CLOs in 41 countries responding to the ACC Chief Legal Officer 2014 Survey, 63 percent indicated their companies are now in-sourcing work formerly performed by outside legal service providers.²¹

And second, there has also been a clear -- though still somewhat modest -- shift of work by business clients to non-law firm vendors.²² Almost 17 percent of the participants in the above-referenced Altman Weil survey said that, during the past 12 months, they had outsourced work to non-law firm vendors in an effort to better control their law department costs.²³ The same respondents indicated that non-law firm vendors accounted for 3.9 percent of their total departmental budgets in 2012, but that figure increased to 6 percent in 2013 and 7.1 percent for 2014.²⁴

Given the laser-like focus of business clients in today's market on achieving greater efficiency and cost effectiveness in their purchase of legal services, it seems unlikely either of these shifts in buying habits will be reversed anytime soon. Indeed, it seems more likely that they will expand.

Persistent Softness in the Litigation Market

Consistent with a trend evident even before 2008, demand growth for law firm litigation services has continued to be very soft -- indeed, flat to negative in most quarters since 2008. This has been somewhat surprising since, in the past, litigation has been a countercyclical practice in most periods of economic distress.

Chart 8 below shows the relative demand growth of litigation versus transactional practices over the period since Q1 2007. As can be seen, with the exception of the period of recession (mid-2008 through Q3 2009) and a brief period in late 2011 and early 2012, demand growth in transactional practices has generally outpaced litigation growth, sometimes by a significant margin. Also of interest, as shown in Chart 9 below, since 2004, litigation as a percentage of the overall practice of Am Law 100 firms has fallen by 1.2 percent per year, and for Am Law Second 100 firms by 0.7 percent per year. Only among midsized firms (i.e., firms outside the Am Law 200) has litigation increased as a percentage of practice -- by 2.4 percent per year.

17 2014 Chief Legal Officer Survey: An Altman Weil Flash Survey ("AW 2014 CLO Survey") at 1. The Aw 2014 CLO Survey included responses from 186 CLOs from large companies. More than 93 percent of responses were from companies with more than \$1 billion in annual revenues, and more than 34 percent were from companies with more than \$10 billion in annual revenues.

18 AW 2014 CLO Survey at 4.

19 *Id.* at 6.

20 *Id.* at 10.

21 Association of Corporate Counsel Chief Legal Officers 2014 Survey at 2.

22 Legal businesses outside of the law firm that solve legal problems traditionally handled by lawyers through the use of process innovation and technology.

23 AW 2014 CLO Survey at 9.

24 *Id.* at 23.

Chart 8 - Demand Growth - Litigation vs. Transactional Practices

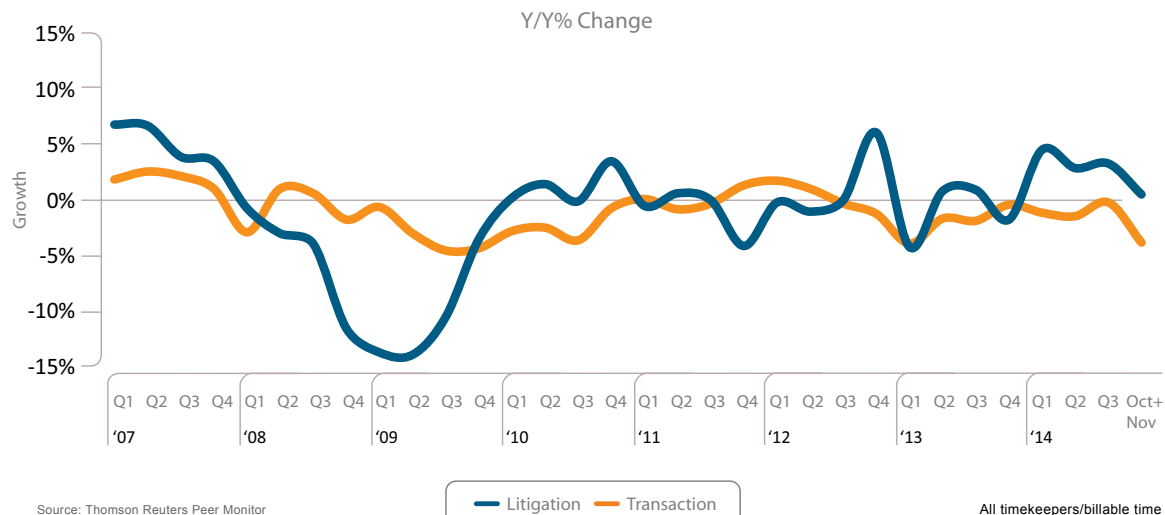
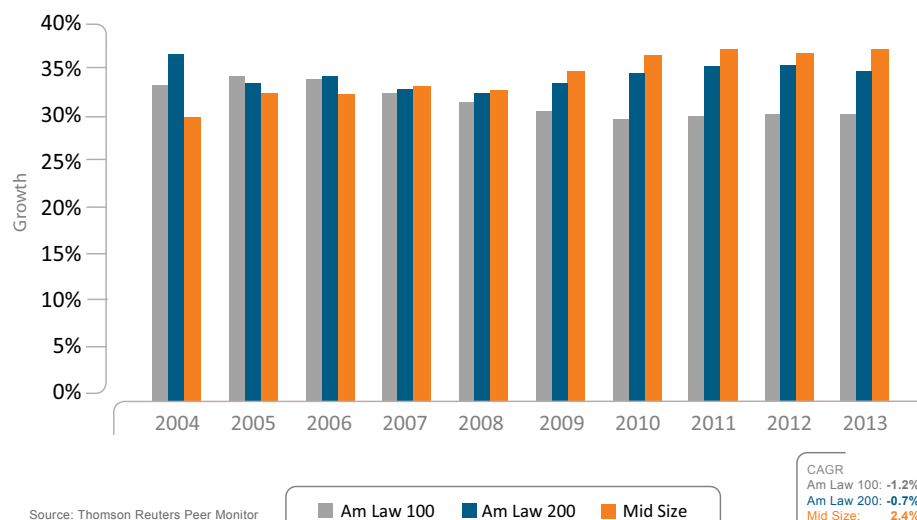


Chart 9 - Litigation Proportionality (% of Total Firm Billable Hours)



The continued softness of the litigation market may well reflect client reactions to the greatly increased cost of litigation in recent years, an increase attributable in no small part to the advent and expansion of e-discovery. Simply put, clients may be less inclined to engage in large scale litigation today than in the period before the proliferation of electronic documents. It also seems likely, however, that some of the decline in demand for law firm services in litigation reflects client decisions to redirect certain discovery work previously done by law firms to legal process outsourcers and other non-traditional service providers. This siphoning off by new competitors of lucrative work previously done by law firms may also contribute to the widening profitability gap between litigation and transactional practices.

As shown in Chart 10 below, collected rates for litigation work have simply not kept pace with escalating rates for transactional practices. And, as can be seen in Chart 11, the gap in realization rate between the two types of practice is also significant -- and increasing.

Chart 10 - Collected Rate Progression -
Litigation vs. Transactional Practices

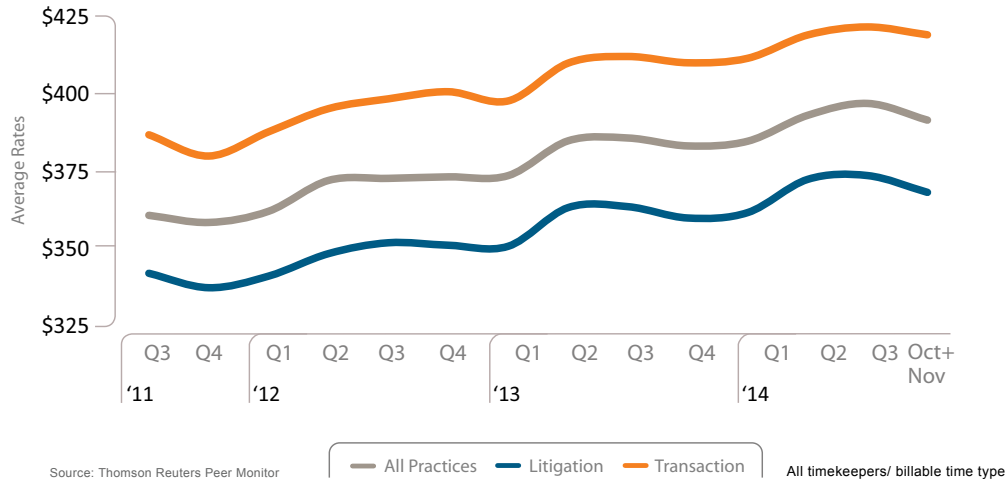
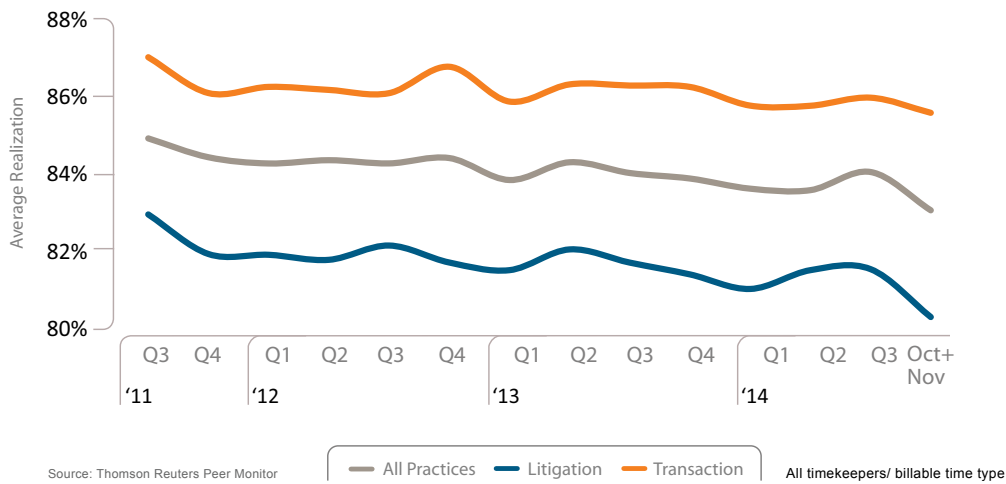


Chart 11 - Collected Realization against Standard -
Litigation vs. Transactional Practices



Given the historic importance of litigation in the U.S. legal market -- typically accounting for over 40 percent of all practice activities 20 years ago -- the drop off in demand in recent years could represent a highly significant market shift. Today, based on Peer Monitor data, litigation (including patent litigation) accounts for about 36 percent of overall billable hours -- 35 percent for Am Law 100 firms and 37 percent for each of Am Law Second 100 and mid-sized firms.

New Competitors in the Legal Market

As noted above, there is growing evidence that the market share of traditional law firms is being eroded by the presence of new competitors in the legal services sector. While the overall impact of such expanded competition remains fairly modest today, it is growing at a steady pace and, over time, promises to be even more disruptive to the near monopoly previously enjoyed by law firms in the legal services market.

The proliferation of new non-traditional service providers has been quite dramatic over the past few years. The trend responds to increased client demands for efficiency and cost effectiveness in the delivery of legal services and reflects the growing willingness of clients to disaggregate services among a variety of different firms and providers. Over the past couple of years, the phenomenon has been particularly evident in the United Kingdom as a result of full implementation of the Legal Services Act of 2007, but the trend is also growing in the United States and elsewhere.

Today, the range of new competitors and the services they offer is quite broad -- from the legal process outsourcing ("LPO") services of firms like CPA Global, Pangea3, and Integreon to offerings of new concept law firms like Riverview Law and Redgrave LLP; and from legal talent management services like Axiom to sophisticated document creation systems offered by firms like Koncision and KM Standards, or new dispute resolution systems provided by companies like Fair Outcomes, Inc., Resolution Tree, Raptor Risk Analysis, or Neota Logic.²⁵ We have even seen traditional companies like British Telecom enter the legal market with specialized services targeted at particular practice niches. And, it must be added, the major accounting firms again appear to be aggressively pursuing opportunities in the legal services sector as well.

On the latter point, Ernst & Young -- operating through its legal arm EY Law -- hired over 250 lawyers in 2013, increasing its total lawyer headcount almost 30 percent to 1,100. Also in 2013, it launched legal services in 29 countries around the world -- including Australia, China, Japan, Mexico, and 14 separate countries in Africa. Its legal services cover transactional, commercial, and employment practices, with a strong focus on the financial services and banking industries. The firm's head of global legal services, Cornelius Grossman, noted that "We're building rapidly and ultimately want to be in every mature [market] and relevant emerging market. . . . We want to at least double or triple in size by 2020."²⁶

It appears that the other major accounting firms are pursuing similar strategies. In February, PricewaterhouseCoopers obtained an "alternative business structure" ("ABS") license in the U.K., permitting its PwC Legal unit to offer legal services in that country.²⁷ And both Deloitte and KPMG have expanded their legal service offerings by hiring additional lawyers in the U.K., Germany, and Asia. KPMG (as well as Ernst & Young) are also reportedly considering use of the ABS model to restructure their legal operations in the U.K.²⁸ And last year, Deloitte Legal opened its own domestic law firm in Shanghai, apparently taking advantage of a quirk in Chinese regulations that allows international accounting firms -- though not international law firms -- to offer domestic legal services in China.²⁹

In short, the market is now awash with new, non-traditional competitors that over time are likely to change the dynamics of the legal services sector in significant ways. The regulatory barriers that for decades have shielded law firms from such competition are collapsing around the world and, even in countries like the United States where formal regulatory constraints remain largely in place, creative "workarounds" are proliferating. Clearly, a much more vibrant and competitive marketplace is emerging.

Growing Market Segmentation

While the market for law firm services has clearly been impacted by external factors, there has also been an important shift in the internal dynamics of the market that has become increasingly apparent in recent years. Specifically, there is now strong evidence that the U.S. legal market has segmented into discernible categories of highly successful and less successful firms, and that the performance gaps between those categories has been steadily widening.

²⁵ While currently representing only a modest share of the overall market for legal -- and legal-related -- services, some of these new competitors are growing at impressive rates. One study undertaken by Thomson Reuters in 2012 found that revenues of LPO firms were growing at an average annual rate of about 30 percent, and there is some evidence that even this growth rate may have increased in the last couple of years as LPO firms have broadened their client base from corporate law departments to include law firms themselves. In 2014, for example, revenue growth from law firms for Pangea3 was a staggering 200 percent over the preceding year.

²⁶ Chris Johnson, "Accounting Firms Make New Foray into Legal Services," *The American Lawyer Daily*, Jul. 30, 2014.

²⁷ *Id.*

²⁸ *Id.*

²⁹ "Deloitte Dabbles in Chinese Legal Practice," *The American Lawyer Daily*, Jan. 30, 2014.

In recent years, the overall financial performance of Am Law 100 firms has been driven by the extraordinary results of 20 elite, high performing firms -- firms with profits per partner of at least \$2 million and revenues per lawyer ("RPL") of at least \$1 million. Since 2008, these high performing firms (dubbed the "Super Rich" by *The American Lawyer*) have grown their revenues by 20 percent, their RPL by 14.4 percent, and their PPP by 31.7 percent. And they have done this with only modest growth, with increases in headcount of only 5 percent and growth in the equity partner ranks of only 4.3 percent.³⁰

The performance of the 20 Super Rich firms have far outstripped that of other Am Law 100 firms, including the six global mega firms organized as Swiss vereins and the 74 others. The stark differences in 2013 financial performance across these three categories are set out in Chart 12 below. As can be seen, during that year, the Super Rich firms saw increases in RPL of 4.1 percent, as contrasted with -4.7 percent for the vereins and 1.0 percent for other firms; growth in PPP of 5.5 percent, compared with -8.2 percent for the vereins and 1.2 percent for other firms; and increases in compensation of all partners of 4.9 percent, as contrasted with -4.3 percent for the vereins and 0.5 percent for other firms. In terms of profit margin, the Super Rich firms recorded an impressive 51 percent, as compared to 29 percent for the vereins and 35 percent for all others.

Chart 12 - Comparison of 2013 Performance of Am Law 100 Firms by Firm Type (% Change over 2012)³¹

Metrics	All Firms	"Super Rich"	Vereins	All Others
Total Gross Revenue	5.4%	4.9%	24.9%	2.2%
Average Revenue Per Lawyer	-0.4%	4.1%	-4.7%	1.0%
Average Profits Per Partner	0.2%	5.5%	-8.2%	1.2%
Average Compensation All Partners	-0.3%	4.9%	-4.3%	0.5%
Head Count	5.8%	1.0%	31.0%	1.2%
Equity Partners	4.6%	0.6%	36.9%	1.2%
Non Equity Partners	7.1%	4.3%	20.5%	3.1%
Leverage	0.05	0.02	-0.25	0.07
Profit Margin	38.0%	51.0%	29.0%	35.0%

Source: American Lawyer Media

A similar market segmentation has been evident among Am Law Second 100 firms as well. During 2013, 20 Am Law Second 100 firms substantially outperformed all others and drove the financial results for the entire Am Law Second 100 group. During that year, the gross revenues of these high performing firms grew by 4.6 percent, as compared with only 1.1 percent for the remaining 80 firms; their average RPL jumped by 3 percent, while others gained only 0.8 percent; and their PPP increased on average 3 percent, while other firms saw negative PPP growth at -0.8 percent. The performance of the 20 high achieving firms qualified them for inclusion in the top firms in the overall market (of Am Law 100 and Am Law Second 100 firms) for both RPL and PPP.³²

The top Am Law 100 firms are largely New York-centric, with market-leading practices that can command premium rates. The leading Am Law Second 100 firms are more dispersed geographically, are smaller than the average Am Law Second 100 firm (both in total numbers and in equity partners), and have intensely focused practices that command much higher rates from excellent clients. In each grouping, however, the difference in performance of these high achieving firms is so significant from others in their size category that there is every likelihood that the emerging market segments could begin to harden, forming effective barriers to entry that would make it far more difficult for other firms to move into these elite classes.

30 Aric Press, "The Super Rich Get Richer," *The American Lawyer*, May 2014, pp. 130, 132.

31 *Id.* at 33.

32 Aric Press, "Punching Above Their Weight," *The American Lawyer*, Jun. 2014, pp. 68-69.

Although the legal market has always had winners and losers in terms of financial performance, there was traditionally a fair amount of fluidity, with underperforming firms having a reasonable chance to improve their lot over time. While the full implications of the changing dynamics of the legal market remain to be seen, the segmentation that is now emerging feels somewhat different and more permanent than before.

Resistance to Change in the Law Firm Market

The shifting dynamics of the legal services market underscore the critical importance of law firms taking a strategic and long-range view of how their clients, their practices, their markets, and their competitors are changing. As events of the past year (including the demise of Bingham McCutchen and Patton Boggs) have starkly underscored, today's highly competitive legal market is very unforgiving, and strategic missteps can have very serious consequences. It is, in other words, more important than ever before that law firms learn to play where the puck is going to be.

As previously noted, most law firm leaders seem to understand all of this instinctively but still express significant doubts about the ability of their firms to make fundamental changes. A substantial majority of the managing partners and chairs of the 304 law firms responding to the Altman Weil 2014 Law Firms in Transition survey acknowledged that the market for legal services has changed permanently in fundamental ways,³³ and almost 67 percent predicted that the pace of change will increase.³⁴ At the same time, only about 13 percent of respondents expressed high confidence in their firms' ability to keep pace with the changes in the marketplace (down from almost 24 percent in 2011).³⁵ And, ranking the seriousness of law firms to implement changes to their legal service delivery models to provide greater value to clients on a low-to-high scale of 1 to 10, survey respondents gave the industry a middling "5". That ranking, interestingly, contrasted to a similar ranking by client CLOs who put the willingness of law firms to change at "3".³⁶

If law firm leaders are convinced of the need for their firms to make fundamental changes to their service delivery, work process, and pricing models but seem unable to initiate those changes, the obvious question is why? The reasons are no doubt complex and related to both human nature (our built-in resistance to change) and the inherent conservatism of lawyers (our perception of change as threat and not opportunity). However, the resistance to change may also be rooted, ironically, in the very success that the legal industry enjoyed prior to 2008 and, by at least some measures, continues to enjoy today. We may, in other words, be victims of our own success.

By any measure, the decade leading up to the economic collapse in 2008 was a time of unprecedented growth for the law firm market. With the exception of the brief "tech bubble" related recession in 2000-2001 that adversely impacted some firms (though not all), law firm partners during this period saw their firms' revenues and profits increase dramatically. Indeed, in the three-year period from 2004 through 2007, U.S. law firms saw their revenues grow at a staggering cumulative rate of 37.5 percent, and their profits per equity partner increase at an impressive cumulative rate of 25.6 percent.³⁷ Of course, this boom period came to an abrupt halt in 2008, when law firm revenues and profits both dropped precipitously. In early 2010, however, the market began to improve and ultimately reached its current level of positive though very modest annual gains.

33 The identified changes included more price competition (93.8 percent), more commoditized legal work (88.6 percent), more non-hourly billing (81.9 percent), fewer equity partners (74.1 percent), more contract lawyers (71.5 percent), reduced leverage (65.4 percent), smaller first-year classes (60.3 percent), lower PPP/slowdown in PPP (58.3 percent), and outsourcing of legal work (50.7 percent). AW 2014 Law Firms Survey at 2.

34 *Id.* at 3.

35 *Id.* at 4, 7.

36 *Id.* at 12-13.

37 Figures drawn from Citi Private Bank *Law Watch* reports.

What is often missed in this story, however, is that given the restructuring that many firms have undertaken since 2008,³⁸ the equity partners in the largest 200 U.S. firms have fared reasonably well, even in the present market environment. In 2013, profits per equity partner in these firms averaged \$1.19 million, not back to levels seen in 2007 but hardly disastrous.³⁹ It is not surprising, therefore, that law firm leaders might have a difficult challenge in convincing their partners of the need to make fundamental changes in their business model or practices. As one observer of the legal market has quipped, "It's hard to convince a room full of millionaires that what they're doing is wrong."

This is not a problem unique to law firms. Indeed, as noted in our Report on the State of the Legal Market last year, whenever a market faces disruptive change -- including the introduction of new forms of competition -- it is often the leading and most successful firms in the market that underestimate or fail to perceive the impact of the change that is occurring. As noted in a 2013 article in the *Harvard Business Review* on disruptive change underway in the consulting and legal services markets, "The temptation for market leaders to view the advent of new competitors with a mixture of disdain, denial, and rationalization is nearly irresistible. . . . As we and others have observed, there may be nothing as vulnerable as entrenched success."⁴⁰ To remain competitive for the long term, law firms -- including particularly successful incumbent firms -- need to focus strategically on how their markets are changing and develop the ability to modify their own operational models to meet the evolving needs and demands of their clients. But past success can be a powerful blinder to the need for change, particularly if it is assumed that only radical change can be successful.

In the wide ranging discussion of the need for change in the legal industry over the past few years, it has sometimes been assumed that the only changes that can be effective are those that require revolutionary new approaches to the solving of legal problems or a radical reinvention of the tasks involved in providing legal services. While it is true that some of the changes on the horizon would have far reaching effects on how law firms operate -- e.g., a shift away from the billable hour as the standard currency of law firm billing and compensation systems or the increased reliance on technology for records searches, document drafting, legal research, and dispute resolution -- it seems unlikely that the basic tasks of lawyers (counseling, negotiating, researching, drafting, litigating, etc.) will change. They are simply part and parcel of how our legal system works. That is not to say, however, that important changes will not occur in the way these tasks are performed.

In 1987, Robert Plath, a pilot for Northwest Airlines and an avid home workshop tinkerer, decided to affix two wheels and a long handle to suitcases that rolled upright, thus creating the world's first Rollaboard.⁴¹ Within a few years, Mr. Plath's creation had revolutionized the luggage industry -- not by inventing an alternative to the suitcase but by making the traditional suitcase more efficient. It seems likely that the kinds of changes we will see in the legal market over the next several years will be of this same genre -- creative ways of improving efficiency and driving down costs in the performance of traditional legal tasks. Conceived of in this way, it might be somewhat easier to convince law firm partners that the changes being driven by the market need not be regarded as a threat, unless of course they are ignored.

There is, however, one additional roadblock to effective change implementation in many firms, and that relates to the metrics firms typically use to measure their economic performance and to guide evaluation and compensation decisions regarding partners. These metrics create incentives and shape behaviors and, to the extent that they measure the wrong things, can lock in inefficient ways of working and produce strong resistance to change.

38 These restructuring efforts included significant layoffs of associates and non-legal staff, dramatic cutbacks in new lawyer hiring quotas, substantial reductions in both direct and indirect expenses, and a significant thinning of the equity partner ranks.

39 Aric Press, note 13 *supra*, at 40.

40 Clayton M. Christensen, Dina Wang, and Derek van Bever, Consulting on the Cusp of Disruption," *Harvard Business Review*, Oct. 2013, p. 114.

41 Joe Sharkey, "Reinventing the Suitcase by Adding the Wheel," *The New York Times*, Oct. 5, 2010, p. B6. Actually, Mr. Plath's Rollaboard was an improved and streamlined version of large "rolling luggage" invented by Bernard Sadow, the vice president of a luggage manufacturing company, in 1970. *Id.*

Commentators have argued for some time that most law firms do in fact measure the wrong things -- or, perhaps more accurately, fail to measure all of the right things. The metrics used by most firms focus on "inputs" -- primarily billable hours, fee growth, utilization, leverage, and the like -- to determine the "value" being delivered to their clients. We assume, in other words, that value equals the sum of all of our inputs. On any rational basis, however, that's an absurd proposition. Why should a client regard a firm as providing higher value simply because its lawyers clock more hours or charge higher fees? Surely issues like the quality and consistency of work, the timeliness and helpfulness of the advice provided, the efficiency with which tasks are performed, the skill with which projects are managed, or the worth to the client of the results obtained are all far more relevant in the client's assessment of the value that a firm provides on a particular matter. And yet, most law firms measure almost none of these factors.

This lack of focus on client oriented performance measures is exacerbated by the fact that most firms use their current metrics as the bases for performance evaluation and compensation decisions. In most firms, for example, total revenues attributed to a partner are the driving factor in compensation, with comparatively little attention paid to profitability of the work or client satisfaction with the firm's overall performance. Most businesses outside the law firm market would regard focusing on the top rather than the bottom line as bizarre, yet it is precisely such top line focus that drives firm decisions that arguably have the most influence on lawyer behaviors.

A similar disconnect is reflected in the use of profits per equity partner ("PPEP") as the defining metric for tracking the comparative performance of law firms. In recent years, firms have kept PPEP high by dramatically paring back promotions to equity partner ranks, by slowing compensation growth for those who are promoted to equity status, and by de-equitizing or terminating equity partners who are regarded as insufficiently productive. PPEP may thus be an especially poor metric for measuring sustainable profitability because its growth is not necessarily tied to actual improvements in business operations, much less to efficiency in meeting client needs.

At a recent conference sponsored by the Thomson Reuters Legal Executive Institute -- The Law Firm Financial Performance Forum held in October -- participants identified a broad range of additional metrics that firms might consider in measuring their overall performance and responsiveness to their clients. These included, among many others, such metrics as profitability assessments at the matter, client, and practice levels; measures of a firm's market share in particular practices; client satisfaction ratings; measures of repeat business or other expansions of key client relationships; assessments of a firm's "brand strength" in particular markets; measures of "wallet share" for key clients; and use of a client quality index. It was suggested that firms should consider collaborating with their clients to devise metrics that more accurately reflect the value of the firms' services from the client perspective. And it was also agreed that firms should move from a focus on "revenues" to an emphasis on "earnings," a change that would highlight efficiency in the delivery of services.

Unless and until firms are prepared to begin to assess their performance on the basis of these kinds of broader criteria and to hold their partners accountable against metrics that assess ROI from the client's perspective and not just the firm's, implementation of any meaningful changes to their operating or pricing models will remain a challenge. Tom Tierney, the former CEO of Bain & Company, once observed that in professional service firms "if your strategy and your compensation system are not aligned, then your compensation system is your strategy." The old axiom that "you get what you measure" is unfortunately largely true in law firms. So if we want different results, we need to think very carefully about what we choose to measure -- and what we do not.

Conclusion

As we enter the seventh year since the economic collapse in 2008, it is quite clear that the market for legal services has changed in fundamental ways. We now live in a buyers' market in which all of the key decisions about how legal services are delivered and priced are being made or strongly influenced by clients. And clients are insisting on increased efficiency, predictability, and cost effectiveness in the services they purchase from law firms. These are new market realities that are not likely to change for the foreseeable future.

At the same time, the dynamics of the legal market have shifted in other significant ways. We seem locked in a cycle of relatively modest demand growth for law firm services, in which revenues are growing -- albeit quite slowly -- but clear challenges remain. Productivity growth remains a serious issue, as does the continuing decline of law firm realization rates. And firms continue to struggle to maintain expense growth at sustainable levels.

The picture is further complicated by shifts in the buying habits of business clients, which may forebode a permanent ratcheting down of spending for outside law firms; a persistent softness in the market for litigation services, which may reflect a reduced willingness of business clients to pursue litigation options; a dramatic increase of non-traditional competitors in the legal market, a development that over time may significantly erode law firm market share; and a growing segmentation of the law firm market into high performing firms versus everyone else, a segmentation that may be hardening.

Against this background, it is more important than ever that law firms take a long-term strategic look at their primary practices, clients, and markets. The key is not just to react to market realities today, but to understand where their markets are likely to be three and five and ten years from now. In Wayne Gretzky's terms, it's playing not where the puck is but where it is going to be. Firms that are able to adopt this kind of long-range thinking will enjoy a significant competitive advantage in today's rapidly changing legal market.

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2015 Report on the State of the Legal Market

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Roundtable on change and challenge in the business of law

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BY REGINALD F. DAVIS AND VICTOR LI



From left: Daniel Lewis, Victor Li, Mark Britton, Kingsley Martin, Jack Newton, Reginald Davis and Michelle Crosby. Photographs by Jeff Green Photography.

At a rather small table in a large hotel conference room, five pioneers in new legal services met with the *ABA Journal* in May. Someone suggested the Las Vegas gathering looked like a poker game, but the intention was a discussion of a very different kind of gambling—the risks they've taken in beginning legal businesses outside the traditional law firm and the bets they've placed on the future of the legal industry.

The participants were Mark Britton, founder and CEO of Avvo, a listing and rating site that connects lawyers to potential clients; Michelle Crosby, co-founder and CEO of Wevorce, a tech-based, mediation-style approach to divorce law; Daniel Lewis of Ravel Law, a legal research service built on visualization; Kingsley Martin, whose KM Standards can create, audit or review legal contracts; and Jack Newton, CEO and founder of Clio, which provides cloud-based legal practice management software.

The group acknowledged there is no such thing as a new legal services community, mainly because they are all busy keeping their own enterprises going. But respect and interest infused their conversation.

What follows are excerpts, edited for clarity, from 90 minutes of discussion. Many subjects were broached: nonlawyer ownership, ethics rules, naysayers and change blockers. But mainly the discussion highlights what five legal industry entrepreneurs have to share about what they've learned, and what they hope the law will allow.



Mark Britton

WHERE NEW LEGAL SERVICES BUSINESSES ARE CARVING A NICHE

You all have different approaches to the growing alternative legal services market. Give us some insight into what matters to your companies now and where you fit in the market.

Mark Britton: For us [at Avvo], it's a mix. You have some big firms who have claimed [Avvo profiles] for every lawyer in their firm. [Avvo's website has individual profiles of 97 percent of licensed U.S. lawyers. Lawyers can claim their profiles by proving identity, and then add information about themselves and their practice areas.] Ropes & Gray is an East Coast example; Cooley, Fenwick, all sorts from Silicon Valley or Portland or Seattle or Phoenix. We see a lot of our big-firm group claims being driven principally out of the West Coast or Florida. But we don't spend a lot of time thinking about the big firms, because our focus is on that consumer that really needs help, and we're not focused on the 1 percent or the big corporations.

When you look at the pain point in legal [who isn't being served adequately by the current legal structure], it is with that 50 percent medium- to high-income consumer avoiding lawyers. And if you take that to low-income to high-income, that's about 86 percent. And so you have all of these

consumers that are just completely baffled as it relates to what lawyers do and how they interact with them. That's where the opportunity is for us, and lawyers in general, and where we see most of the innovation.

Jack Newton: The space Clio is playing in and focusing on is in the small and solo-firm to medium-firm space as well. We see the technology need is so high there because you don't have the human infrastructure at the big firms. You don't have a small army of paralegals and word processors and everyone else behind you to make sure you don't drop the ball. If you're a solo and you drop the ball, nobody's catching it for you.



Michelle Crosby

And that's where technology's got to come in. I think that's the really compelling aspect of cloud technologies; they can allow small firms and solos to have an arsenal of technology that in some cases is much more powerful than what the lawyers have at the big firms. That's been a huge factor in leveling the playing field and making the solos and small firms so much more effective, capable, less at risk of malpractice and so on—just by embracing these technologies.

Michelle Crosby: Do you find the same tension point that we find [at Wevorce]: That although we have the data to prove to you that we're saving you 60 percent of your time, and therefore expenses, you don't need a paralegal—you don't need someone. We can do all these things for you with technology. However, as a profession, there is a sense of entitlement from lawyers of "I need \$400 an hour." But if I cut your expenses, you realize that you're making X-amount more, and that your margins are actually much higher.

Newton: The answer to your question is yes. We've had a tremendously hard time marketing and selling Clio using ROI-type propositions.

Daniel Lewis: [For Ravel] it's mostly the opposite. We've seen adoption from solos all the way up to Wall Street firms.

And I think some of the stereotypes of firms are wrong. We heard when we started the business that lawyers cared about making sure that they could keep their billable hours and would be nervous about anything that made them more efficient. I don't think that's true. The people who get excited about Ravel get excited not because they see an ROI proposition. I don't think [law] firms are particularly geared up as well as businesses to tackle those types of calculations.

But what they are geared up to calculate is: How do they get a competitive edge, because they're operating in a business where everybody shares the same information. Everybody shares the same case law, shares the same knowledge of what's going on in the market. And it's all open information. And so what they try to do is compete with the smartest people who can make the smartest arguments—the most strategic decisions—and when they see tools that can help them do that, they jump on them. And they jump on them because they know that some other firm is going to do them, and then they look over their shoulder and see their competitors using it.

Kingsley Martin: The upper end of the market has a number of significant advantages. They can pay, and it's a relatively small segment, so frankly, we serve them. The biggest segment of our market [at KM Standards] is BigLaw and big corporations. These are focused on big problems, and some of them have pretty hefty price tags. And so, as Dan points out, people do it for competitive and quality advantages, not necessarily efficiency and cost control.



Daniel Lewis

Now, my hope is that we're serving that market, for those reasons. But at the end, the innovation is going to come from the mass market, from our ability to take these incredibly complicated systems and make them more broadly available. I am convinced that while the 1 percent controls just an enormous amount of the total spend, the 99 percent is a potentially very significant market.

ON LEGAL ETHICS AND REGULATION

Long-standing legal ethics rules to protect clients have been criticized as stifling innovation in the legal industry. Do you think it's the responsibility of the new legal services to challenge these ethics rules?

Britton: To challenge the ethical rules? When they're dumb, yes. I can't help but look at [unauthorized practice] and how much it's hurting the legal profession. It was fantastic protectionism for decades—I get that. And maybe, at one time, to save the poor consumer from these “carpetbagging” nonlawyers who were going to lead them down unsavory paths.

I don't think it's going to be anyone at this table challenging these rules. It's going to be the customer. We come out of business backgrounds where we say, “What is our target audience, what does that target audience want, and how do we give them tools to do what they want?” That's what we do, right? The customers—half of them who have money—are avoiding lawyers. Lawyers aren't succeeding in satisfying that demand. So I'm constantly saying: OK, why are half of these people not using lawyers? If we figured that out, we could double the size of the consumer legal services sector overnight.

And what we're seeing are all sorts of regulations that have lawyers sitting on their hands and allowing a lot of nonlawyer services to pick up the flag for the consumer.

If you look at the data in the United States, what's pretty interesting is, whether it's the unauthorized practice of law commissions or the attorney advertising commissions, if you look at the number of actions that are brought by consumers, it's very low. If you look at the number of actions that are even brought by the bar, as a percentage, they're very low. And so you have to ask yourself: What are they actually protecting against? So you're seeing movements in a fair number of bars to where they're saying: OK, we probably need to look at this differently.



Kingsley Martin

In that, rather than having all these preventative regulations, maybe we can pour more of our resources, our precious resources for the bars, into enforcement. You haven't seen it happen aggressively yet, but at least I've heard many more conversations on this in the last two years than I've ever heard in the previous 20. So hopefully they're moving towards more of an enforcement standard. But quite honestly, what I'd love to see is places like the FTC or the state consumer commissions being that place of redress. That's what I'd like to see: a lot of the regulation—either in words or where it resides, with organizations that have that kind of wording in their enforcement.

Martin: I assume that no one on the table feels in any way limited or restricted by the ABA codes of ethics, including unauthorized practice of law. I certainly don't, probably because I don't intend to do anything that even smacks of unethical behavior.

Britton: I constantly feel restricted by rules. Not the ABA. The ABA, on their attorney advertising model rules, do a great job.

I feel like this is all—everything we're talking about—is a subset of a crossroads where the legal profession has found itself. And that looks like this: We have a choice, and we're totally stuck in the middle as regulators and as people who drive the profession forward as a whole, per se. When we think about what is missing, and everything that you're speaking to, it is business sense. And so we can either teach that in law school or we can allow businesspeople to come into the legal profession and share in profits. Those are your two choices. That's it.

Crosby: The concept of law is about serving people in need. Many of us go to law school for that exact value proposition. It gets very quickly contorted in the actual practice. And so, when you talk about ethics and lawyers and reform, I actually challenge the whole bar on what are we trying to do. And is that providing services that are in alignment? We're very comfortable bringing experts on a

very trial basis [to assist with cases]. Why can't we actually apply that to the business of law and bring in the right experts and be more collaborative in it?

That, to me, seems more ethical and is providing services to the client by bringing more resources. Lawyers cannot do all of these things. We are not trained to do it.

Martin: There is an informational negligence about those standards, and maybe it's for us to try and define and set the right level. But I think, ultimately, the only reason that our new clients will come to new law is because of trust. Just as in some ways the old bar and the old rules of ethics tried to establish and enforce that trust, we need to do the same thing in our technologies.

Lewis: It doesn't seem surprising that an industry as old and as fragmented as the legal profession has a hard time changing. It's hard to have a concentrated voice, from one perspective or the other. It wouldn't surprise me, though, if—this is sort of a Silicon Valley perspective—if technology outpaces it so quickly that it forces change.

If you think of Uber or Lyft, these are businesses that grew so quickly, so rapidly, based on demand, that they were breaking the law left and right in market after market, and regulators said, "We don't have any choice but to change the rules because the rules are clearly being proven wrong." And it wouldn't surprise me if that happened in the legal space too. And it may be the only way, if Congress doesn't do something.



Jack Newton

ON METRICS

We often hear about a dearth of data on the legal profession, but surely you're using data to see how effective you are. What metrics are you seeing that you're proud of and what has you worried?

Lewis: For our business [at Ravel], there's one quantitative, one qualitative. The quantitative one is: We've heard folks say that using Ravel for their research has been up to 70 percent faster than using traditional tools. So that's pretty cool. The more qualitative one is: We've heard people say that they've found cases through our systems that they haven't discovered in other tools, even after what they thought was exhaustive research. And those cases have gone on to affect their cases and their wins. So that's the other cool thing.

I think that the idea of metrics at the law firm level is much more interesting, though. Ralph Baxter, one of our organizers who led Orrick, Herrington & Sutcliffe for a very long time and thinks a lot about this issue, is constantly asking this question to other law firm leaders. The answers are all across the board sometimes. The wrong answer you'll hear is billable hours. And the right answer, I think, is a little more unknown, but it has to do more with customer satisfaction and profitability on other metrics rather than just the billable hour.

Martin: We are very metrics-driven. And the one that we're proud of is accuracy, measured on what we use, a precision of recall of low-90 percent. The one that worries us is that most lawyers think that that is a low number, and that they can outperform it. The reality, of course, ... is that the expert opinion is usually no better than a coin toss. But challenging that perception—that I'm always right—we are daily presented with a situation where we present some contract analysis to a client who might say: "All of our contracts, all of our software development agreements contain an acceptance clause." No, they don't. So the client looks at this and says, "Well, there are two possible ways that we can treat this. Either we're right and the [KM Standards] software is wrong, or the software is right and, boy, we may need to change our ways." You can imagine where we always start.

Crosby: All of us at the table are looking at this problem of customers and what they need and all of the data. We are all first movers in looking at large amounts of data in this position. And yet you have all of these solo practitioners and all of these different incentive bases, and all of us at the table are looking at the whole pie. And when you start to present and start to get excited: Look, here's the statistics, here's the data. But you go into a market that has very different incentives to attack it. They don't have a counter-ability to negotiate; there's just this kind of unknowing fear out there.

Newton: Something we had a really hugely positive response to at the Clio Cloud Conference back in September was this dashboard that we rolled out. We're a SaaS [software as a service] company, and SaaS companies are just super metrics-driven, and we started talking to our customers about metrics like MRR [monthly recurring revenue] and churn and net promoter score.

It's kind of a one-time thing; but you think a net promoter score for your legal clients makes a lot of sense, right? Like, one of the biggest drivers of Clio's growth has been referral business. So one happy customer goes and tells five noncustomers that they used this thing called Clio and they love it, and all of a sudden we've got five new customers. And that's all a function of net promoter scores, and I think the same dynamic's at play for many law practice areas, and yet lawyers aren't thinking

of net promoter scores. They're not thinking of sending out that survey; they're not thinking of how do I nurture my clients to make sure I'm staying front of mind with them over time and helping encourage that kind of promoter behavior?

The data can tell you, and it'll tell you in very clear and unambiguous and sometimes painful ways, what you're doing right and what you're doing wrong. But with this dashboard system that we rolled out, we put what we thought were 10 or so of the most important KPIs [key performance indicators] for law firms to be thinking about; and for so many firms, it was just like an epiphany. There's not an unwillingness to learn. They just need to have the systems that make it easy.

Simple is the key. And that's a game changer, and I think we're at a very exciting kind of cusp right now with the combination of easy-to-use software, the cloud, mobile—the things that are facilitating these very rapid and almost scarily fast changes in things like transportation with Uber and Lyft. I think we're seeing all the same dynamics beginning to coalesce around legal, and I think the change will be slow until it's really fast. And it'll be a really, really exciting next few years.

SILENCING NAYSAYERS

Was there a moment when each of you were creating your business that someone told you, “Oh, that'll never catch on”?

Crosby: Just one?

Britton: I still have people telling me we will never catch on. And I point out to them that we are the largest legal marketplace in the world. I don't really point that out to them; I just kind of shake my head.

Even at Stanford [at the ABA National Summit on Innovation in Legal Services], I had someone come up to me and say, “I need to learn more about this Avvo thing, because I'm concerned about your Avvo rating, and I don't want you to turn into this Best Lawyers thing that's causing all sorts of problems.” And I didn't have the heart to tell them that we're probably 50 times the size of Best Lawyers online.

So there will always be this challenge with those that struggle with the new, and they will tell you that it will never conform to the old. And that is where the opportunity lies.

Martin: I think I better reiterate that. I mean, it's not just one occasion; it's daily. The fact of the matter is, I feel that my major challenge is that I operate in a sea of negativity. We have an onslaught of reasons of why it can't be done. From efficiency, revenue models, from inability to analyze language. And so on and so forth. I think of it partly as an incentive for me to do it. And I think it actually leaves the space open long enough for us to grow into it. I think, in some ways, it actually works to our favor.

Newton: From our perspective, I think back to our first ABA Techshow, back in 2008 when we launched the beta of Clio. It was almost a 50/50 split between people who were coming up to us at our little 10-by-10 booth back then, and half of them were telling us this was an insane idea that was

patently irresponsible and was going to fail. And then the other 50 percent were just evangelical. They were coming up to us saying, “We’re so happy; we’ve been waiting for somebody to build this. This is such a perfect fit for us.” And I think if you don’t at least have some healthy set of people coming at you telling you that your idea’s going to fail, it’s probably not an interesting idea.

Crosby: Well, my vision is turning every divorce amicable.

Britton: That is a serious vision. That is shooting high.

Crosby: It is a serious vision, and I think it’s doable. The time is the variable. And it turns out that technology has become the platform for really, actually allowing that to happen.

When I actually would go and talk to the judges, all of a sudden all of my orders were starting to get pulled and challenged. I was stuck in a power struggle because I was doing it differently. I start every certification program [for Wevorce lawyers] with a half-hour of my introduction of “Mission: Impossible.”

I have a very different perspective of how the world works, and it does seem impossible. But when you start looking at it, it’s very possible. And we’re seeing amazing results because of the audacity of the vision. And now the data’s catching up to prove it. And it turns out that I’m not alone. It turns out that I—slowly, with one question at a time—slowly started to attract other believers.

Lewis: When we were raising funding for the first time, we heard from a lot of investors that asked: Why would you do something in the legal space? There’s not enough lawyers—there’s only a million or so; they can’t even help themselves. They’re impossible customers to sell to, and they’re just not likeable people—stuff like that. So there was a lot of negativity about the legal market, but I think we’ve had a great reception from lawyers. The worst that we’ll see is on the older demographic—folks saying, “I don’t understand this visualization thing. It looks pretty cool, and I can understand how young people might use it, but it just doesn’t work for me.”

And I see that, actually, in my own family, where my father thinks it’s cool but doesn’t really understand what we do. My older brother, who’s a fifth-year associate, doesn’t really use it. My younger brother, who’s one year out of Stanford Law, uses it all the time.

Crosby: I’m pleased to report that, overwhelmingly, we’ve had an amazing amount of divorce professionals championing behind us. ... There is a ton of growth and innovation within lawyers, and we’re seeing it percolate; and to me, that is really good.

And, you know, we measure tangible and intangible metrics—everyone that joins our platform. Yes, we have all the KPIs and all the things we report to the board and the investors. But the one thing I’m always looking for with my practitioners is: Do you believe that the work you’re doing with Wevorce is leaving the world a better place? And we still have 100 percent.



The New York Times | <http://nyti.ms/1jGJGCQ>

SundayReview | EDITORIAL

The Law School Debt Crisis

By THE EDITORIAL BOARD OCT. 24, 2015

In 2013, the median LSAT score of students admitted to Florida Coastal School of Law was in the bottom quarter of all test-takers nationwide. According to the test's administrators, students with scores this low are unlikely to ever pass the bar exam.

Despite this bleak outlook, Florida Coastal charges nearly \$45,000 a year in tuition, which, with living expenses, can lead to crushing amounts of debt for its students. Ninety-three percent of the school's 2014 graduating class of 484 had debts and the average was almost \$163,000 — a higher average than all but three law schools in the country. In short, most of Florida Coastal's students are leaving law school with a degree they can't use, bought with a debt they can't repay.

If this sounds like a scam, that's because it is. Florida Coastal, in Jacksonville, is one of six for-profit law schools in the country that have been vacuuming up hordes of young people, charging them outrageously high tuition and, after many of the students fail to become lawyers, sticking taxpayers with the tab for their loan defaults.

Yet for-profit schools are not the only offenders. A majority of American law schools, which have nonprofit status, are increasingly engaging in such behavior, and in the process threatening the future of legal education.

Why? The most significant explanation is also the simplest — free money.

In 2006, Congress extended the federal Direct PLUS Loan program to allow a graduate or professional student to borrow the full amount of tuition, no matter how high, and living expenses. The idea was to give more people access to higher education and thus, in theory, higher lifetime earnings. But broader access doesn't mean much if degrees lead not to well-paying jobs but to heavy debt burdens. That is all too often the result with PLUS loans.

The consequences of this free flow of federal loans have been entirely predictable: Law schools jacked up tuition and accepted more students, even after the legal job market stalled and shrank in the wake of the recession. For years, law schools were able to obscure the poor market by refusing to publish meaningful employment information about their graduates. But in response to pressure from skeptical lawmakers and unhappy graduates, the schools began sharing the data — and it wasn't a pretty picture. Forty-three percent of all 2013 law school graduates did not have long-term full-time legal jobs nine months after graduation, and the numbers are only getting worse. In 2012, the average law graduate's debt was \$140,000, 59 percent higher than eight years earlier.

This reality has contributed to the drastic drop in law school applications since 2011, which has in turn exacerbated the problem — to maintain enrollment numbers, law schools have had to lower their admissions standards and take even more unqualified students. These students then fail to pass the bar in alarmingly high numbers — in 2014, the average score on the common portion of the test was the lowest in more than 25 years.

How can this death spiral be stopped? For starters, the government must require accountability from the law schools that live off student loans. This

year, the Obama administration extended the so-called **gainful employment rule**, which ties a school's eligibility to receive federal student loans to its success in preparing graduates for jobs that will enable them to repay their debt. The rule currently applies only to for-profit law schools, all of which, given their track records, would fail to qualify for federal loans.

This rule should also apply to nonprofit schools. If it did, as many as 50 nonprofit schools could fail as well, based on one measure that considers students' debt-to-income ratio. Another good idea would be to cap the amount of federal loans available to individual schools or to students. This could drive down tuition costs, and reduce the debt loads students carry when they leave school.

Perhaps the most galling part of this crisis is the misallocation of resources. Even as law schools are churning out unqualified graduates stuck under hopeless mountains of debt, millions of poor and lower-income Americans remain desperate for quality legal representation. Public defenders around the country rely on minuscule budgets to handle overwhelming caseloads. In many cases, the lawyers are so overworked that they cannot provide constitutionally adequate representation for criminal defendants. Civil legal services that help people with housing, immigration and workplace issues are even more scarce, with hardly any public support.

If fewer federal dollars were streaming into law schools' coffers and more were directed to fund legal services organizations, the legal profession — and the American legal system as a whole — would be better for it.

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