

Board of Governors
Future Calendar of Events
Revised April 19, 2010

BOG 2010 Meeting Schedule

<u>Committees Meetings at OSB Center</u>	<u>Board Meeting Various Locations</u>	<u>BOG Meeting Locations</u>	<u>Special Events in Conjunction w/Meetings</u>
May 14	April 29-30	OSB Center	Board Meeting, Past BOG Dinner
July 16	June 17-18	Geiser Grand, Baker City	Board Meeting, Local Bar Social
	August 12-13	Tigard	Board Meeting, Local Bar Social (tentative), approve HOD Agenda
September 24	October 29	OSB Center	HOD Annual Meeting (10:00 a.m.)
	November 11-13	Timberline Lodge	Board Retreat, Board Mtg., Local Bar Social

BOG 2011 Meeting Schedule

<u>Committees Meetings at OSB Center</u>	<u>Board Meeting Various Locations</u>	<u>BOG Meeting Locations</u>	<u>Special Events in Conjunction w/Meetings</u>
January 7	February 17-19	Phoenix Grand, Salem	President's Reception, Lunch w/Supreme Court, Dinner w/ONLD, Leadership College
March 18	April 14-16	TBD	Board Meeting, Regional Bar Social
May 20	June 23-25	Tigard	Board Meeting, Past BOG Dinner, PLF Joint Mtg.
July 29	August 25-27	Pendleton	Board Meeting, Regional Bar Social
September 23	November 4	Tigard	HOD Annual Meeting (10:00 a.m.)
	November 17-19	The Allison, Newberg	BOG Planning Retreat, Regional Bar Social

Upcoming Events

BOG members are encouraged to attend

Hispanic CC Scholarship Lunch	May 4	Swearing In Ceremony	October 7
Swearing In Ceremony	May 6	Nat'l Lawyer Referral Workshop	October 27-30
MBA Annual Dinner	May 11	Convocation on Equality	November 4, 2011
HOD Regional Meetings	July 19-23		
Bar Exam (2010)	July 27-28		

Upcoming Events/Meetings of Interest

<u>SPRB</u>		<u>National/Regional Meetings</u>	
May 15	2010 Tigard	June 2-5	2010 ABA Conf. on Professional Responsibility
June 11	Conference Call		Seattle, WA
July 17	TBD		
August 13	Conference Call	Aug. 5-10	2010 NABE/NCBP/ABA
September 11	2010 Tigard	Annual Mtg.	San Francisco, CA
October 15	Conference Call	Feb. 9-15	2011 NABE/NCBP/ABA
November 13	2010 Tigard	Midyear Mtg.	Atlanta, GA
December 17	Conference Call	March 30- April 2	2011 WSBC
<u>Professional Liability Fund Board</u>			
June 11	2010 Bend		Maui, Hawaii
Aug. 13	2010 Hood River	Aug. 4-9	2011 NABE/NCBP/ABA
Oct. 8	2010 Astoria	Annual Meeting	Toronto, Canada
Dec. 10	2010 Tigard		

Feb. 1-7 <i>Midyear Meeting</i>	2012	NABE/NCBP/ABA New Orleans, LA
Aug. 2-7 <i>Annual Meeting</i>	2012	NABE/NCBP/ABA Chicago, IL
Feb. 6-12 <i>Midyear Meeting</i>	2013	NABE/NCBP/ABA Dallas, TX
Aug. 8-13 <i>Annual Meeting</i>	2013	NABE/NCBP/ABA San Francisco, CA
Aug. 7-12 <i>Annual Meeting</i>	2014	NABE/NCBP/ABA Boston, MA
July 30-Aug. 4 <i>Annual Meeting</i>	2015	NABE/NCBP/ABA Chicago, IL

**OREGON STATE BAR
MEETING OF THE BOARD OF GOVERNORS
Schedule of Events
April 29-30, 2010
4/22/2010 11:39 AM**

Meeting Place OSB Center **Phone:** 503-620-0222
16037 SW Upper Boones Ferry Rd.
Tigard, OR 97281-1935

Thursday, April 29, 2010

- 12:00 p.m. – 1:00 p.m. Lunch**
McKenzie
- 12:30 p.m. – 1:30 p.m. Executive Director Evaluation Committee (Garcia, Kent, Fisher, Piucci, Haglund)**
Santiam
- 1:00 p.m. – 1:30 p.m. Public Member Selection Committee (Lord, Matsumonji, Naucler, O’Connor)**
McKenzie
- 1:30 p.m. – 1:45 p.m. Appointments Committee (DiIaconi, Haglund, Knight, Fisher, Kent, Piucci)**
Santiam
- 1:30 p.m. – 2:30 p.m. Access to Justice Committee (Johnnie, O’Connor, Lord, Matsumonji, Naucler, Johnson)**
McKenzie
- 2:30 p.m. – 3:30 p.m. Budget and Finance Committee (Kent, Larson, Lord, Naucler, Garcia, O’Connor, Haglund)**
McKenzie
- 2:30 p.m. – 4:00 p.m. Member Services Committee (Fisher, Johnnie, Matsumonji, DiIaconi, Johnson, Knight)**
Santiam

4:00 p.m. – 5:00 p.m. **Policy and Governance Committee** (Naucler, Kent, DiIaconi, Garcia, O’Connor, Haglund, Knight)
McKenzie

6:00 p.m. – 7:30 p.m. **PLF/BOG Dinner**
Ciao Vito
2203 NE Alberta
Portland, OR 97211
503-282-5522

Friday, April 30, 2010

9:00 a.m. – 10:00 a.m. **Joint Committee on BarBooks**
(DiIaconi, Evans, Fisher, Garcia, Haglund, Johnnie, Johnson, Kent, Knight, Larson, Lord, Matsumonji, Mitchell-Phillips, Naucler, O’Connor, Piucci)
McKenzie

11:00 a.m. – 12:00 p.m. **Board of Governors Meeting**
McKenzie

12:00 p.m. – 1:00 p.m. **PLF/BOG Lunch**
McKenzie

1:00 p.m. – 2:00 p.m. **Joint meeting with PLF**
McKenzie

2:00 p.m. – 4:00 p.m. **Board of Governors Meeting**
McKenzie

NO MEETING **Appellate Screening Committee** (Larson, Knight, Mitchell-Phillips, Johnnie, DiIaconi, Johnson)

NO MEETING **Public Affairs Committee** (Piucci, Johnson, Mitchell-Phillips, Fisher, Matsumonji, Johnnie, Larson)
Santiam

Oregon State Bar
Meeting of the Board of Governors
 April 30, 2010
 Open Session Agenda

The Open Session Meeting of the Oregon State Bar Board of Governors will begin at 9:00 a.m. on April 30, 2010; however, the following agenda is not a definitive indication of the exact order in which items will appear before the board. Any item on the agenda may be presented to the board at any given time during the board meeting.

Friday, April 30, 2010,

9:00 a.m.

1. **Special Committee on BarBooks** [BOG and PLF representatives]
 - A. BarBooks Informational Presentation
 1. Presented by Linda Kruschke Inform PowerPoint
 2. Joint Committee on BarBooks Update Inform No Exhibit

11:00 a.m.

2. **Call to Order/Finalization of the Agenda** Action
3. **Presentation of New Bar Logo**
 - A. Presentation by Anna Zanolli Inform PowerPoint
4. **Report of Officers**
 - A. Report of the President [Ms. Evans] Inform 8.A.1
 - B. Report of the President-elect [Mr. Piucci] Inform 8.B
 - C. Report of the Executive Director [Ms. Schmid] Inform 8.B.1-8.B.5
 - D. Oregon New Lawyers Division [Ms. Cousineau] Inform 9

12:00 p.m. – 1:00 p.m. Lunch - McKenzie

1:00 p.m.

5. **Professional Liability Fund** [Mr. Zarov]
 - A. General Update
 1. Change to PLF Settlement Authority Inform No Exhibit
 2. Audit Report Inform No Exhibit
 3. Report on Meeting with Reinsurers Inform No Exhibit

1:30 p.m.

6. Closed Sessions

- | | | | |
|----|--|-------------------|--------------------|
| A. | Judicial Session (pursuant to ORS 192.690(1)
Reinstatements | Discuss
Action | lavender
agenda |
| B. | Executive Session (pursuant to ORS 192.660(1)(f)
and (h) General Counsel/UPL Report | Discuss
Action | green
agenda |

1:50 p.m.

7. OSB Committees, Sections, Councils, Divisions and Task Forces

- | | | | |
|----|--|--------|-------|
| A. | Client Security Fund [Mr. Larson] | | |
| 1. | CSF Claim No. 09-24 DOUGLAS (Ulle) | Action | 10-23 |
| | ➤ <i>Review the request by Kris Ulle that the BOG review the Client Security Fund's denial of his claim for reimbursement.</i> | | |
| 2. | CSF Claim No. 09-12 HORTON
(Continental Express/Durshpek) | Action | 24-31 |
| | ➤ <i>Consider claimant's request for reimbursement in excess of the amount recommended by the CSF and approved by the BOG in October 2009.</i> | | |
| 3. | CSF Claim No. 09-42 DOUGLAS (McRobert) | Action | 32-36 |
| | ➤ <i>Consider Mr. McRobert's request for BOG review of the CSF Committee's decision on his claim for reimbursement.</i> | | |

8. Committees, Special Committees, Task Forces and Study Groups

2:10 p.m.

- | | | | |
|----|---|--------|------------|
| A. | Access to Justice Committee [Ms. Johnnie] | | |
| 1. | Update | Inform | No Exhibit |

2:20 p.m.

- | | | | |
|----|---|--------|-------|
| B. | Member Services Committee [Ms. Fisher] | | |
| 1. | OSB Sustainability Awards | Action | 37-42 |
| | ➤ <i>Amendment to OSB Bylaw "Article 4 Awards" to include a new section, "4.9 OSB Sustainable Law Office Leadership Award and OSB Sustainable Leadership Awards."</i> | | |

- C. Policy & Governance Committee [Ms. Naucler]
1. Changes to LRAP Policies Action 43-52
 - *Changes to Loan Repayment Assistance Program Policies and Guidelines approved by the Policy & Governance Committee at its meeting on March 19, 2010.*
 2. MCLE Rule 5.2 Action 53
 - *Amendments to MCLE Rule 5.2(e) and Regulation 5.100 regarding credit for legislative service that were approved by the Policy & Governance Committee at its meeting on March 19, 2010.*

2:40 p.m.

- D. Public Affairs Committee [Mr. Piucci]
1. Law Improvement Package Action 54-142
 - *Consider Public Affairs Committee request to approve 2011 OSB package of Law Improvement proposals for introduction.*
 2. Legislative Update Inform No Exhibit

9. Special Appearances

3:00 p.m.

- A. Public Affairs Committee [Mr. Piucci]
1. E-Court Task Force Report [Mark Comstock] Action 143
 - *Consider whether the Board of Governors should accept the First Interim Report from the OSB/OJD eCourt Implementation Task Force.*

3:30 p.m.

- B. ABA Delegates – Judge Adrienne Nelson and Marilyn Harbur
1. ABA Report Inform 143.1-143.20

10.	Consent Agenda	Action	pink
	A. Approve Minutes of Date		
	1. Minutes of Open Session February 19, 2010	Action	144-182
	2. Minutes of Judicial Proceedings February 19, 2010	Action	183-185
	3. Minutes of Closed Session February 19, 2010	Action	186
	B. Appointments Committee		
	1. Various Appointments	Action	Handout
	C. CSF Committee		
	1. CSF Claim - No. 09-26 READ (Gregory)	Action	187
11.	Default Agenda	Inform	blue
	A. CSF Committee		
	1. Thank You Letter from Lawrence K. Peterson	Inform	188
	B. Access to Justice Committee		
	1. Minutes - February 19, 2010	Inform	189
	2. Minutes – March 19, 2010	Inform	190
	C. Budget and Finance Committee		
	1. Minutes – February 19, 2010	Inform	191-192
	2. Minutes – March 19, 2010	Inform	193
	D. Member Services Committee		
	1. Minutes – February 19, 2010	Inform	194
	2. Minutes - March 19, 2010	Inform	195
	E. Policy and Governance Committee		
	1. Minutes - February 19, 2010	Inform	196
	2. Minutes - March 19, 2010	Inform	197

- F. Public Affairs Committee
 - 1. Minutes – February 19, 2010 Inform 198
 - 2. Minutes – March 19, 2010 Inform 199-200
 - G. CSF Claims Report Inform
 - H. Disciplinary Counsel’s Office
 - 1. Disciplinary Counsel’s Annual Report Inform 201-223
12. **Good of the Order (Non-action comments, information and notice of need for possible future board action)**

REPORT OF THE PRESIDENT

Since our last meeting in February in Silverton, I have participated in the following events:

DATE	EVENT
February 22	Participated in the investiture of Judge Suzanne Chanti in Lane County Circuit Court in Eugene.
February 26	Met at the Bar Center with Teresa, Anna, and Andy to work on revision of logo
	Attended the Oregon Hispanic Bar Association Awards Dinner in Portland
March 4	Participated in the investiture of Judge Rebecca Duncan on the Court of Appeals in Salem
March 8	Participated in the investiture of Judge Dale Penn in Marion County Circuit Court in Salem
March 9	Attended the OSB Open Forum (for employees) at the Bar Center
March 12	Attended the Professionalism Commission meeting at the Bar Center
	Attended the OWLS Awards dinner in Portland
March 17	Attended the “Law Girls” lunch in Portland and worked afterwards with Teresa on BarBooks
March 19	BOG Committees and 50 year member luncheon
March 24 - 29	Attended the Western States Bar Conference in San Antonio, with Ann, Steve, Ken, Teresa, and Sylvia
March 31	BarBooks Steering Committee at the Bar Center
April 9	Affirmative Action Spring Social
April 14	Spoke at the Linn Benton Counties Bar Association luncheon
April 20 - 22	Participated in ABA Lobby Day in Washington, DC
April 23	BarBooks Steering Committee at the Bar Center

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: April 30, 2010
Memo Date: April 27, 2010
From: Steve Piucci, President-elect
Re: President-elect Report

Since the last bar meeting at the Oregon Gardens in February these are the highlights of my bar related activities:

- February 22 Met with Presiding Judge of Multnomah County, Jean Maurer to discuss the BOG Court Fee Task Force
- March 10-12 Attended the ABA Leadership Institute in Chicago
- March 24-26 Attended the Western States Bar Conference in San Antonio
- April 8 Meeting with the Chief Justice with bar leadership
- April 12-13 Prepare for and host the OSB/PAC bar bill summit regarding 2011 legislation
- April 20-22 ABA Lobby Day Washington D.C.

Oregon State Bar
Report of Executive Director, Teresa J. Schmid
To the Board of Governors for the Meeting Held
April 30, 2010

Recent Developments: Western States Bar Conference
March 25-27, 2010

Bar leaders from the western states convene each year to discuss issues of mutual interest. A continuing feature of this conference is “Roll Call of the States,” at which bar presidents report recent developments in their respective states. Also appearing were ABA President-elect Steve Zack and Judge Ellen Rosenblum. Following are highlights of the conference:

ABA Initiatives for 2010-2011: Steve Zack’s three priorities for his presidential year are court funding, disaster planning, and restoring civic education in the schools. The Ethics 20/20 Commission, which was established by President Carolyn Lamm in 2009 to study globalization of the profession, will continue its work through 2012. Mr. Zack noted some of the major issues facing the profession, such as the impact of public ownership of law firms (now permitted in Australia and soon to be implemented in the U.K.); regulating “virtual” law offices; and what will be the successor regime if state regulation of lawyers is no longer adequate for the protection of the public in the global marketplace?

Opportunities in the Americas: A presentation on practice in Mexico highlighted the differences, and opportunities, for cross-border practitioners. Notable examples included:

- The protection of labor: in workers compensation claims, the representations of a worker are deemed true unless disproven by the employer.
- Some Mexican transaction may be controlled by U.S. law, and even U.S. courts, if the governing documents so provide.
- A seller of securities has a fiduciary duty as a financial advisor to the purchaser.
- Piercing the corporate veil is a much more robust legal theory under Mexican law than in the U.S.

Immigration and Customs Enforcement: Border Security Issues: A regional official for ICE reported on current developments in border security. Mexican drug wars could not be sustained without the U.S. market for illegal drugs. Smuggling of money, material, and people continues to be the primary illegal activity. Interestingly, as the middle class continues to grow in Mexico, the flow of workers to the U.S. will slow.

Emerging Issues among the States: All attendees reported common concerns about inadequate court funding and deteriorating infrastructure of key institutions critical to access to justice, including those providing legal services and indigent defense. The states’ unique individual issues included the following:

- Utah has developed a mandatory mentoring program for new admittees, which is modeled on that of Georgia. [Oregon may soon follow suit: the Professionalism Commission, Chief Justice Paul De Muniz, and President Kathy Evans have all expressed interest in the program and are actively studying the Utah model.] Other issues include continuing legislative attacks on the courts and a significant increase in member fees, from \$350 to \$425.

- North Dakota is focusing on assistance to new lawyers and on its new discipline diversion program.
- Washington is facing initiatives calling for taxation of legal services (but not other professional services.) Also, while the state does not use the multiple-choice Multistate Bar Examination (MBE), it is considering the Uniform Bar Examination (UBE), which is essay-based and would replace the state's current essay examination. The state is also experiencing pressure to allow practice by foreign lawyers, especially from civil law jurisdictions.
- Texas reported legislative pressure on the courts based on a "case-weighted" study that would determine what resources should go to the courts, based upon how many minutes should be allocated to each case. Utah reported a similar initiative, which is framed as tort reform.
- Arizona reported increased legislative hostility toward the courts, exacerbated by the economy. In northern Arizona, criminal filings are down by 20% due to residents leaving the area for economic reasons. The bar's focus is on assistance to new and unemployed lawyers. On the bright side: the state's new "admission on motion" rule (or mirror reciprocity, as recently adopted in Oregon) is resulting in nearly double the number of applicants as originally estimated. The bar's financial condition is positive enough that its BOG proposed reduction of member dues, which the state supreme court declined to do. The state is also conducting a sweeping change of its discipline system to a model based on Colorado's.
- South Dakota reported having a very positive relationship with its legislature, which it attributed to having a large number of lawyers (14) serving in the legislature. The state is plagued by judicial vacancies, however, which are driven by mandatory retirement.
- Alaska survived sunset review of its mandatory bar.
- Montana is focused on its new Lawyer Assistance Program, noting that the state has the nation's highest suicide rate, and lawyers have the highest suicide rate among the professions. The bar also reported having a troubled relationship with discipline counsel, whose office is lodged within the state supreme court. The state is also considering the UBE, and reciprocity continues to be of interest to the BOG.
- California successfully overcame a veto of the bar bill by the governor, thereby avoiding a repetition of the bar's 1998 financial collapse following a similar action by a previous governor. However, the reprieve is short, and the bar is already working on a spot bill to anticipate similar action in late 2010. While all states reported economy-related challenges to the legal system, California was distinctive in the scope of its economic issues. In San Francisco alone, the closing of two major law firms resulted in unemployment for 2000 lawyers and hundreds of support staff. So many lawyers have been implicated in fraudulent foreclosure assistance schemes that the bar's discipline system has dedicated five lawyers and eight investigators to foreclosure-related prosecutions.
- Nevada reported, as did many other states, a severe drop in funding of legal services due to the drop in revenue from the Interest on Lawyer Trust Account (IOLTA) program, which funds legal services. The state has adopted a mandatory minimum interest rule, by which banks within the state must pay an interest rate on IOLTA accounts that is pegged to the Fed Funds rate and LIBOR.
- Hawaii just adopted a Mandatory Continuing Legal Education (MCLE) rule, making it the last U.S. jurisdiction to do so.

Current Operational Developments

This section of the report tracks current projects with implications for planning, budgeting, and policy development.

<u>Description</u>	<u>Developments</u>
Barbooks™Benefit	<p>The BarBooks™ Steering Committee met on 4/ 1 and 4/23; will have proposal for the BOG at its 4/30 meeting that includes: delivering all current titles as a benefit of active membership beginning in 2011; no member dues increase for 2011; and a financial strategy for 2011-2015. The new BarBooks™ product will be integrated with the bar’s legal research provider, FastCase, and will be available in multiple formats, including BlackBerry, iPod, and Kindle. The new features will be demonstrated to the BOG at its 4/30 meeting. The bar’s Legal Publications will continue to be available in hard copy on demand.</p> <p>The Member Services Committee will begin a Bar-Wide Program Review at its 4/29 meeting to consider the costs, impact on members, impact on other operations, history/alternatives, key constituents and lead time required for transitions, in any, based on information compiled by staff for discussion.</p>
Membership Directory	<p>As part of its sustainability effort, the bar is preparing to offer the membership directory in an online format, projected for the 2011 issue. Under the proposed model, all information from the current format would be available online would be available online and in hard copy, the latter on request only. In addition, information other than member contact information will be provided as a tear-out supplement to the January edition of the <i>Bar Bulletin</i>.</p>
Referral & Information Service	<p>The Public Service Advisory Committee convened focus groups of RIS users on 4/23 for input on a proposed new business model, which would provide for participating panel members to pay a percentage of fees from referred cases to RIS to defray costs of administration; the Ethics Committee is reviewing the model to address for ethical issues, if any, that may arise under the new model. Both committees anticipating reporting their recommendations to the BOG at its June 2010 meeting.</p>
<i>New Project :</i> Mandatory Mentorship Program	<p>The Professionalism Commission adopted as a new project the creation of a mandatory mentorship program for new admittees, based on those currently conducted by the unified state bars in Utah and Georgia. The Utah program was highlighted at the Western States Bar Conference held in San Antonio on 3/25-3/27, and President Kathy Evan introduced it at a conference with Chief Justice De Muniz on 4/8. A state bar task force is being formed, to be chaired by immediate past president Gerry Gaydos and including the Chief Justice among its members.</p>

<i>New Project:</i> CLE MP3	As part of a consolidation of two bar departments, Communications and Member Services, staff is preparing a new service to sections, which is to audio-record short CLE programs offered by sections and to make them available to members as MP3 downloads at a nominal cost. Staff has begun planning for the e-commerce component and for staffing of the service.
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Executive Director's Activities January – April 2010

<u>Date</u>	<u>Activity</u>
January 8	Attended the State of the Court presentation by Chief Justice De Muniz at the Salem City Club luncheon
January 14	Attended the Oregon Minority Lawyers Association's quarterly luncheon in Portland
January 20	Participated in the Campaign for Equal Justice board meeting in Portland
January 21	Attended the Conference of Bar Leaders at the Bar Center and the Marion County Bar Association annual dinner in Salem
January 22	Participated as a judge in the Classroom Law Project's "We the People" Competition in Salem
February 2-6	Attended the ABA's Chief Staff Executive Retreat; meetings of the National Association of Bar Executives and National Council of Bar Presidents; and meeting of the Policy Implementation Committee for the Center for Professional Responsibility, all held in Orlando
February 11	Met with Chief Justice De Muniz in Salem
February 16	Attended the annual luncheon for the Campaign for Equal Justice in Portland
February 17	Met with E.D.s from the Multnomah Bar Association and the Oregon Women Lawyers Association
February 24	Conducted a Brown Bag luncheon at Stoel, Rives in Portland
February 26	Attended the Oregon Hispanic Bar Association's annual dinner in Portland
March 2	Attended the Multnomah Bar Association board meeting; conducted a Brown Bag luncheon at Chernoff Vilhauer McClung in Portland
March 4	Attended the investiture of Judge Rebecca Duncan at the Court of Appeals in Salem
March 11-12	Attended the ABA Bar Leadership Institute in Chicago
March 17	Met with E.D.s of the MBA, OWLS, and the Oregon Trial Lawyers Association, including OSB President Kathy Evans; attended an Open House for the Urban League.
March 25-27	Attended the Western States Bar conference in San Antonio

March 30	Attended a board meeting for the Campaign for Equal Justice in Portland
March 31	Conducted a Brown Bar luncheon at Cosgrave Kester in Portland
April 5	Attended a meeting of the Professional Liability Fund Finance Committee
April 8	Met with Chief Justice De Muniz
April 9	Attended the Affirmative Action Social in Salem
April 13	Attended a national Diversity Conference co-sponsored by the ABA and the State Bar of California in San Francisco
April 15	Conducted a Brown Bag lunch at Davis Wright Tremaine in Portland
April 22-23	Participated in ABA Day lobbying event in Washington, D.C.
April 28	Conducted a Brown Bar lunch at Markowitz Herbold in Portland

On the Horizon

This section of the report is dedicated to giving the Board advance notice of emerging issues that may become significant to the Bar in the future but do not yet require action by the Board.

A central issue for ABA Day was the potential impact of the financial reform legislation package currently pending before Congress, especially those elements that might impact the regulation of lawyers and the lawyer-client relationship. The package included Consumer Financial Protection Act, which appears as Title X of the “Restoring Financial Stability Act.” The Oregon State Bar has joined with other state bars and the ABA in urging the adoption of an express exception of lawyers and legal services from the existing definitions of “financial product or service” and of “covered person.” From the discussions held between bar representatives and both Oregon senators last week, no exception for lawyers is likely in the Senate version is likely. According to news reports, Senate Republicans successfully blocked floor deliberations on the bill for three days but allowed the bill to proceed on April 28.

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OREGON STATE BAR

Board of Governors Agenda

Meeting Date: April 29, 2010
Memo Date: April 16, 2010
From: Jessica Cousineau, Oregon New Lawyers Division Chair
Re: ONLD Report

Since the last BOG meeting the ONLD meet three times to conduct business. In addition to the Executive Committee meetings in February, March, and April, the ONLD also distributed the High School Essay Contest materials, began this year's mentor program and hosted panel presentations at each of the three law schools.

This year the ONLD is working to bring back two services previously offered to their members. The first is an ONLD newsletter. Previously distributed in paper format, the newsletter has been redesigned and is now offered electronically. In addition to the electronic newsletter, the ONLD is also reviving their after-work socials in Portland. All socials will be held the last Wednesday of the month, and with more than 50 members attending the first social at Trees on March 31, the Executive Committee is excited.

The ONLD also saw the launch of their Facebook page in March and designated an Executive Committee member to serve as a liaison on the Affirmative Action Committee. In conjunction with their March meeting, members of the Executive Committee spent the afternoon painting the old jail in Clatsop County to assist the local historical society prepare for the jail's reopening as a film museum. The new museum will celebrate the art and diversity of Oregon filmmaking by highlighting the 300+ films made in the state.

The CLE Subcommittee has been active, in addition to their usual monthly brown bag programs at the Multnomah County Courthouse, the subcommittee hosted a child abuse reporting program in March in Astoria and a DUII program in April in Eugene.

Finally, a subcommittee was formed to review the ONLD bylaws and propose changes to the Board of Governors. The ONLD expects to make a few housekeeping suggestions in addition to the necessary revisions required by the change in bar regions.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: April 30, 2010
From: Sylvia E. Stevens, General Counsel
Re: Request for Review of CSF Claim Denial—No. 09-24 DOUGLAS (Ulle)

Action Recommended

Review the request by Kris Ulle¹ that the BOG review the Client Security Fund's denial of his claim for reimbursement.

Background

This claim is before the BOG for the second time. As explained below, the CSF initially recommended an award of \$2,000 and Mr. Ulle appealed to the BOG seeking the entire \$4,000 he had paid to Mr. Douglas. The BOG referred the claim back to the CSF and on further consideration, the CSF denied the claim. Mr. Ulle now proposes a "settlement" whereby he would accept an award of \$2,000.

Kris Ulle filed a claim in May 2009 seeking reimbursement of \$4000 he had paid to Gerald Douglas to resolve problems with the IRS and Oregon Dept. of Revenue. Ulle hired Douglas in June 2007. Douglas died unexpectedly in January 2009. Ulle recovered his file from Douglas' office, but there was no money available for the refund he claimed, as Douglas' estate was insolvent. In his application to the CSF, Ulle stated that his review of the file shed little light on what work Douglas "actually performed." Ulle also reported that neither the IRS or ODR had received any paperwork from Douglas prior to his death. Ulle's position was that he had received no value for the money he paid.

In its initial review of Ulle's claim on August 13, 2009, the CSF committee had difficulty finding any dishonesty, but was troubled by the estate's inability to refund the unearned portion of the fees advanced by Ulle. The committee found evidence showing clearly that Douglas had done some work on the case, and probably a minimum of 8 hours' worth. The CSF concluded that at his customary rate of \$250, Douglas would have earned ½ of the \$4000 advanced by Ulle and committee recommended an award of \$2000. The recommendation was approved by consent at the August 28, 2009 BOG meeting. Mr. Ulle was advised of the BOG's decision on September 1, 2009. On October 19, 2009, he requested further consideration of the amount awarded.²

In his request for review, Mr. Ulle disputed the committee's finding that Douglas spent at least 8 hours working on his matter and he reiterated that nothing had been filed with the IRS, despite assurances from Douglas that it had been done. The BOG sent the claim back to the committee for further consideration, particularly as to the issue of dishonesty. The BOG was not persuaded that Douglas' death

¹ Pronounced "yule."

² Ordinarily, Mr. Ulle would have received a letter following the CSF Committee meeting informing him of its recommendation. Because of the short time between the CSF meeting and the BOG meeting at which the recommendation was presented, Mr. Ulle did not receive notice of the decision on his claim until after the BOG had acted. It is unusual, but not prohibited by the CSF Rules, for a successful claimant to challenge the amount of an award.

and the inability of his estate to reimburse unearned fees constituted dishonesty within the meaning of the CSF rules.³

The CSF Committee considered Mr. Ulle's claim again at its March 10, 2009 meeting. Additional examination of Ulle's file provided by Douglas' estate turned up several previously unseen documents. One was the fee agreement dated June 11, 2007 and signed by Mr. Ulle, which provided:

"The hourly rate for professional services is \$250. The \$5000 initial retainer⁴ is a *minimum, non-refundable fee* to be applied to my professional services, expenses, and other costs. Although this retainer is considered *earned in full upon receipt* and is not refundable, initial fees and costs will be applied against it. As agreed I will attempt to negotiate an offer in compromise for you with the IRS and a collection remedy with the Oregon Dept. of Revenue (ODR) for a *one-time flat fee* of \$5000."

(Emphasis added)

The file also contained a large volume of financial documents obviously provided to Douglas by Mr. Ulle (tax returns, bank statements, income records, etc.). It also contains the following:

- a. June 7, 2008 fax to the IRS "re: Kris Ulle—433-A Financial Statement and 656 Offer in Compromise."
- b. June 9, 2008 Message Confirmation Report indicating the June 7 fax was sent successfully.
- c. September 2008 fax from ODR with form of financial statement (there is a partially completed financial statement in what appears to be Douglas' handwriting).
- d. October 13, 2008 faxes to ODR "re: Kris Ulle—Request for Hardship."
- e. October 13, 2008 Message Confirmation Report indicating October 13 faxes (2) were sent successfully.
- f. February 2, 2009 receipt signed by Kris Ulle confirming that he picked up his entire file, including the June 7, 2008 fax and its enclosures.

Based on the foregoing, the CSF Committee was satisfied that Douglas sent what appears to be a draft Offer in Compromise to the IRS in June 2008 and in October a request that ODR defer or resolve Ulle's outstanding tax indebtedness. It was also clear that the matters had not been completely resolved at the time of Douglas' death. Because this was a claim for reimbursement of an unearned fee, the committee turned to CSF Rule 2.2:

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

³ In response to the BOG's comments regarding this and other similar claims, the committee proposed an amendment to the CSF rules clarifying that dishonesty includes a lawyer's wrongful failure to maintain unearned client fees in trust; that change was approved on February 19, 2010.

⁴ Mr. Ulle acknowledges that deposited only \$4,000 with Douglas at or near the beginning of the representation.

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.

It was clear from the fee agreement that the fee paid by Mr. Ulle was a fixed fee "earned on receipt" and not required to be held in trust pending the completion of the project. The committee also found that Douglas' services were more than "minimal or insignificant" and that there was no independent assessment as to the amount of the advanced fee that wasn't earned. The committee concluded that the claim was ineligible for reimbursement under Rule 2.2.

Finally, the committee considered whether there was a basis for a waiver of the rules under CSF Rule 2.II:

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.

The "extreme hardship or special and unusual circumstances" suggested were the fact that Douglas' preparatory work on Mr. Ulle's tax problems was never acted on by the IRS or DOR (both of which apparently told Mr. Ulle they have no record of any pending proposals) and that Douglas's estate is insolvent and Mr. Ulle has no other source to recover the unearned portion of the fee. It was also pointed out that the committee had previously recommended a \$2,000 reimbursement notwithstanding Rule 2.2.3 and based on its own assessment of the amount that should be refunded. After considerable discussion, the CSF committee voted to adhere to its rules and deny the claim. Mr. Ulle submitted a timely request for review.

Attached: Investigator's report (9/09)
 BOG consent agenda memo excerpt (8/09)
 Ulle request for review (10/09)
 Committee reconsideration memo (3/10)
 Ulle request for review (3/10)

**CLIENT SECURITY FUND
INVESTIGATIVE REPORT**

FROM: Connie Swenson

DATE: August 13, 2009

Claim: #2009-25

Claimant: Kris Steven Ulle

Attorney: Gerald Douglas (deceased)

Investigator's Recommendation

Recommendation that the Client Security Fund pay \$2,000 of Kris Steven Ulle's \$4,000 claim.

Statement of the Claim

Claimant Kris Steven Ulle seeks reimbursement of \$4,000.00 paid to Mr. Gerald Douglas in order to obtain an Offer in Compromise (OIC). After contacting the IRS and the Oregon Department of Revenue, Mr. Ulle reports that neither one had received any paperwork from Mr. Douglas.

Sources

I have read the claim submitted by Kris Steven Ulle and corresponded with him via voicemail. I talked with Mr. Douglas's secretary, Margaret Hamilton, and examined the three volume file on Mr. Ulle.

Findings and Conclusions

1. Kris Steven Ull paid \$4,000 in order to resolve his tax problems by having Attorney Gerald Douglas present an Offer in Compromise to the IRS and negotiate with the Oregon Dept. of Revenue. Mr. Gerald Douglas' engagement letter of June 11, 2007 confirms this.
2. At that time Mr. Douglas was an active member of the Oregon State Bar and practicing in Tualatin, Oregon.
3. The loss arose during an established attorney-client relationship. At the time of Mr. Douglas' death, no OIC had been achieved and no money was found on a trust account. .
5. Mr. Douglas has no attorney log for the case. However, he does record his first interview with Mr. Ulle by handwritten notes. Several faxes illustrate that he was beyond the stage of just becoming an Agent for Mr. Ulle, under a power of attorney. Mr. Douglas' secretary recalls that some of the information to accompany the financial statement was missing which led to delays. This is substantiated in the file by a request from the IRS for missing information and/or forms.

The Oregon Department of Revenue communicated several times with Mr. Douglas in the fall of 2008. I believe Mr. Douglas would have spent a minimum of 8 to 10 hours developing Mr. Ulle's case at his usual rate of \$250/hour. However, Mr. Ulle was forced to seek other counsel, after the unexpected death of Mr. Douglas. (8 x \$250= \$2,000)

6. There is no knowledge of a bond, surety agreement or insurance contract, outside of the Professional Liability Fund.

7. There is no criminal conviction, civil judgment or disciplinary sanction against Attorney Gerald Douglas. Mr. Ulle does not claim dishonesty. He claims that Mr. Douglas did not complete his contractual obligation due to his death.

8. The dollar amount claimed by the clients is exclusive of interest, attorney fees and court costs. The claimants is not represented by an attorney in this claim or otherwise.

9. There is a hardship, since the Claimant has spent \$4,000 to deal with tax authorities and now must find another attorney.

(Excerpt from BOG Consent Agenda Memo August 31, 2009)

No. 09-25 DOUGLAS (Ulle) \$2,000

Gerald Douglas was a well-regarded IRS attorney for 23 years before opening a private practice in 2003 limited exclusively to helping taxpayers resolve issues with the IRS. He died on February 6, 2009. At the time of his death he had several clients with ongoing matters who, upon contacting his office, were referred to the OSB for help. Within a few days, his brother Donald stepped in to help wind up Gerald's affairs.

According to Don Douglas, for most of his life Gerald had an inoperable benign mass on his spinal cord that affected his mobility and caused considerable discomfort and fatigue. Nevertheless, and although his condition deteriorated as he aged, his death on February 6 was unexpected and unplanned. Gerald lived with his mother and teenaged daughter; there will probably not be a probate because Gerald's estate is insolvent. Don asserts that his brother was an excellent attorney, that most of his clients were in dire straits when they hired him, and that he was generally able to obtain good results for them. He has no explanation for why Gerald had no trust account or why his business account had no funds.

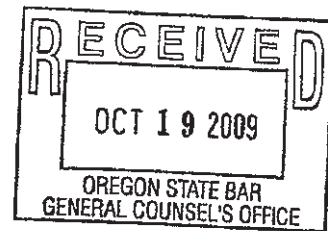
Don Douglas has been very cooperative with the CSF and has made his brother's files available to the extent possible. According to the CSF investigator, however, the files are not as helpful as they could be and there are some gaps in information.

Mr. Ulle paid Gerald Douglas in June 2007 and paid \$4000 in advance for Douglas' assistance in negotiating workouts with the IRS and the Oregon Dept. of Revenue. Douglas' file in this case includes notes from his initial interview with the client and several faxes between Douglas and the taxing authorities. According to Douglas' secretary, delays were caused by the need to acquire additional information not previously provided by the client.

As with the other Douglas claims, the committee had difficulty finding any dishonesty, other than in the estate's inability to refund the unearned portion of the fees advanced by the clients. Nevertheless, the committee recommends reimbursing Ulle \$2000, half of the fees he paid, because there is clear evidence that Douglas performed services for the client prior to his death, even though he had not completed the project. Because Douglas is deceased and his estate is insolvent, the committee also recommends waiving the requirement for a civil judgment.

OCTOBER 11, 2009

TERESA SCHMID
D.S.B. DIRECTOR
16037 S.W. UPPER BOONES FERRY RD.
P.O. Box 231935
TIGARD, OR 97281-1935 (ATTN: SYLVIA STEVENS)



RE: CLIENT SECURITY FUND CLAIM No. 2009-25
LAWYER: ESTATE OF GERALD DOUGLAS

DEAR Ms. SCHMID,

RECENTLY, I RECEIVED NOTIFICATION OF THE CLIENT SECURITY FUND COMMITTEE'S RECOMMENDATION FOR REIMBURSEMENT OF \$2000⁰⁰. THIS WAS A PORTION OF THE \$4000⁰⁰ ORIGINALLY PAID TO GERALD ('GERRY') DOUGLAS FOR THE LOSS CAUSED BY HIM IN CONNECTION WITH HIS AGREEMENT TO RESOLVE MY STATE AND FEDERAL TAX ISSUES. THIS LETTER IS BEING WRITTEN AS AN APPEAL TO THAT DECISION.

AFTER RECEIVING THIS NOTIFICATION I ATTEMPTED TO CONTACT SYLVIA STEVENS, CASSANDRA STICH AND TWO OTHER PEOPLE BUT DISCOVERED THEY WERE ALL UNAVAILABLE. I FOLLOWED UP ONE WEEK LATER AND SPOKE WITH CASSANDRA WHO ANSWERED MANY OF MY QUESTIONS AND HAD SOME SOUND ADVICE IN THE MATTER. SHORTLY AFTERWARD, I DISCUSSED THE COMMITTEE'S DECISION WITH SYLVIA STEVENS. I EXPLAINED WHAT HAD TRANSPIRED BETWEEN GERRY DOUGLAS AND MYSELF AND WHY I FELT ENTITLED TO A FULL REIMBURSEMENT. SHE EXPLAINED THE BOARD MEETS AT THE END OF OCTOBER AND THAT I SHOULD SUBMIT MY APPEAL BY THE MIDDLE OF OCTOBER. ALSO, DURING THIS CONVERSATION I WAS INFORMED THAT IT WAS HER UNDERSTANDING THAT CLIENT

SECURITY FUND COMMITTEE MEMBER CONNIE SWENSON HAD SPOKEN TO ME AS PART OF HER INVESTIGATION INTO THIS MATTER. IN FACT, THE ONLY PERSON TO CONTACT ME WAS SYLVIA STEVENS HERSELF IN A VOICEMAIL MESSAGE, TO ASK ME TO SEND IN ANY DOCUMENTATION I MAY HAVE SHOWING I MADE PAYMENTS TO GERRY. UNFORTUNATELY, THIS COULD NOT HAVE HAPPENED AT A WORSE TIME. I WAS IN THE PROCESS OF MOVING AND ALL MY IMPORTANT DOCUMENTS, PAPERWORK, ETC. HAD ALREADY BEEN BOXED UP AND SEALED. I HAVE REOPENED MANY OF THE BOXES AND FOUND SOME OF THE DOCUMENTS SHE REQUESTED, WHICH I HAVE INCLUDED.

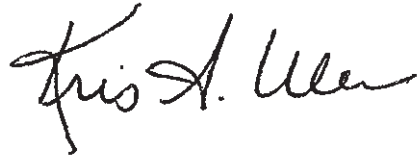
IT WAS MY UNDERSTANDING THAT GERRY HAD PREPARED AND SUBMITTED A SETTLEMENT OFFER TO THE IRS IN DECEMBER OF 2008. ON FEBRUARY 27, 2009 I CALLED GERRY TO CHECK ON THE STATUS OF THE OFFER. HIS SECRETARY TOLD ME THAT GERRY HAD PASSED AWAY AT THE BEGINNING OF THE MONTH BUT THAT HE DID FILE THE OFFER WITH THE IRS. BASED ON GERRY'S FILE ON MY CASE AND A CALL TO THE IRS THIS WAS NOT BOURNE OUT. APPARENTLY, HIS HEALTH HAD FAILED TO THE POINT HE WAS UNABLE TO PREPARE ANYTHING IN THAT REGARD BUT I WAS NOT INFORMED. IT IS MY UNDERSTANDING THE STANDARD RATE FOR AN ATTORNEY'S SERVICES ARE \$250⁰⁰ PER HOUR. IT IS DIFFICULT TO BELIEVE THAT GERRY ACTUALLY PERFORMED EIGHT HOURS OF WORK ON MY CASE. IT SHOULD BE OBVIOUS THAT, BASED ON THE YELLOW HIGHLIGHTED LETTER FROM GERRY HEREIN, AT \$250⁰⁰ PER HOUR GERRY WOULD HAVE FAR EXCEEDED THE \$5000⁰⁰ FLAT FEE WE HAD AGREED UPON TO HANDLE THE CASE IN ITS ENTIRETY.

IT IS NOT MY INTENTION TO PURPOSELY DISCREDIT GERRY. I'M SURE HIS INTENTIONS WERE HONEST AND SINCERE BUT PERHAPS,

BASED ON HIS CONDITION, HE WAS SIMPLY UNABLE TO FULFILL HIS CONTRACTUAL AGREEMENT WHICH I PAID MOST OF IN ADVANCE. IT IS UNFORTUNATE THAT ANY WORK HE MAY HAVE PERFORMED WAS OF LITTLE VALUE TO ME IN THIS CASE.

IF YOU HAVE ANY QUESTIONS OR NEED ADDITIONAL INFORMATION PLEASE CONTACT ME AT: (503) 701-4091.

SINCERELY,

A handwritten signature in cursive script that reads "Kris S. Ullé". The signature is fluid and matches the typed name below it.

KRIS S. ULLE
11102 SE 282ND AVE.
BORING, OR 97009

OREGON STATE BAR

Client Security Fund Committee Agenda

Meeting Date: March 13, 2010
From: Sylvia E. Stevens, General Counsel
Re: CSF Claim No. 09-25 DOUGLAS (Ulle)

Action Recommended

Consider whether to revise the committee's earlier decision to award Mr. Ulle \$2000 of the \$4000 he paid to Gerald Douglas.

Background

Kris Ulle filed a claim for reimbursement of \$4000 he had paid to Gerald Douglas to resolve problems with the IRS and Oregon Dept. of Revenue. Ulle hired Douglas in June 2007. Douglas died unexpectedly in January 2009. Ulle recovered his file from Douglas' office, but there was no money available for the refund he claimed. In his application to the CSF, Ulle stated that his review of the file shed little light on what work Douglas "actually performed." Ulle also reported that neither the IRS or ODR had received any paperwork from Douglas prior to his death.

In its initial review of Ulle's claim, the committee concluded that Douglas had clearly done some work on the case, and probably a minimum of 8 hours' worth. At his customary rate of \$250, Douglas would have earned ½ of the \$4000 advanced by Ulle. The committee recommended an award of \$2000. Upon being advised of the committee's decision, Ulle requested BOG review, again claiming that he should be awarded a full refund of the fees paid to Douglas. He disputed the committee's finding that Douglas spent at least 8 hours working on his matter and he reiterated that nothing had been filed with the IRS, despite assurances from Gerry that it had been done in December 2008.

The BOG sent the claim back to the committee for further consideration, particularly as to the issue of dishonesty. The BOG was not persuaded that Douglas' death and the inability of his estate to reimburse unearned fees constituted dishonesty within the meaning of the CSF rules. (In response to the BOG's comments, the committee proposed an amendment to the CSF rules clarifying that dishonesty includes a lawyer's wrongful failure to maintain unearned client fees in trust; that change was approved on February 19, 2010.)

Further review of Ulle's file (provided by Douglas' estate) turned up several previously unseen documents. One was the fee agreement dated June 11, 2007, which provided:

"The hourly rate for professional services is \$250. The \$5000 initial retainer is a minimum, non-refundable fee to be applied to my professional services, expenses, and other costs. Although this retainer is considered earned in full upon receipt and is not refundable, initial fees and costs will be applied against it. As agreed I will attempt to negotiate an offer in compromise for you with the IRS

and a collection remedy with the Oregon Dept. of Revenue (ODR) for a one-time flat fee of \$5000.”

(Notwithstanding that agreement, there is no dispute that Ulle deposited only \$4,000 with Douglas at or near the beginning of the representation.)

Douglas' file on Ulle is about 2-3 inches thick and contains lots of financial documents obviously provided by Ulle (tax returns, bank statements, income records, etc.). It also contains the following:

- a. June 7, 2008 fax to the IRS “re: Kris Ulle—433-A Financial Statement and 656 Offer in Compromise”
- b. June 9, 2008 Message Confirmation Report indicating the June 7 fax was sent successfully.
- c. September 2008 fax from ODR with form of financial statement (there is a partially completed financial statement in what appears to be Douglas' handwriting).
- d. October 13, 2008 fax to ODR “re: Kris Ulle—Request for Hardship.”
- e. October 13, 2008 Message Confirmation Report indicating October 13 faxes (2) were sent successfully.
- f. February 2, 2009 receipt signed by Kris Ulle confirming that he picked up his entire file, including the June 7, 2008 fax and enclosures.

Despite Ulle's contention to the contrary, there is evidence that the IRS received the Offer in Compromise in June 2008. Similarly, a request was sent to ODR in an effort to resolve Ulle's outstanding tax indebtedness. It is also undisputed that the matters had not been completely resolved at the time of Douglas' death. The issue for the committee is to determine what, if any, amount of the \$4000 advanced to Douglas should be awarded to Ulle as unearned fees.

CSF Rule 2.2 provides:

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.

Accordingly, factors for the committee to consider include:

- The agreed fee for the entire project was \$5000, but Ulle had paid only \$4000.
- Ulle agreed that the fee was "earned on receipt," so Douglas' failure to maintain the funds in trust was not "wrongful."
- The services provided by Douglas were arguably more than "minimal or insignificant."
- There has been no independent assessment as to the amount of the advanced fee that wasn't earned.

The committee might also consider the fact that Ulle's tax problem remains unresolved and that the IRS and ODR deny having received anything from Douglas, suggesting that Douglas' work was of no value to Ulle. If the committee finds those facts compelling, there may be a basis for waiving the requirements of Rule 2.2.2 and recommending an award under Rule 2.11:

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.

ASSIGNMENT OF CLAIM

THIS ASSIGNMENT is made by Kris Ulle ("Assignor"), to the OREGON STATE BAR, ("OSB"):


WHEREAS Assignor has a claim against Gerald Douglas ("Attorney") for the loss of unearned fees paid to Attorney by Assignor;

WHEREAS OSB has agreed to pay Assignor the sum of \$2,000 ("Award") from the Client Security Fund of the OSB as reimbursement for the above loss;

NOW, THEREFORE, in consideration of the Award, Assignor hereby assigns to OSB, to the extent of such Award, all rights, claims and judgments that Assignor has or may have against Attorney, Attorney's heirs, assigns, estate, law partners, law partnerships or successors in interest, and any other person or entity who may be liable for Assignor's loss, with the exception of any claim for professional negligence.

Assignor agrees to cooperate fully with OSB in the pursuit of any such claim or claims, which cooperation shall include, without limitation: (1) Assignor providing OSB with all documentation concerning Attorney's representation of Assignor and (2) Assignor's appearance, as reasonably necessary, at depositions and at trial or hearing if OSB pursues legal action. Assignor further agrees to notify OSB of any action taken by Assignor to recover Assignor's unreimbursed loss against Attorney or any other person or entity who may be liable for the loss, and to notify OSB immediately if Assignor receives notice of any bankruptcy proceeding involving Attorney.

IN WITNESS WHEREOF, Assignor has signed this instrument as Assignor's free and voluntary act.


Kris Ulle

STATE OF OREGON)
)ss.
County of Multnomah)

This instrument was acknowledged before me on _____, _____ by Kris Ulle.

Notary Public for Oregon
My commission expires:

**SEE ATTACHMENT FOR
OFFICIAL NOTARIZATION**

APPEAL FOR FURTHER REVIEW

3/22/10

DEAR CLIENT SECURITY FUND COMMITTEE,

AT THE END OF FEBRUARY 2009, WHEN I FIRST SPOKE TO GERRY DOUGLAS' SECRETARY MARGARET, IN HIS OFFICE, AFTER HIS DEATH, I WAS REFERED TO THE OREGON STATE BAR (OSB). UPON MEETING, I HAD ASKED HER WHO WAS RESPONSIBLE FOR HIS ESTATE AND SHE TOLD ME OSB ONLY INSTRUCTED HER TO REFER CLIENTS TO THEM. FROM THAT POINT FORWARD I HAVE RELIED ON OSB (CLIENT SECURITY FUND COMMITTEE) FOR THEIR EXPERTISE AND ADVICE ON HOW TO PROCEED WITH THIS MATTER. WHEN I HAD QUESTIONS OR COMMENTS THAT WERE PERTINENT, I PROCEEDED IN A MANNER THAT I FELT TO BE CONSISTENT WITH THE INFORMATION I WAS BEING GIVEN. NOW, OVER ONE YEAR HAS PASSED AND I WAS GIVEN THE ADVICE THAT I COULD SUBMIT ANOTHER APPEAL.

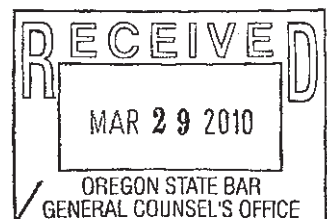
IT HAS BEEN MY CONTENTION THAT FEES PAID TO MR. DOUGLAS WERE PAID FOR A SERVICE. THE SERVICES HE PROMISED WERE NEVER RENDERED (I.E. TAX RESOLUTION IN THE FORM OF AN 'OFFER IN COMPROMISE', INCLUDING ALL APPEALS, WITH THE IRS, AND WHATEVER RESOLUTION HE COULD WORK OUT WITH O.D.I.R.). UNFORTUNATELY, BASED ON CIRCUMSTANCES BEYOND MY CONTROL WE HAD BEEN IN A 'WAITING' PERIOD. IT WAS MY UNDERSTANDING THAT MR. DOUGLAS HAD FILED AN 'OFFER' WITH THE IRS IN DECEMBER OF 2008 BUT UNFORTUNATELY THE FACTS DID NOT BEAR THIS OUT.

NOW, ONE YEAR LATER, IT WOULD PROBABLY BE IN EVERYONE'S BEST INTEREST TO SETTLE THIS. IT IS WITH THIS THAT I AM SUBMITTING THIS 'SETTLEMENT OF CLAIM'.

KRIS S. ULLE
6474 UNIVERSITY AVE.
SAN DIEGO, CA 92115

SINCERELY,

Kris S. Ullé



OREGON STATE BAR

Board of Governors Agenda

Meeting Date: Aril 30, 2010
From: Sylvia E. Stevens, General Counsel
Re: CSF Claim No. 09-12 HORTON (Continental Express/Durshpek)

Action Recommended

Consider claimant's request for reimbursement in excess of the amount recommended by the CSF and approved by the BOG in October 2009.

Background

This claim was on the BOG's consent agenda on October 31, 2009 on the CSF Committee's recommendation for payment. The BOG approved the committee's recommendation to award \$24,500. While the BOG was meeting, staff received a request from the claimant for a larger award. We planned to treat the request as an appeal of the committee's decision, but it was inadvertently omitted from the February BOG agenda.

Continental Express hired William Horton in connection with a commercial tractor lease dispute. The matter settled in August 2007, with Horton receiving \$35,000 on the client's behalf. Horton notified the client of the receipt of the settlement funds on August 29, 2007 and deposited the money into his trust account. The last of the settlement documents were signed in October 2007, but Horton never disbursed the net proceeds to the client, despite many requests. (Horton's trust account records subpoenaed by the bar showed that by the end of September 2007, the balance in his trust account was \$48.)

Continental Express filed a bar complaint and initiated a fee arbitration with the bar, at least in part to resolve the dispute over whether Horton's fee was 30% or 35%. The arbitrator's award was issued January 27, 2009. It concluded that Horton had failed to maintain the funds in trust and that, because he breached his agreement with his clients, was not entitled to a fee. On January 28, 2009, Horton committed suicide. According to the attorney handling Horton's affairs, the estate is insolvent.¹

The CSF committee concluded that the claim is eligible for reimbursement, but that Horton should be credited with a 30% fee because there was no dispute that he performed the services for which he was hired and which generated the client's recovery. The committee recommended an award of \$24,500 and also recommended waiving the requirement for a judgment since there is no likelihood it could be collected from Horton's insolvent estate.

Upon learning of the CSF's recommendation, Continental Express asked the BOG to review the claim and either reimburse the entire \$35,000 received by Horton or award interest on the \$24,500 since January 15, 2009 (the date of the arbitration hearing). In addition to the fee arbitrator's decision that Horton's conduct justified forfeiting his fee,

¹ The CSF has reimbursed three other of Horton's clients in amounts ranging from \$3,500 to \$50,000.

Continental Express explains that Horton's theft resulted in having to operate the business on a line of credit during the 2+ years it took to get reimbursed. Moreover, the claimant has paid an undisclosed amount in attorney fees "to pursue the payment of the arbitration award."

Attachments: Investigator's report
 Excerpt from BOG consent agenda 10/31/09
 Claimant's request for BOG review 10/28/09

OSB CLIENT SECURITY FUND INVESTIGATIVE REPORT

DATE: April 2, 2010

RE: CSF Claim Number 09-12
Claimant: Continental Express LLC
Attorney: William P. Horton

FROM: Michael H. McGean

Investigator's Recommendation

Recommend partial payment of the claim in the amount of \$24,500.

Statement of Claim

This claim is being presented by Continental Express LLC, through its representative Vladimir Durshpek, for reimbursement of \$35,000 in settlement funds that claimant alleged was converted by Mr. Horton. Continental Express LLC is a currently inactive Oregon LLC that was administratively dissolved in 2007. The Bar has determined that Mr. Durshpek is an authorized representative of the LLC.

Mr. Horton represented Continental Express LLC in an action regarding the lease of a tractor. The matter settled in August 2007 with Continental Express receiving \$35,000.

In a letter to Continental Express dated August 29, 2007, Mr. Horton acknowledged receiving the settlement proceeds of \$35,000. The letter stated he would deposit that sum in his trust account the next day, and would then disburse the funds after some final documents were signed to effectuate the settlement. Mr. Horton's bank records indicate that the sum of \$34,800 was deposited in his trust account on August 28, 2007. Mr. Horton acknowledged later that this deposit was from the Continental Express settlement. He never accounted for why the deposit was \$200 less than the amount received in the settlement.

Continental Express executed the necessary documents in September and October 2007.

On September 9, 2008, Vladimir Durshpek submitted a bar complaint on behalf of Continental Express stating that Horton had stopped returning his calls, had not turned over settlement funds, and was not being truthful about the status of the settlement.

A fee arbitration was initiated in September 2008. Mr. Horton wrote to the fee arbitration program that he would tender the entire balance due to Continental Express upon resolution of the fee arbitration, so long as Continental Express would refrain from pursuing its bar complaint. Mr. Horton conceded that he would have released the settlement funds to Continental Express earlier, minus his expenses and attorney fees, but for Continental Express's demand that Horton pay over the entire \$35,000.

The fee arbitration was held January 15, 2009. Mr. Horton appeared and testified that he had a contingent fee agreement for 35 percent of the amount recovered. Continental Express confirmed that an oral contingent fee agreement existed for either 30 percent or 35 percent.

An arbitration award was signed January 27, 2009. The arbitration panel found that Horton had not maintained the settlement funds belonging to Continental Express in trust, and had not paid Continental Express any amount of the settlement proceeds. Based upon the breach of his (albeit oral) contingent fee agreement, the panel found Horton was not entitled to any attorney fees, and awarded the entire sum of \$35,000 to Continental Express.

Mr. Horton died on January 28, 2009.

Findings and Conclusions

Mr. Horton admitted that he was entitled to no more than 35 percent of the settlement proceeds of \$35,000 he received on behalf of Continental Express LLC. Mr. Horton's bank records show that he deposited the sum of \$34,800 in his trust account on August 27, 2007. Horton admitted this sum was the settlement proceeds. By the end of the following month after making the \$34,800 deposit, the balance in Mr. Horton's trust account was \$28. The fee arbitration panel found that Continental Express did not receive any portion of the settlement. Mr. Horton's correspondence to the Bar appears to confirm that he had not distributed any portion of the settlement proceeds to Continental Express.

However, Continental Express LLC also admitted in the fee arbitration that Horton was to receive at least 30 percent of the settlement proceeds under an oral contingent fee agreement. Therefore, although the fee arbitration panel determined that Horton was not entitled to the contingent fee from the settlement proceeds, it was because of Horton's breach of that agreement, and not directly because of dishonest conduct.

Accordingly, I recommend approval and payment of the claim in the amount of \$24,500, representing the \$35,000 settlement payment received by Horton, less the 30 percent Continental Express LLC acknowledged would be the contingent fee.

Continental Express LLC has filed a claim against Mr. Horton's Estate, which is being administered by Mr. Horton's brother as personal representative and by Portland lawyer Roger Leo. The claim was approved, but the Estate is reported insolvent. Mr. Leo informed me that he expects to submit a Limited Judgment in favor of Continental

Express shortly, but that the Estate will not have assets to satisfy any portion of that judgment.

Continental Express LLC is represented in the Estate proceedings by Brady Ricks. Mr. Ricks has requested that the requirement of a final judgment and attempts at collection be waived in this case based on hardship and special circumstances. I believe that the Mr. Horton's death is a special circumstance that would justify the Committee's waiver of the final judgment and collections requirements. Further, I believe that attempts at collection would likely be a futile act.

Excerpt from BOG Consent Agenda 10/31/09
CSF Report

No. 09-12 HORTON (Durshpek/Continental Express) \$24,500

Continental Express hired William Horton regarding a commercial tractor lease. The matter settled in August 2007, with Horton receiving \$35,000 on the client's behalf. Horton notified the client of the receipt of the settlement funds on August 29, 2007 and deposited the money into his trust account. The last of the settlement documents were signed in October 2007, but Horton never disbursed the net proceeds to the client, despite many requests. (Horton's trust account records subpoenaed by the bar showed that by the end of September 2007, the balance in his trust account was \$48.)

Continental Express filed a bar complaint and initiated a fee arbitration with the bar, at least in part to resolve the dispute over whether Horton's fee was 30% or 35%. The arbitrator's award was issued January 27, 2009. It concluded that Horton had failed to maintain the funds in trust and that, because he breached his agreement with his clients, was not entitled to a fee. On January 28, 2009, Horton committed suicide.

According to the attorney handling Horton's affairs, the estate is insolvent. The CSF has three other claims involving Horton under investigation.

The CSF committee concluded that the claim is eligible for reimbursement, but that Horton should be credited with a 30% fee. The committee also recommends waiving the requirement for a judgment. Even though the fee arbitration award could be reduced to judgment, there is virtually no likelihood it could be collected and it would be a pointless exercise for the claimant.

BRADY M. RICKS
ATTORNEY AT LAW

1607 NE 41st AVENUE
PORTLAND, OREGON 97232
TELEPHONE: 503-284-2183
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October 28, 2009

OSB Board of Governors
16037 SW Upper Boones Ferry Road
P.O. Box 231935
Tigard, OR 97281-1935

Re: Client Security Fund Claim No. 2009-12
Claimant: Continental Express, LLC/Vladimir Durshpek
Lawyer: William Horton

Dear Board of Governors:

It is my understanding that you will be considering the Client Security Fund Committee's recommendation that Continental Express LLC ("Continental") be reimbursed for their loss in the amount of \$24,500.00 after crediting Mr. Horton with 30% for his fees.

This matter has arisen out of a very tragic and difficult situation. While my client is appreciative of the fact that it may receive some of the funds it is owed, there are some factors they would like you to consider in reaching your decision.

As stated in the Arbitration Award, Continental did not receive the funds to which it was entitled for over a year and a half. My client informs me that testimony at the hearing indicated that due to the fact it never received its portion of the settlement it was forced to utilize a line of credit for operating expenses, which lead to the incursion of interest it otherwise would not have had the funds been disbursed. These issues appear to have resulted in the fee arbitration panel determining that Mr. Horton was not entitled to any portion of the settlement award. It has now been an additional nine months since the Arbitration Award and Continental is still paying interest on sums it was forced to borrow.

Additionally, the untimely passing of Mr. Horton resulted in Continental incurring attorney fees to pursue the payment of the Arbitration Award.

Continental respectfully requests reimbursement of the \$35,000.00 plus nine percent interest from January 15, 2009 as was contained in the Arbitration Award, or alternatively, the \$24,500.00 plus the interest that has accrued since January 15, 2009.

- 2 -

Thank for your time and attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Brady M. Ricks', written in a cursive style.

Brady M. Ricks

cc: Continental Express/Vladimir Durshpek

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: April 30, 2010
From: Sylvia E. Stevens, General Counsel
Re: CSF Claim No. 09-42 DOUGLAS (McRobert)—Request for Review

Action Recommended

Consider Mr. McRobert's request for BOG review of the CSF Committee's decision on his claim for reimbursement.

Background

Randy Mc Robert hired Gerald Douglas in November or December 2007 to work out a debt settlement with the IRS and Oregon Dept. of Revenue. Mr. McRobert claims to have deposited \$2500 against Douglas's hourly fees, but he is only able to provide a copy of a January 2008 check in the amount of \$1500 and claimed reimbursement of that amount "at least." Mr. McRobert says that after he hired and paid Douglas, "Mr. Douglas died and no service was provided on my case."

Douglas' file contained two lengthy letters to Mr. McRober. In one, Douglas says his fees would likely be between \$1500 and \$7500 depending on his ability to negotiate settlements, but that he expected to be at the low end of the range. He also quoted an hourly fee of \$250 for his services. The other letter discussed the complexities of Mr. McRobert's situation and how Douglas intended to approach them. The file also indicated that Douglas met with an IRS agent and worked out a temporary installment payment plan before he died in February 2009. Mr. McRobert subsequently hired another attorney to negotiate the permanent installment payment plans for his outstanding tax liabilities.

The Committee found that Douglas had not deposited the advance deposits into his trust account as required by RPC 1.15. Under CSF Rule 2.2.1, the wrongful failure to maintain client funds in trust constitutes dishonesty.

However, CSF Rule 2.2.3 allows a refund of an unearned fee only if (i) the lawyer provided no legal services to the client; (ii) the legal services that the lawyer actually provided were minimal or insignificant; or (iii) the claim is supported by an independent determination or an accounting acceptable to the Committee that establishes that the client is owed a refund of a legal fee. Here, the Committee concluded that Douglas provided legal services that were more than minimal and there has been no independent determination that Mr. McRobert is entitled to a refund of the fees advanced to Douglas. On the contrary, the Committee concluded that Douglas very probably spent at least six hours on the matter and therefore earned at least \$1,500.

The Committee denied Mr. McRobert's claim on the foregoing basis. On learning of the Committee's decision, Mr. McRobert submitted the attached request for BOG review. He claims not to have received the services Douglas promised and that what he did receive

was incomplete and insufficient. He also complains about not having been notified of Douglas's death and being "left stranded" without legal representation.

The BOG can affirm the Committee's decision, refer the claim back to the CSF Committee for further analysis, or approve an award to Mr. McRobert of some or all of the amount he claims.

Attachment: Mr. McRobert's request for BOG review
 CSF Committee Report

From: [Randy McRobert](#)
To: [Sylvia Stevens](#)
Subject: Fund Claim # 2009-42
Date: Thursday, April 22, 2010 2:57:16 AM

Dear Sylvia,

After speaking with you, I'm writing a letter in disagreement with the decision made pertaining to my claim, which is # 2009-42.

I didn't receive the services that were offered to me and, the work performed was less than minimal, incomplete and, insufficient.

Due to my case being unresolved, I had to reassign another lawyer to complete my case. This caused me to accrue penalties and interest with time wasted and, additional legal fee's.

In addition to all of that, I was never notified of this lawyer's circumstances in any way, leaving me stranded, with know legal representation. I discovered this on my own when I arrived at his(Gerald Douglas') place of business and, found that it was closed.

For these reasons, I would like you to reconsider my claim.
Thank you for your time and consideration.

Sincerely,
Randy McRobert

CLIENT SECURITY FUND INVESTIGATIVE REPORT

FROM: Connie Swenson

DATE: March 8, 2010

Claim: #2009-42
Claimant: Randy McRobert
Attorney: Gerald Douglas (deceased)

Investigator's Recommendation

Recommendation that the Client Security Fund Committee determine how much if any of the \$1,500 retainer should be returned to Mr. McRobert.

Statement of the Claim

Claimant Randy McRobert seeks reimbursement of at least \$1,500.00 paid to Mr. Gerald Douglas to resolve his IRS and Oregon Dept. of Revenue problems, due to unpaid payroll taxes by his business, Automatic Machining, Inc. and the closure of his line of credit by American Express. In his complaint he states that "After I paid Mr. Douglas the \$1,500 to work out my tax debts to the IRS, Mr. Douglas died and no service was provided on my case." His new lawyer, Benjamin Knaupp, said that Mr. McRobert claimed Mr. Douglas only did some phone calls, but that I should talk directly to Randy McRobert. When I talked directly to Randy McRobert, he admitted that Mr. Douglas did talk to an IRS agent and did work out a temporary installment plan for his taxes. Nevertheless, his new lawyer was the one who worked out a final installment tax plan, and now in 2010 his business is finally improving.

Sources

I have read the claim submitted by Randy McRobert, talked to him by telephone, communicated via email with his new attorney, Benjamin Knaupp, and read Mr. Douglas' file on Randy McRobert.

Findings and Conclusions

1. Randy McRobert submitted the claim for \$1,500, but claims he actually paid Attorney Douglas \$2,500, but cannot locate the receipts at this time. He is the potential injured client.
2. Mr. Douglas started working for Mr. McRobert in December 2007. There is no attorney-client fee agreement, nor attorney log. However, Mr. Douglas did write two long letters to Mr. McRobert discussing what he was planning to do. Mr. Douglas calls the \$1500 a retainer, but this check was not deposited into a trust fund.
3. Mr. Douglas explains in his letter of December 31, 2007, that the tax problems of Mr. McRobert, are significant:

a. Mr. McRobert's spouse (she was seeking a divorce at the time) did the bookkeeping and absconded with monies, including those which were to be used for payroll taxes. If Mr. McRobert desired to continue his business, he must have a method, so that no new payroll taxes or other taxes accrued, while he is seeking an installment plan or other remedy. If he does not have such a method for paying current taxes, the IRS could shut down his business.

b. Randy McRobert needed to settle personal taxes due the IRS and Oregon Dept. of Revenue, as well.

c. Tax returns needed to be finished before Mr. Douglas could go forth and negotiate a remedy. He recommended a tax consultant.

d. Mr. Douglas needed to make certain the IRS did not collect from Mr. McRobert personally. If the IRS could not find monies in the corporation, the IRS could look to the corporate officers. That is, the IRS could decide to levy corporate taxes, approximately \$100,000, against Mr. McRobert himself. This did not happen.

e. Mr. McRobert also needed a general estimate of the corporation taxes for delivery to the dissolution attorneys.

4. Mr. Douglas did meet with the IRS agent, arrange a temporary installment tax plan for Mr. McRobert, and submit a due process hearing application, in case the installment plan action failed. Mr. McRobert was able to stay in business while the remedy was underway.

5. A letter from Mr. Douglas states that the entire process of his representation would cost between \$1,500 to \$7,500, depending upon how well the negotiations with the IRS went. He thought Mr. McRobert would be in the lower range. He states his hourly fee as \$250/hour. It is not unreasonable to assume that Mr. Douglas spent six hours on Randy McRobert's tax problems. However, there is no attorney work log to support this time.

6. The untimely death of Mr. Douglas meant that Mr. McRobert had to hire another attorney to negotiate a permanent installment plan.

4. At that time Mr. Douglas was an active member of the Oregon State Bar and practicing in Tualatin, Oregon.

5. The loss arose during an established attorney-client relationship. At the time of Mr. Douglas' death, no trust monies were ever found.

6. Mr. Douglas' files have no attorney log for the case.

8. There is no knowledge of a bond, surety agreement or insurance contract, outside of the Professional Liability Fund.

9. There is no criminal conviction, civil judgment or disciplinary sanction against Attorney Gerald Douglas.

10. The dollar amount claimed by the clients is exclusive of interest, attorney fees and court costs. The claimants is not represented by an attorney in this claim.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: April 30, 2010
Memo Date: April 12, 2010
From: Member Services Committee
Re: OSB Sustainability Awards

Action Recommended

Amend OSB Bylaw “Article 4 Awards” to include a new section, “4.9 OSB Sustainable Law Office Leadership Award and OSB Sustainable Leadership Awards.”

Background

At its March 2009 meeting the BOG Member Services Committee approved a request from the bar’s Sustainable Future Section to create two new categories of bar awards. The purpose is to recognize the efforts of law offices and individual lawyers who make exceptional voluntary efforts in advancing the societal goal of sustainability.

The section contemplates giving up to two awards annually in the Sustainable Law Office Leadership category, one for a large law office and one for a small law office. In addition, up to two awards would be given in the Sustainable Leadership Award category, one for bar members admitted within the past ten years and one for bar members admitted for more than ten years.

These awards would become part of the bar’s annual recruitment and recognition process with two differences in procedure. First, the Sustainable Future Section’s executive committee would appoint three members to work with the BOG’s Member Services Committee in a “selection panel” to consider nominations and vote on recipients. An alternative would be for the nominations to be vetted by the section and passed on to the BOG committee, allowing direct section input without changing the selection process.

Second, the section would like all information gathered by the panel, as well as discussions and deliberations by the panel, to be confidential. Traditionally we have not considered our award nomination materials to be confidential, but General Counsel Sylvia Stevens says it is possible under the “confidential submissions” section of ORS 192.502(4) (of the Public Records Law). This would require us to specifically discuss with or otherwise notify informants that we will keep their information confidential.

Additional Background: The section’s proposal is attached along with a draft amendment to the applicable bar bylaw. OSB Award nomination forms will be available on the bar’s website in May and will appear in the June and July issues of the Bulletin. The nomination deadline is Friday, July 23. The BOG’s Member Services Committee will deliberate the first week in August and make recommendations to the full BOG at its August 12-13 meeting.

PROPOSAL FOR OREGON STATE BAR AWARDS IN
SUSTAINABLE LAW OFFICE LEADERSHIP AND
SUSTAINABLE LEADERSHIP

OSB Sustainable Future Section

I. AND PURPOSE

On October 30, 2009, the Oregon State Bar (“OSB”) Board of Governors adopted several recommendations presented to it by the OSB Task Force on Sustainability.¹ One of the recommendations adopted was the formation of a new OSB section—the Sustainable Future Section. The Task Force further recommended five actions/initiatives to be undertaken by the Sustainable Future Section. Creation of an annual award to recognize leadership in sustainability efforts was one of these recommendations. The ten member Executive Committee of the Sustainable Future Section has met to discuss the awards program and believes that the award should be included as part of the annual OSB Awards program.

The mission of the OSB Sustainable Future Section is

to support sustainability by providing institutional expertise to the Oregon State Bar and its members, by educating attorneys and other legal professionals on sustainability and its integration into the law and in best office practices and by promoting a dialogue on how law interfaces with the needs and interests of future generations.

The Sustainable Future Section believes that the awards program will advance the mission of the Section, particularly as it pertains to educating attorneys and legal professionals about the relationship between sustainability and the practice of law and to promoting a dialogue on how law interfaces with the needs and interests of future generations.

The purpose of these awards is to recognize the efforts of law offices and individual lawyers who make exceptional voluntary efforts in advancing the societal goal of sustainability. Although advancements in providing paid legal services are important, the awards are not intended to recognize them.

II. SUSTAINABLE LAW OFFICE LEADERSHIP AWARDS

Up to two awards may be given annually, one for a Large Law Office and one for a Small Law Office.

1. Law offices located in the State of Oregon in one of two categories: (a) comprised of more than 15 OSB members at any time during the calendar year of application (Large Law Office); and (b) comprised of no more than 15 OSB members at any time during the year of application (Small Law Office).

¹ See <http://www.osbar.org/docs/resources/09SustainabilityTaskForceReport.pdf> for the full Task Force Report.

2. . The law office has demonstrated leadership in sustainability manifested through some combination of the following modes:
 - a. Firm policy or policies
 - b. Office operations
 - c. Training/education of office personnel
 - d. Transportation practices
 - e. Firm support of organizations or initiatives through donated time, resources or other means
 - f. Other comparable modes

III. SUSTAINABLE LEADERSHIP AWARDS

Up to two awards, one in each of two eligibility categories, may be given annually to lawyers who demonstrate leadership in moving the legal profession to embrace sustainability as a goal of the profession.

1. . The two eligibility categories are: (a) an active or inactive OSB Member who passed the bar within 10 years of the date of application; and (b) an active or inactive OSB member who passed the bar more than 10 years from the date of application.
2. . A lawyer who has demonstrated leadership in sustainability by volunteering time to move any of the following along the path of sustainability:
 - a. The legal profession
 - b. Law office operations
 - c. Law schools
 - d. Judicial or administrative proceedings
 - e. Other forums where law or the practice of law provides the primary context

IV.

1. process

Nominating forms may be obtained by the OSB. Any lawyer may nominate one or more law offices or lawyers for an OSB Sustainability Award by completing the prescribed nominating form or letter. Self-nominations by a lawyer or law office are accepted and will be given the same weight as a nomination by others.

The thoroughness of information submitted can make the difference in the selection process. Supporting detail may include resume information, narratives describing significant contributions and special qualifications, a list of references with phone numbers, letters of recommendation, articles, etc.

The nominations process shall follow the OSB Awards timelines and submittal requirements.

2. Process.

The selection panel will consist of the OSB Membership Services Committee and three members of the OSB Sustainable Future Section. The Executive Committee of the Sustainable Future Section OSB Sustainable Future Section shall select three Section members to serve on the selection panel each year to consider the nominations. If any selection panel member is nominated, or has a personal interest in a nominee, a substitute panel member may be named by the respective committee of whom they are a member.

The panel members will seek to reach consensus in selecting those who will be recommended to the Board of Governors as honorees for the OSB Sustainability Awards. Absent consensus, the panel will develop a process to allow for a majority vote.

In addition to nominees in the current year, the panel may consider nominees from a prior year and request updated information from the nominee or the person who completed the original nomination. The panel or a designated member may interview any nominee or person completing the nomination form where clarification or additional information would be useful.

All information gathered by the panel shall be *confidential*. In addition, the screening discussions and deliberations by the panel shall be confidential.

The selection panel shall complete its work and submit its recommendations to the OSB Board of Governors on a timeline consistent with the OSB Awards program, and the awards shall be awarded at the OSB annual awards event.

Article 4 Awards

Section 4.1 General Policy

The Board will select award recipients from among the nominations received from local bars, committees, sections, individual members, affiliated groups and bar groups.

Section 4.2 President's Membership Service Award

The criteria for the President's Membership Service Award is as follows: The nominee must have volunteered his or her time for the activity in which he or she was involved; the nominee must be an active member of the Bar; the nominee must have made a significant contribution to other lawyers through efforts involving Continuing Legal Education programs or publications, committees, sections, boards or the Bar's legislative/public affairs process or similar activities through local bar associations or other law-related groups.

Section 4.3 President's Public Service Award

The criteria for the President's Public Service Awards is as follows: The nominee must have volunteered his or her time for the activity in which she or he was involved; the nominee must be an active member of the Oregon State Bar; the nominee must have made a significant contribution to the public through efforts involving pro bono services; coordination of local public service law-related events, such as those associated with Law Day; service with community boards or organizations or similar activities that benefit the public.

Section 4.4 President's Affirmative Action Award

The criteria for the President's Affirmative Action Award is as follows: The nominee must be an active member of the Bar or be an Oregon law firm; the nominee must have made a significant contribution to the goal of increasing minority representation in the legal profession in Oregon through progressive employment efforts, innovative recruitment and retention programs, advocacy or other significant efforts.

Section 4.5 President's Special Award of Appreciation

The President's Special Award of Appreciation is a discretionary award of the President of the Bar, with the concurrence of the Board, to be presented to a person who has made recent outstanding contributions to the bar, the bench and/or the community. The award will be made in conjunction with the OSB Awards Dinner or House of Delegates events within the following guidelines. In any given year, there may be no award, one award or more than one award. The recipient may be a lawyer or a non-lawyer. 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.

Section 4.6 Award of Merit

The Award of Merit is the highest honor that the Bar can bestow. The recipient may be (1) an Oregon lawyer who has made outstanding contributions to the bench, the bar and the community-at-large, and who exhibits the highest standards of professionalism or (2) a non-lawyer who has made outstanding contributions to the bar and/or bench, and who

exhibits the highest standards of service to the community-at-large. The award does not have to be granted every year and only one award may be bestowed in any year.

Section 4.7 Wallace P. Carson, Jr. Award for Judicial Excellence

The Wallace P. Carson, Jr. Award for Judicial Excellence honors a member of the state's judiciary. The criteria for the award are as follows: 1) a current or retired state court judge or federal judge; 2) who has made significant contributions to the judicial system; and 3) who is a model of professionalism, integrity, and judicial independence.

Section 4.8 President's Public Leadership Award

The criteria for the President's Public Leadership Award is as follows: The nominee must not be an active or inactive member of the Oregon State Bar and the nominee must have made significant contributions in any of the areas described in the President's Awards (Section 4.2-4.4 above).

***[PROPOSED ADDITION]**

Section 4.9 OSB Sustainable Law Office Leadership and Sustainable Leadership Awards.

Up to two Sustainable Law Office Leadership Awards may be given annually, one for a law office comprised of more than 15 bar members and one for a firm comprised 15 or fewer members. The criteria for the award is demonstrated leadership in sustainability manifested through some combination of the following modes: firm policy or policies; office operations; training/education of office personnel; transportation practices; firm support of organizations or initiatives through donated time; resources or other means; other comparable modes.

Up to two Sustainable Leadership Awards may be given annually, one for an active or inactive bar member admitted 10 years or less and one for an active or inactive bar member admitted for more than 10 years. The criteria for the award is demonstrated leadership in sustainability by volunteering time to move any of the following along the path of sustainability: the legal profession; law office operations; law schools; judicial or administrative proceedings; or other forums where law or the practice of law provides the primary context.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: April 30, 2010
From: Mitzi Naucler, Chair, Policy & Governance Committee
Re: Changes to LRAP Policies and Guidelines

Action Recommended

Review requested changes to Loan Repayment Assistance Program Policies and Guidelines approved by the Policy & Governance Committee at its meeting on March 19, 2010.

Background

The Loan Repayment Assistance Program (LRAP) is now in its fourth year of providing forgivable loans to lawyers pursuing careers in public service law. Through this program, lawyers working in public service may receive loans for up to \$5,000 per year for three years to aid them in repaying their educational debt. Each loan is forgiven at the end of the year, provided that the lawyer remains in public service.

The Policy & Governance Committee agrees with the LRAP Advisory Committee that the Policies and Guidelines ought to be refined to be more consistent with the needs of the applicants, and to ensure that OSB funds are protected. A copy of the proposed changes is attached, with an explanation of each change below:

Section 1, (A)(ii): Adds language to ensure that no current or potential recipient of an LRAP loan serves on the Advisory Committee.

Section 2 (D): Reduces the debt minimum to \$50,000 from \$60,000 to ensure that lawyers who attended public universities and law schools are still able to qualify for LRAP loans. This also ensures that attorneys who have demonstrated a commitment to public service law by working in the area for a number of years (and consequently paying down their loans) are able to qualify for a loan.

Section 3, (A)(i): Changes the disbursement from one \$5,000 check per year to two \$2,500 checks per year, six months apart. Participants who leave their public service jobs before a year has passed are obligated to repay the \$5,000 received that year. This change in policy helps ensure those participants have not placed themselves in a position where they will be unable to repay the money.

Section 3, (A)(ii): Currently, interest on loans that must be repaid is set at nine percent. The Advisory Committee feels this rate is too high. Other LRAPs in the state (and nationwide) tie the interest rate to the Wall Street Journal rate, which is the change proposed here.

Section 3, (B): Clarifies that loan forgiveness dates to the Application deadline, not the awarding of the loan. Applicants must certify that they are employed in public service as of April 15 of the year in which they apply. Staying in public service for a full year allows the loan to be forgiven.

Section 4, (B)(i); Clarifies that the Committee considers monthly loan payments in addition to cumulative debt, when making its determination on participants.

*Loan Repayment
Assistance Program*

Policies and Guidelines

**Adopted by the Board of Governors
November 18, 2006**

Revised January ~~29~~¹, 2010

The mission of the Oregon State Bar’s Loan Repayment Assistance Program is to attract and retain public service lawyers by helping them pay their educational debt.

Statement of Purpose

The Oregon State Bar recognizes that substantial educational debt can create a financial barrier which prevents lawyers from pursuing or continuing careers in public service law. The Oregon State Bar’s program of loan repayment assistance is intended to reduce that barrier for these economically-disadvantaged lawyers, thereby making public service employment more feasible.

Section 1 – Administrative Partners

(A) Advisory Committee

(i) Membership

An Advisory Committee will be appointed by the Oregon State Bar (OSB) Board of Governors, and will be comprised of nine members who meet the following criteria:

- OSB President, or member of the Board of Governors designated by the President
- Chair of the OSB New Lawyers Division, or designee
- Representative from an Oregon law school, preferably with financial aid expertise
- Representative from the indigent criminal defense area of public service law
- Representative from a county district attorney’s office
- Representative from the civil area of public service law
- Three at-large members who are OSB members, represent geographical diversity, and have shown a commitment to public service law

(ii) Appointment and Administration

- OSB President and Chair of the OSB New Lawyers Division, or designees, will serve for a term of one year.
- Other Advisory Committee members will serve for a term of three years and may be reappointed for one additional term.
- Advisory Committee members will elect a Chair and such other officers as they determine are necessary from among Advisory Committee members. Officers shall serve a one-year term, subject to renewal.
- One-third of the initial appointments will be for one year, one-third for two years, and one-third for three years. The OSB Board of Governors will determine which of the initial positions is for which length.
- The OSB will designate a staff person to support the Advisory Committee’s work.
- Current applicants for or recipients of LRAP loans may not serve on the Advisory Committee.

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(iii) Advisory Committee Duties

- Select participants for the loan repayment assistance program (LRAP or the Program), and report the selections to the OSB.

- Report annually to the OSB Access to Justice Committee on the Program's status.
- Amend and set policy guidelines as needed for the Program.
- Raise funds to achieve programmatic objectives.
- Adopt procedures to avoid conflicts of interest.
- Make clear program rules to avoid grievances.

(B) Oregon State Bar

- Support the Advisory Committee's work through provision of a part-time staff person
- Receive and invest member dues designated for LRAP
- Administer other funds raised by the Advisory Committee
- Receive and review LRAP applications for completeness and eligibility, and forward completed applications from eligible applicants to the Advisory Committee
- Disburse LRAP money to participants selected by the Advisory Committee.
- Receive and review annual certifications of continuing LRAP eligibility.
- Provide marketing and advertising services for the Program, including an LRAP website which includes frequently asked questions with responses.
- Coordinate response to grievances submitted by Program participants.
- Handle inquiries about LRAP through the staff person or, if necessary, forward such inquiries to the Advisory Committee.

Section 2 – Requirements for Program Participation

(A) Application and Other Program Procedures

- Applicants must fully complete the Program application, submit annual certifications and follow other Program procedures.

(B) Qualifying Employment

- Employment must be within the State of Oregon.
- Qualifying employment includes employment as a practicing attorney with civil legal aid organizations, other private non-profit organizations providing direct legal representation of low-income individuals, as public defenders or as deputy district attorneys.
- Judicial clerks and attorneys appointed on a case-by-case basis are not eligible.
- Thirty-five hours or more per week will be considered full-time employment.
- Part-time employees are eligible to apply for the Program, but participation may be prorated at the discretion of the Advisory Committee.

(C) Graduation/License/Residency Requirements

- Program applicants must be licensed to practice in Oregon.
- Program participation is not limited to graduates of Oregon law schools. Graduates of any law school may apply.
- Program participation is not limited to recent law school graduates. Any person meeting Program requirements, as outlined herein, may apply.
- Program participation is not limited to Oregon residents, provided the applicant works

in Oregon and meets other Program requirements.

(D) Salary Cap for Initial Applicants

Applicants with full time salaries greater than \$50,000 at the time of initial application will be ineligible for Program participation.

- The Advisory Committee may annually adjust the maximum eligible salary.
- As more fully described in Section 3(B)(ii), Program participants may retain eligibility despite an increase in salary above the cap set for initial participation.

(E) Eligible Loans

All graduate and undergraduate educational debt in the applicant's name will be eligible for repayment assistance.

- Applicants with eligible debt at the time of initial application less than ~~\$60,000~~\$50,000 will be ineligible for Program participation.
- If debt in the applicant's name and in others' names is consolidated, the applicant must provide evidence as to amount in the applicant's name prior to consolidation.
- Loan consolidation or extension of repayment period is not required.
- Program participants who are in default on their student loans will be ineligible to continue participating in the Program (see 4(C)(v) below for more details).

Section 3 – Description of Benefit to Program Participants

(A) Nature of Benefit

The Program will make a forgivable loan (LRAP loan) to Program participants.

(i) Amount and Length of Benefit

- LRAP loans will be \$5,000 per year per Program participant for a maximum of three consecutive years. LRAP loans cannot exceed the annual student loan debt of the participant.
- All Program participants will receive the same LRAP loan regardless of income or amount of debt.
- The Advisory Committee reserves discretion to adjust the amount of the LRAP loan and/or length of participation based on changes in the availability of program funding.
- LRAP loans will be disbursed in semi-annual amounts of \$2,500 each.

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(ii) Interest on LRAP Loans

Interest will accrue from the date the LRAP loan is disbursed, at the rate per annum of Prime, as published by the Wall Street Journal as of April 15 of the year in which the loan is awarded, not to exceed nine percent, ~~or the amount of interest for legal judgments set by the Oregon legislature if different.~~

(iii) Federal Income Tax Liability

Each Program participant is responsible for any tax liability the Program participant may incur, and neither the Advisory Committee nor the OSB can give any Program participant

legal advice as to whether a forgiven LRAP loan must be treated as taxable income. Program participants are advised to consult a tax advisor about the potential income tax implications of LRAP loans. However, the intent of the Program is for LRAP loans which are forgiven to be exempt from income tax liability.

(B) *Forgiveness and Repayment of LRAP Loans*

The Program annually will forgive one year of loans as of April 15 every year if the Participant has been in qualifying employment the prior year and has paid at least the amount of his/her LRAP loan on his/her student loans. Only a complete year (12 months from April 15, the due date of application) of qualifying employment counts toward LRAP loan forgiveness.

(i) Loss of Eligibility Where Repayment Is Required

Program participants who become ineligible for Program participation because they leave qualifying employment must repay LRAP loans, including interest, for any amounts not previously forgiven.

- The repayment period will be equal to the number of months during which the Program participant participated in the Program (including up to three months of approved leave).
- The collection method for LRAP loans not repaid on schedule will be left to the discretion of the Oregon State Bar.
- Participants shall notify the Program within 30 days of leaving qualifying employment.

(ii) Loss of Eligibility Where Repayment Is Not Required

Program participants who become ineligible for continued Program participation due to an increase in income from other than qualifying employment (see Section 4(C)(iv)) or because their student loans are in default (see Section 4(C)(v)) will not receive any additional LRAP loans. Such Program participants will remain eligible to receive forgiveness of LRAP loans already disbursed so long as the Program participant remains in qualifying employment and submits an employer certification pursuant to Section 4(C)(iii).

(iii) Exception to Repayment Requirement

A Program participant may apply to the Advisory Committee for a waiver of the repayment requirement if (s)he has accepted public interest employment in another state, or for other exceptional circumstances. Such Program participants will not receive any additional LRAP loans.

(C) *Leaves of Absence*

Each Program participant will be eligible to continue to receive benefits during any period of leave approved by the Program participant's employer. If any such approved leave period extends for more than three months, the amount of time the Program participant must remain in qualifying employment before an LRAP Loan is forgiven is extended by the length of the leave in excess of three months. This extra time is added to

the end of the year in which the leave is taken and thereafter, the starting date of the new year is reset based upon the new ending date of the year in which the extended leave is taken.

Section 4 – Program Procedures

(A) *Application and Disbursement Procedure*

- Applications submitted to the Advisory Committee must be postmarked or delivered to the Oregon State Bar office by April 15 of each year.
 - Applicants must be members of the OSB already engaged in qualifying employment by the application deadline.
 - Applicants may not commence the application process prior to receiving bar exam results.
 - Unsuccessful applicants will get a standard letter drafted by the Advisory Committee and may reapply in future years as long as they meet the qualifications.
- Applicants will be notified by June 1 of each year as to whether or not they have been selected for Program participation in accordance with the selection criteria set forth in Section 4(B).
- Those applicants selected as Program participants will receive a promissory note for the first year of LRAP loans along with their notification of selection. The executed promissory note will be due to the Advisory Committee by June 15.
- Initial disbursement of LRAP loans will be made by July 1 provided the executed promissory note has been returned.
- In conjunction with the annual certification procedure set forth in Section 4(C), persons who remain eligible Program participants will be sent a new promissory note, covering the LRAP loan in the upcoming year by June 1, which must be executed and returned by June 15.
- Ongoing disbursement of loans to persons who remain Program participants will be made on or about July 1 of each year.

(B) *Program Participant Selection*

(i) *Factors to be Considered*

- Meeting the salary, debt and employment eligibility for the Program does not automatically entitle an applicant to receive a LRAP loan. If the Advisory Committee needs to select among applicants meeting the salary, debt and employment eligibility criteria, it may take into account the following factors:
 - Financial need
 - Educational debt and/or monthly payment to income ratio;
 - Extraordinary personal expenses;
 - Type and location of work;
 - Demonstrated commitment to public service;
 - Assistance from other loan repayment assistance programs;
- The Advisory Committee reserves the right to accord each factor a different weight, and to make a selection among otherwise equally qualified applicants.

- If there are more eligible applicants than potential Program participants for a given year, the Advisory Committee will keep the materials submitted by other applicants for a period of six months in the event a selected individual does not participate in the Program.

(ii) Other Factors to be Considered Related to Applicant’s Income

The following factors, in addition to the applicant’s salary from qualifying employment, may be considered in determining applicant’s income:

- Earnings and other income as shown on applicant’s most recent tax return
- Income-producing assets;
- Medical expenses;
- Child care expenses;
- Child support; and
- Other appropriate financial information.

(C) Annual Certification of Program Participant’s Eligibility

(i) Annual Certifications Required

Program participants and their employers will be required to provide annual certifications to the OSB by April 15 that the participant remains qualified for continued Program participation. Annual certifications forms will be provided by the Program. The OSB will verify that the Program participants remain eligible to receive LRAP loans and will obtain new executed promissory notes by June 15 prior to disbursing funds each July 1.

(ii) Program Participant Annual Certifications - Contents

The annual certifications submitted by Program participants will include:

- Evidence that payments have been made on student’s loans in at least the amount of the LRAP loan for the prior year and evidence that student loan is not in default.
- Completed renewal application demonstrating continued program eligibility

(iii) Employer Certification - Contents

The annual certifications submitted by employers will include:

- Evidence that the Program participant remains in qualifying employment; and
- Evidence of the Program participant’s current salary and, if available, salary for the upcoming year.

(iv) Effect of Increase in Salary and Income and Changes in Circumstances

Program participants remain eligible for the Program for three years despite increases in salary provided that they remain in qualifying employment with the same employer and are not in default on their student loans. If a Program participant’s financial condition changes for other reasons, the Advisory Committee may make a case-by-case determination whether the Program participant may receive any further LRAP loans. Even if no further LRAP loans are received, this increase in income will not affect the LRAP loan forgiveness schedule so long as the Program participant remains in qualifying employment and submits an employer certification pursuant to Section 4(C)(iii).

(v) Effect of Default on Student Loans

Program participants who are in default on their student loans will be ineligible to receive further LRAP Loans, but may seek to have LRAP loans forgiven in accordance with the loan forgiveness schedule if they remain in qualifying employment and submit an employer certification pursuant to Section 4(C)(iii).

(vi) Voluntary Withdrawal from Program

A Program participant may voluntarily forgo future LRAP loans despite retaining eligibility (e.g., the Program participant remains in qualifying employment and receives a substantial increase in salary). In such a case, LRAP loans already received will be forgiven in accordance with the loan forgiveness schedule so long as the Program participant remains in qualifying employment and submits an employer certification as otherwise required under Section 4(C)(iii).

(D) Dispute/Grievance Resolution

- Grievance procedure applies only to Program participants, not applicants.
- Program participants have 30 days to contest a determination in writing.
- The Advisory Committee has 60 days to respond.
- The Advisory Committee's decision is final, subject to BOG review.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: April 30, 2010
From: Mitzi Naucler, Chair, Policy & Governance Committee
Re: MCLE Credit for Legislative Service

Action Recommended

Review requested amendments to MCLE Rule 5.2(e) and Regulation 5.100 regarding credit for legislative service that were approved by the Policy & Governance Committee at its meeting on March 19, 2010.

Background

MCLE Rule 5.2(e) currently reads:

Legislative Service. Two general credit hours per month shall be given for each full month of service as a member of the Oregon Legislative Assembly while it is in session.

The rule as it is currently written does not take into account that legislation sessions often start in the middle of one month and end two or three weeks into another month. This is especially true in the years when there is a special legislative session.

The Policy & Governance Committee agrees with the MCLE Committee recommendation to amend MCLE Rule 5.2(e) to delete reference to the number of credits that may be earned for legislative service and add Regulation 5.100(b) to explain how the credits for this type of service will be calculated. This will allow legislators to earn partial credit for their work when the legislature is not in session for a “full” month.¹

Rule 5.2(e) Legislative Service. ~~Two~~ General credit hours may be earned for ~~per month shall be given for each full month of service~~ as a member of the Oregon Legislative Assembly while it is in session.

Regulation 5.100(b) Credit for legislative service may be earned at a rate of .5 general credit for each week or part thereof while the legislature is in session.

¹ MCLE Rule 6.1(a) allows partial credit for completion of designated portions of a CLE activity.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: April 30, 2010
Memo Date: April 15, 2010
From: Steve Piucci, Chair, Public Affairs Committee
Re: Proposal to Accept 2011 Law Improvement Package of Legislative Proposals

Action Recommended

Consider Public Affairs Committee request to approve 2011 OSB package of Law Improvement proposals for introduction.

Background

Attached is a list of legislative proposals from bar groups reviewed by the Public Affairs Committee. Once approved by the board these bills will be submitted to Legislative Counsel's office for bill drafting purposes and pre-session filing. If anyone would like to see the text or background explanation of any of the proposals, binders will be available at the April 30 meeting.

Direct link to the proposals:

<http://osbpublicaffairs.homestead.com/2011LIPs/List.Proposals.pdf>

Draft 2011 Law Improvement Proposals

(Substantive language of all OSB section sponsored law improvement proposals have been provided by OSB sections at the direction of each section's executive committee. All proposals are pending review and approval by the OSB Board of Governors.)

The following is a list of legislative proposals submitted by OSB groups for sponsorship in the 2011 session of the Oregon Legislature. Each proposal must be approved by the OSB Board of Governors prior to submission to Legislative Counsel for drafting.

If you have any questions about any of the proposals or about the OSB legislative process, please feel free to contact any of the Public Affairs Committee members or the Public Affairs department staff: Director, Susan Grabe sgrabe@osbar.org (503.431.6380); Legislative Attorney, David Nebel dnebel@osbar.org (503.431.6317); or Staff Attorney, Matt Shields mshields@osbar.org (503.431.6358).

Board of Governors' Proposals

IOLTA Sanction Bill – This bill would change the sanction for an IOLTA violation from a disciplinary sanction to an administrative one.

LPRC Restructuring – This bill would authorize the State Professional Responsibility Board to designate individual bar members to serve as investigators rather than relying on the current Local Professional Responsibility Committees. The LPRCs themselves would be eliminated.

Business Law Section Proposal

Vesting of Indemnification – This bill would prohibit a company from taking indemnification rights away from a director or past director unless the company's articles of incorporation expressly allow the company to do so.

Construction Law Section Proposals

Notice Requirements for Lien Claimants – This bill would specify that lien claimants are only required to provide notice to those mortgage assignees that are listed on a recorded assignment. Under current law, lien claimants are required to provide notice to all assignees, even though some assignees may not be listed on a recorded assignment and may be difficult or impossible to locate.

Changes to Notice of Defect Statutes – This bill would exempt small claims actions, as well as counterclaims in all actions, from coverage by the Notice of Defect statutes. Additionally the bill would permit service in such cases by certified mail.

OPPPA Amendments – This bill proposes several minor amendments to the Oregon Private Prompt Payment Act.

Consumer Law Section Proposal

Increase to Wage Garnishment Exemption – This bill increases Oregon's wage garnishment exemption from \$196 to \$217.50, the amount of the exemption required under federal law.

Elder Law Section Proposals

Protective Proceedings – This bill would make technical changes to maintain confidentiality of certain documents received from the Department of Human Services in protective proceedings.

Special Needs Trusts – This proposal would specify that special needs trusts must be included in a surviving spouses' estate for the purposes of a spousal elective share.

Estate Planning and Administration Section Proposals

Elective Share Technical Amendments – This proposal would make several technical changes to Oregon's elective share statute.

UPIA update – This bill would make several updates to the Oregon Uniform Principal and Income Act.

Disposition of Gifted Property – This proposal removes gifted property from the presumption of equal contribution, while retaining the authority to divide the property as may be “just and proper” depending upon the facts of a particular case.

Family Law Section Proposals

Termination of Attorney-Client Relationships – This bill would permit the filing, upon the conclusion of a case, of a notice that the attorney-client relationship was terminated for the reason that the case is concluded.

Amendments to Dissolution and Parental Rights Statutes – This bill makes three changes to statutes dealing with dissolutions of marriage and acknowledgment of parental rights and responsibilities.

Temporary Support Orders – This bill makes three minor changes to temporary spousal and child support statutes.

Real Estate and Land Use Section Proposals

Urban Reserve Statutory Correction – This bill would correct an erroneous statutory reference in the Urban Reserve statutes.

Domestic Partner Survivorship – This bill would amend statutes dealing with tenancies by the entirety to clarify existing state policy that the statute should be interpreted to apply to Domestic Partnerships.

Taxation Section Proposal

Department of Revenue Requirements – This proposal would eliminate the absolute requirement that the Oregon Department of Revenue follow an Internal Revenue Service Rule, even when such a rule differs from the rule that the federal circuit court might require an Oregon taxpayer to follow. This change would give the DOR additional discretion in interpreting federal statutes.

OREGON STATE BAR
Legislative Proposal
Part I – Legislative Summary

RE: IOLTA Sanction

Bar Group: Board of Governors

-
1. Has this been introduced in a prior session? No Yes Years(s) Bill#(s)
- Does this amend current law or programs? No Yes (Specify)
-

2. PROBLEM PRESENTED (including level of severity):

Oregon lawyers who hold client funds are required to maintain them in an interest-bearing Lawyer Trust Account. Since 2006, lawyers have been required to certify annually that they are in compliance with the rules governing IOLTA accounts:

RPC 1.15-2(m): Every lawyer shall certify annually on a form and by a due date prescribed by the Oregon State Bar that the lawyer is in compliance with Rule 1.15-1 and this rule. Between annual certifications, a lawyer establishing an IOLTA account shall so advise the Oregon Law Foundation in writing within 30 days of establishing the account, on a form approved by the Oregon Law Foundation.

That language was part of a package of changes to the trust accounting rules approved by the HOD in 2005 that were intended, in part, to clarify the IOLTA requirements and put them all in a single place where lawyers were likely to find them. An unforeseen consequence of adopting RPC 1.15-2(m) was that making non-compliance a disciplinary matter increased the workload of DCO with, in Disciplinary Counsel’s opinion, “little gain.” In 2010, for example, over 730 lawyers did not file a certificate of compliance by the initial deadline and these names were turned over to DCO. Ultimately, all but a small handful will file, but only after multiple notices and efforts by discipline staff to bring these lawyers into compliance.

The Board of Governors recommends that the IOLTA compliance requirement be handled like bar dues and PLF payments, where a failure to comply results in an administrative suspension rather than discipline where reinstatement is approved by the Executive Director upon proof of compliance and payment of requisite fees.

Technical Correction/Housekeeping

3. SOLUTION:

Substituting an administrative for a disciplinary sanction will require the addition of new language to ORS Chapter 9 (the Bar Act). The new language (below) details the process to be followed in the event that a lawyer fails to file an IOLTA reporting form in a timely manner.

4. PUBLIC POLICY IMPLICATION of this proposed legislative change:

None.

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

No.

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

No.

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

All Oregon State Bar members are impacted by this change, but we are unaware of any group that would oppose it.

OREGON STATE BAR
Legislative Proposal
Part II – Legislative Language

Proposed new language:

ORS 9.201 Trust account certification; effect of failure to file certificate; reinstatement.

(1) Every active member shall certify annually on a form and by a due date prescribed by the Oregon State Bar whether the member maintains a lawyer trust account in Oregon and, if so, disclose the financial institution and account number for each such account.

(2) Any member who does not file the certificate required in subsection (1) shall, after 60 days' written notice of the default, be suspended from membership in the bar. The notice of default shall be sent by the executive director, by registered or certified mail, to the member in default at the last-known post-office address of the member. Failure to file the certificate within 60 days after the date of the deposit of the notice in the post office shall automatically suspend the member in default. The names of all members suspended from membership under this subsection shall be certified by the executive director to the State Court Administrator and to each of the judges of the Court of Appeals, circuit and tax courts of the state.

(3) A member suspended for failing to file a trust account certification shall be reinstated only on compliance with the rules of the Supreme Court and the rules of procedure and payment of all required fees or contributions.

OREGON STATE BAR
Legislative Proposal
Part I – Legislative Summary

RE: LPRC Restructuring

Bar Group: OSB Board of Governors

*Substantive language of all OSB section sponsored law improvement proposals have been provided by OSB sections
at the direction of each section's executive committee.*

1. Has this been introduced in a prior session? No Yes Years(s) Bill#(s)

Does this amend current law or programs? No Yes. ORS 9.532

2. PROBLEM PRESENTED (including level of severity):

For many years, the Oregon State Bar has utilized the services of unpaid volunteers for assistance in investigating disciplinary complaints. The authority for this is found in ORS 9.532. These groups are organized into “Local Professional Responsibility Committees” (LPRCs).

Presently there are 16 LPRCs. There is one for each of Douglas, Lane, and Multnomah Counties. The others are multi-county committees. When the rosters are full, there are about 100 total volunteers serving on these committees. Recently two developments have suggested that it would be appropriate to restructure the LPRCs.

(1) Interest in LPRC service has diminished radically over the last several years such that it is extremely difficult to fill vacant positions on LPRC rosters. Staff expends a significant amount of time drumming up volunteers, but over the last few years we have had to resort to asking existing members to consider reappointment year after year.

(2) As a result of diminished volunteer service, the number of investigative assignments made to LPRCs has correspondingly diminished as Disciplinary Counsel’s Office (DCO) has assumed most of the responsibility for investigating complaints. For example, 131 assignments were made to LPRCs in 1997. Ten years later, in 2007, the number of assignments was 18, and we have averaged even fewer since then;

Technical Correction/Housekeeping

3. SOLUTION:

We propose that ORS 9.532 be amended as set out below. The amendments eliminate the actual LPRCs, but would authorize the designation of individual bar members to serve as investigators with all the authority to issue subpoenas and compel the attendance of witnesses and the production of records that LPRCs presently have. This change would give the State Professional Responsibility Board additional flexibility to use volunteer investigators when and where needed without being required to use a somewhat out-of-date committee model.

4. PUBLIC POLICY IMPLICATION of this proposed legislative change:

None.

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

No.

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

No.

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

All Oregon State Bar members are impacted by this change, but we are unaware of any group that would oppose it.

OREGON STATE BAR
Legislative Proposal
Part II – Legislative Language

9.532 State professional responsibility board; powers; witnesses; subpoenas; oaths.

(1) The board of governors shall create *[local professional responsibility committees to investigate the conduct of attorneys. The composition and authority of local professional responsibility committees]* **a state professional responsibility board to review the conduct of attorneys and to institute disciplinary proceedings against members of the bar. The composition and authority of the state professional responsibility board** shall be as provided in the rules of procedure.

(2) *[The board of governors shall also create a state professional responsibility board to review the conduct of attorneys and to institute disciplinary proceedings against members of the bar. The composition and authority of the state professional responsibility board shall be as provided in the rules of procedure.]* **The state professional responsibility board shall have the authority to designate one or more members of the bar to investigate the conduct of attorneys on behalf of the state professional responsibility board.**

(3)(a) The state professional responsibility board and *[local professional responsibility committees]* **any member of the bar designated to investigate the conduct of attorneys pursuant to subsection (2)** shall have the authority to take evidence, administer oaths or affirmations, and issue subpoenas to compel the attendance of witnesses, including the member being investigated, and the production of books, papers and documents pertaining to the matter under investigation.

(b) A witness in an investigation conducted by the state professional responsibility board or *[a local professional responsibility committee]* **by a designated investigator** who testifies falsely, fails to appear when subpoenaed, or fails to produce any books, papers or documents pursuant to subpoena, shall be subject to the same orders and penalties to which a witness before a circuit court is subject. The state professional responsibility board or *[local professional responsibility committees]* **a designated investigator** may enforce any subpoena issued pursuant to paragraph (a) of this subsection by application to any circuit court.

(c) Any member of the state professional responsibility board or a *[local professional responsibility committee]* **designated investigator** may administer oaths or affirmations and issue any subpoena provided for in paragraph (a) of this subsection.

OREGON STATE BAR
Legislative Proposal
Part I – Legislative Summary

RE: Vesting of Indemnification Rights

Bar Group: Business Law Section

*Substantive language of all OSB section sponsored law improvement proposals have been provided by OSB sections
at the direction of each section's executive committee.*

1. Has this been introduced in a prior session? No Yes Years(s) Bill#(s)

Does this amend current law or programs? No Yes .New ORS 60.415 – Director's Right to Indemnification and Advancement of Expense Vests When Act Giving Rise to Indemnification Occurs; New ORS 66.415 (Nonprofit)

2. PROBLEM PRESENTED (including level of severity):

Protection of directors from the expense of litigation is a key issue for both companies and directors. Most corporate bylaws make indemnification of directors, to the fullest extent allowed by law, mandatory. In addition, bylaws recognize that the expense of defense can be crippling even if a director successfully defends against a claim. Thus, corporations generally provide for advancement of the costs of defense upon receipt of an undertaking to be repaid if the director is finally determined not to be entitled to indemnity.

In a recent case, the Delaware Court of Chancery (*Schoon v. Troy Corp.*, 948 A.2d 1157, 1165-1166 (Del. Ch. 2008)) allowed a company to eliminate a director's advancement rights after he ceased serving as a director, even though the alleged act for which claims were based occurred prior to the change. It is likely that many directors wouldn't expect this result. If Oregon courts follow the Delaware court's reasoning, Oregon directors could have a significant gap in / a risk of losing indemnification protection they counted on when deciding to become a director of an Oregon corporation.

Technical Correction/Housekeeping

3. SOLUTION:

Adopt a new statutory provision that would prohibit a company from taking away indemnification rights or the right to advancement of expenses covering past acts unless the company's articles of incorporation or bylaws expressly allow the company to do so. The new provision would supplement the current indemnification provisions found in ORS 60.384 to 60.414 (corporate statute) and 65.387 to 65.414 (nonprofit statute).

4. PUBLIC POLICY IMPLICATION of this proposed legislative change:

The proposal makes the law consistent with the expectations of directors and supports the retention of quality directors by Oregon corporations. It also prevents directors or ex-directors from unwittingly losing an important right they relied upon in becoming directors.

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

Possibly. Companies could adopt a similar provision in their articles of incorporation or bylaws; specifically, that the indemnification rights can't be taken away with respect to past acts unless consented to by the director.

In addition, a director may insist on a separate indemnification agreement to obtain a contractual right to indemnification, which agreement couldn't be amended without the director's consent.

These solutions may not be sufficient for two reasons. First and primarily, many directors are unlikely to recognize the issue and so will not insist on changes to current bylaws or/and indemnification agreements. Second, with respect to amendments to current indemnification rights, a court may still follow the Delaware's court logic and conclude that a company may eliminate the consent right, followed by elimination of the vesting.

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

No.

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

Oregon corporations and directors would be most impacted and interested in the change. Shareholders might have an interest. We are not aware of any group or constituency that would have any material opposition to the proposal. We submitted this proposal to the following Oregon bar sections: Business Litigation, Corporate Counsel and Litigation, and received no objection.

OREGON STATE BAR
Legislative Proposal
Part II – Legislative Language

Proposed new language

ORS 60.415 Vesting of Indemnification Rights

A right to indemnification or to advancement of expenses arising under a provision of the articles of incorporation or a bylaw shall not be eliminated or impaired by an amendment to such provision after the occurrence of the act or omission that is the subject of the civil, criminal, administrative or investigative action, suit or proceeding for which indemnification or advancement of expenses is sought, unless the provision in effect at the time of such act or omission explicitly authorizes such elimination or impairment after such action or omission has occurred.

Proposed new language

ORS 65.415 Vesting of Indemnification Rights

A right to indemnification or to advancement of expenses arising under a provision of the articles of incorporation or a bylaw shall not be eliminated or impaired by an amendment to such provision after the occurrence of the act or omission that is the subject of the civil, criminal, administrative or investigative action, suit or proceeding for which indemnification or advancement of expenses is sought, unless the provision in effect at the time of such act or omission explicitly authorizes such elimination or impairment after such action or omission has occurred.

OREGON STATE BAR
Legislative Proposal
Part I – Legislative Summary

RE: Notice Requirements for Lien Claimants

Bar Group: Construction Law Section

*Substantive language of all OSB section sponsored law improvement proposals have been provided by OSB sections
at the direction of each section's executive committee.*

1. Has this been introduced in a prior session? No Yes Unknown.
Does this amend current law or programs? No Yes. ORS 87 *et seq.*
-

2. PROBLEM PRESENTED (including level of severity):

The construction lien statutes (ORS 87.001 to 87.093) require certain lien claimants to provide notice to a mortgagee of the claimant's right to file a claim of lien within 8 business days of commencing work. They also require notice to the mortgagee within 20 days of filing a lien claim that the claimant has filed a claim of lien.

Mortgagees who assign multiple partial investment interests (which can be as small as a 1/250th interest) frequently do not put the address of all the assignee(s) on the recorded assignment. In cases where there are many partial assignees whose addresses do not appear in the public record, lien claimants must go to extraordinary expense to try and identify and locate all assignees located anywhere in the United States in order to preserve their lien rights because an assignee is a "mortgagee" under the statutes. If the multiple assignees cannot be located within days notices cannot be given as required with a dramatic impact on the lien claimants' rights.

Technical Correction/Housekeeping

3. SOLUTION:

Require lien claimants to provide notice only to those assignees who comply with the recording statutes by putting the address on the recorded assignment and defining mortgages to include only those mortgagees containing the address of the assignee as is already required by ORS 205.234(1)(g). This change will have no impact on those mortgagees and lenders who already comply with ORS 205.234(1)(g) which provides that "[w]hen any instrument is presented to a county clerk for recording, the first page of the instrument shall contain at least: For instruments assigning a mortgage or trust deed, the name and address of the assignee mortgagee or assignee trust deed beneficiary."

The provision should be implemented immediately by way of an emergency clause so lien claimants and mortgagees involved in filing liens have clarity. It should be effective as of the date addresses were required to be in recorded assignments – i.e. it should apply to all mortgagees recorded since 205.234(1)(g) became effective.

4. PUBLIC POLICY IMPLICATION of this proposed legislative change:

These changes should address the administrative and practical difficulty and the extreme costs currently faced by lien claimants in locating and giving notice to multiple partial assignees under ORS 87.001 to 87.093 when the partial assignees address does not appear of record as required by ORS 205.234(1)(g).

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

No.

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

No.

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

All persons and entities related to the construction industry, i.e., lenders, owners, contractors, material suppliers, title companies, attorneys. Lenders may have questions about this legislation, There is no impact if the lenders complied with 205.234(1)(g) and put an address on the recorded assignment so lien claimants have a chance of knowing where they can send the statutorily required notices to the lender and its assignees. Lenders who did not comply with ORS 205.234(1)(g) and put in a name and address for an assignee will be impacted because they will not be able to assert they did not receive the notices and therefore the lien loses any priority over the recorded mortgage.

OREGON STATE BAR
Legislative Proposal
Part II – Legislative Language

87.005 Definitions for ORS 87.001 to 87.060 and 87.075 to 87.093

(6) “Mortgagee” means a person who has a valid subsisting mortgage of record or trust deed of record securing a loan upon land or an improvement whose name and address appears in a mortgage of record or a trust deed of record consistent with the requirements in ORS 205.234(1)(g).

(7) “Mortgage of record” or “Trust deed of record” means a document recorded by a mortgagee with the county clerk of the county in which the improvement or property is located and containing the information required by ORS 205.234(1)(g).

[Note: Subsection (7) above is a new subsection, and will require renumbering the remaining subsections of existing law.]

87.018 Delivery of notices.

(1) Except as provided in ORS 87.093, all notices required under ORS 87.001 to 87.060 and 87.075 to 87.093 shall be in writing and delivered in person or delivered in person or delivered by registered or certified mail.

(2) Any notice required to be given to a mortgagee or mortgagee of record under ORS 87.001 to 87.060 and 87.075 to 87.093 is required to be delivered only to a person or a nominee or agent of that person whose name and address appears in a mortgage of record or trust deed of record as required by ORS 205.234(1)(g).

Effective date: This proposed amendment shall be effective as of the effective date of ORS 205.234(1)(g) and should apply to all mortgages and trust deeds recorded on or after the effective date of ORS 205.234(1)(g) – January 1, 2008.

OREGON STATE BAR
Legislative Proposal
Part I – Legislative Summary

RE: Changes to Notice of Defect Statutes

Bar Group: Construction Law Section

*Substantive language of all OSB section sponsored law improvement proposals have been provided by OSB sections
at the direction of each section's executive committee.*

1. Has this been introduced in a prior session? No Yes Years(s) Bill#(s)

Does this amend current law or programs? No Yes. ORS 701.560 – 701.600

2. PROBLEM PRESENTED (including level of severity):

The notice of defect statutes, ORS 701.560 – 701.600, require that a plaintiff give a notice of alleged defects to a contractor he or she proposes to take action against before beginning litigation. This process is too cumbersome for small claims litigation.

The notice of defect statute requires service by registered mail. Most other statutes of this nature allow service by certified mail as well. Certified mail is significantly cheaper.

Logically the notice of defect law does not apply to a counterclaim by an owner sued by a contractor, but this is not explicit in the statutes. Since this issue has been litigated in construction lawsuits, it should be explicitly clarified.

Technical Correction/Housekeeping

3. SOLUTION:

Exempt small claims actions from coverage by the law.

Allow service by certified mail.

Exempt counterclaims from coverage by the law.

4. PUBLIC POLICY IMPLICATION of this proposed legislative change:

These changes should make the notice of defect statutes more consumer friendly and remove some barriers to using the court system to redress construction issues.

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

No.

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

No.

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

Various home builder organizations, such as the Oregon Home Builders Association might oppose the bill if they perceive that it weakens the notice requirement. On the other hand they may not oppose it.

OREGON STATE BAR
Legislative Proposal
Part II – Legislative Language

701.565 Notice of defect requirement; contents; mailing. (1) An owner may not compel arbitration or commence a court action against a contractor, subcontractor or supplier to assert a claim arising out of or related to any defect in the construction, alteration or repair of a residence or in any system, component or material incorporated into a residence located in this state unless the owner has sent that contractor, subcontractor or supplier a notice of defect as provided in this section and has complied with ORS 701.575.

(2) An owner must send a notice of defect by registered **or certified** mail, return receipt requested. If a notice of defect is sent to a contractor or subcontractor, the owner must send the notice to the last known address for the contractor or subcontractor as shown in the records of the Construction Contractors Board. If a notice of defect is sent to a supplier, the owner must send the notice to the Oregon business address of the supplier or, if none, to the registered agent of the supplier.

(3) A notice of defect sent by an owner must include:

(a) The name and mailing address of the owner or the owner's legal representative, if any;

(b) A statement that the owner may seek to compel arbitration or bring a court action against the contractor, subcontractor or supplier;

(c) The address and location of the affected residence;

(d) A description of:

(A) Each defect;

(B) The remediation the owner believes is necessary; and

(C) Any incidental damage not curable by remediation as described in subparagraph (B) of this paragraph; and

(e) Any report or other document evidencing the existence of the defects and any incidental damage.

701.570 Secondary notice of defect; inspection of residence; response to notice or secondary notice. (1) A contractor, subcontractor or supplier that receives a notice of defect sent under ORS 701.565 shall, not later than 14 days after receiving the notice of defect, send a secondary notice to any other known contractor, subcontractor or supplier that may be responsible for some or all of the defects described in the notice of defect. The contractor, subcontractor or supplier must send the secondary notice by registered **or certified** mail, return receipt requested, to an address described in ORS 701.565(2). The

secondary notice must be accompanied by a statement describing the basis for contending that the other contractor, subcontractor or supplier may be responsible for some or all of the defects.

(2) A contractor, subcontractor or supplier that receives a notice of defect or secondary notice may send the owner a written request to conduct a visual examination of the residence. The written request must be sent not later than 14 days after the requesting contractor, subcontractor or supplier receives a notice of defect or secondary notice. The written request to conduct a visual examination of the residence must state the estimated time required for the visual examination.

(3) A contractor, subcontractor or supplier that receives a notice of defect or secondary notice may send the owner a written request to inspect the residence. The written request must be sent not later than 14 days after the requesting contractor, subcontractor or supplier conducted a visual examination of the residence. The written request to inspect the residence must state the nature and scope of the inspection, whether any testing is to be performed and the estimated time required for the inspection. The recipient of a secondary notice that requests to inspect the residence shall send a copy of the request to the sender of the secondary notice.

(4) A contractor, subcontractor or supplier that sends a secondary notice and intends to hold the recipient of the secondary notice liable for a defect described in a notice of defect shall coordinate the scheduling of any inspection with the owner and all recipients of a secondary notice from the contractor, subcontractor or supplier. The contractor, subcontractor or supplier shall deliver a copy of any written request to inspect the residence to each recipient of the secondary notice in time to provide the recipient with an opportunity to attend the requested inspection and to participate in any remediation. The sender of a secondary notice shall give reasonable advance notice to the owner or the owner's legal representative, if any, of the identity of any contractor, subcontractor or supplier who will attend the inspection.

(5) Unless otherwise agreed to by the owner, a contractor, subcontractor or supplier that receives a notice of defect or secondary notice shall send a written response to the owner not later than 90 days after the contractor, subcontractor or supplier receives a notice of defect or secondary notice. A contractor, subcontractor or supplier that receives a secondary notice also shall send a copy of the written response to the sender of the secondary notice. The written response must be sent by registered or certified mail, return receipt requested. The written response must include:

(a) One or more of the following for each defect described in the notice of defect or secondary notice or discovered during the course of any visual examination or inspection:

(A) An acknowledgment of the existence, nature and extent of the defect without regard to responsibility for the defect.

(B) A statement describing the existence of a defect different in nature or extent from the defect described in the notice of defect or secondary notice, without regard to responsibility for the defect.

(C) A denial of the existence of the defect.

(b) A copy of the documents described in ORS 701.575(4).

(c) One or more of the following:

(A) An offer to perform some or all of the remediation. The offer must specify the date by which the offered remediation will be completed.

(B) An offer to pay a stated amount of monetary compensation to the owner for some or all of the acknowledged defects and any incidental damage. The offer must specify the date by which payment will be made.

(C) A denial of responsibility for some or all of the acknowledged defects or incidental damage.

701.600 Nonapplicability of ORS 701.560 to 701.595 and 701.605. ORS 701.560 to 701.595 and 701.605 do not apply:

(1) To personal injury or death claims.

(2) To claims or complaints filed pursuant to ORS 671.695 or 701.139.

(3) To claims against a person licensed under ORS 671.010 to 671.220.

(4) To complaints filed in a small claims department of a justice or circuit court described in ORS 55.011.

(5) To a response, including but not limited to a counterclaim, to a claim, arbitration demand, or a complaint by a contractor, subcontractor or supplier arising out of or related to a contract for the construction, alteration or repair of a residence or a system, component or material incorporated into a residence.

OREGON STATE BAR
Legislative Proposal
Part I – Legislative Summary

RE: Oregon Private Prompt Payment Act (OPPPA) Amendments

Bar Group: Construction Law Section

*Substantive language of all OSB section sponsored law improvement proposals have been provided by OSB sections
at the direction of each section's executive committee.*

1. Has this been introduced in a prior session? No Yes Years(s) Bill#(s)

Does this amend current law or programs? No Yes. ORS 701.620 to .640

2. PROBLEM PRESENTED (including level of severity):

The OPPPA provides controlling payment terms for private construction contracts, but the statute contains internal inconsistencies and ambiguities that make it hard to implement or follow in practice. The issues addressed in this proposal include the following:

a. Progress payments are to be made in 30-day cycles under the OPPPA, but most construction contracts call for monthly payment cycles and only five months contain only 30 days.

Consequently, to comply with the statute, a statutory notice should be placed on every page of drawings and specifications to change "30 days" to "monthly," which is cumbersome and should be unnecessary.

b. Inconsistent language is used for the same or similar circumstances, such as the inconsistent use of "alternate" for "alternative," "contract" for "construction contract" (a defined term), and various iterations of plans, specifications, and addenda for the usual "drawings and specifications." The inconsistencies create ambiguity in the statute that can be avoided by simple amendments to consistent use of terms or the definition of terms.

c. The OPPPA permits recovery of attorney fees for claims for "payments or interest" in certain circumstances when it appears that attorney fees are intended only for the recovery of the OPPPA's statutory interest for late payments. Under the public contract prompt payment act, recovery of attorney fees is allowed only for claims for the statutory interest. The current OPPPA language could be interpreted in different ways that are inconsistent with the statute's public counterpart or the parties' negotiated contract terms. It is open to inconsistent interpretations and applications, which would allow some parties to recover fees when others would not in similar circumstances.

d. Opt-out notices are prescribed for three of the four prompt payment deadlines in the OPPPA. There appears to be no reason why the fourth deadline, the time for final payment, was not to also have an opt-out provision.

3. SOLUTION:

Amend the terms of the OPPPA to eliminate ambiguity in the use of defined terms and other repeated terms so that the statute is applied uniformly and without ambiguity in similar circumstances. Revise the payment cycle from "30-days" to "monthly." Delete the requirement for attorney fees on claims for "payment" and resolve ambiguity in fee provisions, to correspond with the equivalent provision in the public contracting prompt payment law and provide clear statement of the law. Expand the opt-out notice for progress payment deadlines to include provision for contractual final payment deadline.

4. PUBLIC POLICY IMPLICATION of this proposed legislative change:

These amendments provide uniformity and consistency in the law, which is to be read into every private construction contract. This allows for uniform application of the law to all parties in similar circumstances and consistency in the application of the OPPPA, without unnecessary litigation.

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

No.

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

No.

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

Construction contractors and subcontractors should welcome clarification and improvement of the statute. Subcontractor associations may see the proposed amendment to attorney fee rights as a restriction of the current law, but we ultimately seek to have the law say what the legislature means, whether it adopts our proposed amendment or another that clarifies the statute. We do not anticipate conflict and seek only clarity in what is meant.

OREGON STATE BAR
Legislative Proposal
Part II – Legislative Language

CONSTRUCTION CONTRACT PAYMENTS

701.620 Definitions for ORS 701.620 to 701.640. As used in ORS 701.620 to 701.640:

(1) “Construction contract” means a written or oral construction agreement, including without limitation [all] plans, [specifications and addenda] relating to:

(a) Excavating, landscaping, demolishing and detaching existing structures, leveling, filling in and other preparation of land for the making and placement of a building, structure or superstructure;

(b) Creation or making of a building, structure or superstructure; and

(c) Alteration, partial construction and repairs done in and upon a building, structure or superstructure.

(2) “Contractor” has the meaning given that term in ORS 87.005.

(3) “Days” means calendar days.

(4) “Material supplier” means any person providing materials or products under a construction contract by any contractual means [including] such as oral authorization, written contract, purchase order, price agreement or rental agreement.

(5) “Original contractor” has the meaning given that term in ORS 87.005.

(6) “Owner” has the meaning given that term in ORS 701.410.

(7) "Plans" means the drawings and specifications provided to solicit bids or proposals for the work of the construction contract. Statements made on each page of plans may be satisfied by statements included on the reverse side of each page.

(8) “Subcontractor” has the meaning given that term in ORS 87.005. [2003 c.675 §54]

Note: 701.620 to 701.645 were enacted into law by the Legislative Assembly but were not added to or made a part of ORS chapter 701 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

701.625 Progress payments; alternative billing cycle; certification of billing or estimate; payment in full; prohibited agreements. (1) By mutual agreement with an original contractor, an owner may make progress payments to the original contractor on a construction contract that is anticipated to last less than 60 days. An owner shall make progress payments to the original contractor on all other construction contracts. Progress payments shall be made on the basis of a certified billing or estimate for the work performed and the materials or products supplied during the preceding [30-day] month's billing cycle, or an [alternate] alternative billing cycle as stated in the construction contract. If billings or estimates are to

be submitted in [*alternate*]**alternative**, rather than [*30-day*]**monthly** billing cycles, the construction contract shall specify the [*alternate*]**alternative** billing cycles in a clear and conspicuous manner as prescribed in subsection (2) of this section. Except as provided in subsection (3) of this section, the owner shall make progress payments to the original contractor within 14 days after the date the billing is submitted pursuant to subsection (4) of this section.

(2) A construction contract may provide for an [*alternate*]**alternative** billing cycle if the plans [*and specifications*] specifically set forth that there is an [*alternate*]**alternative** billing cycle and the owner provides for each page of plans [*and specifications*] a statement substantially similar to the following statement:

Notice of [*Alternate*]**Alternative** Billing Cycle

The **construction** contract will allow the owner to require the submission of billings or estimates in billing cycles other than [*30-day*]**monthly** cycles. Billings or estimates for the **construction** contract shall be submitted as follows:

(3) An owner may make progress payments later than 14 days after the date the billing or estimate is submitted, **or final payment later than seven (7) days after the date the final billing or estimate is submitted, if:**

(a) The owner is responsible for providing plans [*and specifications*] that expressly allow in a clear and conspicuous manner an extended payment, defined by a specified number of days after the billing or estimate is submitted; and

(b) The owner provides for each page of plans [*and specifications*] a statement substantially similar to the following statement:

Notice of Extended Payment Provision

The **construction** contract will allow the owner to make **progress payments** within _____ days after the date a billing or estimate is submitted. **Final payment may be made within _____ days after the date the final billing or estimate is submitted.**

(4) The owner is deemed to have received the billing or estimate when the billing or estimate is submitted to any person designated by the owner for the receipt, review or approval of the billing or estimate. A billing or estimate is deemed to be certified 10 days after the owner receives the billing or estimate, unless before that time the owner or the owner's agent prepares and issues a written statement detailing those items in the billing or estimate that are not approved. An owner may decline to approve a billing or estimate or portion of a billing or estimate for:

- (a) Unsatisfactory work progress;
- (b) Defective construction work, materials or products not remedied;
- (c) Disputed work, materials or products, not to exceed 150 percent of the amount in dispute;
- (d) Failure to comply with other material provisions of the construction contract;
- (e) A [T] third party claim[s] filed or reasonable evidence that such a claim will be filed;
- (f) Failure of the original contractor or a subcontractor to make timely payments to subcontractors and material suppliers for labor, equipment, materials and products;
- (g) Damage to the owner;
- (h) Reasonable evidence that the construction contract cannot be completed for the unpaid balance of the construction contract sum; or
- (i) Other items as allowed under the construction contract terms and conditions.

(5) An owner may withhold from a progress payment an amount that is sufficient to pay the direct expenses the owner reasonably expects to incur to correct any item[s] set forth in writing pursuant to subsection (4) of this section. The owner may also withhold a reasonable amount as retainage as defined in ORS 701.410.

(6) An owner may extend the period within which the billing or estimate may be certified if:

(a) The owner is responsible for providing plans [*and specifications*] that expressly allow in a clear and conspicuous manner an extended period within which a billing or estimate may be certified; and

(b) The owner provides for each page of plans [*and specifications, including bid plans and construction plans,*] a statement substantially similar to the following statement:

Notice of Extended Certification Period Provision

The construction contract will allow the owner to certify billings and estimates within _____ days after the billings and estimates are received from the original contractor.

(7) After a subcontractor or material supplier submits a bid or proposal or other written pricing information to an original contractor, an owner and the original contractor may change the specified number of days after certification during which the owner may make payment to the original contractor or within which the owner must certify a billing or estimate. Any original contractor, subcontractor or material supplier that does not provide written consent to the change will continue to be paid as indicated in the plans [*and specifications*].

(8) When an original contractor completes and an owner approves all work under a construction contract, the owner shall make payment in full of all remaining amounts due on the construction contract within seven days, **except as allowed in subsection (3)**. When an original contractor completes and an owner approves all work under a portion of a construction contract for which the contract states a separate price, the owner shall make payment in full of all remaining amounts due on that portion of the construction contract, subject to the satisfaction of any issue described in subsection (4) of this section or ORS 701.630 (4).

(9) Payment is not required under this section unless the original contractor provides the owner with a billing or estimate for the work performed or the materials or products supplied in accordance with the terms of the construction contract between the parties.

(10) A construction contract may not alter the right of any original contractor, subcontractor or material supplier to receive prompt and timely progress payments as provided under this section.

(11) If an owner or a person designated by the owner as responsible for making progress payments on a construction contract does not make a timely payment under this section, the owner shall pay the original contractor interest on the unpaid balance at the rate of one and one-half percent a month or fraction of a month, or at a higher rate as the parties to the construction contract may agree.

(12) On the written request of a subcontractor, the owner shall notify the subcontractor within five days after the issuance of a progress payment to the original contractor. On the written request of a subcontractor, the owner shall notify the subcontractor within five days after the owner makes the final payment to the original contractor on the construction contract.

(13) In any action, claim or arbitration brought to collect [*payments* or] interest pursuant to this section, the prevailing party shall be awarded **costs and** reasonable [*costs and*] attorney fees.

(14) If the owner and original contractor are a single entity, that entity shall pay subcontractors and material suppliers within 14 days after the billing or estimate is received unless the deadlines for certification or payment have been modified pursuant to subsection (3) or (6) of this section. [2003 c.675 §55]

Note: See note under 701.620.

701.630 Payments to subcontractors and material suppliers; failure to pay; omission of payment; board discipline. (1) Performance by an original contractor, subcontractor or material supplier in accordance with the provisions of a construction contract entitles the original contractor, subcontractor or material supplier to payment from the party with whom the original contractor, subcontractor or material supplier contracts.

(2) If a subcontractor or material supplier has performed in accordance with the provisions of a construction contract, the original contractor shall pay to the subcontractor or material supplier, and each subcontractor shall pay to its subcontractors or material suppliers, the full amount received for such subcontractor's work and for materials and products supplied based on the subcontract or purchase order terms and conditions within seven days of receipt by the original contractor or subcontractor of a progress payment or final payment. Payment is not required under this subsection unless a subcontractor or material supplier provides to the original contractor or subcontractor a billing or invoice for the work performed or materials or products supplied in compliance with the terms of the contract between the parties. Each subcontractor or material supplier must provide an appropriate waiver of any mechanic's or materialman's lien in accordance with subcontract or purchase order terms and conditions. The original contractor or subcontractor may require that such waivers of lien be notarized.

(3) Any failure to reasonably account for the application or use of payments, as proven in a legal proceeding authorized under the terms of the construction contract, may constitute grounds for disciplinary action by the Construction Contractors Board under ORS 701.098.

(4) Nothing in this section prevents an original contractor when submitting a bill or estimate to an owner, or a subcontractor when submitting a bill or estimate to the original contractor, from omitting from the bill estimate amounts withheld from payment to a subcontractor or material supplier for:

- (a) Unsatisfactory work progress;
- (b) Defective construction work, materials or products not remedied;
- (c) Disputed work, materials or products, not to exceed 150 percent of the amount in dispute;
- (d) Failure to comply with other material provisions of the construction contract;
- (e) A [T] third party claim[s] filed or reasonable evidence that such a claim will be filed;
- (f) Failure of the subcontractor to make timely payments to subcontractors and material suppliers for labor, equipment, materials and products;
- (g) Damage to an original contractor, subcontractor or material supplier;
- (h) Reasonable evidence that the subcontract cannot be completed for the unpaid balance of the subcontract sum;
- (i) A reasonable amount for retainage, as defined in ORS 701.410, that does not exceed the actual percentage allowed by the subcontract or purchase order; or

(j) Other items as allowed under the subcontract or purchase order terms and conditions.

(5) If a progress or final payment to a subcontractor or material supplier is delayed by more than seven days after receipt of a progress or final payment by an original contractor or subcontractor, the original contractor or subcontractor shall pay its subcontractor or material supplier interest beginning on the eighth day, *[except during periods of time during which]* **unless** payment is withheld pursuant to subsection (4) of this section, at the rate of one and one-half percent a month or a fraction of a month on the unpaid balance or at such higher rate as the parties agree.

(6) In any action, claim or arbitration brought to collect *[payments or]* interest under this section, the prevailing party shall be awarded **costs and** reasonable *[costs and]* attorney fees. [2003 c.675 §56]

Note: See note under 701.620.

701.635 Suspension of performance. (1) An original contractor may suspend performance under a construction contract, or terminate a construction contract if performance is suspended for longer than *[30-days]* **a month**, for failure by the owner to make timely payment of the amount certified under ORS 701.625. An original contractor shall provide written notice to an owner at least seven days before the original contractor suspends performance or terminates the **construction** contract, unless a shorter notice period is prescribed in the **construction** contract. An original contractor may not be deemed in breach of a construction contract for suspending performance or terminating a construction contract pursuant to this subsection. A construction contract may not extend the notice period under this subsection.

(2) A subcontractor may suspend performance under a construction contract, or terminate a construction contract if performance is suspended for longer than *[30-days]* **a month**, for failure by the owner to make timely payment of amounts certified under ORS 701.625 or the subcontractor fails to receive payment for the certified work under ORS 701.630 (2). A subcontractor shall provide written notice to the original contractor and owner at least three days before the subcontractor suspends performance or terminates the **construction** contract, unless a shorter notice period is prescribed in the **construction** contract. A subcontractor may not be deemed in breach of a construction contract for suspending performance or terminating a **construction** contract pursuant to this subsection. A construction contract may not extend the notice period under this subsection.

(3) A subcontractor may suspend performance under a construction contract, or terminate a construction contract if performance is suspended for longer than *[30-days]* **a month**, if the owner makes timely payment of amounts certified under ORS 701.625 for the subcontractor's work but the original contractor fails to pay the subcontractor for the certified work. A subcontractor shall provide written notice to the original contractor and owner at least seven days before the subcontractor suspends performance or terminates the **construction** contract, unless a shorter notice period is prescribed in the **construction** contract. A subcontractor may not be deemed in breach of a construction contract for suspending performance or terminating a **construction** contract pursuant to this subsection. A construction contract may not extend the notice period under this subsection.

(4) A subcontractor may suspend performance under a construction contract, or terminate a construction contract if performance is suspended for longer than [30-days] **a month**, if the owner fails to approve portions of the contractor's billing or estimate under ORS 701.625 for that subcontractor's work but the reasons for that failure are not the fault of or directly related to the subcontractor's work. A subcontractor shall provide written notice to the original contractor and the owner at least seven days before the subcontractor suspends performance or terminates the **construction** contract, unless a shorter notice period is prescribed in the **construction** contract. A subcontractor may not be deemed in breach of a construction contract for suspending performance or terminating a **construction** contract pursuant to this subsection. A construction contract may not extend the notice period under this subsection.

(5) A contractor or subcontractor may not submit a notice of suspension under this section until the lawful period for payment to the contractor or subcontractor has expired.

(6) An original contractor or subcontractor that suspends performance as provided in this section is not required to furnish further labor, materials, products or services until the original contractor or subcontractor is paid the amount that was certified under ORS 701.625, together with any documented, substantial and reasonably incurred costs for mobilization resulting from the shutdown or start-up of a project.

(7) In any action, claim or arbitration brought pursuant to this section, the prevailing party shall be awarded **costs and** reasonable attorney fees.

(8) Written notice required under this section is deemed to have been provided if the notice:

(a) Is delivered in person to the owner, original contractor, subcontractor or a person designated by the owner, original contractor or subcontractor to receive notice; or

(b) Is delivered by certified mail, return receipt requested, or other means that provides written, third-[party verification of delivery to the last business address of the owner, original contractor or subcontractor known to the party giving notice. [2003 c.675 §57]

Note: See note under 701.620.

701.640 Prohibition against contrary provisions, covenants or clauses. (1) A construction contract may not include any provision, covenant or clause that:

(a) Makes the **construction** contract subject to the laws of another state or [that]requires any litigation, arbitration or other dispute resolution proceeding arising from the **construction** contract to be conducted in another state; or

(b) States that a party to the **construction** contract cannot suspend performance under the **construction** contract or terminate the **construction** contract if another party to the **construction** contract fails to make prompt payments under the **construction** contract pursuant to ORS 701.620 to 701.640.

(2) Any provision, covenant or clause described in subsection (1) of this section is void and unenforceable. [2003 c.675 §58]

OREGON STATE BAR
Legislative Proposal
Part I – Legislative Summary

RE: Increase to Wage Garnishment Exemption

Bar Group: Consumer Law Section

*Substantive language of all OSB section sponsored law improvement proposals have been provided by OSB sections
at the direction of each section's executive committee.*

1. Has this been introduced in a prior session? No Yes Years(s) Bill#(s)

Does this amend current law or programs? No Yes. ORS 18

2. PROBLEM PRESENTED (including level of severity):

Under federal law, the wage garnishment exemption is \$217.50 per week: 30 times the federal minimum wage, which is currently and for the foreseeable future set at \$7.25 per hour. See Title III of the Consumer Credit Protection Act and Section 6(a)(1) of the Fair Labor Standards Act. ORS 18.385 sets the Oregon garnishment wage exemption at \$196 per week, and this figure is currently in the garnishment forms. Under the supremacy clause, the federal law pre-empts the state law, and Oregon's garnishment statute is inaccurate.

Technical Correction/Housekeeping

3. SOLUTION:

Increase the Oregon wage exemption statute to exempt \$217.50 per week to reflect the applicable federal exemption, and make conforming amendments to the remainder of ORS chapter 18.

4. PUBLIC POLICY IMPLICATION of this proposed legislative change:

The current statute is preempted by federal law. This bill will change Oregon statutes to reflect the applicable law more accurately.

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

No.

6. COULD ANOTHER SECTION OR GROUP MORE APPROPRIATELY

INTRODUCE THE BILL? If so, have you suggested it to the section or group?

No.

7. IDENTIFY THE GROUP OR CONSTITUENCIES THAT WOULD BE MOST IMPACTED or interested in this change. Who would support it and who would oppose it? There should be no opposition.

OREGON STATE BAR
Legislative Proposal
Part II – Legislative Language

ORS 18.385 is amended to read:

- (1) Except as provided in this section, 75 percent of the disposable earnings of an individual are exempt from execution.
- (2) The disposable earnings of an individual are exempt from execution to the extent that payment under a garnishment would result in net disposable earnings for an individual of less than the following amounts:
 - (a) \$217.50 [\$196] for any period of one week or less;
 - (b) \$435 [\$392] for any two-week period;
 - (c) \$467.63 [\$420] for any half-month period;
 - (d) \$935.25 [\$840] for any one-month period; and
 - (e) For any other period longer than one week, \$217.50 [\$196] multiplied by that fraction produced by dividing the number of days for which the earnings are paid by seven. The amount calculated under this paragraph must be rounded to the nearest dollar.
- (3) If an individual is paid for a period shorter than one week, the exemption calculated under subsection (2) of this section may not exceed \$217.50 [\$196] for any one-week period.

(Remainder of ORS 18.385 unchanged)

Make corresponding changes to ORS 18.840 (the garnishment form).

OREGON STATE BAR
Legislative Proposal
Part I – Legislative Summary

RE: Protective Proceedings

Bar Group: Elder Law Section

*Substantive language of all OSB section sponsored law improvement proposals have been provided by OSB sections
at the direction of each section's executive committee.*

1. Has this been introduced in a prior session? Yes No Years(s) Bill#(s)
Does this amend current law or programs? No Yes. ORS 125.012

2. PROBLEM PRESENTED (including level of severity):

ORS 125.012 as written requires the court to seal information obtained from the Department of Human Services and filed with the court in a protective proceeding. It limits access to the DHS information to parties only and allows only the inspection of the information. As a result there is confusion as to who is entitled to inspection of information, whether persons entitled to inspection may be allowed to make photocopies, and what information is covered by the statute.

Technical Correction/Housekeeping

3. SOLUTION:

- a. Identify clearly who is a "party" by definition.
 - b. Identify the information subject to the statute as information voluntarily disclosed by DHS.
 - c. Require an order be entered that controls access and use of the information.
-

4. PUBLIC POLICY IMPLICATION of this proposed legislative change:

Parties involved in protective proceedings will be able to obtain information necessary to effective representation and presentation of issues to the court. Court staff will have clear rules to follow as to who is entitled to access the information and the limitations on any access.

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

No.

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

No.

7. IDENTIFY THE GROUP OR CONSTITUENCIES THAT WOULD BE MOST

IMPACTED or interested in this change. Who would support it and who would oppose it?

Department of Human Services, Disability Rights Oregon, State Court Administration, and attorneys were identified as the groups or constituencies that would be interested or impacted by this change.

All were represented in the committee process that drafted the proposed legislation. Opposition is not expected.

OREGON STATE BAR
Legislative Proposal
Part II – Legislative Language

125.012 Petition for protective order; disclosure of information; confidentiality; inspection; visitor report. The Department of Human Services, for the purpose of providing protective services as that term is defined in ORS 410.040, may petition for a protective order under this chapter. When the department, or a petitioning attorney with whom the department has contracted, petitions for a protective order under this section, the department shall disclose to the court or to the petitioning attorney on a minimum amount of information about the person who is the subject of the petition, including protected health, mental health, financial, substantiated abuse and legal information, as is reasonably necessary to prevent or lessen a serious and imminent threat to the health or safety of the person who is the subject of the petition or protective order.

(2) When a petition for a protective order is filed under this chapter by a person other than the Department of Human Services or an attorney with whom the department has contracted, or when a protective order has already been entered, the department may disclose to a court protected health, mental health, financial, substantiated abuse and legal information about the person who is the subject of the petition or protective order, or about a person who has petitioned for appointment, or who has been appointed, as a fiduciary for a protected person under this chapter. The department may disclose such information without authorization from the person or fiduciary if the disclosure is made in good faith and with the belief that the disclosure is the minimum amount of information about the person or fiduciary as is reasonably necessary to prevent or lessen a serious and imminent threat to the health or safety of the person who is the subject of the petition or protective order.

(3)(a) All confidential and protected health, mental health, financial, substantiated abuse and legal information disclosed **by the Department of Human Services** under this section must remain confidential and, when disclosed to the court, [*must be sealed by the court*] **made subject to an order as prescribed in paragraph (e) of this section.**

(b) Information disclosed under this section must be identified and marked by the entity or person making the disclosure as confidential and protected information that is subject to the requirements of paragraph (a) of this subsection, **and the order prescribed by paragraph (e).**

(c) Information disclosed under this section that is subject to the requirements of paragraph (a) of this subsection [*is subject to inspection only by the parties of the proceeding and their attorneys and*] is not subject to inspection by members of the public except pursuant to a court order entered after showing of good cause. **Good cause may include inspection by an attorney considering representation of the respondent or protected person in the proceeding. Only the petitioner, respondent, protected person, objectors, nominated or appointed fiduciaries, the court visitor, and their attorneys of record will be entitled to access to the information, subject to the order prescribed by paragraph (e) of this section.**

(d) Notwithstanding ORS 125.155 (4), to the extent that the report of a visitor appointed by the court under ORS 125.150 contains information that is subject to the requirements of paragraph (a) of this subsection, the report in its entirety shall be considered subject to the requirements of paragraph (a) of this subsection and may be disclosed only as provided in paragraph (c) of this subsection.

(e) When confidential information subject to this section is filed with the court, the party filing the confidential information shall submit to the court for its signature an Order Regarding Confidential Information Disclosed By Department of Human Services which shall read:

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF _____
PROBATE DEPARTMENT

In the Matter of the _____) Case No. _____
_____)
Of _____) ORDER REGARDING CONFIDENTIAL
_____) INFORMATION DISCLOSED BY
DEPARTMENT _____) OF HUMAN SERVICES

This matter came before the Court on the Petition for Appointment of _____
as Fiduciary for _____ . Confidential information from the
Department of Human Services, herein after referred to as “the Information,” has been submitted in
accordance with ORS 125.012.

NOW THEREFORE, IT IS HEREBY ORDERED

1. The attorney of record for a Respondent, Protected Person, Petitioner, Objector, and any nominated or appointed fiduciary may request a copy of the Information from the clerk of the court.
2. Counsel is prohibited from any re-disclosure of the Information, subject to the following exceptions: If the attorney of record reasonably believes there is a necessity to re-disclose the Information to an expert in order to address the issues in this proceeding; or upon specific application to the Court prior to any other re-disclosure.
3. At the conclusion of the proceeding, the Court will require the return of all copies of the Information to the clerk of the court. The Court will rely on the attorney representation as an Officer of the Court that all copies are returned.
4. Nothing in this order shall be construed to prevent the discussion of the contents of the Information by counsel with the Petitioner, Respondent, Protected Person, Objector and any nominated or appointed fiduciary.
5. The Visitor appointed by the Court shall be prohibited from re-disclosure of the Information. At the conclusion of the proceeding, the Visitor will return the copy to the clerk of the court. Nothing in this order shall be construed to prevent the visitor from discussion the contents of the Information with the Petitioner, Respondent, Objector and any nominated or appointed fiduciary.
6. In the event that a Petitioner, Respondent, Protected Person, Objector and any nominated or appointed fiduciary does not have an attorney, the party may come to the courthouse prior to the date of the hearing to review the Information. The Information shall not be duplicated in any manner by the party.
7. At the time of hearing, the unrepresented Petitioner, Respondent, Protected Person, Objector and any nominated or appointed fiduciary may have a copy of the Information in the courtroom for purposes of the hearing.
8. The unrepresented party shall return the copy of the Information to the clerk of the court at the conclusion of the proceeding.

9. The unrepresented party shall not remove any copy of the Information from the courtroom without prior permission of the Court.

Dated: _____

CIRCUIT COURT JUDGE

(4) As used in this section, “protected health information” has the meaning given that term in ORS 192.519.

(5) Nothing in this section is intended to limit the application of ORS 125.050 to the use of information disclosed under this section in proceedings under this chapter.

(6) Information may be disclosed under this section only for the purpose of providing protective services as that term is defined in ORS 410.040.

(7) As used in this section, Department of Human Services includes the Oregon Health Authority.

OREGON STATE BAR
Legislative Proposal
Part I – Legislative Summary

RE: Special Needs Trusts

Bar Group: Elder Law Section

*Substantive language of all OSB section sponsored law improvement proposals have been provided by OSB sections
at the direction of each section's executive committee.*

1. Has this been introduced in a prior session? No Yes Years(s) Bill#(s)

Does this amend current law or programs? No Yes. ORS 114.675

2. PROBLEM PRESENTED (including level of severity):

ORS 114.600 et seq, which go into effect January 1, 2011, restructure the method and amount a disinherited spouse can claim of the assets of his or her deceased spouse. This is called the ‘spousal elective share.’

In calculating the amount of the elective share, the disinherited spouse’s own assets are included as an offset. ORS 114.630 and ORS 114.675. In most cases, those are assets individually owned by the surviving spouse. However, in ORS 114.675 (2) (a) – (c) there are three types of trusts which were created by the deceased spouse for the benefit of the surviving spouse. These trusts are included in the surviving spouse’s estate because the surviving spouse has a vested distribution interest in those trusts. All three of these trusts are in part driven by estate/inheritance tax planning.

The problem is that the statutes do not include in the surviving spouse’s estate a type of trust that is frequently established by a decedent for a disabled surviving spouse. This type of trust goes by various names of which ‘special needs trust’ is most common. This type of trust provides for the special quality of life goods and services that a surviving spouse might need such as uninsured therapy, cable television and transportation. As with the other trusts already included as part of the elective share calculation, the special needs trust is an asset that benefits the surviving spouse and should also be factored into the elective share calculation.

Technical Correction/Housekeeping

3. SOLUTION:

The solution to the problem is to amend ORS 114.675 (2) to include a special needs trust in the surviving spouse’s estate for determination of the spousal elective share.

4. PUBLIC POLICY IMPLICATION of this proposed legislative change:

Spouses will be more likely to leave assets in a special needs trust for the benefit of a disabled survivor. Historically, disabled survivors have been disinherited.

In Oregon, if the special needs trust is correctly drafted, it will not interfere with the survivor's eligibility for public benefits such as Medicaid, OHP and SSI. Hence, survivors on those benefits will have the ability to improve their quality of life through trusts.

The proposal will bring special needs trust planning to parity with estate/inheritance tax planning.

The fiscal impact of this proposal is difficult to predict, since the section has no access to statistics on the number of individuals who have established special needs trusts or to information about how often the Department of Human Services (DHS) elects for assets on behalf of the surviving spouse.

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

No.

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

No.

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

All support groups for Alzheimers, Parkinsons Disease, Multiple Sclerosis, Brain Inury, Huntingtons Disease, ALS, etc. are likely to support the proposal because it would allow greater resources for people with disabilities.

Public benefit providers such as DHS are likely to oppose it because including the special needs trust in the surviving spouse's estate will decrease the amount that the surviving spouse can elect to receive from the deceased spouse's estate, thus reducing the surviving spouse's total assets.

OREGON STATE BAR
Legislative Proposal
Part II – Legislative Language

114.675 Surviving spouse's estate. (1) For purposes of ORS 114.600 to 114.725, a surviving spouse's estate is:

(a) All property of the spouse other than decedent's probate transfers to the surviving spouse under ORS 114.685, as determined on the date of the decedent's death.

(b) The decedent's probate transfers to the spouse, as described in ORS 114.685.

(c) Any property that would have been included under paragraph (a) or (b) of this subsection except for the exercise of a disclaimer by the spouse after the death of the decedent.

(2)(a) For the purpose of establishing the value of the surviving spouse's estate under this section, the estate includes 100 percent of the corpus of any trust or portion of a trust from which all income must be distributed to or for the benefit of the surviving spouse during the life of the surviving spouse, and for which the surviving spouse has a general power of appointment that the surviving spouse, acting alone, may exercise, during the surviving spouse's lifetime or at death of the surviving spouse, to or for the benefit of the surviving spouse or the surviving spouse's estate.

(b) For the purpose of establishing the value of the surviving spouse's estate under this section, the estate includes 100 percent of the corpus of a trust or portion of a trust, if all income from the trust or portion of a trust must be distributed to or for the benefit of the surviving spouse during the life of the surviving spouse and the trust principal may be accessed only by the trustee or the spouse and only for the purpose of providing for the health, education, support or maintenance of the spouse.

(c) For the purpose of establishing the value of the surviving spouse's estate under this section, the estate includes 50 percent of the corpus of a trust or portion of a trust if all income from the trust or portion of a trust must be distributed to or for the benefit of the surviving spouse during the life of the surviving spouse and neither the trustee nor the spouse has the power to distribute trust principal to or for the benefit of the surviving spouse or any other person during the spouse's lifetime.

(d) **For the purpose of establishing the value of the surviving spouse's estate under this section, the estate includes 100 percent of the corpus of a trust or portion of a trust established by the deceased spouse for the special or supplemental needs of a disabled or incapable surviving spouse.**

(e) For the purposes of this section, all amounts distributed to a surviving spouse from a unitrust that meets the requirements of ORS 129.225 (4) shall be considered income. [2009 c.574 §13]

OREGON STATE BAR
Legislative Proposal
Part I – Legislative Summary

RE: Elective Share Technical Amendments

Bar Group: Oregon State Bar Estate Planning and Administration Section

*Substantive language of all OSB section sponsored law improvement proposals have been provided by OSB sections
at the direction of each section's executive committee.*

1. Has this been introduced in a prior session? No Yes Years(s) Bill#(s)

Does this amend current law or programs? No Yes. The proposed bill will make technical corrections to the statutes created by HB 3077 in the 2009 Legislative Assembly, which rewrote Oregon's elective share.

2. PROBLEM PRESENTED (including level of severity):

HB 3077 from the 2009 Legislative assembly was complex legislation. It will begin taking effect for decedents who die on or after January 1, 2011. However, because it implicates planning decisions, practitioners are working with the statute now. As a result, they have pointed out inconsistencies with respect to various aspects of the statutes. These problems range from potentially severe to minor and could lead to adverse tax impacts, unfortunate disruption of the decedent spouse's planning goals, and expensive litigation. The proposal addresses the following issues:

- a. Gifts made prior to death and property held solely in a fiduciary capacity are not explicitly excluded from the augmented estate. ORS 114.630.
- b. There is inconsistent treatment of claims and administration expenses for probate and nonprobate estates in ORS 114.650 and 114.660.
- c. The decedent spouse's nonprobate estate in ORS 114.665 should not include property over which the decedent has the power to designate the beneficiary if the spouse is not a permissible designee.
- d. The decedent spouse's nonprobate transfers to the surviving spouse are (apparently unintentionally) not mentioned in the statute defining the surviving spouse's estate, ORS 114.675.
- e. It is unclear how to value certain trusts, including those established by persons other than the decedent, ORS 114.675(2).
- f. The mandatory pro rata contributions to the elective share amount may create unnecessary hardships, ORS 114.700 (3) and (4).
- g. The corrections in this bill should be effective when the elective share statutes themselves become effective, for decedents who die on or after January 1, 2011.

Technical Correction/Housekeeping

3. SOLUTION:

A. Improve the definition of excluded property. The definition of augmented estate is very broad, subject only to certain exclusions listed in ORS 114.630. Property should not be included in the augmented estate if the property was transferred prior to the decedent's death or if the relationship of the decedent or surviving spouse to the property is limited to acting as a fiduciary with respect to the property. The proposed solution is to amend ORS 114.650 to read as follows (new language in bold in the body of the statute):

114.635 Exclusions from augmented estate. (1) The augmented estate does not include any value attributable to future enhanced earning capacity of either spouse.

(2) The augmented estate does not include any property that was irrevocably transferred before **the decedent spouse's death** or after the death of the decedent spouse with the written joinder or written consent of the surviving spouse.

(3) The augmented estate does not include any property that is community property under ORS 112.705 to 112.775 or under the laws of the jurisdiction where the property is located.

(4) The augmented estate does not include any property that is held by either spouse solely in a fiduciary capacity.

B. Make the treatment of probate and nonprobate property consistent. ORS 114.650 provides, with respect to the decedent's probate estate, that the value is determined "after payment of claims and expenses of administration." The definition of the decedent's nonprobate estate in ORS 114.660 does not permit a similar deduction. The proposed solution is to amend ORS 114.650 to read as follows:

114.660 Decedent's nonprobate estate. For purposes of ORS 114.600 to 114.725, a decedent's nonprobate estate consists of the property described in ORS 114.665 that is not included in the decedent's probate estate and that does not constitute a probate transfer to the decedent's surviving spouse. **The value of the nonprobate estate is the value of all nonprobate property described in this section after payment of claims and expenses of administration."**

C. Limit the scope of ORS 114.665 to the ability of the decedent to designate the spouse as beneficiary. ORS 114.665(3) includes in the decedent's nonprobate estate property owned by the decedent over which the decedent has the power to designate the beneficiary. A concern has been expressed that in certain circumstances property may be considered "owned by the decedent" over which the decedent's power to designate the beneficiary is constrained. Therefore such property should be included in the nonprobate estate only to the extent the decedent is able to name the spouse as a beneficiary. The proposed solution is to amend ORS 114.665 to read as follows:

(3) A decedent's nonprobate estate includes any property owned by the decedent immediately before death for which the decedent had the power to designate **the spouse as a beneficiary, and only to the extent of that power.**

D. Include nonprobate transfers to the surviving spouse in the definition of the surviving spouse's estate. The definition of the surviving spouse's estate in ORS 114.675(1) includes specific reference to the decedent's probate transfers to the surviving spouse but not the decedent's nonprobate transfers to the surviving spouse. The proposed solution is to amend ORS 114.675(1) to read as follows:

(1) For purposes of ORS 114.600 to 114.725, a surviving spouse's estate is:

(a) All property of the spouse other than decedent's probate **and nonprobate** transfers to the surviving spouse under ORS 114.685, as determined on the date of the decedent's death.

(b) The decedent's probate **and nonprobate** transfers to the spouse, as described in ORS 114.685.

(c) Any property that would have been included under paragraph (a) or (b) of this subsection except for the exercise of a disclaimer by the spouse after the death of the decedent."

E. Make clear how to value trusts. ORS 114.675(2) states specific rules for valuing certain specific kinds of trusts. However, it makes no specific reference to other kinds of trusts, such as discretionary trusts, leaving open a possible implication that other types of trusts might have no value.

Further, it appears that the trusts given specific value in ORS 114.675(2) are defined to include more trusts than we believe the drafters intended. Specifically, to make the elective share statute consistent with marital deduction provisions in the federal estate tax and Oregon inheritance tax, ORS 114.675(2)(b) and (c) assign specific values to terminable interest trusts of which the surviving spouse is beneficiary. This is appropriate for trusts established by the decedent. It is not obvious that these valuations should apply to similar trusts established by, for instance, the surviving spouse's parents.

The Estate Planning and Administration Executive Committee does not believe the proponents of HB 3077 intended to include trusts established by persons other than the decedent spouse, since such trusts do not qualify for the marital deduction at the decedent's death. The trust described in subsection (2)(a) can qualify for the marital deduction, but more importantly gives the beneficiary control over all its assets and therefore is appropriately valued at 100% of the trust corpus, no matter who established the trust.

To deal with discretionary and other trusts not described in subsection (2), we propose to cross reference to the valuation concepts described in ORS 114.630(3) and (4), which provide:

"(3) The value attributable to any property included in the augmented estate includes the present value of any present or future interest and the present value of amounts payable under any trust, life insurance settlement option, annuity contract, public or private pension, disability compensation, death benefit or retirement plan, or any similar arrangement, exclusive of the federal Social Security Act.

“(4) The value attributable to property included in the augmented estate is equal to the value that would be used for purposes of federal estate and gift tax laws if the property had passed without consideration to an unrelated person on the date that the value of the property is determined for the purposes of ORS 114.600 to 114.725.

The proposed solution is to amend ORS 114.675(2) to read as follows:

(2)(a) For the purpose of establishing the value of the surviving spouse’s estate under this section, the estate includes 100 percent of the corpus of any trust or portion of a trust from which all income must be distributed to or for the benefit of the surviving spouse during the life of the surviving spouse, and for which the surviving spouse has a general power of appointment that the surviving spouse, acting alone, may exercise, during the surviving spouse’s lifetime or at death of the surviving spouse, to or for the benefit of the surviving spouse or the surviving spouse’s estate.

(b) For the purpose of establishing the value of the surviving spouse’s estate under this section, the estate includes 100 percent of the corpus of a trust or portion of a trust **created by the decedent spouse**, if all income from the trust or portion of a trust must be distributed to or for the benefit of the surviving spouse during the life of the surviving spouse and the trust principal may be accessed only by the trustee or the spouse and only for the purpose of providing for the health, education, support or maintenance of the spouse.

(c) For the purpose of establishing the value of the surviving spouse’s estate under this section, the estate includes 50 percent of the corpus of a trust or portion of a trust **created by the decedent spouse**, if all income from the trust or portion of a trust must be distributed to or for the benefit of the surviving spouse during the life of the surviving spouse and neither the trustee nor the spouse has the power to distribute trust principal to or for the benefit of the surviving spouse or any other person during the spouse’s lifetime.

(d) For the purposes of this section, all amounts distributed to a surviving spouse from a unitrust that meets the requirements of ORS 129.225 (4) shall be considered income.

(e) **The value of the surviving spouse’s beneficial interest in any other trust of which the surviving spouse is a permissible beneficiary shall be determined using the concepts described in Section 114.630 (3) and (4).**

F. Allow testators to override the mandatory contribution rules to control the impact of a surviving spouse’s election on the decedent’s estate plan. ORS 114.700(3) and (4) require that each beneficiary contribute a proportionate share of the distribution to that beneficiary toward the payment of the elective

share amount. This can work a hardship on certain beneficiaries. For instance, a beneficiary who receives an interest in an IRA must pay income taxes on any amounts distributed from the IRA. The statute allows no offset for the income tax impact on the beneficiary. Further, normal rules of abatement that a testator would expect might apply are defeated by the mandatory contribution rule.

Although members of the section executive committee continue to believe a valuation offset to solve the IRA tax trap is appropriate, this issue was debated as part of the discussion that led to the final version of HB3077, and it is not the purpose of this proposal to revisit that issue. However, it would make sense to allow the testator to specify how the elective share amount is to be paid, if a payment must be made.

The proposed solution is to amend ORS 114.700 by adding subsection (7) to read as follows:

(7) The decedent spouse may provide in the will, trust or other governing instrument for a different apportionment of sources from which the unsatisfied balance of an elective share amount is payable, other than as provided in subsections 114.700(3) and (4), in which case that different apportionment shall control.

G. Make these corrections retroactive so they apply to decedents who die on or after the effective date of the act creating ORS 114.600 to 114.775, January 1, 2011. Oregon's elective share statutes were completely rewritten by 2009's HB 3077, which created ORS 114.600 to 114.775. However, it was given a delayed effective date, until deaths on or after January 1, 2011, to give practitioners an opportunity to adjust to the new law. These technical corrections should be set up to take effect simultaneously with the effective date of the provisions of HB 3077 from 2009.

4. PUBLIC POLICY IMPLICATION of this proposed legislative change:

These proposals are technical corrections to the elective share statutes. They are not intended to change the policy decisions that led to the passage of HB3077.

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

Although drafting around some of the problems described is technically possible, most testators will not understand the issue well enough to do so.

6. COULD ANOTHER SECTION OR GROUP MORE APPROPRIATELY

INTRODUCE THE BILL? If so, have you suggested it to the section or group?

The Oregon Law Commission was the primary mover behind the passage of HB 3077 in the 2009 Legislative Assembly. The proposal will be circulated to members of the law commission. The family law section of the Oregon State Bar may wish to review the proposals.

7. IDENTIFY THE GROUP OR CONSTITUENCIES THAT WOULD BE MOST

IMPACTED or interested in this change. Who would support it and who would oppose it?

Assuming the Oregon Law Commission accepts these proposals as friendly amendments to 2009's HB 3077, we do not anticipate opposition or much interest from other groups.

OREGON STATE BAR
Legislative Proposal
Part II – Legislative Language

SECTION 1. ORS 114.635 is amended to read:

114.635 Exclusions from augmented estate. (1) The augmented estate does not include any value attributable to future enhanced earning capacity of either spouse.

(2) The augmented estate does not include any property that was irrevocably transferred before **the decedent spouse's death** or after the death of the decedent spouse with the written joinder or written consent of the surviving spouse.

(3) The augmented estate does not include any property that is community property under ORS 112.705 to 112.775 or under the laws of the jurisdiction where the property is located.

(4) The augmented estate does not include any property that is held by either spouse solely in a fiduciary capacity.

SECTION 2. ORS 114.660 is amended to read:

114.660 Decedent's nonprobate estate. For purposes of ORS 114.600 to 114.725, a decedent's nonprobate estate consists of the property described in ORS 114.665 that is not included in the decedent's probate estate and that does not constitute a probate transfer to the decedent's surviving spouse. **The value of the nonprobate estate is the value of all nonprobate property described in this section after payment of claims and expenses of administration.**

SECTION 3. ORS 114.665 is amended to read:

114.665 Decedent's nonprobate estate; property owned immediately before death. (1) A decedent's nonprobate estate includes the decedent's fractional interest in property held by the decedent in any form of survivorship tenancy immediately before the death of the decedent. The amount included in the decedent's nonprobate estate under the provisions of this subsection is the value of the decedent's fractional interest, to the extent the fractional interest passes by right of survivorship at the decedent's death to a surviving tenant other than the decedent's surviving spouse.

(2) A decedent's nonprobate estate includes the decedent's ownership interest in property or accounts held immediately before death under a payable on death designation or deed, under a transfer on death registration or in co-ownership registration with a right of survivorship. The amount included in the decedent's nonprobate estate under the provisions of this subsection is the value of the decedent's ownership interest, to the extent the decedent's ownership interest passed at the decedent's death to any person other than the decedent's estate or surviving spouse or for the benefit of any person other than the decedent's estate or surviving spouse.

(3) A decedent's nonprobate estate includes any property owned by the decedent immediately before death for which the decedent had the power to designate **the spouse as** a beneficiary, **and only to the extent of that power.**

(4) A decedent's nonprobate estate includes any property that immediately before death the decedent could have acquired by the exercise of a revocation, without regard to whether the revocation was required to be made by the decedent alone or in conjunction with other persons.

(5) A decedent's nonprobate estate does not include the present value of any life insurance policy payable on the death of the decedent. [2009 c.574 §12]

SECTION 4. ORS 114.675 is amended to read:

114.675 Surviving spouse's estate. (1) For purposes of ORS 114.600 to 114.725, a surviving spouse's estate is:

(a) All property of the spouse other than decedent's probate **and nonprobate** transfers to the surviving spouse under ORS 114.685, as determined on the date of the decedent's death.

(b) The decedent's probate **and nonprobate** transfers to the spouse, as described in ORS 114.685.

(c) Any property that would have been included under paragraph (a) or (b) of this subsection except for the exercise of a disclaimer by the spouse after the death of the decedent.

(2)(a) For the purpose of establishing the value of the surviving spouse's estate under this section, the estate includes 100 percent of the corpus of any trust or portion of a trust from which all income must be distributed to or for the benefit of the surviving spouse during the life of the surviving spouse, and for which the surviving spouse has a general power of appointment that the surviving spouse, acting alone, may exercise, during the surviving spouse's lifetime or at death of the surviving spouse, to or for the benefit of the surviving spouse or the surviving spouse's estate.

(b) For the purpose of establishing the value of the surviving spouse's estate under this section, the estate includes 100 percent of the corpus of a trust or portion of a trust **created by the decedent spouse**, if all income from the trust or portion of a trust must be distributed to or for the benefit of the surviving spouse during the life of the surviving spouse and the trust principal may be accessed only by the trustee or the spouse and only for the purpose of providing for the health, education, support or maintenance of the spouse.

(c) For the purpose of establishing the value of the surviving spouse's estate under this section, the estate includes 50 percent of the corpus of a trust or portion of a trust **created by the decedent spouse**, if all income from the trust or portion of a trust must be distributed to or for the benefit of the surviving spouse during the life of the surviving spouse and neither the trustee nor the spouse has the power to distribute trust principal to or for the benefit of the surviving spouse or any other person during the spouse's lifetime.

(d) For the purposes of this section, all amounts distributed to a surviving spouse from a unitrust that meets the requirements of ORS 129.225 (4) shall be considered income.

(e) The value of the surviving spouse's beneficial interest in any other trust of which the surviving spouse is a permissible beneficiary shall be determined using the concepts described in Section 114.630 (3) and (4).

SECTION 5. ORS 114.700 is amended to read:

114.700 Priority of sources from which elective share payable. (1) The following amounts are applied first to satisfy the dollar amount of the elective share and to reduce or eliminate any contributions due from the decedent's probate estate and recipients of the decedent's nonprobate transfers to others:

(a) The surviving spouse's estate as described in ORS 114.675.

(b) The amount of all of the decedent's probate transfers to the surviving spouse described in ORS 114.685.

(c) The amount of all of the decedent's nonprobate transfers to the surviving spouse described in ORS 114.690.

(2) If after application of the amounts specified in subsection (1) of this section the elective share amount is not fully satisfied, the following amounts shall be applied to the extent necessary to satisfy the balance of the elective share amount:

(a) Amounts included in the decedent's probate estate.

(b) Amounts included in the decedent's nonprobate estate under ORS 114.600 to 114.725.

(3) Amounts applied against the unsatisfied balance of an elective share amount under subsection (2) of this section shall be collected from both the probate and nonprobate estates of the decedent in a manner that ensures that the probate and nonprobate estates bear proportionate liability for the amounts necessary to pay the elective share amount.

(4) Amounts applied against the unsatisfied balance of an elective share amount under subsection (2) of this section out of the probate estate of the decedent must be apportioned among all recipients of the decedent's probate estate in a manner that ensures that each recipient bears liability for a portion of the payment that is proportionate to the recipient's interest in the decedent's probate estate. Amounts applied against the unsatisfied balance of an elective share amount under subsection (2) of this section out of the nonprobate estate of the decedent must be apportioned among all recipients of the decedent's nonprobate

estate in a manner that ensures that each recipient bears liability for a portion of the payment that is proportionate to the recipient's interest in the decedent's nonprobate estate.

(5) All apportionments required under this section between the probate and nonprobate estates of the decedent and among the recipients of those estates shall be based on the assets of each estate that are subject to distribution by the court under the provisions of ORS 114.600 to 114.725.

(6) In any proceeding described in ORS 114.610, the court may allocate the cost of storing and maintaining property included in the augmented estate pending distribution of the property.

(7) The decedent spouse may provide in the will, trust or other governing instrument for a different apportionment of sources from which the unsatisfied balance of an elective share amount is payable, other than as provided in subsections 114.700(3) and (4), in which case that different apportionment shall control.

SECTION 6. Sections 1 through 5 of this 2011 Act shall take effect with respect to the surviving spouses of decedents who die on or after January 1, 2011.

OREGON STATE BAR
Legislative Proposal
Part I – Legislative Summary

RE: UPIA update

- (1) Amend the statute headings in ORS Chapter 129 that are derived from the Uniform Principal and Income Act;**
- (2) Amend ORS Section 129.355 (Uniform Principal and Income Act – Deferred Compensation, Annuities and Similar Payments); and**
- (3) Amend ORS Section 129.420 (Uniform Principal and Income Act – Income taxes).**

**Sponsoring Groups: Oregon State Bar Estate Planning Section and
Oregon Society of Certified Public Accountants
(potential co-sponsor: Oregon Bankers Association)**

1. Has this been introduced in a prior session? No Yes Years(s) Bill#(s)

Does this amend current law or programs? No Yes. **ORS Statutes in Chapter 129:**

All statute headings in ORS Chapter 129 that are derived from the Uniform Principal and Income Act (UPIA) and ORS 129.355 and ORS 129.420

2. PROBLEM PRESENTED (including level of severity):

Specific application of proposal:

- (1) Add UPIA section references to the related Oregon statute headings;
- (2) Adopt UPIA revision to Section 409 which is adopted in Oregon as ORS 129.355; and (3) Adopt UPIA revision to Section 505 which is adopted in Oregon as ORS 129.420.

a. Add Uniform Principal and Income Act Section References to ORS Chapter 129

Often it is necessary in determining or interpreting the UPIA, as adopted in Oregon, to review the related section comments provided by the National Conference of Commissioners on Uniform State Laws (NCCUSL). This proposal would add the UPIA section references to the parallel Oregon statutes found in ORS Chapter 129 so that it will be simple to determine the coordinating section comments. It is believed that this would provide a helpful research reference source for those who use these statutes. This has been done to other Oregon statutes that are based on model codes. For example, when the Oregon Uniform Trust Code (ORS Chapter 130) was adopted the uniform section references were placed in the statute headings as a reference tool.

b. Amend ORS 129.355 (UPIA Section 409)

The two 2008 amendments (UPIA Sections 409 and 505) by the NCCUSL particularly dealt with the imbalances which can result from tax laws or their interpretations. The UPIA authorizes fiduciaries to make adjustments between principal and income to correct inequities caused by tax elections or peculiarities in the way the fiduciary income tax rules apply. The NCCUSL commissioners attempt to resolve these allocation adjustments in a fair and equitable manner for all beneficiaries. They encourage every state to adopt the act and its amendments as soon as possible.

Part of this proposal is the Oregon version of the specific amendment to Section 409 of the UPIA adopted by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) in 2008. The Oregon version of the original Section 409 was adopted in 2003 and is found at ORS 129.355.

It is not known to what extent Oregon spouses who are beneficiaries of marital deduction trusts have encountered the problems which are corrected by the proposed revision, but as a matter of keeping Oregon law in conformity with federal tax law, there are good public policy reasons for this proposed amendment.

The reason for the proposed revision is that the current statute does not satisfy the IRS safe harbor requirements published in IRS Revenue Ruling 2006-26 for an IRA or other retirement arrangement (a “plan”) that is payable to a marital deduction trust. Generally, for a trust to qualify as a marital deduction trust, the surviving spouse who is the beneficiary of the trust must have the right to demand distribution of all of the income from such trust on an annual basis while the surviving spouse is living.

Even though ORS 129.355(4) requires the trustee to allocate IRA or retirement “plan” distributions as necessary to “obtain a marital deduction,” this statute does NOT satisfy the safe harbor requirements in the opinion of the Internal Revenue Service for these distributions to qualify for ‘QTIP Treatment’ under Internal Revenue Code Section 2056(b)(7) for estate tax purposes.

When an IRA or plan arrangement is payable to a marital deduction trust, the IRS treats these accounts as a separate property asset interest that by itself must qualify for the marital deduction. IRS Rev. Rul. 2006-26 indicated that UPIA Section 409 (before the amendment in 2008) (e.g., ORS 129.355, which contains the pre-’08 language), as written, does not allow such a trust to qualify for the ‘safe harbor’ requirements to satisfy IRC Sec. 2056(b)(7)(C).

Without necessarily agreeing with the IRS position in that ruling, the proposed revision to ORS 129.355 is designed to satisfy the IRS safe harbor requirements and to address concerns that might be raised for similar assets. Rev. Rul. 2006-26 addresses circumstances where a marital trust is the named beneficiary of a decedent’s IRA (or qualified defined contribution plan) and the surviving spouse is considered to have a qualifying income interest for life in both the IRA and the marital trust.

In order to satisfy the IRS safe harbor requirements the surviving spouse, who is the beneficiary of the trust, must have the right to demand all of the income from a decedent’s IRA (or qualified defined contribution plan) distributable to such trust while the surviving spouse is living. This “income” requirement is significantly different from the more familiar “required minimum distribution” requirement that also applies to these distributions.

Sometimes due to the lack of information provided by the fund’s custodian/administrator, a trustee may be unable to determine the fund’s actual income for the period. When the necessary information is not available, the proposed revision utilizes the 4.0% ‘unitrust’ concept to assist a trustee to determine the portion of the IRA or pension distribution that is allocable to income. Under this circumstance a trustee would seek the value of the fund assets as of the most recent statement of value immediately preceding the beginning of the accounting year and then apply the 4% unitrust value for purposes of determining the

amount of income available for distribution purposes based upon the average value (ORS 129.225(4)(b) & (c)). If a trustee cannot determine either the internal income of the separate accounts or the fund's value, a trustee may rely on IRC Sec. 7520 valuation methods to determine the present value of expected future payments because many funds described in Section 129.355 are annuities.

The 4% unitrust amount was chosen because it is the same as the percentage specified in ORS 129.225(4)(b) for unitrust conversions. Also the special income allocation rules currently provided in ORS 129.355(5) will be retained, as written, in the proposed revision.

c. Amend ORS 129.420 (UPIA Section 505)

Part of this proposal is the Oregon version of the specific amendment to Section 505 of the UPIA adopted by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") in 2008. The Oregon version of the original Section 505 was adopted in 2003 and is found at ORS 129.420.

The catalyst for revising Section 505 was the fact that trustees are sometimes placed in a difficult position when a cash distribution received from an entity was not sufficient to pay the tax liabilities, as well as satisfy the required income distribution amount to the income beneficiary. The problem often arises when a trust holds an interest in a partnership, Limited Liability Company, Subchapter-S Corporation or other pass-through entity. Such entities may choose to distribute only enough cash to the trust to pay the trust's tax liability attributable to its distributive share of the entity's Schedule K-1 income which is often higher for income tax reporting purposes than the actual cash distribution received by the trust.

In many such cases beneficiaries sought to require distributions that would place trustees in the dilemma of inadequately satisfying both fiduciary responsibilities to the income beneficiary and the remainder beneficiary. This circumstance is further complicated by the fact that a trust receives an income distribution tax deduction for net income distributions to the income beneficiary. Section 505 was amended to provide better guidance for a trustee's duties in such cases.

The NCCUSL commissioners realized that the former language was ambiguous and created beneficiary animosity when a trustee is required to distribute all of the trust's income annually (for a mandatory income or simple trust). This problem exists with the current language in ORS 129.420.

This dilemma is a pretty significant problem for trustees, and their professional advisors who are called upon to determine whether the income tax liabilities are to be paid from trust income or trust principal.

Technical Correction/Housekeeping

3. SOLUTION:

a. Add Uniform Principal and Income Act Section References to ORS Chapter 129

The proposed revision would add the UPIA section references to the parallel Oregon statute headings found in Chapter 129. These references would provide a research link to the UPIA commentaries adopted by NCCUSL.

b. Amend ORS 129.355 (UPIA Section 409)

The proposed amendment would allow IRA and retirement distributions to a marital deduction trust to qualify for QTIP treatment under the IRS safe harbor provisions. Existing trust law, the ‘Revised Uniform Principal and Income Act’, requires a trust to be administered, as specified in the instrument or local state law, if silent, with due regard to the respective interests of defined income and remainder beneficiaries. Currently, ORS 129.355(1)(a) “payment” is defined to mean a payment that a trustee “may receive over a fixed number of years or during the life of one or more individuals because of services rendered or property transferred to the payer in exchange for future payments . . . including a private or commercial annuity, an individual retirement account and a pension, profit sharing, stock bonus or stock-ownership plan.”

This proposed revision would require a trustee to separately account for a private or commercial annuity, an individual retirement account and a pension, profit sharing, stock bonus or stock-ownership plan. The revised definition for “payment” also includes any payment from a “separate fund”, as described, and would further require the trustee to allocate the internal income from any separate fund to income, thus protecting the estate tax marital deduction for the trust, in accordance with prescribed federal requirements.

Also, this proposed revision would revise the requirements for determining the amount of a payment that is required to be allocated to income for purposes of qualifying for a marital tax deduction under federal law, as specified, and for calculating the amount of tax required to be paid by a trustee based on income, as determined by receipts allocated to income for the year.

For purposes of the marital tax deduction, the proposed revision would require the trustee to determine, if the separate fund payer provides documentation reflecting the internal income of the separate fund to the trustee, that the internal income of each separate fund be allocated for the accounting period as if the separate fund were a trust subject to the proposed revision, except as provided.

The revision would require the trustee to allocate the balance of the payment to principal. Naming the marital trust as the IRA or plan beneficiary could ensure that any principal not distributed to the surviving spouse could be accumulated and be available to pass to the designated remainder beneficiaries upon the death of that spouse.

c. Amend ORS 129.420 (UPIA Section 505)

The proposed amendment would no longer place the trustee in the difficult position of how to pay the trust’s tax liabilities when a cash distribution received from an entity is not sufficient, as well as how to satisfy the required income distribution amount to the income beneficiary. The NCCUSL commissioners amended UPIA Section 505 to make it clear that a trustee of a mandatory income trust may in fact pay some or all of the tax liability on the trust’s share of the entity’s taxable income from income or principal receipts from the pass-through entity. They further clarified that the trustee is required to increase current year income distributions to the income beneficiary to the extent that the trust’s income tax liability is reduced by distributing the corresponding income receipts to the beneficiary.

The official comments to the Section 505 amendment which are included in this proposal contain an algebraic formula developed from the ‘revised language’ that might be used because the trust’s tax liability and amounts distributed to the beneficiary are interrelated. The formula, when properly implemented, supports the trustee’s actions that after deducting the proper income distributions paid to the beneficiary, the remaining cash is sufficient to satisfy the trust’s tax liability on its share of the entity’s taxable income as reduced by the tax deduction of the income distribution(s).

This proposed revision to ORS 129.420 would incorporate the amendments made to UPIA Section 505. For income tax purposes, the amount of income required to be distributed by a trustee is based upon the current year's trust income as determined by fiduciary accounting income, generally following statutory state law provisions. This revision, if enacted, would provide greater clarity and consistency for trusts administered under Oregon law.

4. PUBLIC POLICY IMPLICATION of this proposed legislative change:

a. Add Uniform Principal and Income Act Section References to ORS Chapter 129

The best resource for fiduciaries, beneficiaries and their advisors for interpretation of the Principal and Income Act is the 'comments' to the Act, as drafted by NCCUSL commissioners. Such cross-reference provides a means to promote more objective and fair application of UPIA provisions for all trust beneficiaries. The public policy implications of adding the UPIA section references would be favorable for beneficiaries, trustees and their professional advisors to enable them to more expeditiously determine which UPIA section commentaries are appropriate to consult for further analysis. At the same time the revisions to these statute headings should be 'revenue neutral' for Oregon taxpayers.

b. Amend ORS 129.355 (UPIA Section 409)

The public policy implication of this legislative proposal would continue the general policy of conformity to federal tax law and be favorable for beneficiaries and trustees to enable distributions to be more fairly allocated between income and principal as required by the safe harbor provisions of IRS Rev. Rul. 2006-26, and avoid possible unfavorable tax treatment under current tax laws. At the same time the revisions to this section should be 'revenue neutral' for Oregon taxpayers. Passage of the proposal would provide more tax stability for IRA and other retirement distributions in trust administration. Passage would promote community common sense and common conscience, having due regard for all circumstances for each particular relationship and situation.

c. Amend ORS 129.420 (UPIA Section 505)

The public policy implications of this legislative proposal would be favorable for beneficiaries and trustees and their professional advisors to enable distributions to be more fairly allocated between income and principal, as well as avoid possible disputes resulting from ambiguous statute provisions as outlined in Section "2" above. Passage of the proposal would provide more fairness and flexibility in Oregon trust administration. Passage would promote community common sense and common conscience, having due regard for all circumstances for each particular relationship and situation.

The current Oregon statutes, ORS 129.355 and ORS 129.420, must be amended in order to correct the current dilemmas described in Section '2' above. The proposed revision may need to be reviewed by the 'Appropriation' or 'Fiscal' legislative committees, but we believe it will be revenue neutral. It is not a State-mandated local program.

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

No, the Solution, as described in Section '3' above, requires a legislative solution, as these statutes are Oregon law, which these proposals, if enacted, would amend.

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

The ‘Workgroup for the Oregon UPIA Revisions’ consists of members who are active members of the Oregon State Bar and the Oregon Society of CPAs. These members have daily contact with trust fiduciaries and beneficiaries as well as seasoned experience with the trust administration intricacies described in Sections ‘2’ and ‘3’ above. Each member has participated in a joint effort to edit, review and prepare this revision proposal for consideration by the Legislative Committee members. The joint sponsorship by these professional organizations exemplifies the importance and urgency of the proposed revision.

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

As indicated in Sections ‘2’ and ‘6’ above, trust beneficiaries both income and remainder beneficiaries as well as fiduciaries both private and professional would be favorably impacted and support passage of the proposed revisions described above. Accountants and attorneys who are engaged to prepare tax returns, assist trustees with trust administration, consult on trust matters, and draft estate plans would experience less challenge because Oregon law would be coordinated with federal tax laws and more definitive language as stipulated in the UPIA Section 409 and 505 amendments.

Because the proposed revision should be tax revenue neutral, it is fair to assume that no group or constituency would appear to solicit opposition to the revision proposal. Several other states have previously enacted similar revisions to their statutes on these UPIA amendments made in 2008.

NOTE: EFFECTIVE DATE OF THIS REVISION, IF ENACTED

The representatives of NCCUSL informed us that U.S. Treasury officials informally urged that these revisions be adopted retroactively. However, because the retroactivity affects trust administration and income tax issues, they further suggested that the revision, if enacted, be retroactive to January 1 of the year in which the revision is enacted. Because this revision would benefit trust administration and income tax planning, the workgroup suggests a retroactive effective date of January 1, 2011, or earlier if permissible.

2. NCCUSL OFFICIAL COMMENTS TO THE SECTION 409 REVISION:

Marital deduction requirements. When an IRA or other retirement arrangement (a “plan”) is payable to a marital deduction trust, the IRS treats the plan as a separate property interest that by itself must qualify for the marital deduction. IRS Revenue Ruling 2006-26 said that, as written, Section 409 does not cause a trust to qualify for the IRS’ safe harbors. Revenue Ruling 2006-26 was limited in scope to certain situations involving IRAs and defined contribution retirement plans. Without necessarily agreeing with the IRS’ position in that ruling, the revision to this section is designed to satisfy the IRS’ safe harbor and to address concerns that might be raised for similar assets. No IRS pronouncements have addressed the scope of Code § 2056(b)(7)(C).

Subsection (f) [*subsection (6) of the proposed legislation*] requires the trustee to demand certain distributions if the surviving spouse so requests. The safe harbor of Revenue Ruling 2006-26 requires that the surviving spouse be separately entitled to demand the fund's income (without regard to the income from the trust's other assets) and the income from the other assets (without regard to the fund's income). In any event, the surviving spouse is not required to demand that the trustee distribute all of the fund's income from the fund or from other trust assets. Treas. Reg. § 20.2056(b)-5(f)(8).

Subsection (f) [*subsection (6) of the proposed legislation*] also recognizes that the trustee might not control the payments that the trustee receives and provides a remedy to the surviving spouse if the distributions under subsection (d)(1) are insufficient.

Subsection (g) [*subsection (7) of the proposed legislation*] addresses situations where, due to lack of information provided by the fund's administrator, the trustee is unable to determine the fund's actual income. The bracketed language is the range approved for unitrust payments by Treas. Reg. § 1.643(b)-1. In determining the value for purposes of applying the unitrust percentage, the trustee would seek to obtain the value of the assets as of the most recent statement of value immediately preceding the beginning of the year. For example, suppose a trust's accounting period is January 1 through December 31. If a retirement plan administrator furnishes information annually each September 30 and declines to provide information as of December 31, then the trustee may rely on the September 30 value to determine the distribution for the following year. For funds whose values are not readily available, subsection (g) relies on Code section 7520 valuation methods because many funds described in Section 409 are annuities, and one consistent set of valuation principles should apply whether or not the fund is, in fact, an annuity.

3. NCCUSL OFFICIAL COMMENTS TO THE SECTION 505 REVISION:

Taxes on Undistributed Entity Taxable Income. When a trust owns an interest in a pass-through entity, such as a partnership or S corporation, it must report its share of the entity's taxable income regardless of how much the entity distributes to the trust. Whether the entity distributes more or less than the trust's tax on its share of the entity's taxable income, the trust must pay the taxes and allocate them between income and principal.

Subsection (c) [*subsection (3) of proposed legislation*] requires the trust to pay the taxes on its share of an entity's taxable income from income or principal receipts to the extent that receipts from the entity are allocable to each. This assures the trust a source of cash to pay some or all of the taxes on its share of the entity's taxable income. Subsection 505(d) recognizes that, except in the case of an Electing Small Business Trust (ESBT), a trust normally receives a deduction for amounts distributed to a beneficiary. Accordingly, subsection 505(d) requires the trust to increase receipts payable to a beneficiary as determined under subsection (c) to the extent the trust's taxes are reduced by distributing those receipts to the beneficiary.

Because the trust's taxes and amounts distributed to a beneficiary are interrelated, the trust may be required to apply a formula to determine the correct amount payable to a beneficiary. This formula should take into account that each time a distribution is made to a beneficiary, the trust taxes are reduced and amounts distributable to a beneficiary are increased. The formula assures that after deducting distributions to a beneficiary, the trust has enough to satisfy its taxes on its share of the entity's taxable income as reduced by distributions to beneficiaries.

Example (1) – Trust T receives a Schedule K-1 from Partnership P reflecting taxable income of \$1 million. Partnership P distributes \$100,000 to T, which allocates the receipts to income. Both Trust T and income Beneficiary B are in the 35 percent tax bracket. Trust T’s tax on \$1 million of taxable income is \$350,000. Under Subsection (c) T’s tax must be paid from income receipts because receipts from the entity are allocated only to income. Therefore, T must apply the entire \$100,000 of income receipts to pay its tax. In this case, Beneficiary B receives nothing.

Example (2) - Trust T receives a Schedule K-1 from Partnership P reflecting taxable income of \$1 million. Partnership P distributes \$500,000 to T, which allocates the receipts to income. Both Trust T and income Beneficiary B are in the 35 percent tax bracket. Trust T’s tax on \$1 million of taxable income is \$350,000. Under Subsection (c), T’s tax must be paid from income receipts because receipts from P are allocated only to income. Therefore, T uses \$ 350,000 of the \$ 500,000 to pay its taxes and distributes the remaining \$ 150,000 to B. The \$150,000 payment to B reduces T’s taxes by \$52,500, which it must pay to B. But the \$52,500 further reduces T’s taxes by \$18,375, which it also must pay to B. In fact, each time T makes a distribution to B, its taxes are further reduced, causing another payment to be due B.

Alternatively, T can apply the following algebraic formula to determine the amount payable to B:

$$D = (C - R * K) / (1 - R)$$

D = Distribution to income beneficiary

C = Cash paid by the entity to the trust

R = tax rate on income

K = entity’s K-1 taxable income

Applying the formula to Example (2) above, Trust T must pay \$230,769 to B so that after deducting the payment, T has exactly enough to pay its tax on the remaining taxable income from P.

Taxable Income per K-1	1,000,000
Payment to beneficiary	230,769 ¹
Trust Taxable Income	\$ 769,231
35 percent tax	269,231
Partnership Distribution	\$ 500,000
Fiduciary’s Tax Liability	(269,231)
Payable to the Beneficiary	\$230,769

In addition, B will report \$230,769 on his or her own personal income tax return, paying taxes of \$80,769. Because Trust T withheld \$269,231 to pay its taxes and B paid \$80,769 taxes of its own, B bore the entire \$350,000 tax burden on the \$1 million of entity taxable income, including the \$500,000 that the entity retained that presumably increased the value of the trust’s investment entity.

If a trustee determines that it is appropriate to so, it should consider exercising the discretion granted in UPIA section 506 to adjust between income and principal. Alternatively, the trustee may exercise the power to adjust under UPIA section 104 to the extent it is available and appropriate

¹ $D = (C - R * K) / (1 - R) = (500,000 - 350,000) / (1 - .35) = \$230,769$. (D is the amount payable to the income beneficiary, K is the entity’s K-1 taxable income, R is the trust ordinary tax rate, and C is the cash distributed by the entity).

under the circumstances, including whether a future distribution from the entity that would be allocated to principal should be reallocated to income because the income beneficiary already bore the burden of taxes on the reinvested income. In exercising the power, the trust should consider the impact that future distributions will have on any current adjustments.

$D = (C - R * K) / (1 - R) = (500,000 - 350,000) / (1 - .35) = \$230,769$. (D is the amount payable to the income beneficiary, K is the entity's K-1 taxable income, R is the trust ordinary tax rate, and C is the cash distributed by the entity).

OREGON STATE BAR
Legislative Proposal
Part II – Legislative Language

1. ORS CHAPTER 129 HEADING CHANGES:

- 129.200. UPIA 101. Short title
- 129.205. UPIA 102. Definitions
- 129.210. UPIA 103. Fiduciary duties; general principles
- 129.215. UPIA 104. Trustee's power to adjust
- 129.250. UPIA 201. Determination and distribution of net income
- 129.255. UPIA 202. Distribution to residuary and remainder beneficiaries
- 129.270. UPIA 301. When right to income begins and ends
- 129.275. UPIA 302. Apportionment of receipts and disbursements when decedent dies or income interest begins
- 129.280. UPIA 303. Apportionment when income interest ends
- 129.300. UPIA 401. Character of receipts
- 129.305. UPIA 402. Distribution from trust or estate
- 129.308. UPIA 403. Business and other activities conducted by trustee
- 129.310. UPIA 404. Principal receipts
- 129.315. UPIA 405. Rental property
- 129.320. UPIA 406. Obligation to pay money
- 129.325. UPIA 407. Insurance policies and similar contracts
- 129.350. UPIA 408. Insubstantial allocations not required
- 129.355. UPIA 409. Deferred compensation, annuities and similar payments
- 129.360. UPIA 410. Liquidating asset
- 129.365. UPIA 411. Minerals, water and other natural resources
- 129.370. UPIA 412. Timber
- 129.375. UPIA 413. Property not productive of income
- 129.380. UPIA 414. Derivatives and options
- 129.385. UPIA 415. Asset-backed securities
- 129.400. UPIA 501. Disbursements from income
- 129.405. UPIA 502. Disbursements from principal
- 129.410. UPIA 503. Transfers from income to principal for depreciation
- 129.415. UPIA 504. Transfers from income to reimburse principal
- 129.420. UPIA 505. Income taxes
- 129.425. UPIA 506. Adjustments between principal and income because of taxes
- 129.450. UPIA 601. Uniformity of application and construction

2. PROPOSED REVISION TO ORS 129.355:

129.355 Deferred compensation, annuities and similar payments.

(1) In this section, the following terms have the following meanings:

(a) “[p] Payment” means a payment that a trustee may receive over a fixed number of years or during the life of one or more individuals because of services rendered or property transferred to the payer in exchange for future payments. The term includes a payment made in money or property from the payer’s general assets or from a separate fund created by the payer, *[including a private or commercial annuity, an individual retirement account and a pension, profit sharing, stock bonus or stock-ownership plan.]* **For purposes of subsections (4), (5), (6), and (7), the term also includes any payment from any separate fund, regardless of the reason for the payment.**

(b) **“Separate fund” includes a private or commercial annuity, an individual retirement account, and a pension, profit-sharing, stock-bonus, or stock-ownership plan.**

(2) Except as provided in subsection ([5] **8**) of this section, to the extent that a payment is characterized as interest, [or] a dividend; or a payment made in lieu of interest or a dividend, a trustee shall allocate **that portion of [it] the payment** to income. The trustee shall allocate to principal the balance of the payment and any other payment received in the same accounting period that is not characterized as interest, a dividend or an equivalent payment.

(3) Except as provided in subsection ([5] **8**) of this section, if no part of a payment is characterized as interest, a dividend or an equivalent payment, and all or part of the payment is required to be made, a trustee shall allocate to income 10 percent of the part that is required to be made during the accounting period and the balance to principal. If no part of a payment is required to be made or the payment received is the entire amount to which the trustee is entitled, the trustee shall allocate the entire payment to principal. For purposes of this subsection, a payment is not “required to be made” to the extent that it is made because the trustee exercises a right of withdrawal.

(4) *[If, to obtain an estate tax marital deduction for a trust, a trustee must allocate more of a payment to income than provided for by this section, the trustee shall allocate to income the additional amount necessary to obtain the marital deduction.]* **Except as otherwise provided in subsection (5), subsections (6) and (7) apply, and subsections (2) and (3) shall [do] not apply, in determining the allocation of a payment made from a separate fund to either of the following:**

(a) a trust to which an election to qualify for a marital deduction under Section 2056(b)(7) of the Internal Revenue Code of 1986 [, as amended][,26 U.S.C. Section 2056(b)(7)][[as amended] has been made; or

(b) a trust that qualifies for the marital deduction under Section 2056(b)(5) of the Internal Revenue Code of 1986 [, as amended][,26 U.S.C. Section 2056(b)(5)][[, as amended].

(5) Subsections (4), (6), and (7) shall [do] not apply if and to the extent that the series of payments would, without the application of subsection (4), qualify for the marital deduction under Section 2056(b)(7)(C) of the Internal Revenue Code of 1986 [, as amended][, 26 U.S.C. Section 2056(b)(7)(C)][[, as amended].

(6) A trustee shall determine the internal income of each separate fund for the accounting period as if the separate fund were a trust subject to this [act], except as provided in subsection (7).

Upon request of the surviving spouse, the trustee shall demand that the person administering the separate fund distribute the internal income to the trust. The trustee shall allocate a payment from the separate fund to income to the extent of the internal income of the separate fund and distribute that amount to the surviving spouse. The trustee shall allocate the balance of the payment to principal. Upon request of the surviving spouse, the trustee shall allocate principal to income to the extent the internal income of the separate fund exceeds payments made from the separate fund to the trust during the accounting period.

(7) If a trustee cannot determine the internal income of a separate fund but can determine the value of the separate fund, the internal income of the separate fund is deemed to equal four percent of the fund's value, according to the most recent statement of value preceding the beginning of the accounting period. If the trustee can determine neither the internal income of the separate fund nor the fund's value, the internal income of the fund is deemed to equal the product of the interest rate and the present value of the expected future payments, as determined under Section 7520 of the Internal Revenue Code of 1986 [, as amended][, 26 U.S.C. Section 7520][, as amended], for the month preceding the accounting period for which the computation is made.

(/5/ 8) (a) An increase in value of the following obligations over the value of the obligations at the time of acquisition by the trust is distributable as income:

- (A) A zero coupon security.
- (B) A deferred annuity contract surrendered wholly or partially before annuitization.
- (C) A life insurance contract surrendered wholly or partially before the death of the insured.
- (D) Any other obligation for the payment of money that is payable at a future time in accordance with a fixed, variable or discretionary schedule of appreciation in excess of the price at which it was issued.

(b) For purposes of this subsection, the increase in value of an obligation is available for distribution only when the trustee receives cash on account of the obligation. If the obligation is surrendered or partially liquidated, the cash available must be attributed first to the increase. The increase is distributable to the income beneficiary who is the beneficiary at the time the cash is received.

(/6/ 9) This section does not apply to payments to which ORS 129.360 applies.

3. PROPOSED REVISION TO ORS 129.420:

129.420 Income taxes. (1) A tax required to be paid by a trustee based upon receipts allocated to income must be paid from income.

(2) A tax required to be paid by a trustee based on receipts allocated to principal must be paid from principal, even if the tax is called an income tax by the taxing authority.

(3) A tax required to be paid by a trustee on the trust's share of an entity's taxable income must be paid [*proportionately*]:

and (a) From income to the extent that receipts from the entity are allocated only to income;

(b) From principal to the extent that:

[(A) R] receipts from the entity are allocated only to principal; [and]

[(B) The trust's share of the entity's taxable income exceeds the total receipts described in paragraph (a) of this subsection and subparagraph (A) of this paragraph.]

(c) proportionately from principal and income to the extent that receipts from the entity are allocated to both income and principal; and

(d) from principal to the extent that the tax exceeds the total receipts from the entity.

(4) *[For purposes of this section, receipts allocated to principal or income must be reduced by the amount distributed to a beneficiary from principal or income for which the trust receives a deduction in calculating the tax.]* After applying subsections (1) through (3), the trustee shall adjust income or principal receipts to the extent that the trust's taxes are reduced because the trust receives a deduction for payments made to a beneficiary.

4. PROPOSED TRANSITIONAL RULES:

ORS 129. Transitional matters for ORS 129.355. ORS 129.355, as amended by this [amendment], applies to a trust described in ORS 129.355(4) on and after the following dates:

- (1) If the trust is not funded as of January 1, 2011, the date of the decedent's death.
- (2) If the trust is initially funded in the calendar year beginning January 1, 2011, the date of the decedent's death.
- (3) If the trust is not described in paragraph (1) or (2), January 1, 2011.

ORS 129. Transitional matters for ORS 129.420. ORS 129.420 as amended by this [amendment] shall take effect on January 1, 2011.

OREGON STATE BAR
Legislative Proposal
Part I – Legislative Summary

RE: Disposition of Gifted Property

Bar Group: The Estate Planning Section and the Family Law Section

*Substantive language of all OSB section sponsored law improvement proposals have been provided by OSB sections
at the direction of each section's executive committee.*

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1. Has this been introduced in a prior session? No Yes Year: 2009 Bill#: HB 3338
Does this amend current law or programs? No Yes. Amends ORS 107.105(1)(f)
-

2. PROBLEM PRESENTED (including level of severity):

This proposal addresses the disposition, in the dissolution of a marriage, of property gifted to and held separately by one party during the marriage.¹

Under current 107.105(1)(f), spouses are presumed to have contributed equally to the acquisition of marital assets. The presumption is a rebuttable one. Well established case law states that as a general rule, when the presumption has not been rebutted, the value of a marital asset is to be equally divided upon the dissolution of the marriage.

If the presumption of equal contribution is rebutted, the asset in question is not presumptively shared but is still within the dispositional authority of the court to divide as is “just and proper”, giving consideration to the degree of contribution by each spouse.

Neither ORS 107.105 nor any other Oregon statute specifically addresses the disposition of gifted property upon dissolution of a marriage.

As established by a line of appellate cases, to rebut the presumption of equal contribution to the acquisition of gifted property the burden is on the recipient spouse to prove that there was no intent by the donor that the non-recipient spouse share the asset.

In Olesberg and Olesberg, 206 Or App 496, rev den 342 Or 633 (2007), the appellate court further defined its interpretation of ORS 107.105(1)(f) by holding that the donative intent of the donor cannot be established merely by proving the donor specifically named one spouse as the recipient and not the other. In other words, the fact that Grandpa left money to Husband by specifically naming him in his will, but not Wife, is not enough to prove that Grandpa did not intend Wife to be the object of his donative intent and, consequently, is not enough to overcome the presumption of equal contribution.

The Olesburg ruling is widely viewed by both estate planning attorneys and family law attorneys as

being contrary to the most basic and firmly held tenets of estate planning: A testator should be able to bequest property to a specific person and know that the property is, at least presumptively, going to go to that person and not someone else. The Olesberg ruling has been the subject of great discussion in the estate planning and family law legal community and is viewed as a serious problem badly in need of a legislative remedy.

In addition to the Olesberg issue discussed above, the proposal breaks ORS 107.105(1)(f) down into subject based subparagraphs, without making substantive changes. As it currently exists, ORS 107.105(1)(f) is a single extraordinarily long paragraph reflecting countless patch-work additions over many legislative sessions. This is an appropriate time to clean it up.

¹ The proposal defines gifted property as that acquired by one party through gift, devise, bequest, operation of law, beneficiary designation or inheritance.

Technical Correction/Housekeeping

3. SOLUTION:

The proposal removes gifted property from the presumption of equal contribution, while retaining the authority to divide the property as may be “just and proper” depending upon the facts of a particular case. In addition, as noted above, the proposal cleans up the format of the statute.

4. PUBLIC POLICY IMPLICATION of this proposed legislative change:

The proposal codifies what was, prior to Olesberg, the analysis established by case law for the disposition of gifted property. The proposal does not alter the fundamental policy directive that the court divide marital property in a manner that is just and proper.

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

No.

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

The bill is being jointly sponsored by the two bar sections most directly impacted by the Olesberg ruling and the proposed statutory amendment.

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

Estate planners and their clients would be most (and positively) impacted. To the extent the proposal does not change the pre-Olesberg application of family law; little actual impact to family law cases is envisioned.

OREGON STATE BAR
Legislative Proposal
Part II – Legislative Language

ORS 107.105(1)

(f) For the division or other disposition between the parties of the real or personal property, or both, of either or both of the parties as may be just and proper in all the circumstances. **In determining the division of property under this paragraph, the following apply:**

(A) A retirement plan or pension or an interest therein shall be considered as property.

(B) The court shall consider the contribution of a *[spouse]* **party** as a homemaker as a contribution to the acquisition of marital assets.

(C) **Except as provided in subparagraph (D),** there is a rebuttable presumption that both *[spouses]* **parties** have contributed equally to the acquisition of property during the marriage, whether such property is jointly or separately held.

(D) (i) **Property acquired by gift to one party during the marriage and separately held by that party on a continuing basis from the time of receipt is not subject to a presumption of equal contribution.**

(ii) **For purposes of this subparagraph, “property acquired by gift” means property acquired by one party through gift, devise, bequest, operation of law, beneficiary designation or inheritance.**

(E) Subsequent to the filing of a petition for annulment or dissolution of marriage or separation, the rights of the parties in the marital assets shall be considered a species of co-ownership, and a transfer of marital assets under a judgment of annulment or dissolution of marriage or of separation entered on or after October 4, 1977, shall be considered a partitioning of jointly owned property.

(F) The court shall require full disclosure of all assets by the parties in arriving at a just property division.

(G) In arriving at a just and proper division of property, the court shall consider reasonable costs of sale of assets, taxes and any other costs reasonably anticipated by the parties.

(H) (i) If a *[spouse]* **party** has been awarded spousal support in lieu of a share of property, the court shall so state on the record and shall order the obligor to provide for and maintain life insurance in an amount commensurate with the obligation and designating the obligee as beneficiary for the duration of the obligation.

(ii) If the obligor dies prior to the termination of such support and such insurance is not in force, the court may modify the method of payment of spousal support under the 2 judgment or order of support from installments to a lump sum payment to the obligee from the estate of the obligor in an amount commensurate with the present value of the spousal support at the time of death.

(iii) The obligee or attorney of the obligee shall cause a certified copy of the judgment to be delivered to the life insurance company or companies.

(iv) If the obligee or the attorney of the obligee delivers a true copy of the judgment to the life insurance company or companies, identifying the policies involved and requesting such notification under this section, the company or companies shall notify the obligee, as beneficiary of the insurance policy, whenever the policyholder takes any action that will change the beneficiary or reduce the benefits of the policy. Either party may request notification by the insurer when premium payments have not been made. If the obligor is ordered to provide for and maintain life insurance, the obligor shall provide to the obligee a true copy of the policy. The obligor shall also provide to the obligee written notice of any action that will reduce the benefits or change the designation of the beneficiaries under the policy. / / / /

OREGON STATE BAR
Legislative Proposal
Part I – Legislative Summary

RE: Termination of Attorney-Client Relationships

Bar Group: Family Law Section

*Substantive language of all OSB section sponsored law improvement proposals have been provided by OSB sections
at the direction of each section's executive committee.*

1. Has this been introduced in a prior session? No Yes Years(s) Bill#(s)

Does this amend current law or programs? No Yes. Amends ORS 9.380

2. PROBLEM PRESENTED (including level of severity):

There is currently no uniform procedure for the termination of an attorney-client relationship upon conclusion of a case without filing a motion, affidavit and order allowing withdrawal of the attorney. Requiring that procedure when the reason for the withdrawal is the conclusion of the matter for which the attorney has been hired is unnecessarily burdensome and creates expenses that must be passed on the client or absorbed by the attorney. The requirement of filing a motion, affidavit and order creates unnecessary work for court staff and judges.

Technical Correction/Housekeeping

3. SOLUTION:

Judicial efficiency would be promoted and the cost to litigants lessened if there was statutory authorization for filing, upon the conclusion of a case, a simple notice that the attorney - client relationship was terminated for the reason that the case was concluded. The filing of such a notice will allow the attorney to cease continuing to be viewed as the "attorney of record" in the eyes of the court when the matter for which the attorney was hired has been concluded and would lessen the work load of the courts.

4. PUBLIC POLICY IMPLICATION of this proposed legislative change:

None have been identified or can be envisioned.

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

No.

6. COULD ANOTHER SECTION OR GROUP MORE APPROPRIATELY

INTRODUCE THE BILL? If so, have you suggested it to the section or group?

It has arisen in the Family Law Section because compared to other areas of practice family law attorneys appear as attorney of record in many cases.

7. IDENTIFY THE GROUP OR CONSTITUENCIES THAT WOULD BE MOST

IMPACTED or interested in this change. Who would support it and who would oppose it?

All attorneys who at some point become an attorney of record in a case would be impacted by, and we believe would benefit from, this legislation, as would their clients. As noted above, the legislation would avoid the need for the courts to file and process motions and orders to withdraw at the conclusion of a case. There is no known opposition and no known reason it would be opposed by any group. This proposal has the support of the Executive Committee of the Family Law Section.

OREGON STATE BAR
Legislative Proposal
Part II – Legislative Language

Amend ORS 9.380 as follows:

9.380 Mode of changing attorneys. The attorney in an action, suit or proceeding may be changed, or the relationship of attorney and client terminated, as follows:

- (1) Before judgment or final determination, upon the consent of the attorney filed with the clerk or entered in the appropriate record of the court; ~~or~~
 - (2) At any time, upon the order of the court or judge thereof, based on the application of the client or the attorney, for good and sufficient cause; **or**
 - (3) After conclusion of the action, upon the filing of a notice of termination of attorney - client relationship.**
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OREGON STATE BAR
Legislative Proposal
Part I – Legislative Summary

RE: Amendments to Dissolution and Parental Rights Statutes

Bar Group: Family Law

*Substantive language of all OSB section sponsored law improvement proposals have been provided by OSB sections
at the direction of each section's executive committee.*

1. Has this been introduced in a prior session? No Yes Years(s) Bill#(s)

Does this amend current law or programs? No Yes. ORS Ch. 107 AND 109

2. PROBLEM PRESENTED (including level of severity):

This proposal addresses three areas of deficiency in ORS Chapters 107 and 109. First it eliminates an unnecessary statutory waiting period on dissolution of marriage proceedings. Second it amends the section of statute dealing with post-judgment ex parte temporary custody or parenting time orders to require that the party filing the request also request a modification of the original judgment to reconcile the judgment with any changes resulting from the temporary order. Finally this proposal makes a technical correction to the provision of statute establishing state policy that unmarried parents have the same rights as married or divorced parents, by updating internal statutory references to accommodate other recent statutory changes.

Part 1 –

ORS 107.065 prohibits a trial or hearing on the merits of a dissolution of marriage proceeding from taking place within 90 days of the date of service of summons. If the dissolution proceeding is settled out of court by stipulation of the parties – as most cases are – obtaining a waiver of the 90 day waiting period requires the preparation and filing of a separate motion and affidavit and the inclusion in the judgment of the grounds for waiver. The 90 day waiting period serves no practical, financial or judicial purpose. To the contrary, obtaining a waiver of the waiting period causes the parties to incur unnecessary expense and creates additional work for the courts when dealing with self represented litigants.

Part 2 –

ORS 107.139 sets forth the court's authority to enter a post-judgment ex-parte temporary order regarding custody or parenting time upon the finding that the child is in immediate danger. There is no

requirement in this statute, which is only for a temporary order, that the provisions regarding custody or parenting time in the pre-existing judgment be adjudicated. All parties would benefit by reconciliation of an ex-parte temporary order with a pre-existing judgment.

Part 3 –

ORS 109.103(1) sets forth the current state policy that unmarried parents of a minor child(ren) have the same rights and responsibilities regarding custody, support and parenting time as married or divorced parents have and references provisions of ORS 107.093 to 107.425 that related to custody, support and parenting time. Amendments to ORS 107 have added provisions related to custody, support and parenting that are not covered in ORS 109.103's reference to ORS 107.093 to 107.425.

Technical Correction/Housekeeping

3. SOLUTION:

Part 1 –

Repeal ORS 107.065.

Part 2 –

Amend ORS 107.139 to include a requirement that with a request for post-judgment temporary order regarding custody or parenting time, the party seeking such relief simultaneously file pursuant to ORS 107,135 a motion to set aside, alter or modify the portion pre-existing judgment that provides for custody, parenting time or visitation.

Part 3 –

Amend ORS 109.103(1) to include a reference to provisions from ORS 107 related to custody, support and parenting time that are outside the range of ORS 107.093 to 107.425.

4. PUBLIC POLICY IMPLICATION of this proposed legislative change:

Both parts two and three conform statute to existing public policy, and should have no public policy implications. Likewise, part one appears to have no public policy implications. As near as we can determine, the statute was enacted when Oregon moved to a “no-fault” system of dissolution of marriage due to concerns that the change would result in an unwieldy flood of litigation.

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

No.

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

All of these proposals are updates to Family Law statutes, and the Family Law Section is the most appropriate sponsor.

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

This proposal has been approved by the Executive Committee of the Family Law Section. The section is unaware of any groups that object to any of these changes. With respect to the change to ORS 107.139, the only negative affect would be the filing fees and costs incurred to prepare and file pleadings to modify the judgment.

OREGON STATE BAR
Legislative Proposal
Part II – Legislative Language

PART 1 –

ORS 107.065 is repealed.

PART 2 –

107.139 Post-judgment ex parte temporary custody or parenting time order; hearing. (1)(a) Following entry of a judgment, a court may enter ex parte a temporary order providing for the custody of, or parenting time with, a child if:

(A) A parent of the child is present in court and presents an affidavit alleging that the child is in immediate danger;

(B) The parent has made a good faith effort to confer with the other party regarding the purpose and time of this court appearance; and

(C) The court finds by clear and convincing evidence, based on the facts presented in the parent's testimony and affidavit and in the testimony of the other party, if the other party is present, that the child is in immediate danger.

(b) The party requesting an order under this subsection shall provide the court with telephone numbers where the party can be reached at any time during the day and a contact address.

(c) A copy of the order and the supporting affidavit must be served on the other party in the manner of service of a summons under ORCP 7. The order must include the following statement:

Notice: You may request a hearing on this order as long as it remains in effect by filing with the court a request for a hearing. In the request you must tell the court and the other party that you object to the order on the ground that the child was not in immediate danger at the time the order was issued. In the request you must also inform the court of your telephone number or contact number and your current residence, mailing or contact address.

(2)(a) A party against whom an order is entered under subsection (1) of this section may request a hearing by filing with the court a hearing request described in subsection (1) of this section at any time while the order is in effect.

(b) The court shall hold a hearing within 14 days after receipt of the request for the hearing. The court shall notify each party of the time, date and place of the hearing.

(c) An order issued under subsection (1) of this section remains in effect through the date of the hearing. If the party against whom the order was entered fails to appear at the hearing without good cause, the court shall continue the order in effect. If the party who obtained the order fails to appear at the hearing without good cause, the court shall vacate the order.

(d) The issue at a hearing to contest a temporary order for the custody of, or parenting time with, a child is limited to whether the child was in immediate danger at the time the order was issued.

(3) The State Court Administrator shall prescribe the content and form of a request for a hearing described in this section.

(4) A party seeking relief under this section shall concurrently file pursuant to ORS 107.135 a motion to set aside, alter or modify the portion of the judgment that provides for custody, parenting time or visitation.

PART 3 –

109.103 Proceeding to determine custody or support of child. (1) If a child is born to an unmarried woman and paternity has been established under ORS 109.070, or if a child is born to a married woman by a man other than her husband and the man's paternity has been established under ORS 109.070, either parent may initiate a civil proceeding to determine the custody or support of, or parenting time with, the child. The proceeding shall be brought in the circuit court of the county in which the child resides or is found or in the circuit court of the county in which either parent resides. The parents have the same rights and responsibilities regarding the custody and support of, and parenting time with, their child that married or divorced parents would have, and the provisions of ORS 107.093 to [107.425] **107.449 and 107.755 to 107.795** that relate to custody, support and parenting time apply to the proceeding.

OREGON STATE BAR
Legislative Proposal
Part I – Legislative Summary

RE: Temporary Support Orders

Bar Group: Family Law Section

*Substantive language of all OSB section sponsored law improvement proposals have been provided by OSB sections
at the direction of each section's executive committee.*

1. Has this been introduced in a prior session? No Yes Years(s) Bill#(s)

Does this amend current law or programs? No Yes. Amends ORS 107.095 and 107.105

2. PROBLEM PRESENTED (including level of severity):

This proposal addresses three problems.

1. In a dissolution of marriage proceeding there is authorization under ORS 107.095 for the filing of a motion for temporary child or spousal support. It is not uncommon for a hearing to never take place on such motions, usually when the proximity of a temporary support hearing to the final dissolution hearing makes it impractical for the court to schedule two separate hearings. There is currently no authority under ORS 107.105 for a final general judgment to include an award of support that was requested during the pendency of the case but never ordered due to the lack of a hearing. This is a moderate problem.

2. Currently, ORS 107.095(1)(a) provides authority for an award of "suit money" to be paid by one party on behalf of another party during the pendency of a case, but requires such money to be paid to the clerk of the court. The clerk of the court is in fact not set up to receive such payments or facilitate the forwarding of such suit money to the party who is to benefit from it. The proposal conforms the statute to common practice, which is to pay suit money directly to the party to whom it is awarded.

3. ORS 107.095(1)(a) also states that an award of temporary spousal support is to be paid "to the Department of Justice, court clerk or court administrator, whichever is appropriate." In fact, none of the three payees specified in the statute is appropriate. The Department of Justice is no longer required to provide accounting and distribution services for spousal support payments, and neither the clerk nor the administrator of the court currently functions as a financial middleman for the purpose of passing on spousal support payments to the obligee. In fact, an attempt to pay temporary spousal support as currently proscribed by the statute would ensure that an obligee who needs support would not receive cash in hand for a significant period of time. The proposal conforms the statute to common practice, which is to pay temporary spousal support directly to the party to whom it is awarded.

Technical Correction/Housekeeping

3. SOLUTION:

For problem 1:

Amend ORS 107.095 and 107.105 to allow a general judgment to include, if deemed appropriate by the court, accrued child or spousal support that could have been paid during the pendency of the proceeding. Such support could only be ordered from the date a motion requesting such support was served on the obligor.

For problems 2 and 3:

Amend ORS 107.095 to provide that awards of suit money and temporary spousal support are paid to the obligee creditor.

4. PUBLIC POLICY IMPLICATION of this proposed legislative change:

None have been identified or can be envisioned.

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

No.

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

If the current statute was ever complied with the Oregon Judicial Department would probably take quick notice, as such compliance would become a work load issue for the courts. The proposal has been forwarded to OJD for comment.

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

The proposal has the support of the Executive Committee of the Family Law Section. We are not aware of any opposition and suspect the bill would have OJD support.

OREGON STATE BAR
Legislative Proposal
Part II – Legislative Language

Amend ORS 107.095 as follows:

107.095 Provisions court may make after commencement of suit and before judgment. (1) After the commencement of a suit for marital annulment, dissolution or separation and until a general judgment therein, the court may provide as follows:

(a) That a party pay to **another party** *[the clerk of the court]* such amount of money as may be necessary to enable the other party to prosecute or defend the suit, including costs of expert witnesses, and also such amount of money to **another party** *[to the Department of Justice, court clerk or court administrator, whichever is appropriate,]* as may be necessary to support and maintain the other party.

(b) For the care, custody, support and maintenance, by one party or jointly, of the minor children as described in ORS 107.105 (1)(a) and for the parenting time rights as described in ORS 107.105 (1)(b) of the parent not having custody of such children.

* * * *

(6) Support under this subsection (1)(a) or (b) of this section may be awarded in the first instance in a general judgment entered under ORS 107.105 and may be awarded retroactive to the date a motion for relief under this section was served or to any date thereafter.

Amend ORS 107.105 as follows:

* * * * *

(7) A general judgment entered under this section may include an award of support as provided by ORS 107.095 (6) / / / /

OREGON STATE BAR
Legislative Proposal
Part I – Legislative Summary

RE: Urban Reserve Statutory Correction

Bar Group: Real Estate and Land Use

*Substantive language of all OSB section sponsored law improvement proposals have been provided by OSB sections
at the direction of each section's executive committee.*

1. Has this been introduced in a prior session? No Yes Years(s) Bill#(s)

Does this amend current law or programs? No Yes. ORS 195.145

2. PROBLEM PRESENTED (including level of severity):

ORS 197.626 says that a local decision to designate an urban reserve area goes to LCDC for review. ORS 195.145(1)(a), however, says that a local government designates an urban reserve area “subject to ORS 197.610 to 197.625.” Accordingly, the series reference in 195.145 needs to be amended to read: “. . . ORS 197.610 to 197.626.”

This reference in ORS 195.145(1)(a) was missed when ORS 197.626 was enacted and despite subsequent amendments to ORS 195.145.

Technical Correction/Housekeeping

3. SOLUTION:

Amend ORS 195.145(1)(a) to say:

“(a) Local governments may cooperatively designate lands outside urban growth boundaries as urban reserves subject to ORS 197.610 to 197.62[5]6.”

Note: *Italics denote deleted language.* **Bold denotes added language.**

4. PUBLIC POLICY IMPLICATION of this proposed legislative change:

Leaving the current reference in 195.145 creates confusion about the venue for review of the local decision to designate urban reserve lands. As written, the reference in 195.145 says that the local decision is a PAPA and goes to LUBA. ORS 197.626, however, says that it goes to LCDC.

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

No. This is purely a matter of a statutory reference.

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

No. This is exclusively a land use matter.

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

Local governments, anyone appealing a local government decision regarding urban reserve designations, LUBA and LCDC.

OREGON STATE BAR
Legislative Proposal
Part II – Legislative Language

195.145 Urban reserves; when required; limitation; rules. (1) To ensure that the supply of land available for urbanization is maintained:

(a) Local governments may cooperatively designate lands outside urban growth boundaries as urban reserves subject to ORS 197.610 to 197.62[5]6.

(b) Alternatively, a metropolitan service district established under ORS chapter 268 and a county may enter into a written agreement pursuant to ORS 190.003 to 190.130, 195.025 or 197.652 to 197.658 to designate urban reserves. A process and criteria developed pursuant to this paragraph are an alternative to a process or criteria adopted pursuant to paragraph (a) of this subsection.

(2)(a) The Land Conservation and Development Commission may require a local government to designate an urban reserve pursuant to subsection (1)(a) of this section during its periodic review in accordance with the conditions for periodic review under ORS 197.628.

(b) Notwithstanding paragraph (a) of this subsection, the commission may require a local government to designate an urban reserve pursuant to subsection (1)(a) of this section outside of its periodic review if:

(A) The local government is located inside a Primary Metropolitan Statistical Area or a Metropolitan Statistical Area as designated by the Federal Census Bureau upon November 4, 1993; and

(B) The local government has been required to designate an urban reserve by rule prior to November 4, 1993.

(3) In carrying out subsections (1) and (2) of this section:

(a) Within an urban reserve, neither the commission nor any local government shall prohibit the siting on a legal parcel of a single family dwelling that would otherwise have been allowed under law existing prior to designation as an urban reserve.

(b) The commission shall provide to local governments a list of options, rather than prescribing a single planning technique, to ensure the efficient transition from rural to urban use in urban reserves.

(4) Urban reserves designated by a metropolitan service district and a county pursuant to subsection (1)(b) of this section must be planned to accommodate population and employment growth for at least 20 years, and not more than 30 years, after the 20-year period for which the district has demonstrated a buildable land supply in the most recent inventory, determination and analysis performed under ORS 197.296.

(5) A district and a county shall base the designation of urban reserves under subsection (1)(b) of this section upon consideration of factors including, but not limited to, whether land proposed for designation as urban reserves, alone or in conjunction with land inside the urban growth boundary:

(a) Can be developed at urban densities in a way that makes efficient use of existing and future public infrastructure investments;

- (b) Includes sufficient development capacity to support a healthy urban economy;
 - (c) Can be served by public schools and other urban-level public facilities and services efficiently and cost-effectively by appropriate and financially capable service providers;
 - (d) Can be designed to be walkable and served by a well-connected system of streets by appropriate service providers;
 - (e) Can be designed to preserve and enhance natural ecological systems; and
 - (f) Includes sufficient land suitable for a range of housing types.
- (6) The commission shall adopt by goal or by rule a process and criteria for designating urban reserves pursuant to subsection (1)(b) of this section.
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OREGON STATE BAR
Legislative Proposal
Part I – Legislative Summary

RE: Domestic Partner Survivorship

Bar Group: Oregon State Bar Real Estate and Land Use Section

*Substantive language of all OSB section sponsored law improvement proposals have been provided by OSB sections
at the direction of each section's executive committee.*

1. Has this been introduced in a prior session? No Yes Years(s) Bill#(s)

Does this amend current law or programs? No Yes. ORS Statute: 93.180 and 93.280

2. PROBLEM PRESENTED (including level of severity):

Existing statute is unclear as to whether tenants by the entirety apply to registered domestic partnerships or not. The definition clearly does not and yet ORS 106.340 mandates that registered domestic partners have the same rights and privileges as a married couple. Because of this possible confusion children or other heirs of a domestic partner might claim in probate or other action that title did not lie in survivorship in those cases where only the language “as tenants by the entirety” is used without further survivorship language. ORS 93.180 describes tenants by the entirety as “husband and wife,” not as a “married couple”. Tenants by the entirety is not a status created by statute, it is a status created by common law and further defined by statute. There are over 1300 attorneys in Oregon who are members of the Real Estate and Land Use Section and regularly practice real estate law. They do not have a uniform interpretation of the current statute. It is inevitable that in the case of a large intestate estate a legal challenge to the inheritance would be made. In addition a lien claimant of one of the domestic partners could attempt to execute against the property by challenging this statute. Passing this law closes a loophole that otherwise could be costly to a surviving domestic partner and could even deprive him or her of their inheritance depending on how the courts rule.

Technical Correction/Housekeeping

3. SOLUTION:

A simple amendment to current statutes to make clear and certain the intention of Chapter 99.

4. PUBLIC POLICY IMPLICATION of this proposed legislative change:

No public policy issue.

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

No. It is likely that there will be varying interpretations of this statute that could lead to court action.

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

No. It is appropriate that this statute's clarification be initiated by the Real Estate Section.

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

It is likely to be unopposed, however there are those who feel that any clarification of ORS 106.340 in other statutes weakens the case that marriages and domestic partnerships are to be treated the same. Since ORS 106.340 clearly states that they are not the same thing, it is felt that this clarification will enable the intent of the chapter to be fulfilled. It is likely to impact the estate and probate section in the future should the clarification not be made. It is likely to be supported by the real estate community.

OREGON STATE BAR
Legislative Proposal
Part II – Legislative Language

A. Section 1: ORS 93.180 is amended to read:

- (1) A conveyance or devise of real property, or an interest in real property, that is made to two or more persons:
 - a. Creates a tenancy in common unless the conveyance or devise clearly and expressly declares that the grantees or devisees take the real property with right of survivorship.
 - b. Creates a tenancy by the entirety if the conveyance or devise is to a husband and wife **or to domestic partners registered in the State of Oregon under Chapter 99 Oregon Laws 2007** unless the conveyance or devise clearly and expressly declares otherwise.
 - c. Creates a joint tenancy as described in ORS 93.190 if the conveyance or devise is to a trustee or personal representative.
- (2) A declaration of a right to survivorship creates a tenancy in common in the life estate with cross-contingent remainders in the fee simple.
- (3) Except as provided in ORS 93.190, joint tenancy in real property is abolished and the use in a conveyance or devise of the words “joint tenants” or similar words without any other indication of an intent to create a right of survivorship creates a tenancy in common.

B. Section 2: Section (3) ORS 93.280 is amended to read:

- (3) Any “person” mentioned in this section may be a married person **or a domestic partner registered in the State of Oregon**, and any “persons” so mentioned may be married to each other **or Oregon registered domestic partners with each other.**

OREGON STATE BAR
Legislative Proposal
Part I – Legislative Summary

RE: Department of Revenue Requirements

Bar Group: Taxation Section

*Substantive language of all OSB section sponsored law improvement proposals have been provided by OSB sections
at the direction of each section's executive committee.*

1. Has this been introduced in a prior session? No Yes Years(s) Bill#(s)

Does this amend current law or programs? No Yes. 316.032(2), 317.013(2)

2. PROBLEM PRESENTED (including level of severity):

Oregon law generally incorporates federal income tax law, but federal law can vary from circuit to circuit. Moreover, the IRS may have an official position that differs from that of the circuit whose law applies to a particular taxpayer. Presently, the above statutes say that, when there is a conflict between two or more federal courts, the Oregon Department of Revenue must follow the rule observed by the Internal Revenue Service. This provision has been interpreted to mean that the Department must follow the IRS's position, even if that position would be different from the federal law of the taxpayer's federal circuit that binds both the taxpayer and the IRS. This can lead to circumstances in which a taxpayer is required to treat a transaction one way when filing the taxpayer's federal income tax return, but the Department of Revenue is required to treat the transaction differently for Oregon income tax purposes. This issue arose in a recent Oregon Tax Court case (*Department of Revenue v. Marks*, No. 4797 (Nov. 3, 2009)); however, the court found that there was no actual federal conflict, so the issue was not decided.

Note that the text of ORS 316.032(2) and 317.013(2) are identical. They are parallel provisions that apply to the personal income tax law and the corporation excise and income tax law, respectively. The proposal would change both provisions.

Technical Correction/Housekeeping

3. SOLUTION:

Delete the second sentence in ORS 316.032(2) and 317.013(2) as described above. Deleting the sentence would mean that the Department would no longer be required to follow a position that may be different from the position the taxpayer is required to follow. The Department still could choose to take a different position, but the mere fact of a circuit split would no longer bind the Department to automatically take the IRS's official position.

4. PUBLIC POLICY IMPLICATION of this proposed legislative change:

The change would allow greater consistency between federal law and Oregon law. It would reduce the number of circumstances in which the Department is automatically required to disagree with taxpayers, while still allowing the Department to disagree if it chooses to do so.

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

No. In initial communications between the tax section and the Department, the Department has indicated that an administrative rule would not be possible because the Department has taken the position in litigation that it is required to follow the IRS's position when federal courts are in conflict. And educating taxpayers will not avoid the problem because the problem involves a situation in which taxpayers have no choice--they are bound by the federal law of their circuit (typically, the Ninth Circuit).

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

No.

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

There is no particular industry or social group that is likely to be specifically affected. The tax section has begun discussions with the Department of Revenue to determine whether the Department would support, oppose or take no position with respect to this proposal. At this point, the Department has not stated a position, and the discussions have not advanced sufficiently to determine the Department's likely position. The tax section very much wants to reach agreement with the Department on this issue if possible and plans to continue the discussion, which may necessitate modifying the language.

OREGON STATE BAR
Legislative Proposal
Part II – Legislative Language

The text of the proposed legislative language follows (bracketed text would be deleted):

(2) Insofar as is practicable in the administration of this chapter, the department shall apply and follow the administrative and judicial interpretations of the federal income tax law. *[When a provision of the federal income tax law is the subject of conflicting opinions by two or more federal courts, the department shall follow the rule observed by the United States Commissioner of Internal Revenue until the conflict is resolved.]*

Nothing contained in this section limits the right or duty of the department to audit the return of any taxpayer or to determine any fact relating to the tax liability of any taxpayer.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: April 29, 2010
Memo Date: April 1, 2010
From: Steve Piucci, Chair, Public Affairs Committee
Re: Proposal to Accept eCourt Report

Action Recommended

Consider whether the Board of Governors should accept the First Interim Report from the OSB/OJD eCourt Implementation Task Force.

Background

The Oregon State Bar Board of Governors, at the behest of then-President Rick Yugler, and in coordination with Chief Justice DeMuniz, created the OSB/OJD eCourt Implementation Task Force in 2008. The Oregon eCourt Program is a business transformation project undertaken by the court to fundamentally change the way that the Oregon Judicial Department (“OJD”) conducts business and interacts with the public and stakeholders. The goal of the eCourt project is to give courts and judges the tools they need to provide just, prompt, and safe resolution of civil disputes; to improve public safety and the quality of life in our communities; and to improve the lives of children and families in crisis.

The task force was created to assist the OJD eCourt implementation by providing feedback from Oregon lawyers. After initial meetings in 2008, the task force resumed monthly meetings in August of 2009, after the adjournment of the 2009 legislative session. The task force was charged to work with the Oregon Judicial Department to:

- Assist in the implementation of the Oregon eCourt initiative over the next five years;
- Provide input and feedback from bar members on the implementation of Oregon eCourt;
- Develop a strategy to communicate with and educate bar members about Oregon eCourt programs;
- Provide periodic updates to the Board of Governors

This first interim report of the OJD/OSB Oregon eCourt implementation Task Force was developed in order to provide the Oregon Judicial Department and other interested parties with feedback and comments received from Oregon State Bar members on the Oregon eCourt Program and to the August 2009 draft of UTCR Chapter 22, proposed to address practice rules for the operation of the Oregon eCourt program. In addition to providing background on the program and on the task force itself, it is hoped that this report will aid in system development, particularly regarding remote electronic access to electronic versions of court documents, as the program moves forward.

MEMORANDUM

TO: Oregon State Bar (OSB) Board of Governors and Teresa Schmid, Executive Director

FROM: Ben Eder, Marilyn Harbur, Christine Meadows and Hon. Adrienne Nelson, OSB Delegates to the American Bar Association House of Delegates

SUBJECT: 2010 Midyear Meeting of the American Bar Association and Meeting of the House of Delegates

DATE: March 16, 2010

REPORT ON THE ABA MIDYEAR MEETING

The 71st Midyear Meeting of the American Bar Association (the “ABA”) was held February 8-9, 2010 at the Walt Disney World Dolphin Hotel in Orlando, Florida. Wide varieties of programs were sponsored by committees, sections, divisions, and affiliated organizations. The House of Delegates met for a two day session and the proceedings of the House of Delegates were made available via webcast. The Nominating Committee also met.

The Nominating Committee sponsored a “Meet the Candidates” Forum on Sunday, February 7, 2010. Laura G. Bellows of Illinois, candidate for President-Elect, seeking nomination at the 2011 Midyear Meeting, gave a speech to the Nominating Committee and to the members of the Association present.

THE HOUSE OF DELEGATES

The House of Delegates of the American Bar Association (the “House”) met on Monday, February 8 and Tuesday, February 9, 2010. William C. Hubbard of South Carolina, presided as Chair of the House.

The Evans High School Junior ROTC presented the colors. The invocation for the House was delivered by Paulette Brown of New Jersey. The Chair of the House Committee on Credentials and Admissions, C. Elisia Frazier of Georgia, welcomed the new members of the House and moved that the signed roster be approved as the permanent roster for this meeting of the House. The motion was **approved**.

Chair Hubbard recognized all those lawyers who had served in the House of Delegates for more than 25 years.

Deceased members of the House were named by the Secretary of the Association, Hon. Bernice B. Donald of Tennessee, and were remembered by a moment of silence. Chair Hubbard also asked for recognition of those who had given their lives in Iraq and Afghanistan, as well as those who have suffered so much in Haiti.

Chair Hubbard recognized William Reese Smith, of Florida, on a point of personal privilege regarding the passing of F. William McCalpin of Missouri. Past President Smith paid tribute to F. William McCalpin who died December 9, 2009. He described his service for over 50 years to the Association, noting that he had first served in the House of Delegates in 1966. He told delegates he was a member of the American College of Trial Lawyers and practiced at the St. Louis law firm of Lewis, Rice & Fingersh from 1948 to 1991. He recounted his many years of service to the organized bar at local, state and national levels including as president of the Bar Association of Metropolitan St. Louis. He highlighted his service as Assistant Secretary and Secretary of the American Bar Association and his work as Chair of numerous ABA entities. He told delegates that Mr. McCalpin's life was characterized by the 3Cs of professionalism – character, competence, commitment.

Mr. McCalpin's crowning contribution was his commitment to legal services to the poor, where he was an early and vocal defender of the Legal Services Corporation and had much to do with its creation in 1974. Past President Smith pointed out Mr. McCalpin was Board Chair of LSC in 1979 and that he stood strongly in opposition to efforts to cut its funding in 1981. He was committed to access to justice and testified that to eliminate funding for LSC would be to deny our nation's commitment to equal justice under the law. His work to develop and assure organized legal aid for the bar was recognized in 1988 by the ABA for exceptionally distinguished service with the ABA Medal. Past President Smith read a letter from the U.S. Secretary of State Hillary Rodham Clinton paying tribute to Bill McCalpin. He told the delegates Mr. McCalpin has been identified as one of the five most important people in the history of legal services in the U.S. He said his life should remind us of our calling to be great.

Chair Hubbard recognized Paula E. Boggs of Washington on a point of personal privilege to recognize Joseph H. Gordon, Sr. of Washington, the longest serving member of Washington delegation. She recounted his 57 years of service to the bar including work on the ABA Board of Governors and as Association Treasurer. She told delegates he had attended well over 100 consecutive ABA meetings since 1952. She paid tribute to his work for the Association and to the state of Washington and noted that the Association is far richer for his contribution.

Chair Hubbard recognized Gibson Gayle, Jr. of Texas on a point of personal privilege to recognize Joseph H. Gordon, Sr. for his 50 years of friendship, his dedication and devotion to the Association.

Chair Hubbard recognized Mary K. Ryan of Massachusetts on a point of personal privilege to pay tribute to Jack P. Driscoll of Massachusetts, a former president of the

Boston Bar Association. She paid tribute to his penchant for action and recounted his work in dealing with the critical issues facing the profession and the community. She pointed out his

love for the Association and this House and that at the time of his death, he was chair-elect of the Senior Lawyers Division. She expressed her gratitude for his many contributions.

Chair Hubbard recognized Robert E. Clifford of Illinois on a point of personal privilege to recognize Daniel Robert Thies of Massachusetts for his work in organizing ABA Day at Harvard University. Mr. Clifford also urged members to contact him with suggestions on how to improve the Association's web site.

Judy Perry Martinez of Louisiana, Chair of the Committee on Rules and Calendar provided a report on the Final Calendar for the House, including recently filed reports, as well as Informational Reports from the Board of Governors. She noted the receipt of one additional bar association report 10A and two late filed reports, 300 and 301. Ms. Martinez moved to consider the late filed reports, adopt the Final Calendar and approve the list of individuals who sought privileges of the floor. All three motions were **approved**.

She also referred to the consent calendar, noting the deadline for removing an item from the consent calendar.

She noted the rules for limited debate applicable to certain resolutions. She also moved a special rule for consideration of Resolution 177B. The motion was **approved**.

Ms. Martinez noted that the deadline for submission of Reports with Recommendations for the 2010 Annual Meeting is May 4, 2010, while the deadline for Informational Reports is June 4, 2010. The members of the House were reminded that the Drafting Committee, chaired by Palmer Gene Vance II of Kentucky, is available to assist anyone in drafting resolutions prior to the filing deadline.

Chair Hubbard thanked Ms. Martinez for her exemplary service.

Later in the day, Ms. Martinez moved the items on the consent calendar. The motion was **approved**.

For more details of the House meeting, see the following two-part report of the House session. The first part of the report provides a synopsis of the speeches and reports made to the House. The second part provides a summary of the action on the recommendations presented to the House.

I. SPEECHES AND REPORTS MADE TO THE HOUSE OF DELEGATES

Statement by the Chair of the House

William C. Hubbard of South Carolina, Chair of the House, reviewed procedural matters. He recognized the Committee on Rules and Calendar and the staff members who support the committee. Chair Hubbard introduced the Tellers Committee and reviewed the procedures for speaking. He recognized and thanked all the members who serve on House committees. During the meeting, he also recognized several other members of the Association staff including Martin D. Balogh for his efforts in dealing with hotel logistics in light of the weather, Adrienne P. Barney for her work on the overhead projections during the House proceedings and Carri L. Kerber for her work on technology for the House.

Chair Hubbard addressed the importance and need for the work of the Fund for Justice and Education ("FJE") and urged every House member to support it financially. He urged delegates to make a contribution and ensure 100% participation by the House by the annual meeting in San Francisco.

Chair Hubbard highlighted the work of the Legal Opportunity Scholarship Fund which was started in 1999. It funds scholarships to minority law students and over the last years has provided over \$3 million in minority scholarships. He urged the delegates to support it financially.

He discussed the obligations and responsibilities of House members to take legislative priorities to lawmakers in Washington, D.C. He asked each delegate to be part of the Grass Roots Action Team and attend ABA Day on April 20-22, 2010, in Washington D.C., under the direction of Laurel Bellows of Illinois.

Chair Hubbard announced that at the 2010 annual meeting, the House will elect one member for a full-term and two members to unexpired terms due to vacancies on the Committee on Scope and Correlation of Work. He detailed the procedures for submitting nominations.

Chair Hubbard also described the appointments process in connection with the new ABA year when Stephen N. Zack of Florida will become President of the Association.

Statement by the Secretary

Hon. Bernice B. Donald of Tennessee, Secretary of the Association, moved approval of the House of Delegates Summary of Action from the 2009 Annual Meeting, which was **approved** by the House.

On behalf of the Board of Governors, Secretary Donald presented and referred the House to Report Nos. 177, 177A and 177C, the Board's Informational, Transmittal and Legislative Priorities Reports.

Statement by the ABA President

Chair Hubbard recognized and welcomed President Carolyn B. Lamm of the

District of Columbia to the House for remarks.

She talked about pursuing dreams that all people have and told the delegates she has pursued her dream to lead the ABA. She used the metaphor of flying to recount the last months and the economic downturn and how it has affected all of us including our firms, friends, colleagues, families and association. She told us the ABA's advocacy on behalf of the public and the profession is strong, but we must make it stronger; the financial condition

of the Association is strong, but must be stronger; and the membership is the largest of its kind in the world, but we must grow it.

She told delegates about 70% of the members of the profession have found a reason not to join the ABA, and that many of them have identified our dues as a reason. She noted that the ABA has struggled too long with value and relevance to members. For too long, it has played catch-up on technology and its use. She told members we can overcome all these challenges but not on an auto-pilot, that the status quo is not acceptable and that we cannot survive and prosper by doing business as usual. These challenges call for strong leadership and bold ideas. She called on all of us to be part of the solution. She told us that all had answered the call and thanked the executive committee, the board and the staff for their work and unanimity.

President Lamm described internal events since August including staff changes and budget issues and the good progress made in these areas. She told the delegates about work being done on non-dues revenue. She highlighted Bob Clifford's work on the web site and technology issues. She reported on the executive director change and commended Thomas R. Howell, Jr. for the job he is doing as Interim Executive Director. She told of the progress of the search committee and indicated she anticipated a new Executive Director by August. She also reported on other staff promotions and changes. She reported that after a challenging ride, your ABA is stronger and better and has landed successfully.

She also reported on the equally successful external events. She recounted the Association's good work through its task forces on issues such as financial regulation, attorney-client privilege and preemption. She previewed upcoming task forces that will report to the House this year. She described in detail the important work of the Commission on the Economic Crisis and its many accomplishments. She highlighted Resolution 301 dealing with law students and young lawyers' debt. She expressed her pride in the diversity work done by the Presidential Diversity Commission chaired by Judge Ellen Rosenblum. She provided details on the need for and purpose of Ethics 20/20, a 3-year project led by Michael Traynor and Jamie S. Gorelick. She described the success of the ABA's advocacy efforts.

Finally and most importantly, she described the Association's membership initiative and the goal to reach 50% of the profession. She told delegates there were three parts that were approached strategically. The first was last year's value assessment of 12 segments of our profession led by Laurel G. Bellows and Maury B.

Poscover. The second dimension is pricing led by the Standing Committee on Membership. She commended the committee for its incredibly hard work and Chair Trish Refo for the breathtakingly good job she has done on the substance, the strategy and education of our Association on the study. She reported that leadership and the Board of Governors support the membership proposal before the House. Third, she told the House that the Association has retained a marketing firm to assist in reaching all segments of our profession and help craft a message to reach our profession. She highlighted new member initiatives and voiced her belief that our efforts will result in a significantly stronger and larger ABA.

President Lamm closed by telling delegates that you realize that your dreams are not for yourself, but for those who will come after you. She said 130 years ago, a small group of lawyers dreamed that America would have one American Bar Association that would speak with one voice. For over a century, that voice has been heard. She told us that now we are the keepers of that original dream, not only for ourselves, but for generations to come. She recounted her dream to leave them with a more powerful and flexible association. To do this, she urged us to make bold decisions, change the way we do things and to see it through. Regardless of the times, she said there must be a strong voice and secure home for America's lawyers. She announced confidently that we are America's Bar Association.

Statement by the Treasurer

Chair Hubbard welcomed the Association's Treasurer for a report and remarks to the House.

Treasurer Alice E. Richmond of Massachusetts began by making a reference to a quote by Franklin D. Roosevelt to highlight the last months. She referred members of the House of Delegates to her written report. She reported that the ABA's finances remain strong and that she and the financial services staff are reviewing and revising financial processes and technical systems to be the best we can be. She introduced and welcomed Kathryn Shaw, the new CFO of the Association.

She reported the fiscal year end on August 31, 2009 saw consolidated revenues exceed expenses by \$5.1M. That included a \$3.3 contribution from the dues warehouse for an actual surplus of \$1.8M. As of December 31, 2009, there was \$14.1M in the dues warehouse.

As of August 31, 2009, the Association had \$107.8M in assets. That is a 30% decrease from the prior year's end of \$46.5M, mostly due to a drop in the value of the investment portfolio and an increase in pension liability. She reported that the Association reduced debt on its Washington, DC building. The operating revenue of the Association was \$206M as of August 31, 2009 which is a 2.3% reduction. \$84.0M of that is dues revenue. She informed the House that an external audit of the Association was performed and was clean.

She reviewed a chart showing dues trends. She also reviewed non-dues revenue. She highlighted \$40M gifts and grants, up \$ 500,000 from last year. She reviewed the consolidated trend of non-dues revenue chart. Treasurer Richmond told delegates there was a \$2.7M decline in expenses and reviewed the operating expense trends chart. She noted that 80% of expenses are geared toward programs and that demonstrated efficiency and is very good.

The Treasurer noted that investments fell 12% or \$24.6M in value. She reported that the investment allocations have been altered and there has been a recovery in value of \$4.7M since August 31, 2009. Over a three year period, she reports we exceeded our benchmarks. She reviewed the total pension obligation chart and indicated that unfunded liability went from \$19.2M to \$45.4M. She said this is highly volatile and noted the unfunded liability had been reduced by \$7.3M in the last four months. She reviewed the other changes including the development of cash flow projections, and highlighted adherence to the principle that we will not spend what is not there. She reviewed the cash and cash equivalents chart and noted a \$10.3M decline last year and \$8.8M more decline in the last four months. She also reviewed the revenue trend to expenses chart. Revenues are going down and reported they are working hard on revenues and expenses. She reviewed the permanent reserve and noted it is down to \$44.2M. It is \$46.6M as of December 31, 2009.

Treasurer Richmond noted the Association has done a lot in the financial services, but there is much left to do. She closed by telling the delegates the current issues facing the Association are: increase membership, value proposition, economic downturn, pension, non-dues revenue strategy, and publishing roadmap. She said we need to identify the strategies to deal with these issues, plan for them and execute them.

Chair Hubbard thanked her for her report.

Statement by the Interim Executive Director

Chair Hubbard recognized Thomas R. Howell, Jr. of Illinois, Interim Executive Director and Chief Operating Officer of the ABA for remarks.

He introduced himself and noted he had been on the job for 3 months after having served as General Counsel of the ABA. He referred the delegates to his written report. He reported the ABA is on budget, programs and projects are on schedule and that the ABA has a strong, capable and dedicated management team in place. He expressed and urged appreciation for all the Association staff and the delegates responded with applause. On behalf of the staff, he looks forward to working with the Association.

Chair Hubbard thanked Mr. Howell.

Welcome by The Honorable Bill Nelson, Florida Senator

Chair Hubbard introduced Senator Bill Nelson who was elected to the U.S. Senate in 2000 and is recognized as the leading Congressional expert on NASA. He noted his service in the U. S. House of Representatives, and his six day trip aboard the space shuttle Columbia and his record of work on behalf of Floridians.

Senator Nelson thanked the Association for coming to the aid of the Haitian people and its work in creating the Haiti Legal Development Fund. He recounted that he was the only lawyer who had flown in space. Based on his 37 years of service, he gave the delegates several observations about our profession and how it interacts with his in public service.

He told the delegates we have a legal system accessible to all, especially the least and most vulnerable among us. A challenge in remaining a just society is to ensure that everyone aggrieved or harmed can find a place in our system for justice. To effectively represent clients, attorneys must have the tools to do so. These tools include a fair and impartial judiciary. He discussed the selection and confirmation of federal judges. He also discussed the need for robust funding for the poor and legal services. He pointed out there remains a justice gap and commended the Association's work in that area.

He discussed the need to take on the attitude of a public servant in a way that extends beyond the walls of our offices and commented that we are committed to those principles. He said this country needs healing and it needs to change the public discourse. He told the House we need civility, not savagery and we need to start listening to one another. He called on the delegates as leaders of the profession to use their talents as conciliators and mediators to influence political discourse positively.

Chair Hubbard thanked him for his inspiring and challenging remarks.

Remarks on the "State of the State Courts"

Chair Hubbard introduced the Honorable Christine M. Durham, President of the Conference of Chief Justices and Chief Justice of the Utah Supreme Court to address the House on the State of the State Courts.

The Chief Justice thanked the House of Delegates for the privilege to address the House. She was pleased to continue the tradition of addressing the House, as begun last year by her predecessor. She told us that the mission of the Conference of Chief Justices is to improve the administration of justice throughout the states and territories by promoting the effectiveness, independence and vitality of state judicial systems. This is done by advancing policies, by educating leaders, by exchanging information and by supporting the concept of adequate resources for state courts. She stressed the importance of efficiency and effectiveness in the administration of justice as well as the ability to be fair and impartial. She indicated her belief that institutional independence is linked to decisional independence. She described the many aspects of each concept.

She discussed the national role of the Conference of Chief Justices. In addition to improving the administration of justice in each state system, the Conference stresses the need for a national voice to educate policy makers about needs and concerns. She pointed out that state courts decide more than 95% of all claims filed in the U.S. Given that, the voice of the Conference matters.

She updated the House since last year on the recession and its effect on the state courts. These include court closings, pay freezes, hiring freezes, furloughs and pay reductions. There is growing concern that things may never return to normal in state court systems. She described collaborative efforts to provide funding by the Conference and the American Bar Association. She outlined a number of initiatives by courts to reduce costs through efficiency, innovation and re-evaluation of all systems. She told us that the public and media realize that courts are the heart and soul of this country's commitment to justice for all and that they are and must be part of the engine for economic recovery. She explained this by reference to a Florida study about mortgage foreclosures. She discussed the need for reform of state judicial elections and the effect of the Caperton and Citizens United decisions.

She closed by saying that lawyers and judges properly understand their roles in society and their institutions as an integral part of the constitutional experiment that is the American system of justice. She expressed her appreciation for the ABA and its positions, advocacy and support. She noted the good work on Ethics 20/20. She thanked President Carolyn Lamm for her work and dialogue with the Conference of Chief Justices. She looks forward to working cooperatively with the American Bar Association to improve the state court system.

Chair Hubbard thanked her for her remarks.

Report of the Nominating Committee

The Nominating Committee met on Sunday, February 7, 2010. On behalf of the committee, Thomas R. Curtin of New Jersey, Chair of the Steering Committee of the Nominating Committee, reported on the following nominations for the terms indicated:

MEMBERS OF THE BOARD OF GOVERNORS (2010-2013)

District Members

District 7: Cheryl I. Niro of Illinois

District 8: Edith G. Osman of Florida

District 10: James S. Hill of North Dakota

District 11: James F. Carr of Colorado

District 13: Carlos A. Rodriguez-Vidal of Puerto Rico

District 18: James Dimos of Indiana

Section Members-at-Large

Section of Legal Education and Admissions to the Bar

Peter A. Winograd of New Mexico

Section of Public Contract Law

Mary Ellen Coster Williams of Maryland

Woman Member-At-Large

Michelle A. Behnke of Wisconsin

OFFICERS OF THE ASSOCIATION

President-Elect for 2010-2011

Wm. "Bill" T. Robinson, III of Kentucky

Chair of the House of Delegates for 2010-2012

Linda A. Klein of Georgia

Secretary for 2011-2014 (to serve as Secretary-Elect in 2010-2011)

Honorable Cara Lee Neville of Minnesota

Treasurer for 2011-2014 (to serve as Treasurer-Elect in 2010-2011)

Lucian T. Pera of Tennessee

Remarks by President-Elect Nominee

Chair Hubbard recognized President-Elect Nominee Wm. T. (Bill) Robinson III and welcomed him for remarks to the House of Delegates.

President-Elect Nominee Bill Robinson began his remarks "at the top" by thanking his spouse and best friend, Joan Robinson. He then thanked his law firm Frost Brown & Todd LLC for its support. He also paid tribute to President Carolyn Lamm and President-Elect Stephen Zack for their dynamic leadership and told the delegates he is committed to follow in their "big footsteps" with continuity of leadership.

Robinson told the delegates that the Association has confronted significant challenges in the past and has successfully worked through each of them. He is confident that we will find opportunities in the challenges of today and tomorrow. We will need to be agile, creative and maintain a healthy sense of urgency. He said we need to be reminded of what has brought us together – the obligation and privilege of providing volunteer public service, a privileged responsibility that we fulfill in part by our volunteer work in the organized bar, including the ABA. This volunteer service is part of our professional DNA and can be found everyday in conference rooms, in bar associations, in court houses and in the House of Delegates itself. He remarked that

more recently, the quality of volunteer lawyer work has been substantially enhanced by diversity. The boards, committees and task forces of our associations more broadly and better reflect the diversity of our society and we are enriched by it. We must continue to strengthen diversity in our profession, our bar associations and the ABA. He told us that all these constructive concepts are familiar to us because we live them year after year in public service and professional volunteer commitment. We know the work needs to be done and we do it enthusiastically without considering the financial cost to self from doing so. He promised to promote, support and recognize volunteer lawyer service at every opportunity.

Robinson talked of the great sense of responsibility he feels, but said is reassured by two principles that have guided him throughout his professional career. The first is that the primary responsibility of a lawyer is the representation of others with hard work and a sincere sense of fiduciary responsibility. That is what he will endeavor to accomplish as he represents the Association and our profession.

Second, Robinson sees his nomination as a continuation of his long working partnership with many members of the ABA including members of the House. Whatever is accomplished during his term of leadership will largely be the result of our working together, side by side. As he looked out to the House, he was reminded of and noted our mutual friendship, encouragement and support. He told the delegates that his year as President, 2011-2012, will be a great success if ABA members can look back and say with confidence: "That was a great year to be a member of the American Bar Association – just look at what we accomplished together!"

Chair Hubbard thanked Bill Robinson and indicated he looked forward to Robinson's leadership with great anticipation, expressing gratitude for his past service.

Remarks Regarding Commission on Ethics 20/20

Chair Hubbard recognized Michael Traynor of California, Co-chair of the Commission on Ethics 20/20.

Mr. Traynor reported that we need to address new challenges of the digital generation and the global economy. He told the delegates new issues of data security, confidence, choice of law, and disciplinary enforcement are presented. Vigilance is important to make sure ethical guidance does not lag too far behind technology. He noted that technology and globalization affect us all. Mr. Traynor cited family law as an example.

He told delegates that last August, President Lamm created the Commission on Ethics 20/20 for a tenure of three years. Mr. Traynor expressed appreciation for the encouragement of President-Elect Zack and President-Elect Nominee Robinson. He told the House the Commission will be guided by three principles: protection of the public; preservation of our core professional values; and maintenance of a strong independent and self-regulated profession.

He noted the Commission has no preconceived notions about the issues, but will do their best and not shy away from controversial issues. He informed the House of the subcommittees and a website and promised transparency. He reported they held their first meeting last September and their first public hearing on February 5, 2010. They will hold their second public hearing in August at the ABA Annual Meeting.

He expects to have a report and recommendations on the outsourcing issue at the Midyear Meeting in 2011. They will have a comprehensive report and recommendations by the end of the 3-year term.

Chair Hubbard thanked him.

Remarks Regarding Executive Director Search Committee

William C. Hubbard of South Carolina, Chair of the Executive Director Search Committee, reported on the progress of the executive director search. Due to the weather, some of the interviews scheduled have been postponed. He reported five interviews will be done at this meeting and 5-10 more interviews soon. After 15-18 interviews in the first round, they expect to have a second round of in-depth interviews with a smaller number of individuals. He asked the House to share with him any thoughts regarding qualities to be sought in an individual for the position of executive director.

Issues of Concern Panel Discussion

Chair Hubbard introduced the House to a panel presentation by the House Committee on Issues of Concern to the Profession regarding the nomination and confirmation process for Supreme Court Justices. He told the delegates that many in the legal profession and the public at large believe that the process should be improved. The American Bar Association, as the voice of the legal profession, should help lead that reform. The panel was designed to help ABA leadership and the House of Delegates identify those issues where the ABA can develop policy that might lead to constructive reform. He introduced Barbara J. Howard of Ohio, chair of the House Committee on Issues of Concern to the Profession. She introduced both panelists: Christopher Eisgruber, Provost of Princeton University and author of "The Next Justice: Repairing the Supreme Court Appointments Process," and Dahlia Lithwick, a contributing editor at Newsweek and senior editor at Slate.

Ms. Lithwick began by discussing news stories about the possibility of two vacancies on the U.S. Supreme Court. Mr. Eisgruber discussed the historical sweep of the confirmation process. He said confirmations have always been political, contentious and nasty, and he cited to the example of John Rutledge, a George Washington nominee. He told delegates we are in a period where it has been more contentious since 1968 with seven nominees who were not confirmed or were withdrawn. In the preceding 70 years before 1968, only one nominee was rejected. He said four things

have changed to cause this: (a) the United States Supreme Court has become more prominent as a political actor in our society; (b) Presidents now give more attention than ever before to the ideology of their nominees. Ideology and party affiliation have been important and it always has been that way since at least 1795, but there has been much more scrutiny and aggressiveness in the last 40 years; (c) hearings are different than they used to be. It used to be nominees would not appear at hearings; and (d) the country and legal community is becoming increasingly polarized in our judicial views.

He said the question is what can realistically be done. It is false hope to remove politics. It was designed to be political. It will remain so.

Ms. Lithwick provided a perspective from a very close vantage point. Her concerns are that neither the Senate nor the nominee has fared well. She said the conversations are framed at the edges of political ideology and things on the edge are given great attention. She voiced concern that the nominee is polarized because the process is so personal.

Mr. Eisgruber voiced three recommendations for what is achievable: (a) educate people about the process; (b) separate concerns of the kind the ABA raises from political issues; and (c) moderate and avoid the extreme.

He suggested we ought to learn the nominee's judicial philosophy and views on judicial deference. He sees the ABA's role as one of education.

The panelists also discussed the role of experience and whether we will see justices selected from other than a pool of Courts of Appeal judges. They pointed out that every member of the current court has had prior federal judiciary experience for the first time in history. Mr. Eisgruber indicated he is skeptical that the president will step out of the federal judiciary experience mold.

Ms. Lithwick discussed the Sotomayor's nomination process and made several observations. There were a number of questions from the delegates to which the panelists responded.

Chair Hubbard thanked the panelists and the House Committee on Issues of Concern to the Profession.

II. RECOMMENDATIONS VOTED ON BY THE HOUSE

A brief summary of the action taken on recommendations brought before the House follows. The recommendations are listed in chronological order and the number of the recommendation is noted in brackets.

[100] The House **approved by consent** Recommendation 100 as submitted by the Standing Committee on Specialization, extending the accreditation of the Social Security Disability Advocacy program of the National Board of Social Security Disability

Advocacy, division of the National Board of Legal Specialty Certification of Wrentham, Massachusetts.

[101] The House **approved by consent** Recommendation 101 as submitted by the Maritime Law Association of the United States, urging the United States Senate to ratify the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, also known as the “Rotterdam Rules.”

[102A] On behalf of the Criminal Justice Section, Stephen A. Saltzburg of the District of Columbia moved Revised Report 102A urging federal, state, territorial and local governments to increase the opportunities of youth involved with the juvenile or criminal justice systems and to prevent the continuing discrimination against those who have been involved with these systems in the past by limiting the collateral consequences of juvenile arrests, adjudications and convictions. The recommendation was **approved as revised**.

[102B] On behalf of the Criminal Justice Section, William N. Shepherd of Florida moved Report 102B urging federal, state, territorial and local legislative bodies and governmental agencies to support the development of simplified *Miranda* warning language for use with juvenile arrestees. The recommendation was **approved**.

[102C] On behalf of the Criminal Justice Section, Stephen A. Saltzburg of the District of Columbia moved Report 102C urging federal, state, local and territorial governments to undertake a comprehensive review of the misdemeanor provisions of their criminal laws, and, where appropriate, to allow the imposition of civil fines or nonmonetary civil remedies instead of criminal penalties, including fines and incarceration. The recommendation was **approved**.

[102D] On behalf of the Criminal Justice Section, William N. Shepherd of Florida moved Revised Report 102D urging policy making bodies of federal, state, local and territorial courts to adopt a procedure whereby a criminal trial court shall conduct, at a reasonable time prior to a criminal trial, a conference with the parties to ensure that they are fully aware of their respective disclosure obligations under applicable discovery rules, statutes, ethical standards and the federal and state constitutions and to offer the court’s assistance in resolving disputes over disclosure obligations. Herbert B. Ditorz, Jr. of the District of Columbia spoke in favor of the recommendation. The recommendation was **approved as revised**.

[102E] On behalf of the Criminal Justice Section, Stephen A. Saltzburg of the District of Columbia moved Report 102E urging federal, state, local and territorial governments to ensure that judicial, administrative, legislative and executive authorities expand, as appropriate in light of security and safety concerns, initiatives that facilitate contact and communication between parents in correctional custody and their children in the free community. The recommendation was **approved**.

[102F] On behalf of the Criminal Justice Section, William N. Shepherd of Florida moved Report 102F urging bars associations and law schools to consider and expand, as

appropriate, initiatives to assist criminal defendants and prisoners in avoiding undue consequences of arrest and conviction on their custodial and parental rights and urges Congress to eliminate restrictions that prohibit recipients of Legal Services Corporation funds from providing legal assistance to prisoners on family law issues. The recommendation was **approved**.

[102G] On behalf of the Criminal Justice Section, Stephen A. Saltzburg of the District of Columbia moved Report 102G urging the President and the Attorney General to assure that lawyers in the Department of Justice do not make decisions concerning investigations or proceedings based upon partisan political interests and do not perceive that they will be rewarded for, or punished for not, making a decision based upon partisan political interests. The recommendation was **approved**.

[102H] On behalf of the Criminal Justice Section, Stephen A. Saltzburg of the District of Columbia **withdrew** Report 102H urging federal, state, local and territorial governments to provide sufficient funding, infrastructure, equipment and other legislative efforts necessary to strengthen the forensic science community in its mission of providing accurate, timely, reliable and scientifically valid evidence to the nation's criminal justice system.

[102I] On behalf of the Criminal Justice Section, Neal R. Sonnett of Florida moved Revised Report 102I adopting the black letter of the ABA Criminal Justice Standards on the Treatment of Prisoners, dated February 2010, to supplant the ABA Criminal Justice Standards on the Legal Status of Prisoners. The recommendation was **approved as revised**.

[102J] On behalf of the Criminal Justice Section, John D. Roman of Florida moved Report 102J urging Congress to ensure that funding for the John R. Justice Prosecutors and Defenders Incentive Act of 2008 (Section 951 of PL 110-315) is expanded beyond its original authorization of \$25 million to cover the actual national need. The recommendation was **approved**.

[103A] On behalf of the Tort Trial and Insurance Practice Section, James F. Carr of Colorado moved Revised Report 103A adopting the Model Act Governing Standards for the Care and Disposition of Disaster Animals, dated February 2010, and recommends its adoption by state and territorial legislative bodies. The recommendation was **approved as revised**.

[103B] On behalf of the Tort Trial and Insurance Practice Section, Hervey P. Levin of Texas moved Report 103B opposing the adoption of legislation by Congress that merges medical payment components of workers compensation and medical payment components of automobile insurance with health insurance, commonly referred to as "Universal 24-Hour Health Coverage." The recommendation was **approved**.

[104] On behalf of the Section of Litigation, Joanne A. Epps of Pennsylvania moved Report 104 urging the United States, state and territorial governments to work to ensure that the fundamental protections of Article 36 to the Vienna Convention on Consular

Relations (“Article 36”) are extended fully and without obstacle to foreign nationals within United States borders. Robert A. Stein of Minnesota spoke in favor of the recommendation. Brian Charles Miller of Texas spoke in opposition to the recommendation. The recommendation was **approved**.

[105A] On behalf of the Commission on Homelessness and Poverty, Josephine A. McNeil of Massachusetts moved Revised Report 105A supporting the development of comprehensive, systemic approaches to address the special needs of veterans through diversionary programs that connect veterans to appropriate housing, treatment and services through partnerships with the Local Veterans Administration Medical Centers, community-based services and housing providers. Francis J. Brady of Connecticut moved to postpone consideration of Revised Report 105A indefinitely. Robert M. Carlson of Montana and Michael S. Greco of Massachusetts spoke in opposition to the motion to postpone indefinitely. The motion to postpone indefinitely failed. Robert Arnold Weeks of California spoke in favor the recommendation. The recommendation was **approved as revised**.

[105B] On behalf of the Commission on Homelessness and Poverty, Josephine A. McNeil of Massachusetts moved Report 105B urging Congress to increase funding for programs under the Runaway and Homeless Youth Act and other laws in order to more effectively intervene and end homelessness for youth, ages 12 through 24. The recommendation was **approved**.

[106] The House **approved by consent** Recommendation 106 as submitted by the Standing Committee on Paralegals, granting approval and reapproval to several paralegal education programs, withdraws the approval of two programs at the requests of the institutions and extends the term of approval to several paralegal education programs.

[107] On behalf of the Commission on Women in the Profession, Roberta D. Liebenberg of Pennsylvania moved Report 107 urging Congress to enact legislation that would provide more effective remedies, procedures and protections to those subjected to pay discrimination, including discrimination on the basis of gender, and would help overcome the barriers to the elimination of such pay discrimination that continue to exist. James R. Silkenat of New York spoke in favor the recommendation. The recommendation was **approved**.

[108A] On behalf of the Section of International Law, Michael H. Byowitz of New York moved Report 108A urging the United States to ratify the Comprehensive Nuclear Test Ban Treaty. Douglas A. Copeland of Missouri spoke in opposition to the recommendation. The recommendation was **defeated** 175-206.

[108B] The House **approved by consent** Recommendation 108B as submitted by the Section of International Law, urging the United States to ratify and implement the United Nations Convention on the Rights of Persons with Disabilities.

[108C] On behalf of the Section of International Law, Andrew Joshua Markus of Florida moved Report 108C urging that legislation be enacted to provide procedures for implementing on an expedited basis commitments in existing treaties where the President reports to the Congress that binding measures are necessary to avoid the imminent risk of breach by the United States. The recommendation was **approved**.

[109] On behalf of the Section of Intellectual Property Law, Donald R. Dunner of the District of Columbia moved Report 109 urging courts to interpret the statutory first sale doctrine in Section 109(a) of the U.S. Copyright Act and the copyright owner's importation right in Section 602(a) to exclude application of the first sale doctrine to the importation of goods embodying a copyrighted work that were not manufactured in the United States. The recommendation was **approved**.

[110] On behalf of the Commission on Youth at Risk, Laura V. Farber of California moved Revised Report 110 urging Congress, states, tribal, local and territorial governments to enact child welfare financing laws and/or implement policies to reform the current child welfare financing structure to end the current fiscal incentives to place children in foster care. The recommendation was **approved as revised**.

[111A] The House **approved by consent** Recommendation 111A as submitted by the National Conference of Commissioners on Uniform State Laws, approving the Uniform Real Property Transfer on Death Act, promulgated by the National Conference of Commissioners on Uniform State Laws in 2009, as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.

[111B] The House **approved by consent** the Recommendation 111B as submitted by the National Conference of Commissioners on Uniform State Laws, approving the Uniform Collateral Consequences of Conviction Act, promulgated by the National Conference of Commissioners on Uniform State Laws in 2009, as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.

[111C] On behalf of the National Conference of Commissioners on Uniform State Laws, Robert A. Stein of Minnesota **withdrew** Report 111C approving the Uniform Collaborative Law Act, promulgated by the National Conference of Commissioners on Uniform State Laws in 2009, as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.

[111D] The House **approved by consent** Recommendation 111D as submitted by the National Conference of Commissioners on Uniform State Laws, approving the Uniform Statutory Trust Entity Act, promulgated by the National Conference of Commissioners on Uniform State Laws in 2009, as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.

[112] On behalf of the Senior Lawyers Division, Anthony R. Palermo of New York **withdrew** Report 112 recommending that dues for lawyers age 60 and above shall be one-half of the regular dues for Class 7 members; and that dues for lawyers age 75 and above shall be waived.

[113] On behalf of the General Practice, Solo and Small Firm Division, Big Gen. Thomas L. Hemingway of Virginia moved Revised Report 113 supporting a correction to existing deficiencies in government sponsored debt relief for lawyers serving our nation in uniform. Sharon C. Stevens of Oregon spoke in favor of the recommendation. The recommendation was **approved as revised**.

[114A] On behalf of the Commission on Immigration, Karen T. Grisez of the District of Columbia moved Report 114A urging the Department of Homeland Security to implement specific policies and procedures within the immigration removal adjudication system and urges Congress to amend the Immigration and Nationality Act regarding the removal of noncitizens convicted of certain crimes. Carolyn B. Lamm of the District of Columbia and Stephen N. Zack of Florida spoke in favor of the recommendation. The recommendation was **approved**.

[114B] On behalf of the Commission on Immigration, Karen T. Grisez of the District of Columbia moved Revised Report 114B supporting measures to improve immigration courts and create a more professional, independent and accountable immigration judiciary, including a provision to increase the number of immigration judges by at least 100, increase the number of law clerks to a ratio of one clerk per judge, increase the number of support personnel and increase the number of Assistant Chief Immigration Judges, and expand their deployment to regional courts. The Hon. Denise Noona Slavin of Florida spoke in favor of the recommendation. The recommendation was **approved as revised**.

[114C] On behalf of the Commission on Immigration, Karen T. Grisez of the District of Columbia moved Report 114C supporting improving the efficiency, transparency and fairness of administrative review by the Board of Immigration Appeals through increasing the resources available to the Board, including additional staff attorneys and additional Board members. Robert N. Weiner of the District of Columbia spoke in favor of the recommendation. The recommendation was **approved**.

[114D] On behalf of the Commission on Immigration, Karen T. Grisez of the District of Columbia moved Report 114D supporting the restoration of federal judicial review of immigration decisions and urges Congress to enact legislation to ensure that noncitizens are treated fairly in the adjudication process and also to provide oversight for the government's decision making process. Loren Kieve of California and Robert E. Juceam of New York spoke in favor of the recommendation. The recommendation was **approved**.

[114E] On behalf of the Commission on Immigration, Karen T. Grisez of the District of Columbia **withdrew** Report 114E supporting measures to improve access to legal representation and legal information for noncitizens in the immigration removal system.

[114F] On behalf of the Commission on Immigration, Karen T. Grisez of the District of Columbia moved Report 114F supporting the creation of an Article I court, with both trial and appellate divisions, to adjudicate immigration cases, which should have features

substantially consistent with specific guidelines, or as an alternative to an Article I court, supports the creation of an independent agency for both trial and appellate functions. The Hon. Denise Noona Slavin of Florida and John Michael Vittone of the District of Columbia spoke in favor of the recommendation. The recommendation was **approved**.

[115] On behalf of the Commission on Domestic Violence, Mark L. Schickman of California moved Report 115 urging Congress to reauthorize and fully fund the Violence Against Women Act and similar legislation that promotes access to justice and safety for victims of domestic violence, dating violence, sexual assault, and stalking within the United States. The recommendation was **approved**.

[116] On behalf of Bruce Wilder, ABA Member, Judy Perry Martinez of Louisiana **withdrew** Report 116 urging the government of the United States and specifically the Department of Health and Human Services to undertake measures which would ensure the least possible disclosure of patients' personally identifiable information contained in the electronic health record, except in specific instances as required by law.

[10A] On behalf of the New York State Bar Association, A. Vincent Buzard of New York, moved Report 10A urging the ABA President to "examine the efforts of U.S. News and World Report to publish a ranking of law firms. Stephen C. Krane of New York moved to postpone consideration of Report 10A indefinitely. Carolyn B. Lamm of the District of Columbia, Nancy H. Rogers of Ohio, Neal R. Sonnett of Florida spoke in favor of the motion to postpone indefinitely. A. Vincent Buzard of New York, Anthony R. Palermo of New York, E. Christopher Johnson, Jr. of Michigan and Stephen P. Younger, Jr. of New York opposed the motion to postpone indefinitely. The motion to postpone indefinitely was defeated 190-209.

Jonathan W. Wolfe of New Jersey moved to amend the recommendation. A point of personal privilege was raised by Roy A. Hammer of Massachusetts regarding the text of the resolution which was read aloud by Secretary Bernice B. Donald of Tennessee. John L. McDonald, Jr. of California and Thomas Bolt of the Virgin Islands raised points of order which were ruled out of order. Robert N. Weiner of the District of Columbia spoke in favor of the motion to amend. Mark H. Alcott of New York and A. Vincent Buzard of New York spoke in opposition to the motion to amend. **The motion to amend was approved 203-183.**

Ann B. Lask of New York raised a point of personal privilege to clarify certain language. Thomas Bolt of the Virgin Islands moved to amend the recommendation. The motion to amend passed.

Lora J. Livingston of Texas rose to call the question, but because there were no further speakers, the House moved to a vote. Report 10A was **approved as revised and amended**.

[177B] On behalf of the Standing Committee on Membership, Patricia Lee Rifo of Arizona moved Report 177B recommending a new dues structure for members of the Association effective for dues commencing with the 2010-2011 fiscal year and each

year thereafter. Sharon C. Stevens of Oregon and L. Jonathan Ross of New Hampshire spoke in favor of the recommendation. The recommendation was **approved as revised**.

[300] On behalf of the Section of Litigation, David C. Weiner of Ohio moved Report 300 amending the current method by which Federal Judges are given cost-of-living adjustments (COLAs) to their salaries. The recommendation was **approved**.

[301] On behalf of the Commission on the Impact of the Economic Crisis on the Profession and the Legal Needs, Allan J. Tanenbaum of Georgia moved Report 301 urging Congress, the Executive Branch and/or Commercial Lenders to develop and implement programs to assist law students and recent law school graduates experiencing financial hardship due to deferred or lack of employment (and consequently lack of income) during a period of economic crisis. Daniel Robert Thies of Massachusetts and Jay E. Ray of Texas spoke in favor of the recommendation. The recommendation was **approved**.

Closing Business

At the conclusion of the meeting of the House on Tuesday, February 9, Chair Hubbard recognized and thanked the delegates for their dedication to the work of the House.

Dwight L. Smith of Oklahoma moved a resolution in appreciation of the Florida lawyers and judges and special advisor Suzanne E. Gilbert of Florida for their work in hosting the meeting. The motion was **approved**.

John L. McDonnell, Jr. of California and the California delegation were recognized to make a musical presentation regarding the 2010 San Francisco Annual Meeting.

Chair Hubbard recognized Judy Perry Martinez of Louisiana, Chair of the Rules and Calendar Committee, who then moved that the House adjourn *sine die*. The motion was **approved**.

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**Oregon State Bar
Meeting of the Board of Governors**

February 19, 2010
The Oregon Garden
Silverton, Oregon

Open Session Minutes

The meeting was called to order by President Kathleen Evans at 9:00 a.m. on February 19, 2010, and adjourned at 3:30 p.m. Members present from the Board of Governors were Barbara DiIaconi, Kathy Evans, Ann Fisher, Michelle Garcia, Mike Haglund, Gina Johnnie, Derek Johnson, Chris Kent, Ethan Knight, Karen Lord, Audrey Matsumonji, Kenneth Mitchell-Phillips, Mitzi Naucler, Maureen O'Connor, and Steve Piucci. Staff members present were Teresa Schmid, Sylvia Stevens, Susan Grabe, Jeff Sapiro, Rod Wegener, Andrew Baudoin, and Teresa Wenzel. Also present were Ira Zarov (PLF), Tom Cave (LPF), Lawrence Peterson, and Jessica Cousineau (ONLD).

1. Swearing in of New Members

President Evans administered the oath of office to Maureen O'Connor and Kenneth Mitchell-Phillips.

2. Inspirational Words

Ms. Evans welcomed the 2010 board, members provided introductions, and Ms. Evans read a speech from Abraham Lincoln – attached as Exhibit A

3. Report of Officers

A. Report of the President

1. Western States Bar Conference

Ms. Evans reminded the board members that the deadline for registering for the WSBC is March 8, 2010, and the bar has a fund of \$6,000 to be divided equally among attendees to help defray individual costs.

B. Report of the President-elect

As written.

C. Report of the Executive Director

1. ED Report

As written

2. Long Range Plan

Motion: Ms. Fisher moved, Mr. Piucci seconded, and the board voted unanimously to ratify the long-range plan as presented and agreed upon at the BOG's retreat in November 2009.

D. Oregon New Lawyers Division

Ms. Cousineau updated the board on the ONLD's activities including a successful Super Saturday CLE, its annual meeting, preparations for its December "futures" projects in Eugene, and an upcoming essay contest.

4. Professional Liability Fund

A. PLF Bylaws and Policy Manual - Chapter 6 Revisions

Mr. Zarov presented information concerning the changes to PLF Bylaws and Policy Manual; informed the board that Suzanne Chianti of the PLF resigned due to her new judgeship; and told the board that the PLF is in the process of going paperless.

The PLF will be meeting with its reinsurers in April, but has no predictions as to the rates for 2010. It has potentially high claims, but is not sure of the final amounts and it has some concerns regarding Medicare reporting. The PLF will keep the board updated on these issues.

Though the number of claims in 2009 was more than expected, the payout was less than expected, allowing for a break-even year. There was a spike in claims that appeared to come from lawyers that leave the practice suddenly. Because 2008 and 2009 were such volatile years, it is very difficult to predict 2010.

The board asked about having PLF premiums paid by credit cards and was informed that the PLF has opted not to do this because the transaction fees charged by the banks are substantial and it did not seem fair to have all covered parties pay for the convenience of a few. The PLF will continue to look at ways to make the payment process more convenient for members.

Mr. Zarov noted that the PLF continues to look at the aging of the bar and Ms. Evans noted that the bar had a Senior Lawyers Task Force that submitted recommendations to the BOG relating to aging issues.

Motion: Mr. Kent moved, Ms. DiIaconi seconded, and the board unanimously passed the motion to approve the changes to the PLF Bylaws and Policy Manual.

5. Special Appearances

A. Disciplinary Counsel's Office

1. Board's Role in Reinstatements

Mr. Sapiro presented information about the board's role and the standards to be applied in the reinstatement process.

6. Rules and Ethics Opinions

A. Revision of OSB Formal Op. No. 2005-48

1. Revised Opinion

Ms. Stevens explained that the Legal Ethics Committee recommends revisions to OSB Formal Opinion No. 2005-48 to address 2009 legislative changes that require abandoned funds in lawyer trust accounts to be paid to the OSB for legal services programs.

Motion: Mr. Haglund moved, Mr. Knight seconded, and the board unanimously passed the motion to approve revised OSB Formal Opinion No 2005-48.

7. OSB Committees, Sections, Councils, Divisions and Task Forces

A. Client Security Fund [Ms. Lord]

1. CSF Appeal No. 09-32 SHINN (Doblie)

Attorney Lawrence Peterson, representing Max Doblie, presented Mr. Doblie's appeal of the amount recommended by the CSF Committee, including the fact that Mr. Doblie had to incur significant legal fees to pursue his claims arising out of Michael Shinn's misappropriation of an injury settlement.

Ms. Stevens explained the CSF Committee's initial review of Mr. Doblie's claim and the adjustment it made to its recommendation based on the appeal.

Motion: Mr. Piucci moved, Ms. Fisher seconded, and the board approved an award to Mr. Doblie of \$32,190.50, which reflects an allocation of 25% rather than the original 33% for Shinn's attorney fee in the matter.

2. CSF Appeal No. 09- 04 SUSHIDA (Street)

Ms. Stevens presented information concerning the CSF's analysis, recommendation, and the basis for Mr. Street's appeal of the Committee's denial of his claim.

Motion: Mr. Piucci moved, Ms. Matsumonji seconded, and the board voted unanimously to uphold the CSF Committee decision and to deny Mr. Street's claim.

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

A. Access to Justice Committee

Ms. Johnnie reported that the Bench-Bar Task Force that Mr. Gaydos will chair has not yet begun to meet, as it is awaiting further developments in the federal LSC funding legislation. She also reported that General Counsel's Office has been asked to propose amendments to the RPCs on fee sharing that will facilitate contingent fees for RIS referrals.

B. Budget and Finance Committee

1. Revised Investment Portfolio

Mr. Kent explained the work that was done to develop the new investment policy as laid out in the proposed amendments to Bylaw 7.4.

Motion: The board unanimously passed the committee motion to approve the bar's new investment policy.

2. Request from SSFP Section on BarBooks Subscription Rate

Mr. Kent presented background on the SSFP Section's proposal that it be entitled to an "office share" BarBooks subscription price. Because the bar is moving toward a universal access model, the committee does not believe it is a good time to change the pricing structure of BarBooks for SSFP members.

Motion: The board unanimously passed the committee motion to deny the SSFP Section treatment as an office share group.

3. 2009 Financial Report

Mr. Wegener presented encouraging financial news. The bar ended 2009 with net revenue; Admissions had one of its best years financially, likely, due to reciprocity; MCLE and Lawyer Referral Services had their best years ever; and unrealized revenues added to the financial picture and contributed to the positive balance. The uncertainty on the horizon is OPUS Northwest's financial situation, since a default by OPUS on the Master Lease will result in increased expense for the bar.

4. Guidelines for BOG Special Account

By consensus, the board agreed to the proposed guidelines for a special account managed by the CFO for purchases of alcoholic beverages at BOG functions, with the stipulation that contributions by BOG members are strictly voluntary.

C. Member Services Committee

Ms. Johnnie informed the board that the Member Services Committee would be joining the BarBooks discussions with the Budget and Finance and Policy and Governance Committees.

D. Policy and Governance Committee

1. Implementing the Senior Lawyers Task Force Recommendations

Ms. Naucler informed the board that the Member Services Committee be reviewing the recommendations of the Senior Lawyers Task Force for the board's consideration later this year.

2. BOG Spouse/Guest Expense Reimbursement Policy

Motion: The board unanimously passed the committee motion to reimburse BOG members for spouse or guest expenses for board meetings and the Past BOG Dinner (see Exhibit B). The reimbursement will also be available to senior staff whose attendance at meetings is required.

3. Adoption of Bar Rule of Procedure for Ethics School

Motion: The board unanimously passed the committee motion to use the model in Option C (see Exhibit C).

4. MCLE Regulation 3.300

Motion: The board unanimously passed the committee motion to approve new MCLE Regulation 3.300(d) to clarify the alternate reporting requirement for Access to Justice credits. (see Exhibit D).

5. Bar Rule of Procedure Changes from Redistricting

Motion: The board unanimously passed the committee motion to amend the Bar Rules of Procedure (BRs) relating to Disciplinary Board and LPRC appointment, to conform to the new BOG regions that will be effective January 2011 (see Exhibit E).

6. Bylaw 3.4 Amendment re: Distribution of HOD Agendas

Motion: The board unanimously passed the committee motion to amend Bylaw 3.4. (see Exhibit F).

7. Misc. Housekeeping Bylaw Amendments

Motion: The board unanimously passed the committee motion to apply various housekeeping changes to the OSB Bylaws (see Exhibit G).

8. CSF Rule 2.2.1 Amendment

Motion: The board unanimously passed the motion to amend CSF Rule 2.2.1 expanding the definition of "dishonesty" to include a lawyer's wrongful failure to maintain client funds in trust until earned (see Exhibit H).

9. Proposed Amendments to LPRC Statute

Motion: The board unanimously passed the committee motion to propose amendments to LPRC statute, which will appear in the 2011 legislative package (see Exhibit I).

10. Certified Mailings for MCLE Notices

Motion: The board unanimously passed the committee motion to amend MCLE Regulation 1.115 regarding service by mail (see Exhibit J).

11. Proposed Amendment to MCLE Regulation 4.350(e)

Motion: The board unanimously passed the committee motion to amend MCLE Regulation 4.350(e) to assess late fees for untimely accreditation requests by local bar associations (see Exhibit K).

12. Limit Number of HOD Resolutions

The Policy and Governance Committee is not recommending that the BOG take any action to limit the number of HOD resolutions presented by a single delegate at the HOD meeting.

13. Committee Charges Revisions

Motion: The board unanimously passed the committee motion to revise the Federal Practice and Procedure and Quality of Life Committee charges (see Exhibit L).

E. Public Affairs Committee [Mr. Piucci]

1. Legislative Update

The legislature is looking to go to annual sessions, alternating between short sessions in even-numbered years and the regular longer session in odd-numbered years. The state's revenue for 2010 is stable but 2011 is projected to have a \$2 billion to \$5 billion deficit. On April 13 and 14, the bar will sponsor a legislative review session, emceed by Ms. Fisher, in an effort to review upcoming bills, provide better communications between sections on the various proposals, and to flush out problems and ascertain the impact they will have.

The board reviewed and discussed issues surrounding the state court filing fees and establishing a task force to review the matter (see Exhibit M).

Motion: The board unanimously passed the committee motion to convene a task force on state court filing fees as set forth in Exhibit M and to ask the Chief Justice to join the task force.

The task force will report back to the board at its November 2010 meeting.

9. Consent Agenda

Motion: Ms. DiIaconi moved, Ms. Lord seconded, and the board unanimously passed the consent agenda items, including the October 30, 2009 minutes as corrected (see Exhibit N).

Notes for a Law Lecture

Abraham Lincoln [c. 1859]

I am not an accomplished lawyer. I find quite as much material for a lecture, in those points wherein I have failed as in those wherein I have been moderately successful.

① The leading rule for the lawyer, as for the man of every other calling, is diligence. Leave nothing for to-morrow, which can be done to-day. Never let your correspondence fall behind. Whatever piece of business you have in hand, before stopping, do all the labor pertaining to it, which can then be done.

When you bring a common-law suit, if you have the facts for doing so, write the declaration at once. If a law point be involved, examine the books, and note the authority you rely on, upon the declaration itself, where you are sure to find it when wanted. The same of defences and pleas. In business not likely to be litigated--ordinary collection cases, foreclosures, partitions, and the like,--make all examinations of titles

^and note them,^ and even draft orders and decrees in advance. This course has a tripple advantage; it avoids omissions and neglect, saves your labor, when once done; performs the labor out of court when you have leisure, rather than in court, when you have not. ② Extemporaneous speaking should be practiced

and cultivated. It is the lawyer's avenue to the public. However able and faithful he may be in other respects, people are slow to bring him business, if he can not make a speech. And yet there is not a more fatal error to young lawyers, than relying too much on speech-making. If any one, upon his rare powers of speaking, shall claim an exemption from the drudgery of the law, his case is a failure in advance

Never encourage ③ Discourage^ litigation. Persuade your neighbors to compromise whenever you can.

Point out to them how the nominal winner is often a real loser, in fees, expenses, and waste of time. As a peace-maker, the lawyer has a superior opertunity of being a good man. There will still be business enough.

Exhibit A

Never stir up litigation. A worse man can scarcely be ~~conceived~~ of ^{^found^} than one who does this.

Who can be more nearly a fiend than he who habitually overhauls the Register of deeds, in search of defects in titles, whereon to stir up strife, and put money in his pocket? A moral tone ought to be infused into the profession, which should drive such men out of it.

④ The matter of fees is important far beyond the mere question of bread and butter involved. Properly attended to, fuller justice is done to both lawyer and client. An exorbitant fee should never be claimed. As a general rule, never take your whole fee in advance, nor any more than a small retainer. When fully paid before hand, you are more than a common mortal if you can feel the same interest in the case, as if something was still in prospect for you, as well as for your client. And when you lack interest in the case, the job will very likely lack skill and diligence in the performance. Settle the amount of fee, and take a note in advance. Then you will feel that you are working for something, and you ^{^are^} sure to do your work faithfully, and well. Never sell a fee-note--at least, not before the consideration service is performed. It leads to negligence and dishonesty--negligence, by losing interest in the case, and dishonesty in refusing to refund, when you have allowed the consideration to fail.

⑤ There is a vague popular belief that lawyers are necessarily dishonest. I say vague, because when we consider to what extent confidence, and honors are reposed in, and conferred upon lawyers by the people, it appears improbable that their impression of dishonesty, is very distinct and vivid. Yet the expression, is common--almost universal. Let no young man, choosing the law for a calling, for a moment yield to this popular belief. Resolve to be honest at all events; and if, in your own judgment, you can not be an honest-lawyer, resolve to be honest without being a lawyer. Choose some other occupation, rather than one in the choosing of which you do, in advance, consent to be a knave.

Exhibit A

OREGON STATE BAR

Policy & Governance Committee Agenda

Meeting Date: January 15, 2010
From: Sylvia E. Stevens, General Counsel
Re: BOG Spouse/Guest Expense Reimbursement

Action Recommended

Consider whether to revise the policy on spouse/guest reimbursement for BOG members and staff.

Background

Questions have come up recently regarding the policy on reimbursement of spouse/guest expense at BOG meetings. The general policy on expense reimbursement is set forth in OSB Bylaw 7.500:

Bar employees and members of the Board of Governors...will be reimbursed for their expenses in accordance with this policy when acting in their official capacities. Expenses of spouses or guests will not be reimbursed except as specifically approved by the Board of Governors....

The BOG Handbook sets out the following policy for board members:

Spouse/guest expense for one guest is complimentary for official Board of Governor's events as follows: Meal expense at Board of Governors regional bar social events, past Board of Governors dinner, annual Board of Governors dinner, and House of Delegates' social events. Guest expenses considered to be a personal expense include meals at the November planning retreat, other meals associated with travel and meetings or additional travel costs such as airline tickets.

The spouse/guest policy was adopted sometime after 1992. Prior to that time, the bar covered the expense for BOG members' spouses or guests to attend any board meeting or other bar-related event at which BOG members were expected to be present. The reason for the change is unclear, but may reflect a desire to contain costs when the board met more frequently, held more meetings away from the Portland metro area, and had more guests in attendance.

The policy as written is deficient in several respects. First, there is no "annual Board of Governors dinner." Nor does there seem to be any clear rationale for the choice of events at which expenses are covered.

Exhibit B

15

**Proposed Ethics School BR
Option C – No Exam Requirement**

BR 6.4. Ethics School.

(a) An attorney sanctioned under BR 6.1(a)(ii), (a)(iii) or (a)(iv) shall successfully complete a one-day course of study developed and offered by the Bar on the subjects of legal ethics, professional responsibility and law office management. Successful completion requires that the attorney attend in person the course offered by the Bar and pay the attendance fee established by the Bar.

(b) An attorney reprimanded under BR 6.1(a)(ii) who does not successfully complete the course of study when the course is next offered by the Bar following the effective date of the reprimand shall be suspended from the practice of law until the attorney successfully completes the course.

(c) An attorney suspended under BR 6.1(a)(iii) or (a)(iv) shall not be reinstated until the attorney successfully completes the course of study, unless the course is not offered before the attorney's term of suspension lapses, in which case the attorney may be reinstated if otherwise eligible under applicable provisions of Title 8 of these Rules until the course is next offered by the Bar. If the attorney does not successfully complete the course when it is next offered, the attorney shall be suspended from the practice of law until the attorney successfully completes the course.

OREGON STATE BAR

P & G Committee Agenda

Meeting Date: January 15, 2010
Memo Date: December 18
From: MCLE Committee
Re: MCLE Rule 3.2(c) Access to Justice and proposed regulation

Action Recommended

Review proposed MCLE Regulation 3.300(d) regarding the reporting requirements for access to justice (A2J) credits.

Background

At its August 28 and October 30, 2009 meetings, the Policy and Governance (P&G) Committee of the Board of Governors reviewed the MCLE Committee's recommendation for an amendment to MCLE Rule 3.2(c).

After lengthy discussions, the P&G Committee declined to approve the proposed rule amendment.

In lieu of amending Rule 3.2(c), the P&G Committee asked the MCLE Committee to propose a regulation to the rule, which outlines the reporting periods in which A2J credits are required.

The MCLE Committee recommends adding MCLE Regulation 3.300(d), which sets forth the reporting periods in which access to justice credits are required:

Regulation 3.300 Application of Credits.

(d) Members in a three-year reporting period are required to have 3.0 access to justice credits in reporting periods ending 12/31/2012 through 12/31/2014 and 12/31/2018 through 12/31/2020. Access to Justice credits earned in a non-required reporting period will be credited as general credits.

OREGON STATE BAR

BOG Policy & Governance Agenda

Meeting Date: January 15, 2010
Memo Date: January 6, 2010
From: Sylvia Stevens, General Counsel, Ext. 359
Jeffrey D. Sapiro, Disciplinary Counsel, Ext. 319
Re: Proposed Amendments to Bar Rules regarding New BOG Regions

Action Recommended

Recommend to the Board of Governors that amendments to the Bar Rules of Procedure (BRs) be adopted to implement the new BOG regions, effective January 2011.

Discussion

As a result of the recent reconfiguration of BOG regions required by ORS 9.025, a new Region 7 (Clackamas County) will be created effective January 1, 2011. The creation of the new region necessitates amendments to the Bar Rules of Procedure relating to the SPRB and Disciplinary Board, as they are both tied to the BOG regions. (The compositions of Regions 1, 3, 4 and 6 are also affected by the reconfiguration, but do not require additional changes in the BRs.) Staff suggest the following amendments to BRs 2.3(b)(1) and 2.4(a), respectively:

Rule 2.3 Local Professional Responsibility Committees And State Professional Responsibility Board.

* * *

(b) SPRB.

(1) Appointment. The Board shall create for the state at large a state professional responsibility board and appoint its members. The SPRB shall be composed of eight [~~seven~~] resident attorneys and two members of the public who are not attorneys. Two attorney members shall be from Board Region 5 and one attorney member shall be from each of the remaining Board regions. The public members shall be at-large appointees. Members of the SPRB shall be appointed for terms of not more than four years and shall serve not more than four years. Each year the Board shall appoint one member of the SPRB as chairperson. The chairperson shall be an attorney. In the event the chairperson is unable to carry out any responsibility given to him or her by these rules, the chairperson may designate another member of the SPRB to do so.

* * *

Exhibit E

Rule 2.4 Disciplinary Board.

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

Other volunteer positions within the disciplinary system (LPRC and bar counsel) do not require amendments to the rules of procedure because they either are not tied to region configuration or their composition is not addressed in the existing BRs.

OREGON STATE BAR

Policy and Governance Committee Agenda

Meeting Date: December 18, 2009
From: Sylvia E. Stevens, General Counsel
Re: Revision of Bylaw 3.4 (HOD Agendas)

Action Recommended

Consider amending Bylaw 3.4 regarding distribution of the HOD agenda to assure conformance with current practice.

Background

The Committee should consider recommending to the BOG that OSB Bylaw 3.4 be amended as follows:

Section 3.4 Meeting Agenda

After receiving all resolutions, the Board must prepare an agenda for the House. The Board may exclude resolutions from the agenda that are inconsistent with the Oregon or United States constitutions, are outside the scope of the Bar's statutory mission or are determined by the Board to be outside the scope of a mandatory bar's activity under the U.S. Supreme Court decision in *Keller v. the State Bar of California*. The **House agenda, including any resolutions that the Board has excluded, must be published by Board, [must distribute the House agenda] with notice thereof** to all active and inactive bar members, [including any resolutions that the Board has excluded,] at least 20 days in advance of the House meeting.

The *former* BOG Policies required that the agenda be *mailed* to the membership. When the policies were incorporated into the Bylaws in 2003, the language was changed to substitute "distributed" for "mailed" in anticipation of electronic distribution. Since approximately 2006, we have distributed the agenda by sending an e-mail with a link to the OSB web site where the agenda is posted. The only members who get hard copies are those who don't have an e-mail address on file with the bar.

A question was raised this year whether sending an e-mail with a link is the equivalent of "distributing" the agenda. Thus far we have not had any complaints or objections from any delegate. However, it may be wise to amend the bylaw to avoid any challenges to the manner in which the agenda is handled. Of course, amending the bylaw doesn't entirely solve the problem because of there is also a HOD rule requiring "distribution" of the agenda.¹ Changes to

¹ HOD Rule of Procedure 5.5 provides: In advance of any meeting of the House of Delegates, the Board of Governors of the Oregon State Bar shall review proposed agenda items for conformity with applicable law and bar

the HOD Rules must be approved by the HOD and that could not happen until the 2010 HOD meeting.

policy and propose a preliminary agenda for the meeting. *The preliminary agenda*, along with notice of the questions or measures the Board determined should not be placed on the agenda, *shall be distributed to the membership* of the Oregon State Bar at least twenty (20) days prior to the meeting.

Exhibit F

OREGON STATE BAR

Policy & Governance Committee Agenda

Meeting Date: February 18, 2010
From: Sylvia E. Stevens, General Counsel
Re: Bylaw Corrections

Action Recommended

Approve the two “housekeeping” bylaw amendments set out below.

Background

Bylaw 2.302

Bylaw 2.302 sets out the grounds for which a public members of the BOG is subject to removal. There is an incorrect citation to Bylaw 2.400, which should be Bylaw 2.300:

Subsection 2.300 Appointment

Any person appointed to a public position on the Board must meet the qualifications set forth in ORS 9.025(1). Public members serve for a term of four years, beginning on January 1 of the year following appointment. Every attempt will be made to maintain geographic distribution; however, the priority will be to match the current needs of the Board with the areas of interest of the public members.

* * *

Subsection 2.302 Removal

Public members of the Board are subject to removal by the Board upon the following grounds and for the following reasons: A public member no longer meets the initial qualifications for appointment set forth in Subsection 2.300 of the Bar’s Bylaws; or a public member commits an act substantially similar to the conduct proscribed by ORS 9.527 or fails to perform the duties of the office. If at least ten members of the Board propose that the public member be removed, the public member is given written notice of the proposed removal, together with the reasons therefore. The written notice must be given at least 15 days before the next regularly scheduled board meeting. Thereafter, on a vote of at least ten members of the Board, the public member is removed and the position is vacated.

Bylaw 18.4

When the Client Assistance Office was created in 2003, we amended Bar Rule of Procedure 2.5 and moved most of the previous BR 2.5 to a new BR 2.6. Apparently, we didn’t correct all of the references in the Bylaws:

Section 18.4 Disciplinary Correspondence

Members of the Board of Governors or other bar officials may receive occasional correspondence related to disciplinary matters. All such correspondence, including letters from complainants or accused lawyers, must be forwarded to Disciplinary Counsel for response. Disciplinary Counsel need not send a copy of any response to the board member or bar official to whom the initial correspondence was addressed. Any correspondence alleging an ethics complaint about Disciplinary Counsel or General Counsel must be sent directly to the chairperson of the SPRB pursuant to BR 2.6(g), with a copy to the staff member named in the complaint.

Exhibit G

10

OREGON STATE BAR

Policy & Governance Committee Agenda

Meeting Date: February 18, 2010
From: Sylvia E. Stevens, General Counsel
Re: Bylaw Corrections

Action Recommended

Approve the two “housekeeping” bylaw amendments set out below.

Background

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Exhibit G

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.

Exhibit H

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: February 19, 2010
From: Mitzi Naucler, Chair, Policy & Governance Committee
Steve Pucci, Chair, Public Affairs Committee
Re: Proposed Amendments to LPRC Statute

Action Recommended

Authorize staff to include in the 2011 Bar Bill an amendment to ORS 9.532 eliminating the requirement that volunteer investigators be grouped by regional committees.

Discussion

For many years, the Oregon State Bar has utilized the services of unpaid volunteers for assistance in investigating disciplinary complaints. The authority for this is found in ORS 9.532, the same statute that gives the Board of Governors authority to appoint the SPRB. That statute provides:

9.532 Local professional responsibility committees; state professional responsibility board; powers; witnesses; subpoenas; oaths.

(1) The board of governors shall create local professional responsibility committees to investigate the conduct of attorneys. The composition and authority of local professional responsibility committees shall be as provided in the rules of procedure.

(2) The board of governors shall also create a state professional responsibility board to review the conduct of attorneys and to institute disciplinary proceedings against members of the bar. The composition and authority of the state professional responsibility board shall be as provided in the rules of procedure.

(3)(a) The state professional responsibility board and local professional responsibility committees shall have the authority to take evidence, administer oaths or affirmations, and issue subpoenas to compel the attendance of witnesses, including the member being investigated, and the production of books, papers and documents pertaining to the matter under investigation.

(b) A witness in an investigation conducted by the state professional responsibility board or a local professional responsibility committee who testifies falsely, fails to appear when subpoenaed, or fails to produce any books, papers or documents pursuant to subpoena, shall be subject to the same orders and penalties to which a witness before a circuit court is subject. The state professional responsibility board or local professional responsibility committees may enforce any subpoena issued pursuant to paragraph (a) of this subsection by application to any circuit court.

Exhibit I

(c) Any member of the state professional responsibility board or a local professional responsibility committee may administer oaths or affirmations and issue any subpoena provided for in paragraph (a) of this subsection.

Presently, there are 16 LPRCs. There is one for Douglas County, one for Lane County and one for Multnomah County. The rest are multi-county committees. When rosters are full, total LPRC membership is roughly 100. Each year, staff gathers the names of those lawyers who express interest in LPRC service, solicits additional volunteers, puts together a proposed roster for each of the 16 committees and presents them to the Board of Governors Appointments Committee. The Appointments Committee then makes recommendations to the full Board of Governors, which makes the final appointments. Members are then notified of their appointments, a training manual is updated by staff and circulated, and pending committee assignments are coordinated with the new chairpersons.

Two developments suggest that it is time to amend ORS 9.532 to do away with the committee structure (but *not* with volunteer investigators):

(1) The number of investigative assignments made to LPRCs has diminished substantially as Disciplinary Counsel's Office (DCO) has assumed most of the responsibility for investigating complaints. For example, 131 assignments were made to LPRCs in 1997. Ten years later, in 2007, the number of assignments was 18, and the average is even fewer since then;

(2) Interest in LPRC service has diminished radically over the last several years such that it is extremely difficult to fill vacant positions on LPRC rosters. Staff expends a good bit of time drumming up volunteers, but over the last few years has had to resort to asking existing members to consider reappointment year after year.

Staff suggests that the LPRC committee structure has outlived its usefulness. In fact, the Bar and the Supreme Court took a step in the direction of reducing reliance on the committee structure in 2004, when Bar Rule of Procedure (BR) 2.3(a) was amended to provide that investigative assignments are to be made by disciplinary counsel directly to *individual* members of an LPRC, rather than routing assignments through committee chairpersons. Although an LPRC member may request that the LPRC chair convene a meeting of the full committee to discuss an assignment, the investigating member "need not obtain the approval of the LPRC as a whole, or of the chairperson, before submitting his or her final investigative report to Disciplinary Counsel." BR 2.3(a)(2)(E). To staff's knowledge, the only LPRC that actually meets as a committee and discusses investigative reports is in Multnomah County.

Disciplinary Counsel's Office still has occasional need for investigative assistance from volunteer lawyers in local communities. It is not always practical for DCO to travel to Burns or Pendleton or Medford to interview a witness or meet face-to-face with an interested party. Disciplinary Counsel envisions keeping a list of volunteers who are willing to take on an investigative assignment as the need arises. However, continuing with the present committee recruitment, appointment and maintenance process is not an effective use of time given the low numbers of investigative assignments each year, the limited number of volunteers and the rule that provides for direct assignments to and direct reports back from individual investigators.

The Policy & Governance and Public Affairs Committees propose that ORS 9.532 be amended as set out below. The amendments eliminate LPRCs, but authorize the designation of individual bar members to serve as investigators with all the authority to issue subpoenas and compel the attendance of witnesses and the production of records that LPRCs presently have.

9.532 ~~State professional responsibility board; powers; witnesses; subpoenas; oaths.~~

(1) ~~The board of governors shall create a state professional responsibility board to review the conduct of attorneys and to institute disciplinary proceedings against members of the bar. The composition and authority of the state professional responsibility board shall be as provided in the rules of procedure.~~

(2) The state professional responsibility board shall have the authority to designate one or more members of the bar to investigate the conduct of attorneys on behalf of the state professional responsibility board.

(3)(a) The state professional responsibility board and any member of the bar designated to investigate the conduct of attorneys pursuant to subsection (2) shall have the authority to take evidence, administer oaths or affirmations, and issue subpoenas to compel the attendance of witnesses, including the member being investigated, and the production of books, papers and documents pertaining to the matter under investigation.

(b) A witness in an investigation conducted by the state professional responsibility board or by a designated investigator who testifies falsely, fails to appear when subpoenaed, or fails to produce any books, papers or documents pursuant to subpoena, shall be subject to the same orders and penalties to which a witness before a circuit court is subject. The state professional responsibility board or designated investigator may enforce any subpoena issued pursuant to paragraph (a) of this subsection by application to any circuit court.

Deleted: Local professional responsibility committees; s

Deleted: The board of governors shall create local professional responsibility committees to investigate the conduct of attorneys. The composition and authority of local professional responsibility committees shall be as provided in the rules of procedure.

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(c) Any member of the state professional responsibility board or a ~~designated investigator~~ may administer oaths or affirmations and issue any subpoena provided for in paragraph (a) of this subsection.

Deleted: local professional responsibility committee

Conclusion

The above amendments are not likely to reduce the involvement of volunteer lawyers in the investigative process beyond the current level of that involvement. However, the amendments will streamline the appointments process and eliminate a level of structure that is not necessary or beneficial. The SPRB has seen the above amendments and are not opposed to them.

Exhibit I

OREGON STATE BAR

P & G Committee Agenda

Meeting Date: January 15, 2010
Memo Date: December 18, 2009
From: MCLE Committee
Re: Certified Mailings for MCLE Notices

Action Recommended

Review the proposed amendment to MCLE Regulation 1.115 regarding service by mail.

Background

At the August 28, 2009 meeting of the Policy and Governance (P&G) Committee, members concluded that certified mailings, which will no longer be sent “return receipt requested”, should be accompanied by an e-mail or regular mail notice (for members who do not have e-mail) as a back-up method of notice. The P&G Committee asked the MCLE Committee to draft a regulation to that effect.

Pursuant to the P&G Committee’s request, the MCLE Committee recommends amending Regulation 1.115 as follows:

1.115 Service By Mail.

(a) Anything transmitted by mail to a member shall be sent to the member by first class mail, or certified mail if required by these rules, addressed to the member at the member’s last designated business or residence address on file with the Oregon State Bar. Certified mail will not be sent “Return Receipt Requested”. Members who are sent certified mail will also be notified about the certified mailing via e-mail or regular mail (for those members who do not have e-mail).

(b) Service by mail shall be complete on deposit in the mail.

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Exhibit J

OREGON STATE BAR

P & G Committee Agenda

Meeting Date: January 15, 2010
Memo Date: December 18, 2009
From: MCLE Committee
Re: Review Proposed Amendment to MCLE Reg 4.350(e)

Action Recommended

Review the proposed amendment to MCLE Regulation 4.350(e) regarding sponsor fees paid by local bar associations.

Background

In November 18, 2005, the Board of Governors amended the MCLE Regulations to exempt local bar associations in Oregon from payment of the MCLE program sponsor fee. See Regulation 4.350(e) below.

4.350 Sponsor Fees.

- (a) A sponsor of a 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 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.

The MCLE Department frequently receives accreditation applications from local bar associations for programs that were held more than 30 days prior to the application being received in our office. These applications are often for programs that were held 90 days, six

Exhibit K

months, or occasionally one year prior to the request for CLE credit being submitted. This frustrates program attendees who do not understand why the MCLE Department has no record of a local bar association program they attended.

In order to encourage local bar associations to submit their applications in a timely manner, the MCLE Committee recommends amending MCLE Regulation 4.350(e) to impose late fees on local bar associations, as follows:

MCLE Regulation 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.

OREGON STATE BAR

Policy and Governance Committee Agenda

Meeting Date: February 18, 2010
Memo Date: February 2, 2010
From: Danielle Edwards, Ext. 426
Re: Committee assignment revisions

Action Recommended

Consider changes to the Federal Practice and Procedure and Quality of Life Committee assignments (also referred to as a committee charge).

Background

The Federal Practice and Procedure Committee would like to revise its current assignment to allow the committee to review the procedure used to nominate district and magistrate judges and make a recommendation to the Board of Governors as to the role the bar can play in the process. The attached assignment outlines the specific wording of these changes.

Due to the creation of the Sustainable Futures Section, the Quality of Life Committee would like to remove the assignment of tracking national and local developments in applying the concepts of sustainability to the practice of law. This change is noted on the attached revised assignment.

Note: Any additions, deletions or changes made to the original assignment are indicated by underlining (new) or strikethrough (deleted).

Exhibit L

FEDERAL PRACTICE AND PROCEDURE COMMITTEE CHARGE

General:

Assist in update and review of federal practices and procedures, keep the members of the Bar apprised of changes, and assist judiciary in its efforts to modernize this area of law. Advise Board of Governors on issues relating to federal practice. Coordinate liaison efforts between Bar membership and the federal judiciary.

Specific:

1. Identify and report to BOG improvements and proposed changes in federal practices and procedures.
2. Continue liaison activities with Oregon federal judges and staff to maintain communication and cooperation on issues affecting practice in the federal courts.
3. Continue liaison activities with Litigation Section.
4. Continue liaison activities with Federal Bar Association, federal court Local Rules Committee and 9th Circuit Lawyer Representatives.
5. Publish from time to time federal practice and procedure updates and other relevant information in appropriate forums, such as the Oregon State Bar Bulletin, to keep the Bar apprised of federal practice issues and developments.
6. Study the procedures used to nominate district court judges and magistrate judges to determine how the Bar can provide input into this process and make a recommendation to the Board of Governors.
7. Solicit nominations for the OSB Award of Merit, the President's Public Service Award, Membership Service Award, Affirmative Action Awards, the Joint Bench Bar Professionalism Award and any other state, local and national awards for lawyers who contribute to serving the legal needs of Oregonians.

QUALITY OF LIFE COMMITTEE CHARGE

General:

Educate and motivate lawyers to make professional choices that will enhance their quality of life and advance the legal profession.

Specific:

1. Encourage awareness and discussion of the diverse standards by which lawyers evaluate their lives.
2. Educate lawyers and law firms about the benefits of reducing tension between personal and professional life, and methods for doing so.
3. Provide information and support for lawyers who choose non-traditional career paths.
4. Continue publication of articles on enhancing the quality of life in the *Bulletin* and other OSB publications.
5. Form relationships with other Bar sections and committees to promote discussion of these issues within their constituencies. Enhance involvement with groups outside of the OSB, including OAAP, OWLs and Oregon law schools in promoting the goals of the committee.
6. Continue to maintain web site.
- ~~8. Track national and local developments in applying the concepts of sustainability to the practice of law and make recommendations for the Board of Governors.~~
8. Pursue greater speaker outreach to talk to members and law students about balancing home and work life.
9. Solicit nominations for the OSB Award of Merit, the President's Public Service Award, Membership Service Award, Affirmative Action Awards, the Joint Bench Bar Professionalism Award and any other state, local and national awards for lawyers who contribute to serving the legal needs of Oregonians.

The increase in state court filing fees and fines effective on October 1, 2009, has led court users to notice and examine the use of court filing fees and criminal fines as a revenue raising device for state government – even when some of that revenue is used to fund the operation of the State’s court system. The Oregon State Bar has an important role to play in assisting the legislature in assuring continued access to the court system. The bar supports a healthy, effective, and accountable judicial branch as an essential part of the state government. While users have always paid for the privilege of using the Oregon court system, the bar wishes to examine the appropriate place of filing fees and criminal fines in supporting the courts in particular and state government in general.

The Oregon State Bar will convene a Task Force on State Court Filing Fees. The Task Force will assist the Joint Interim Committee of Justice System Revenue in assessing the effects of the current filing fee and criminal fine structure on the operation of the court system. The Task Force may also make recommendations to the Joint Interim Committee.

The Task Force will be appointed by the Board of Governors, will be chaired by a lawyer, will include the two non-legislator members of the Joint Interim Committee on Justice System Revenues, representatives of the civil plaintiff and defense bars, representatives of district attorneys and criminal defense bar, a circuit court judge and an appellate court judge, and a staff person from the Oregon Judicial Department.

Among the issues the Task Force will examine are the following:

- How much has the increase in filing fees affected the access of people to the court system?
- At what point will filing fees become so high that litigants will routinely use non-judicial dispute resolution procedures?
- Are certain kinds of court filings or proceedings within cases inappropriate for the imposition of a fee?
- Are the fine surcharges appropriate to the crimes on which they are imposed?
- To what extent should the legislature look to the users of the courts to defray the state’s expense in running them?
- What justice system related entities are appropriately funded by filing fees?
- Should there be a dedicated source of funding for the operation of the State court system which will preserve access to justice in Oregon for all who need such services?

The Task Force will meet regularly, will take public comment at a time to be determined, and will provide a report to the Board of Governors on or before November 13, 2010.

The task force charge, for the long term, will be to recommend a system for funding the courts that recognizes their status as a separate and co-equal branch of government; preserves the balance between judicial accountability and independence; and maintains an open and accessible judicial system for all Oregonians.

Oregon State Bar
Meeting of the Board of Governors

October 30, 2009

Revised February 25, 2010

Open Session Minutes

The meeting was called to order by President Gerry Gaydos at 10:10 a.m. on Friday, October 30, 2009, and adjourned at 4:15 p.m. Members present from the Board of Governors were Barbara DiIaconi, Kathy Evans, Ann Fisher, Gerry Gaydos, Ward Greene, Gina Johnnie, Chris Kent, Steve Larson, Karen Lord, Audrey Matsumonji, Mitzi Naucler, Steve Piucci, Robert Vieira and Terry Wright. New board members present were Derek Johnson, Mike Haglund, and Maureen O'Connor. Staff members present were Teresa Schmid, Sylvia Stevens, Rod Wegener, Susan Grabe, Anna Zanolli, and Teresa Wenzel. Others present were Ross Williamson and Jessica Cousineau from the ONLD; Ira Zarov, Jeff Crawford, and Bill Carter from the PLF; Dick Roy, Bill Kabeiseman, and Jim Kennedy from the Sustainability Task Force; and via phone, Bob Browning of the Sole and Small Firm Practitioners Section.

Friday, October 30, 2009

1. Nominating Committee

A. Nomination of Steve Piucci as President-elect

The board agreed by consensus to approve Steve Piucci as the 2010 President-elect.

2. Report of Officers

A. Report of the President

Mr. Gaydos thanked the board for its support and efforts during his term in office, directed their attention to his written report, and encouraged them to attend the Diversity Summit, House of Delegates meeting, and bar's awards dinner.

B. Report of the President-elect

Ms. Evans directed the board's attention to her written report and indicated that she continues to prepare for her term as president in 2010.

C. Report of the Executive Director

As written.

Exhibit N

D. Oregon New Lawyers Division

1. ONLD Report

Mr. Williamson introduced the 2010 ONLD Chair, Jessica Cousineau and thanked the board for the opportunity of participating in the board meetings. His report was presented as written.

3. Board Members' Reports

A. Proposed HOD Resolution

1. Veterans' Day Resolution

Mr. Kent presented his request for an annual Veterans' Day Resolution honoring military service and sacrifice.

Motion: Mr. Kent moved, Mr. Piucci seconded, and the board voted unanimously to adopt the Veterans' Day Resolution.

4. Professional Liability Fund

A. General Update

Mr. Zarov informed the board the 2010 assessment would remain the same as 2009 and that he was optimistic it would remain the same for 2011.

B. 2010 Pro Bono Coverage Plan Changes

1. PLF Policy 3.800

Motion: Mr. Kent moved, Mr. Greene seconded, and the board voted unanimously to approve the proposed changes to PLF Policy 3.800 to allow coverage for all certified programs, provided they do not present an unacceptably high risk of claims, as shown on Exhibit A.

C. Primary Plan Retroactive Dates

1. PLF Policy 3.100 Claims Made Plan and Retroactive Date

Motion: Mr. Kent moved, Mr. Greene seconded, and the board voted unanimously to approve the proposed changes to PLF Policy 3.100 regarding the retroactive date of coverage for lawyers who discontinue and resume practice in the same coverage year, as shown on Exhibit B.

D. Primary and Excess Coverage Plan Changes

Mr. Crawford presented the PLF's recommendation to amend the Primary Coverage Plan to clarify the year to which a claim will be assigned. He also presented a recommendation to amend both the Primary and Excess Plans to limit statutory damages.

Motion: Ms. Evans moved, Mr. Kent seconded, and the board voted unanimously to approve the plan as shown on Exhibit C.

E. Adoption of 2010 Master Plans

Mr. Crawford presented the 2010 Master Primary (Claims Made), Excess and Pro Bono Plans for the board's approval as amended.

Motion: Mr. Kent moved, Ms. DiIaconi seconded, and the board voted unanimously to approve the plan.

F. Excess Rates for 2010

Mr. Zarov presented the PLF's request to increase the Excess Plan rates for 2010 by approximately 10%.

Motion: Mr. Kent moved, Ms. DiIaconi seconded, and the board voted to approve the revised rates.

G. Changes to 2010 Policy Manual

Mr. Zarov presented a recommendation to amend Chapter 7 of the PLF Policy Manual to charge additional rates for high-risk practices, redefine what constitutes securities practice, and clarify the rates for out-of-state firm members.

Motion: Mr. Piucci moved, Ms. DiIaconi seconded, and the board voted unanimously to approve the policy changes as set forth on Exhibit D.

H. 2010 PLF Assessment and Budget

Mr. Carter presented information about the PLF 2010 budget that includes a raise for the CEO. He acknowledged that the salary change will mean that the PLF CEO and the OSB Executive Director salaries will no longer be in parity, in contravention of the policy in recent years. Ms. Schmid informed the board that circumstances have changed and that, in her opinion, salary parity is less of an issue. Mr. Carter expressed the PLF Board of Directors' view that the raise will bring the CEO's salary in line with the market and will enhance recruitment and retention. Several board members inquired about

the process for determining a comparable market and the PLF's experience in recruitment and retention. Some concern was expressed that eliminating parity at the top would lead to increased salaries for all PLF staff. Mr. Carter assured the board that was not the intention.

Motion: Ms. Fisher moved, Ms. DiIaconi seconded, and the board voted to approve the PLF's 2010 Budget. Ms. Wright, Ms. Evans, Ms. Naucler, and Mr. Greene abstained.

5. Special Appearances

A. Sustainability Task Force [Mr. Roy, Mr. Kabeiseman, Mr. Kennedy]

Mr. Greene introduced the chair of the Sustainability Task Force (STF), Mr. Kabeiseman, and task force members Mr. Roy and Mr. Kennedy. The members of the STF thanked the board for its interest in sustainability and reviewed the STF report and recommendations. They put particular emphasis on the creation of a Sustainable Futures Section, for which they had obtained more than 400 petition signatures, and the adoption of an OSB bylaw recognizing the bar's commitment to sustainability. Mr. Greene thanked the task force for the enormous amount of effort put forth.

Motion: Ms. Evans moved, Ms. Wright seconded, and the board voted unanimously to create a Sustainable Futures Section.

Motion: Mr. Greene moved, Ms. DiIaconi seconded and the board voted to waive the one meeting notice requirement for changing the OSB Bylaws. Mr. Kent and Ms. Fisher opposed.

Motion: Mr. Greene moved, Ms. Evans seconded and the board approved new bylaw Article 26 as set forth below. Mr. Kent opposed.

Article 26 – Sustainability

The bar supports the goal of sustainability, generally defined as meeting present needs without compromising the ability of future generations to meet their own needs. Because bar operations and the practice of law impact the environment and society generally, the bar will be cognizant of sustainability in its internal operating practices as well as in its service to members. Internally, the executive director will designate a sustainability coordinator for bar operations, will encourage continuous sustainability improvement in bar operations, and will report to the Board of Governors at least annually on progress and impediments. In the practice of law, principles of sustainability may be important in addressing competing economic, social, and

environmental priorities that impact future generations. The bar will encourage education and dialogue on how law impacts the needs and interests of future generations relative to the advancement of the science of jurisprudence and improvement of the administration of justice.

The board will discuss implementation of other issues in the SSTF report at its planning session on October 31, 2009.

B. Sole & Small Firm Practitioners Section [Mr. Browning, Mr. Phinney]

1. Resolution for “Office Share” Pricing of

Mr. Browning presented the Section’s request that the bar implement a more equitable pricing of by treating the Section as a large law firm or “office share” arrangement. Mr. Gaydos responded that the board would be discussing pricing and related issues at the strategic planning session on October 31, 2009.

6. Rules and Ethics Opinions

A. Proposed Ethics Opinion

1. Formal Opinion Request No. 07-03

Ms. Stevens summarized for the board the proposed formal ethics opinion relating to a lawyer’s obligation to withdraw when a client files a bar complaint.

Motion: Mr. Piucci moved, Ms. DiIaconi seconded, and the board voted unanimously to issue the opinion as a Formal Ethics Opinion .

7. OSB Committees, Sections, Councils, Divisions and Task Forces

A. Client Security Fund

1. Request for Review of Claim Denial

a. No. 2009-28 MURPHY (Hubler)

Ms. Lord presented information concerning Ms. Hubler’s claim.

Motion: Ms. Wright moved, Ms. Evans seconded, and the board voted unanimously to uphold the decision of the CSF Committee to deny Ms. Hubler’s claim.

b. No. 2009-25 DOUGLAS (Ulle)

Ms. Lord and Ms. Stevens presented information concerning the claimant's request for review of the CSF Committee's recommendation to award only half of the money paid to his lawyer.

Motion: Ms. Evans moved to reimburse the full amount of the claim, Ms. Lord seconded the motion, but the motion failed (yes, 6 [Evans, Fisher, Gaydos, Lord, Piucci, Vieira]; no, 8 [DiIaconi, Greene, Johnnie, Kent, Larson, Marsumonji, Naucler, Wright]; absent, 2 [Garcia, Johnson])

B. Senior Lawyers Task Force

1. Senior Lawyers Task Force Report

Ms. Stevens presented the Senior Lawyers Task Force report on behalf of the chair, Albert Menashe. In the report, seniors are defined as lawyers over 55 and the task force recommended that the board establish a Senior Lawyers Division similar to the ONLD. The board thanked the task force for its work. Board members acknowledged the contributions that senior lawyers make as well as the problems of age-related impairments, but concluded that creation of a Senior Lawyers Division should be deferred pending further exploration into the level of interest among members and what the financial implications would be.

C. Urban /Rural Task Force

1. Update

Ms. Fisher indicated that the task force may continue for another year. Half of Oregon lawyers live outside of the Portland area, and many feel disenfranchised because of their distance from Portland. The task force is looking for ways to facilitate interaction throughout the entire bar. This will be an issue for the board's 2010 planning session.

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

A. Access to Justice Committee

1. Access to Civil Legal Services Task Force

Motion: The board passed the committee motion to establish the Access to Civil Legal Services Task Force, with Mr. Gaydos as chair. Ms. Naucler abstained.

2. Legal Services Program Appropriations

Motion: The board passed the committee motion to approve the LSP appropriations recommendation as set forth in Exhibit E. Ms. Naucner abstained.

B. Member Services Committee

1. Approve Election Dates for 2010

Motion: The board unanimously passed the committee motion to approve the election dates for 2010 with the understanding that the dates may change if the BOG retreat cannot be rescheduled.

C. Policy and Governance Committee

1. Miscellaneous Housekeeping Bylaw Amendments

Motion: The board unanimously passed the committee motion to approve the various housekeeping changes to the Bar Bylaws as shown on Exhibit F.

2. Revised Committee Assignments

Motion: The board unanimously passed the committee motion to approve the revised committee assignments for SLAC, as shown on Exhibit G.

3. Proposed Amendments to Bylaw 13.01

Motion: The board unanimously passed the committee motion to approve the amendments to Bar Bylaw 13.01 to expand eligibility for certified pro bono program, as shown on Exhibit H.

4. Anonymous Payments to the CSF

Ms. Stevens explained that the CSF had received an offer of an anonymous “donation” of funds that “may be due to the CSF.” The CSF Committee sought the board’s guidance on whether such payments should be accepted.

Motion: The board unanimously passed the committee motion to accept anonymous donations to the Client Security Fund provided they are unrestricted and not available as “credit” against a future obligation to the Fund.

5. Housekeeping MCLE Rule Amendments

Motion: The board unanimously passed the committee motion to approve the amendments to MCLE Rule 3.6 and MCLE Regulation 3.500 as shown on Exhibit I.

6. Sunsetting the Joint OSB/CPA Committee

Motion: The board unanimously passed the committee motion to sunset the Joint OSB/CPA Committee, as requested by the joint committee chair and members.

D. Public Affairs Committee

1. Public Affairs Update

Mr. Piucci updated the board on legislative issues, including the likelihood of passage or failure of various bills and reminding them that 2010 will be a short session proposed to last less than 30 days.

E. Budget and Finance Committee

1. 2010 OSB Budget

Mr. Greene summarized the proposed 2010 OSB Budget, informing the board that the bar has received significant savings from implementing electronic procedures.

Motion: The board unanimously passed the committee motion to approve the 2010 OSB budget.

2. Request from Sole & Small Firm Practitioners Section on BarBooks™

The committee had no recommendation regarding the request from the SSFPS. The board will review this matter during its strategic planning session on October 31, 2009.

Executive Session

3. Facilities Management Agreement
(closed pursuant to ORS 192.660(2)(e) and (h))

Mr. Greene updated the board on the status of the facilities management agreement. The committee brought no motion forward.

Open Session

4. Executive Director Contract and Salary
Recommendation

Ms. Naucler reported that the committee would recommend renewal of Ms. Schmid's contract at the board's November 6, 2009, special meeting.

9. Consent Agenda

The following items were removed from the Consent Agenda for discussion No. 09-08 SHINN, No. 09-32 SHINN, No. 09-09 COULTER, No. 09-33 COULTER, No. 09-36 COULTER, and No. 09-23 DOUGLAS:

1. No. 09-08 SHINN (Cousin)

Ms. Stevens explained that Mr. Shinn objected to the amount of award recommended by the CSF Committee and that she had verified his calculations, indicating that the award should be reduced to \$9000.01. Ms. Stevens also explained the Disciplinary Counsel's Office believed Mr. Shinn had charged the claimant for costs he had either not incurred or was not entitled to charge .

Motion: Mr. Greene moved, Ms. DiIaconi seconded, and the board voted to award \$9,000.01, concluding that there was insufficient evidence of dishonesty regarding the additional questioned amounts, which appear to be a fee dispute. Mr. Pucci opposed.

2. No. 09-32 SHINN (Doblie)

Ms. Stevens presented Mr. Doblie's request for review of the amount recommended for reimbursement by the CSF Committee.

Motion: Ms. Wright moved, Ms. Fisher seconded, and the board voted unanimously to return the matter to the CSF Committee for further action.

3. No. 09-09 COULTER (Warren), No. 09-33 COULTER (Puderbaugh), No. 09-36 COULTER (Christensen), No. 09-23 DOUGLAS (Johnson).

Motion: Ms. Wright moved to deny payment of No. 09-09, No. 09-33, No. 09-36, and No. 09-23. The motion died for lack of a second.

Motion: Ms. Evans moved, Mr. Pucci seconded, and the board voted unanimously to rescind action on No. 2009-25 DOUGLAS (Ulle) and send it along with No. 09-09, No. 09-33, No. 09-36, and No. 09-23 back to the CSF Committee for additional analysis and a recommendation for a consistent standard to apply in the cases.

Motion: Ms. Evans moved, Ms. Wright seconded, and the board unanimously approved the remainder of the Consent Agenda with a change to the October 30, 2009 minutes in 6.1. Access to Justice Committee. It should read "...the committee will bring its requests for distribution of legal services funds to the board for approval..."

10. Good of the Order

None.

Exhibit N

13. Terry M. Rood

Action: Mr. Piucci moved, Mr. Knight seconded, and the board unanimously passed the motion to reinstate temporarily Ms. Rood to active status.

14. Michael A. Schoessler

Action: Ms. Matsumonji moved, Ms. DiIaconi seconded, and the board unanimously passed the motion to reinstate temporarily Mr. Schoessler to active status.

15. Kathey I. Shaw

Action: Mr. Piucci moved, Mr. Mitchell-Phillips seconded, and the board unanimously passed the motion to recommend to the Oregon Supreme Court that Ms. Shaw be reinstated as an active member of the Oregon State Bar upon completion of 45 MCLE credits.

16. Richard A. Sheard

Action: The board reviewed information concerning the BR 8.1 reinstatement application of Mr. Sheard to satisfy the one meeting notice requirement of Bylaw 6.103. The application will come before the board at a later meeting.

17. Rose Thrush

Action: The board reviewed information concerning the BR 8.1 reinstatement application of Ms. Thrush to satisfy the one meeting notice requirement of Bylaw 6.103. The application will come before the board at a later meeting.

B. Disciplinary Counsel's Report

As written

**Oregon State Bar
Board of Governors Meeting
February 19, 2010
Judicial Proceedings Agenda**

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

A. Reinstatements

1. Deborah S. Berg

Action: Ms. Lord moved, Ms. O'Connor seconded, and the board unanimously passed the motion to recommend to the Oregon Supreme Court that Ms. Berg be reinstated as an active member of the Oregon State Bar.

2. William G. Benjamin

Action: The board reviewed information concerning the BR 8.1 reinstatement application of Mr. Benjamin to satisfy the one meeting notice requirement of Bylaw 6.103. The application will come before the board at a later meeting.

3. Virginia Bond

Action: Ms. Johnnie moved, Ms. Lord seconded, and the board unanimously passed the motion to recommend to the Oregon Supreme Court that Ms. Bond be reinstated as an active member of the Oregon State Bar.

4. Janine Curtis

Action: Mr. Kent moved, Mr. Piucci seconded, and the board unanimously passed the motion to recommend to the Oregon Supreme Court that Ms. Curtis be reinstated as an active member of the Oregon State Bar.

5. Dennis L. Dunn

Action: The board reviewed information concerning the BR 8.1 reinstatement application of Mr. Dunn to satisfy the one meeting notice requirement of Bylaw 6.103. The application will come before the board at a later meeting.

6. Richard Fairclo

Action: Mr. Piucci moved and Ms. Matsumonji seconded the motion to reinstate temporarily Mr. Fairclo to active status upon completion of 25 hours of CLE

credits. The board passed the motion (yes, 14 [DiIacnoi, Evans, Fisher, Garcia, Haglund, Johnnie, Kent, Knight, Lord, Matsumonji, Mitchell-Phillips, Naucler, O'Connor, Piucci]; no, 0; absent, 1[Larson]; abstain, 1 [Johnson]). The application will come before the board at a later meeting.

7. Charles M. Gudger

Action: The board reviewed information concerning the BR 8.1 reinstatement application of Mr. Gudger to satisfy the one meeting notice requirement of Bylaw 6.103. The application will come before the board at a later meeting.

8. Patrick Hughes

Action: The board reviewed information concerning the BR 8.1 reinstatement application of Mr. Hughes to satisfy the one meeting notice requirement of Bylaw 6.103. The application will come before the board at a later meeting.

9. Laura J. Larson

Action: The board reviewed information concerning the BR 8.1 reinstatement application of Ms. Larson to satisfy the one meeting notice requirement of Bylaw 6.103. The application will come before the board at a later meeting.

10. Stella K. Manabe

Action: The board reviewed information concerning the BR 8.1 reinstatement application of Ms. Manabe to satisfy the one meeting notice requirement of Bylaw 6.103. The application will come before the board at a later meeting.

11. M. Maila Putnam

Action: Ms. Fisher moved, Mr. Piucci seconded, and the board unanimously passed the motion to recommend to the Oregon Supreme Court that Ms. Putnam be reinstated as an active member of the Oregon State Bar.

12. Richard I. Rappaport

Action: Ms. Johnnie moved and Mr. Haglund seconded the motion to recommend to the Oregon Supreme Court that Mr. Rappaport be reinstated as an active member of the Oregon State Bar upon completion of 45 MCLE credits. The board passed the motion (yes, 14 [DiIacnoi, Evans, Fisher, Garcia, Haglund, Johnnie, Kent, Knight, Lord, Matsumonji, Mitchell-Phillips, Naucler, O'Connor, Piucci]; no, 0; absent, 1[Larson]; abstain, 1 [Johnson]).

**Oregon State Bar
Board of Governors Meeting
February 19, 2010
Executive Session Minutes**

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

A. Unlawful Practice of Law

1. Roderick Livesay, UPL No. 09-19

Action: Ms. DiIaconi moved, Ms. Matsumonji seconded, and the board voted unanimously to approve the cease and desist agreement negotiated with Mr. Livesay.

2. Michael Nichols, UPL No. 09-18

Action: Ms. DiIaconi moved, Ms. Matsumonji seconded, and the board voted unanimously to approve the cease and desist agreement negotiated with Mr. Nichols.

3. Evelyn Hayes, UPL No. 09-28

Action: Ms. DiIaconi moved, Ms. Matsumonji seconded, and the board voted unanimously to approve the cease and desist agreement negotiated with Ms. Hayes.

4. Don Tilton and Dianne Rettke, dba Pacific Legal Alternatives, Inc., UPL Nos. 07-22, 08-21, 08-27 & 08-44

Action: Ms. DiIaconi moved, Ms. Matsumonji seconded, and the board voted unanimously to approve the cease and desist agreement negotiated with Pacific Legal Alternatives, Inc.

5. Jeffrey Sharp

Action: By consensus, the board agreed to take no action against Mr. Sharp.

B. Other Matters

General Counsel reported on non-disciplinary litigation and other legal issues facing the bar.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: April 29, 2010
From: Sylvia E. Stevens, General Counsel
Re: CSF Claim Recommended for Payment

Action Recommended

Approve the CSF Committee's recommendation to pay the following claim for reimbursement:

No. 09-26 READ (Gregory)	\$2,713.35
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Background

Portland attorney Karen Read co-counseled with Florida counsel Siegel & Hughes in the Dow Corning breast implant class action. One of their clients was Gail Gregory.

In May 2007, Read received \$20,000 in settlement of Gregory's claim. At Read's request, Siegel & Hughes provided an itemization of the firm's costs in the matter totaling \$2,713.35. Thereafter, Read forwarded the settlement check to Gregory for endorsement together with a disbursement statement showing that Siegel & Hughes' costs would be reimbursed first, then the attorney fees would be deducted, and Gregory would receive the balance. Gregory endorsed the check and returned it to Read, who deposited it into her trust account. Read's trust account records indicate that she disbursed Gregory's share of the proceeds a week after the settlement check was deposited. The remainder of the \$20,000 was withdrawn in a lump sum in December 2007, but it is not clear what it was used for. Nothing was sent to Siegel & Hughes.

In April 2008, after many contacts from Siegel & Hughes, Read sent a check for the firm's share of attorney fees on the case. When she failed to follow with the cost reimbursement, Siegel & Hughes filed a complaint with the bar.¹ Read's response to the bar indicated that she had been ill during much of 2007 and early 2008, spending only a few hours a week attending to her practice. In September 2008, she assured DCO that she would reimburse Siegel & Hughes right away. She has never done so. In April 2009, with the assistance of the PLF, Read closed her practice.

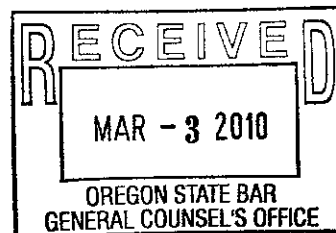
The CSF Committee recommends payment of the claim. The committee also recommends that no civil judgment be required. The claim is for less than \$5000 and Read is sure to be disciplined in connection with this and 8 other similar pending disciplinary matters.

¹ They also filed a claim for reimbursement with the CSF but, because the CSF rules allow claims only from clients, the claim was resubmitted by Gail Gregory. She has instructed that any award be paid to Siegel & Hughes.

**Lawrence K. Peterson
Law Office**

301 Lakeside Plaza – 8 North State Street – Lake Oswego, Oregon 97034 – 503/635-3546 - FAX 503/636-8512
larry@petersonlaw.info patty@petersonlaw.info

March 1, 2010



Sylvia Stevens
General Counsel
OREGON STATE BAR
PO Box 231935
Tigard, OR 97281-1935

**RE: Claimant: My Client Max Doblle
Client Security Fund 2009-32**

Dear Ms. Stevens:

Please relay to the board of bar governors my sincere thanks for their hospitality and professional courtesies extended to me and my client during the meeting of February 19, 2010. Mr. Doblle and I are appreciative of the Board's efforts and interests in a proper resolution of Mr. Doblle's claim before the client's security fund. I would also like to thank the CSF Committee for its hospitality and courtesies extended to me and my client in their review of Mr. Doblle's claim. Both Mr. Doblle and I feel we received a fair review by the bar and the Committee during this process.

I have enclosed executed Assignment of Judgment in favor of the Oregon State Bar for the amount of \$32,190.50. I've also enclosed Mr. Doblle's executed W-9 as previously presented to my office. I trust that these are all the documents that the Bar needs to issue a check in favor of Mr. Doblle and me in the amount of \$32,190.50. My taxpayer ID number is 93-1243742. Finally, last but not least, thank you Sylvia for the many courtesies you extended to me and Mr. Doblle during this process.

Please feel free to contact me if you have any questions or comments regarding the above or the enclosed.

Sincerely,

A large, stylized handwritten signature in black ink, appearing to read "Lawrence K. Peterson".

Lawrence K. Peterson

encl/abc
cc: Max Doblle

Minutes
Access to Justice Committee
OSB Board of Governors
February 18, 2010
Oregon Garden, Silverton

Committee Members Present: Gina Johnnie (Chair), Derek Johnson, Karen Lord, Audrey Matsumonji, Kenneth Mitchell-Phillips, Mitzi Naucler. **Staff:** Susan Grabe, Kay Pulju, Teresa Schmid.

Minutes of the January 15 meeting were approved as submitted.

1. Bench/Bar Task Force on Family Law Forms and Services. Although discussed at the BOG's November 2009 planning retreat, this item (and others from the retreat) have not been officially adopted by the board and will be on the agenda for the February meeting. The task force will review available forms and services in light of budget realities and make recommendations on priorities to the bench and bar. This includes recommendations for the comprehensive set of family law forms that OJD has developed but currently does not have funds to update or expand.

Kay reported that member recruitment is under way, and reminded the committee that the Chief Justice's proposal called for appointing a member of this committee to the task force. After discussion, it was agreed that Mitzi Naucler and Karen Lord would be co-representatives, attending as their schedules allow.

2. RIS funding models. Teresa Schmid and Kay Pulju gave an overview of percentage fee funding for Lawyer Referral Services and discussed barriers to adoption in Oregon. An agenda memo from the Public Service Advisory Committee and staff recommended further study by General Counsel for referral to the BOG's Policy & Governance Committee. Members discussed the model and memo, including concerns on how such a system would impact trial lawyers. It was agreed that before taking any such proposal to the House of Delegates it will be thoroughly vetted with bar members and discussed with leaders of the Oregon Trial Lawyers Association. By consensus the committee agreed to forward resolution of the legal and legal ethics issues to General Counsel and the Policy & Governance Committee.

Next Meeting: Friday, March 19 at the OSB Center in Tigard.

Minutes
Access to Justice Committee
OSB Board of Governors
March 19, 2010
OSB Center, Tigard

Committee Members Present: Gina Johnnie (Chair), Kathy Evans, Ann Fisher, Derek Johnson, Chris Kent, Audrey Matsumonji, Kenneth Mitchell-Phillips, Maureen O'Connor, Mitzi Naucler. **Guest:** Linda Eyeran. **Staff:** Judith Baker, Catherine Petrecca, Susan Grabe, Helen Hierschbiel, Kay Pulju, Teresa Schmid.

Minutes of the February 18 meeting were approved as submitted.

1. Loan Repayment Assistance Program (LRAP). Linda Eyeran, chair of the LRAP Committee, gave a brief history of the program. LRAP has just completed its first three-year cycle, with 21 grant recipients receiving \$5,000 per year for a total of \$15,000 each. She described LRAP as a successful and very productive program limited only by finances. The committee requests an increase in funding through a per-member assessment in bar fees, which would go before the bar's House of Delegates.

ACTION: Approved a motion to support increased funding for LRAP and referred to Budget & Finance Committee for consideration.

2. Bench/Bar Task Force on Family Law Forms and Services. The committee reviewed and approved a recommendation that the following individuals serve on the bar's behalf:

- BOG: Karen Lord/Mitzi Naucler
- Family Law Section: Mike Fearl (co-chair), Anthony Wilson
- Pro Bono Committee: Matthew Rizzo
- Department of Justice: Jean Fogarty
- County Law Librarian: Martha Renick

3. Columbia County Legal Aid Program. The peer review conducted by the Legal Services Program (LSP) found that the Columbia County program does not meet the standards and guidelines required by LSP. The program wants to continue its current operational model. State Senator Betsy Johnson (Scappoose) is arranging for mediation between the two programs.

Next Meeting: Thursday, April 29, at the OSB Center in Tigard.

Minutes
Budget & Finance Committee
February 18, 2010
The Oregon Garden Resort
Silverton, Oregon

Present - Committee Members: Mitzi Naucler; Mike Haglund; Michelle Garcia; Karen Lord; Maureen O'Connor. **Other BOG Members:** Kathy Evans; Steve Piucci **Staff:** Teresa Schmid; Sylvia Stevens; Susan Grabe; Rod Wegener.

1. Minutes – January 15, 2010 Committee Meetings

The minutes of the January 15, 2010 meeting were approved.

2. Financial Report – Preliminary 2009 end of year

Mr. Wegener presented an “almost final” financial report for fiscal year 2009. The net revenue for general operations will be slightly over \$100,000 compared to the budgeted net revenue of \$249,000. Attaining a net revenue is positive since key revenue sources as CLE Seminars, Legal Publications, and investment income have been expected to be below budget all year. Revenue from Admissions, MCL:E, and Lawyer Referral exceeded their 2009 budgets, but not enough to offset the other activities. Membership fee revenue was on target at 100.3% of budget. The largest expense, staff salaries, was amazingly close to the budget being only \$304 below the \$5.243 million budget. As all non-dues revenue was below budget, the corresponding direct program and administrative costs also were below budget.

The transition from traditional paper-related to electronic costs continued as the accounts for office supplies, postage, copy service, and telephone all were all below budget while computer related costs were over budget.

The preliminary Fanno Creek Place (FCP) net expense is \$715,000 compared to a \$733,00 budgeted net expense. The largest cost of FCP is the non-cash expense of depreciation which is \$489,000. Operating costs were below budget.

When including the bottom line for the operating budget, FCP, the realized and unrealized loss of the investment portfolio, the required accrual for publications inventory, the bar’s net operating revenue for audit report purposes will be a surprisingly small positive number.

3. Revised Investment Policy

The committee approved the revised investment policy at bylaw 7.4 at a prior meeting and the topic is on the board agenda for action.

Mr. Wegener reported that all funds except five corporate bonds have been transferred to the custodians. The transfer of those bonds is in process. The total value of the funds transferred was \$3,651,582.02, so each investment manager will have \$1,825,791.01 to manage for the bar. Washington Trust has made a few small stock purchases, but generally

all funds are still in cash or money market accounts. The committee instructed Mr. Wegener to notify each broker to begin the more active management of the funds per the policy. Investment managers from Becker Capital and Washington Trust will be invited to the committee's March 19 meeting. Mr. Wegener also reported that representatives from the LGIP are willing to meet with the committee and they also will be invited to the March 19 meeting.

4. Request from Sole & Small Firm Practitioners (SSFP) Section Request on BarBooks Subscription Rate

At its previous meeting, the committee listened to the request from the section representatives and resolved not to change the subscription plans for this one-time request of the section. The matter is on the board's agenda for final action by the board.

The committee acknowledged that it will meet with the Policy & Governance Committee to discuss the universal access and other options for funding an electronic version of the legal publications library.

5. Guidelines for BOG Special Account

The committee reviewed and approved after some minor revisions the guidelines at its October 30, 2009 meeting and had no further changes. The topic is on the board's agenda for final action.

6. Opus Northwest Master Lease

This topic was on the agenda to continue to monitor the leases in the bar center. The February rent payment to the PLF from Opus Northwest to reimburse PLF for its former office space had not been received as of the meeting date. This condition is in the master agreement between the bar and Opus and Opus' default on the former PLF space could have ramifications to the bar. The morning's *Oregonian* included an article stating that Opus Northwest was selling assets to raise cash. Both conditions were alarming for the committee and a contingency plan for any defaults will be presented at the next meeting.

7. Next committee meeting

The next meeting will be Friday, March 19 at the bar center in Tigard.

Minutes
Budget & Finance Committee
March 19, 2010
Oregon State Bar Center
Tigard, Oregon

Present - Committee Members: Chris Kent, chair; Mitzi Naucler; Mike Haglund; Karen Lord; Maureen O'Connor. **Other BOG Members:** Kathy Evans. **Staff:** Teresa Schmid; Michelle Peterson; Rod Wegener.

1. Minutes – February 18, 2010 Committee Meetings

The minutes of the February 18, 2010 meeting were approved.

2. Meeting with Investment Managers

The meeting time was spent solely listening to and asking questions of the two investment managers with Becker Capital Management and the state's Short Term Fund, which manages the Local Government Investment Pool (LGIP). First Mr. Darren Bond, the Deputy State Treasurer, and Tom Lofton shared the policy and practices of the state's Short-Term Fund, which objectives are identical to the bar's of security, liquidity, and yield in that order. The STF is very liquid wherein half the portfolio must mature within 93 days and a maximum of 25% may mature after one year.

Becker representatives Keene Satchwell and Marian Kessler indicated it has begun to implement the bar's revised investment policy. They shared a summarized report of the investments it has made and indicated it has purchased 50-60 equities averaging about \$18,000 each. It also has made investments into the fixed income market. Becker does not expect a significant rise in interest rates during 2010. Becker will meet with the committee each quarter in the near future.

3. Next committee meeting

The next meeting will be April 29 at the bar center in Tigard.

BOG Member Services Committee
February 18, 2020
Oregon Garden

Present:

Gina Johnnie, Vice Chair
Audrey Matsumonji
Barbara DeIaconi
Ethan Knight
Ken Mitchell-Phillips

Staff:

Margaret Robinson
Kay Pulju

Approval of Minutes

The minutes of the January meeting were approved as written.

Status of BarBooks

The background and status of the BarBooks issue was discussed. Kay Pulju, Communications Manager, provided useful input.

Diversity/AAP Update

The update included the Affirmative Action Administrator's activities over the month of January. Kudos was extended for his community outreach efforts.

BOG Member Services Committee
March 19, 2010
Oregon State Bar Center

Present:

Ann Fisher, Chair
Gina Johnnie, Vice Chair
Audrey Matsumonji
Ken Mitchell-Phillips
Barbara DiIaconi
Derek Johnson

Staff:

Margaret Robinson
Kay Pulju
Anna Zanolli
Frank Garcia
Dani Edwards

Guest:

Dick Roy

Approval of Minutes

The minutes of the February meeting were approved as written.

Member Survey

Staff provided history on the membership survey for the committee and asked that they begin thinking of questions to ask the membership. Typically, the survey is only five or six questions.

Sustainable Futures Award

The Sustainable Futures Section of the bar is requesting the addition of four additional bar awards to be given at the annual bar awards dinner. The section would like two awards to be given to law firms and two awards to practicing attorneys (one to a lawyer practicing less than 10 years and one to an attorney practicing more than 10 years). The proposal requested that three members of the section's executive committee work with three members of the BOG to select the award honorees each year. The proposal was approved by the committee and will go before the BOG in April.

Diversity/AAP Update

The update included the Affirmative Action Administrator's activities over the month of February and early March. The administrator emphasized the work he has done to align the AAP with other bar groups and departments and highlighted several coordination activities and events. The administrator provided details on the first Diversity Director Conference he will be attending later this year.

Courthouse Access Card

Staff provided the committee with background information on an access card for attorneys to use for easy access into courthouse around the state. Three sources need to work together to and at present, the most difficult hurdle is the Sheriff's Office. Incorporating an access card would require background checks in each county and for this, the Sheriff's Office is needed.

Minutes

BOG Policy and Governance Committee

February 18, 2010

The Oregon Garden, Silverton, Oregon

Chair – Mitzi Naucner

Committee members present: Barbara Dilaconi, Michael Haglund, Ethan Knight, Maureen O'Connor.

Other attendees: Kathleen Evans, Teresa Schmid, Sylvia Stevens

<p>1. Minutes. The minutes of the January 15, 2010 meeting were approved.</p>
<p>2. Senior Lawyers Division. Ms. Schmid pointed out that under the Long Range Plan, consideration of the Senior Lawyer Task Force recommendations was assigned to Member Services.</p>
<p>3. BOG Spouse/Guest Expense Reimbursement. The committee voted to recommend a change in policy to allow reimbursement of spouse or guest meals at all BOG meetings including the retreat, as well as at HOD social events and the annual BOG alumni dinner. The policy also applies to senior staff who are required to attend BOG meetings. The change is retroactive to the November 2009 retreat.</p>
<p>4. Ethics School. The committee will recommend that the BOG approve Option C, which does not require passing a test for successful completion of ethics school.</p>
<p>5. MCLE Regulation Amendments. The committee will recommend four MCLE regulation changes: (1) clarifying the alternate reporting periods for AtoJ credits, (2) eliminating the requirement for certified mail return receipts on notices of noncompliance, but requiring additional notice by e-mail or regular mail, (3) imposing late fees for untimely local bar accreditation applications, and (4) correcting a typo in Rule 3.3.</p>
<p>6. BR Amendments Due to Redistricting. The committee reviewed and forwarded to the BOG staff's suggested amendments to Bar Rules of Procedure 2.3 and 2.4 changing the number of DB and SPRB members necessitated by the creation of new Region 7.</p>
<p>7. Revision of Bylaw 3.4 (HOD Agendas). The committee will recommend that the BOG amend the OSB Bylaws to require that the bar "distribute" rather than "publish" the annual HOD agenda. The recommendation will include submitting a resolution to the HOD in 2010 to conform the HOD rule.</p>
<p>8. Limiting Delegate Resolutions on HOD Agenda. The committee considered a member's suggestion to limit the number of resolutions any single delegate can place on the HOD agenda. After discussion, it was the consensus of the committee that regulation of such matters is properly the province of HOD members rather than the BOG. Ms. Evans will respond to the member who raised the issue.</p>
<p>9. Housekeeping Bylaw Amendments. The committee reviewed and will recommend amendments of to correct incorrect references in Bylaws 2.302 and 18.6.</p>
<p>10. CSF Rule 2.2.1 Amendment. The committee reviewed the CSF Committee proposal and forwarded it to the board with a minor change to make it clear that wrongful failure to maintain funds in trust until they are earned will constitute dishonesty within the meaning of the CSF rules.</p>
<p>11. Amended Committee Charges for FPP and QoL. The committee reviewed and forwarded to the BOG the requests of the Federal Practice and Procedure and Quality of Life Committees to modify their charges. The FPP charge will include an assignments to study and made recommendations for how the Bar can be involved in federal judicial appointments. The assignment to study and develop sustainable law office practices will be removed from the QoL charge.</p>

Minutes

BOG Policy and Governance Committee

March 19, 2010

OSB Center

Chair – Mitzi Naucler

Committee members present: Chris Kent, Barbara Dilaconi, Michelle Garcia, Michael Haglund, Maureen O'Connor

Others present: Kathy Evans, Rod Wegener, Teresa Schmid, Denise Cline, Catherine Petrecca, Helen Hierschbiel

<p>1. Minutes of February 19, 2010 meeting. Ms. O'Connor moved, Ms. Dilaconi seconded, and the minutes of the February 19, 2010 meeting were approved unanimously.</p>
<p>2. MCLE Committee Teaching , Writing and AtoJ Proposals. At the request of the proponents and drafters, discussion of the proposals was deferred until the April 29, 2010 meeting.</p>
<p>3. MCLE Credits for Legislative Service. Ms. Cline explained the MCLE Committee's suggestion that Rule 5.2 and Regulation 5.100 be amended to clarify how credits for legislative service can be earned. Mr. Kent moved, Mr. Haglund seconded, and the committee voted unanimously to recommend the changes to the BOG in April.</p>
<p>4. LRAP Policies and Guidelines. Ms. Petrecca explained the LRAP Advisory Committee's request to amend the LRAP Policies and Guidelines to make them more consistent with the needs of the applicants, and to ensure that OSB funds are protected. Mr. Haglund moved, Mr. Kent seconded, and the committee voted unanimously to recommend the changes to the BOG in April.</p>

OSB Public Affairs Committee

February 18, 2010
Oregon Garden
Silverton, Oregon

Committee Members Present: Steve Piucci, Gina Johnnie, Derek Johnson, Audrey Matsumonji, Kenneth Mitchell-Phillips. **Staff:** Susan Grabe.

1. **Legislative Update.** The committee received an update on how the special session was proceeding, bar group involvement in the session, and whether it would likely adjourn on time.
2. **State Justice System Revenue Committee.** Most of the meeting was spent discussing issues related to the legislatively-created Interim Committee on State Justice System Revenues and the need for the Oregon State Bar to address growing concerns about the fee structure imposed as a result of the last legislative session. Ultimately, PAC determined that the it was incumbent on the bar to form a task force which would: in the short term, identify specific fees and fines to be retained, amended, or eliminated in furtherance of the overarching policy of providing a transparent, open and accessible court system at all levels; and, in the long term, to recommend a system for funding the judicial branch that recognizes its status as a separate and co-equal branch of government, preserves the balance between judicial accountability and independence, and maintains a judicial system open and accessible to all Oregonians.

Action. The committee moved to recommend to the Board of Governors that the bar form a task force to assist the Joint Interim Committee on Justice System Revenues in assessing the effects of the current filing fee and criminal fine structure on the operation of the court system. The motion passed unanimously.

3. **Legislative Comment Forum.** The committee will schedule a meeting for bar groups to discuss legislative proposals the third week of April. This will be an opportunity to highlight issues and concerns other groups may have with respect to proposed legislative concepts under consideration by the bar.
4. **Oregon eCourt Status.** The Task Force is finalizing its interim report for consideration at the next Board of Governors meeting.
5. **Proposed MCLE Rule Change.** The MCLE Committee will be considering the suggested rule change to allow Lawyer-Legislators to accrue the MCLE credit *pro rata* (.5 per week as opposed to 2 per 1 month of service) in light of the shift to annual legislative sessions that do not start at the beginning of the month and adjourn at the end of the month.

OSB Public Affairs Committee

March 19, 2010
Oregon State Bar
Portland, Oregon

Committee Members Present: Steve Piucci, Gina Johnnie, Derek Johnson, Audrey Matsumonji, Kenneth Mitchell-Phillips, and Steve Larson. **Staff:** Susan Grabe.

1. **Legislative Update.** The committee received a status update on pending initiatives and legislative candidates. One positive note is that there are more lawyers running for office than in the past, which will likely result in more lawyers serving in office.
2. **OSB Court Fees Task Force.** The Court Fees Task Force will have its first meeting on March 30 in Salem back to back with the State Justice Systems Revenue Committee. This forum will increase the likelihood that the two co-chairs will attend a portion of the bar's task force meeting to share their thoughts on how the bar group can best assist the legislature.
3. **2011 Legislative Package.** April 1st is the deadline for bar groups to submit proposed legislation for 2011 to the bar for consideration. The Public Affairs Committee will conduct a legislative forum on Tuesday April 13 to discuss these legislative proposals. This forum will be an opportunity to highlight issues and concerns other groups may have with respect to proposed legislative concepts under consideration by the bar.
4. **Interim eCourt Report.** The eCourt Task Force is finalizing its interim report for consideration at the next Board of Governors meeting.
 - a. **ACTION:** Ann Fisher moved and Audrey Matsumonji seconded a motion to recommend the board accept the interim report from the OSB/OJD eCourt Task Force. The motion passed unanimously.
5. **Proposed MCLE Rule Change.** The MCLE Committee approved the suggested rule change to allow lawyer-legislators to accrue the MCLE credit *pro rata* (.5 per week as opposed to 2 per 1 month of service) in light of the shift to annual legislative sessions that do not start at the beginning of the month and adjourn at the end of the month.

A second MCLE issue arose related to a request for the bar to waive MCLE requirements for deployed service members which the bar can and did agree to do. However, since the child abuse reporting requirement is statutory, the question was raised as to whether the bar would consider seeking an amendment to the statute to allow waiver for deployed service men and women. After considerable discussion, the committee declined to do so.

ACTION: The committee unanimously declined to seek a change to the statutory child abuse reporting statutes.

6. **American Bar Association.** The committee discussed the growing trend of encroachment on lawyer regulation and attorney-client privilege. The letter to HUD

urging it to expand the lawyer exemption contained in its proposed rule under the SAFE Mortgage Licensing Act was time-sensitive and already went out over the chair's signature. However, the letter to Senator Dodd expressing concerns regarding expanded lawyer regulation provisions contained in the Consumer Financial Protection Agency Act.

ACTION: Ann Fisher moved and Audrey Matsumonji seconded a motion to ratify and approve of the letters to HUD re the SAFE Mortgage Licensing Act and Senator Dodd regarding the Consumer Financial Protection Agency Act. The motion passed unanimously.

Oregon State Bar

2009 **Disciplinary
Counsel's Office**

Annual Report

March 2010

Jeffrey D. Sapiro
Disciplinary Counsel

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I. INTRODUCTION

This is the Annual Report of the Oregon State Bar Disciplinary Counsel's Office for 2009. The report provides an overview of Oregon's lawyer discipline system, an analysis of the caseload within the system, along with the dispositions in 2009, and a discussion of significant developments over the last year.

II. STATE PROFESSIONAL RESPONSIBILITY BOARD (SPRB)

The principal responsibility of Disciplinary Counsel's Office is to serve as counsel to the State Professional Responsibility Board (SPRB), the body to which the investigative and prosecutorial functions within the discipline system are delegated by statute. The SPRB seeks to enforce the disciplinary rules in the Rules of Professional Conduct (the RPCs), while operating within the procedural framework of the Bar Rules of Procedure (the BRs). The SPRB is a nine-member board of unpaid volunteers, consisting of one lawyer each from Board of Governors (BOG) Regions 1 through 4 and 6, two lawyers from Region 5 and two public members.

The SPRB met 12 times in 2009. With regular meetings and conference calls combined, the SPRB considered approximately 315 case-specific agenda items during the year. This does not include the many policy matters also considered by the board.

The Bar was fortunate to have the following individuals on the SPRB in 2009:

Liz Fancher (Bend) – Chairperson
Peter R. Chamberlain (Portland)
Jonathan P. Hill (Roseburg) – Public Member
David W. Hittle (Salem)
William B. Kirby (Beaverton)
Jolie Krechman (Portland) – Public Member
James A. Marshall (Albany)
Martha J. Rodman (Eugene)
Jana Toran (Portland)

The terms of Liz Fancher and James Marshall expired at the end of 2009. The new appointments for 2010 include: Greg Hendrix (Bend) and Timothy L. Jackle (Medford). David Hittle is the SPRB Chairperson for 2010.

III. SYSTEM OVERVIEW

A. COMPLAINTS RECEIVED

The Bar's Client Assistance Office (CAO) handles the intake of all oral and written inquiries and complaints about lawyer conduct. Only when the CAO finds that there is sufficient evidence to support a reasonable belief that misconduct may have occurred is a matter referred to Disciplinary Counsel's Office for investigation. See BR 2.5.

The table below reflects the number of files opened by Disciplinary Counsel in recent years. In 2009, Disciplinary Counsel opened 466 files (involving 483 Oregon lawyers).

Files Opened by Disciplinary Counsel

Month	2005	2006	2007	2008	2009
January	34	28	30	30	43
February	29	40	49	39	25
March	30	41	42	36	39
April	30	53	30	26	40
May	42	22	19	35	21
June	47	23	29	30	142*
July	35	29	31	37	16
August	32	36	23	38	35
September	22	21	16	125†	31
October	31	38	38	27	34
November	41	23	46	15	31
December	31	29	23	29	26
Total	404	383	376	467	483

†97 IOLTA compliance matters

*98 IOLTA compliance matters

The breakdown of the open files for 2009 is: 272 referrals from the Client Assistance Office, 100 trust account overdraft notices from financial institutions that came directly to Disciplinary Counsel's Office, 97 inquiries concerning lawyer compliance with the IOLTA rules, and 14 other matters opened by Disciplinary Counsel on the office's initiative.

For 2009, statistical information regarding complainant type and complaint subject matter is found in Appendix A to this report. Similar information for 2008 is found in Appendix B for comparison purposes.

Every complaint Disciplinary Counsel's Office received in 2009, was acknowledged in writing by staff, analyzed and investigated to varying degrees depending on the nature of the allegations. As warranted, staff corresponded with the complainant and the responding attorney, and obtained relevant information from other sources, to develop a "record" upon which a decision on merit could be made.

If, after investigation, staff determined that probable cause did not exist to believe that misconduct had occurred, the matter was dismissed by Disciplinary

Counsel. BR 2.6(b). Complainants have the right under the rules of procedure to contest or appeal a dismissal by Disciplinary Counsel staff. In that case, the matter is submitted to the SPRB for review. The SPRB reviewed 28 such appeals in 2009, affirming all of the dismissals.

When Disciplinary Counsel determined from an investigation that there may have been probable cause of misconduct by a lawyer, the matter was referred to the SPRB for review and action. Each matter was presented to the board by means of a complaint summary (factual review, ethics analysis and recommendation) prepared by staff. Each file also was made available to the SPRB. In 2009, the SPRB reviewed 177 of these probable cause investigations. The following section describes that process of review in more detail.

B. SPRB

The SPRB acts as a grand jury in the disciplinary process, determining in each matter referred to it by Disciplinary Counsel whether probable cause of an ethics violation exists. Options available to the SPRB include dismissal if there is no probable cause of misconduct; referral of a matter back to Disciplinary Counsel or to a local professional responsibility committee (LPRC) for additional investigation; issuing a letter of admonition if a violation has occurred but is not of a serious nature; offering a remedial diversion program to the lawyer; or authorizing a formal disciplinary proceeding in which allegations of professional misconduct are litigated. A lawyer who is offered a letter of admonition may reject the letter, in which case the Rules of Procedure require the matter to proceed to a formal disciplinary proceeding. Rejections are rare.

A lawyer who is notified that a formal disciplinary proceeding will be instituted against him or her may request that the SPRB reconsider that decision. Such a request must be supported by new evidence not previously available that would have clearly affected the board’s decision, or legal authority not previously known to the SPRB which establishes that the decision to prosecute is incorrect.

In 2009, the SPRB took action on 15 reports submitted by investigative committees and 205 matters investigated by Disciplinary Counsel staff. Action taken by the SPRB in recent years and in 2009 is summarized in the following table:

Action Taken by SPRB

Year	Pros.	Admonition Offered	Admonition Accepted	Dismissed	Diversion
2005	131	43	43	122	3
2006	94	33	33	85	4
2007	133	40	40	77	2
2008	123	31	30 [†]	90	2
2009	128	29	28 [†]	59	5

[†] One admonition letter offered was later reconsidered by the SPRB and the matter was dismissed.

Note that the figures for prosecutions reflect the number of complaints that were authorized for prosecution, not necessarily the number of lawyers being prosecuted. For example, one lawyer may be the subject of numerous complaints that are consolidated into one disciplinary proceeding.

In addition to the normal complaint review process, the SPRB also is responsible for making recommendations to the Supreme Court on matters of urgency including temporary and immediate suspensions of lawyers who have abandoned their practice, are suffering under some disability, have been convicted of certain crimes, or have been disciplined in another jurisdiction subjecting them to reciprocal discipline here in Oregon. There were seven (7) such matters in 2009.

C. LOCAL PROFESSIONAL RESPONSIBILITY COMMITTEE (LPRCS)

Most complaints are investigated in-house by Disciplinary Counsel staff. However, some matters that require in-depth field investigation are referred by staff or the SPRB to local professional responsibility committees (LPRCs). There are 16 such committees made up of single county or multi-county districts. Total membership for all LPRCs is approximately 65. At the option of the committee, each LPRC may have one public member.

Each year at the time of appointment, LPRC members are provided with a handbook prepared and updated by the Disciplinary Counsel's Office. The handbook describes in detail the responsibilities each LPRC member is asked to undertake. It also provides practical suggestions in conducting an LPRC investigation, contains copies of resource materials including the applicable statutes and procedural rules, and includes examples of final LPRC reports in a standardized format requested by the SPRB.

Under the applicable rules of procedure, Disciplinary Counsel staff arranges for an assignment to be made to an individual committee member, and the committee member is authorized to report back his or her findings without going through the entire committee. A committee member has 90 days to complete an assignment, with one extension of 60 days available. If an investigation is not completed by then, the rules require the matter to be referred back to Disciplinary Counsel for completion. BR 2.3(a)(2)(C). Thirteen (13) matters were referred to LPRCs in 2009.

D. FORMAL PROCEEDINGS

(1) Prosecution Function

After the SPRB authorizes formal proceedings in a given matter, attorneys in Disciplinary Counsel's Office draft a formal complaint and may, but don't always, arrange for volunteer bar counsel to assist in preparation for trial. Bar Counsel are selected from a panel of lawyers appointed by the Board of Governors.

Discovery methods in disciplinary proceedings are similar to those in civil litigation. Requests for admission, requests for production, and depositions are common. Disputes over discovery are resolved by the trial panel chairperson assigned to a particular case.

Pre-hearing conferences to narrow the issues and to explore settlement are available at the request of either party. Such conferences are held before a member of the Disciplinary Board who is not a member of the trial panel in that case.

(2) Adjudicative Function

Members of the Disciplinary Board, appointed by the Supreme Court, sit in panels of three (two lawyers, one non-lawyer) and are selected for each disciplinary case by a regional chairperson. The panel chair rules on all pretrial matters and is responsible for bringing each case to hearing within a specific time frame established by the rules.

After hearing, the panel is required to render its decision within 28 days (subject to time extensions), making findings of fact, conclusions of law and a disposition. Panels rely on the ABA *Standards for Imposing Lawyer Sanctions* and Oregon case law in determining appropriate sanctions when misconduct has been found.

Fourteen (14) disciplinary cases were tried in 2009, although some of these matters went by default and did not require full evidentiary hearings.

E. DISPOSITIONS SHORT OF TRIAL

Fortunately, many of the disciplinary proceedings authorized by the SPRB are resolved short of trial with resignations or stipulations. Form B resignation (resignation “under fire”) does not require an admission of guilt by an accused lawyer but, because charges are pending, is treated like a disbarment such that the lawyer is not eligible for reinstatement in the future. Eight (8) lawyers submitted Form B resignations in 2009, thereby eliminating the need for further prosecution in those cases. While a resignation ends a formal proceeding, it is often obtained only after a substantial amount of investigation, discovery and trial preparation. For example, one lawyer resigned in 2009, but only after a trial panel issued its decision and an appeal to the Supreme Court was about to commence.

A significant number of cases are resolved by stipulations for discipline in which there is no dispute over material fact and both the Bar and the accused lawyer agree on the violations committed and appropriate sanction. Stipulations must be approved by the SPRB or its chairperson on behalf of the Bar. Once that approval is obtained, judicial approval is required from the state and regional chair of the Disciplinary Board in cases where sanctions do not exceed a 6-month suspension, or from the Supreme Court for cases involving greater sanctions. Judicial approval is not always given, in which case the parties must negotiate further or proceed to trial.

In 2009, 44 formal proceedings were concluded: 8 by decision in a contested case; 23 by stipulation; 8 by Form B resignation; and 5 by diversion.

F. APPELLATE REVIEW

The Supreme Court does not automatically review discipline cases in Oregon. Trial panel decisions, even those imposing disbarment, are final unless either the Bar or the accused lawyer seeks Supreme Court review. Appellate review by the court is mandatory if requested by a party.

When there is an appeal, lawyers in Disciplinary Counsel’s Office prepare the

record for submission to the court, draft and file the Bar's briefs and present oral argument before the court. The SPRB decides for the Bar whether to seek Supreme Court review.

In 2009, the Supreme Court rendered four (4) discipline opinions in contested cases. The court also approved three (3) stipulations for discipline and issued orders in three (3) other cases suspending lawyers on an interim basis while the disciplinary proceedings against them were pending.

Among the noteworthy court decisions were:

In *In re G. Jefferson Campbell, Jr.*, 345 Or 670, 202 P3d 871 (2009), this Jackson County lawyer was suspended for 60 days for charging an excessive fee in violation of former DR 2-106(A), and for a conflict of interest in violation of former DR 5-105(C). On the fee issue, the lawyer charged his client for late fees in excess of the legal rate of interest when there was no written agreement requiring the client to pay any such fees at all. Regarding the conflict issue, the lawyer represented a debtor in a bankruptcy proceeding for which the lawyer was owed attorney fees. During the administration of the estate, the bankruptcy trustee retained the lawyer as special counsel to oppose a claim made by another creditor. Ultimately, the trustee settled with this other creditor against the lawyer's advice. The lawyer, believing that the settlement would preclude his ability to collect his attorney fees from the estate, opposed and then appealed the settlement on his own behalf and as counsel for two other creditors. The Bar alleged and the court found that the lawyer committed a former client conflict of interest when he opposed the settlement entered into by his former client, the trustee.

The case of *In re R. Kevin Hendrick*, 346 Or 98, 208 P3d 488 (2009), was not decided by the Supreme Court on the substantive merits. Instead, the court remanded the case back to the Disciplinary Board for hearing before a new trial panel after finding that it was error to deny this Marion County lawyer's procedural challenge to a member of the panel that heard his case. Two justices dissented, opining that the procedural error in this case was not shown to have affected the lawyer's ability to create a record or the court's ability to correct the error with its *de novo* review of that record.

In *In re Lauren J. Paulson*, 346 Or 676, 216 P3d 859 (2009), *recon*, 347 Or 529 (2010), the Supreme Court disbarred this Washington County lawyer after finding numerous disciplinary rule violations. Some violations arose out of the lawyer's handling of an estate that, according to the court, should have been a straightforward matter for all concerned. Instead, the lawyer engaged in obstreperous conduct that delayed, frustrated and actively interfered with efforts to settle the estate, in violation of former DR 1-102(A)(4) and RPC 8.4(a)(4) [conduct prejudicial to the administration of justice] and former DR 2-106(A) [charging an excessive fee]. The court also found that, in other client matters, the lawyer: failed to take reasonable steps to protect client interests upon the termination of the lawyer's representation, in violation of RPC 1.16(d); practiced law during a period when he was suspended, in violation of RPC 5.5 and RPC 1.16(a)(1); made false statements to the court, in violation of RPC 3.3(a)(1), RPC 8.4(a)(3) and RPC 8.4(a)(4); and failed to respond to numerous inquiries by the

Bar, in violation of RPC 8.1(a)(2). The court determined that disbarment was the appropriate sanction, in part, because of the lawyer's prior disciplinary history.

In *In re Jay R. Jackson*, 347 Or 426, 223 P3d 387 (2009), this Linn County lawyer was found to have: neglected a client's legal matter, in violation of RPC 1.3; caused delay and additional burden on a trial court, in violation of RPC 8.4(a)(4); and made misrepresentations to the trial court to cover for his neglectful conduct, in violation of RPC 3.3(a)(1) and RPC 8.4(a)(3). The Supreme Court suspended the lawyer for 120 days.

G. CONTESTED ADMISSIONS/CONTESTED REINSTATEMENTS

Disciplinary Counsel's Office also represents the Board of Bar Examiners (BBX) in briefing and arguing before the Supreme Court those cases in which the BBX has made an adverse admissions recommendation regarding an applicant. The actual investigation and hearing in these cases are handled by the BBX under a procedure different from that applicable to lawyer discipline cases.

For reinstatements, Disciplinary Counsel's Office is responsible for processing and investigating all applications. Recommendations are then made to either the bar's Executive Director or the Board of Governors, depending on the nature of the application. Many reinstatements are approved without any further level of review. For reinstatement applicants who have had significant, prior disciplinary problems or have been away from active membership status for more than five years, the Board of Governors makes a recommendation to the Supreme Court. In cases when the board recommends against reinstatement of an applicant, the Supreme Court may refer the matter to the Disciplinary Board for a hearing before a three-member panel much like lawyer discipline matters, or may direct that a hearing take place before a special master appointed by the court. Disciplinary Counsel's Office has the same responsibilities for prosecuting these contested cases as with disciplinary matters. The office also handles the appeal of these cases, which is automatic, before the Supreme Court.

IV. DISPOSITIONS

Attached as Appendix C is a list of disciplinary dispositions from 2009. The following table summarizes dispositions in recent years:

Sanction Type	2005	2006	2007	2008	2009
Disbarment	2	3	1	5	1
Form B Resignation	9	6	10	18	8
Suspension	34	36	35	22	18
Suspension Stayed/probation	1	0	0	2	0
Reprimand	22	14	20	23	12
Involuntary Inactive Transfer	0	0	0	1	0
Total Lawyer Sanctions	68	59	66	71	39
Dismissals After Adjudication	1	5	0	2	0
Dismissed as Moot	1 [†]	0	0	1	1
Diversion	3	4	2	2	5
Admonitions	43	33	42	30	28

† no further action taken pursuant to BR 2.6(f)(2)

In conjunction with a stayed suspension or as a condition of admission or reinstatement, it is common for a period of probation to be imposed upon a lawyer. Disciplinary Counsel's Office was monitoring eight (8) lawyers on probation at the end of 2009, along with six (6) lawyers in diversion. Most probations and diversions require some periodic reporting by the lawyer. Some require more active monitoring by a probation supervisor, typically another lawyer in the probationer's community.

The types of conduct for which a disciplinary sanction was imposed in 2009, or a Form B resignation was submitted, varied widely. The following table identifies the misconduct most often implicated in those proceedings that were concluded by decision, stipulation, order, or resignation in 2009:

Type of misconduct	% of cases in which misconduct present
Neglect of legal matter	38%
Improper withdrawal	36%
Failure to respond to OSB	31%
Conduct prejudicial to justice	31%
Dishonesty or misrepresentation	28%
Excessive or illegal fees	28%
Trust account violation	28%
Failure to return property or funds	20%
Multiple client conflicts	15%
Criminal conduct	13%
Self-interest conflicts	13%
Inadequate accounting records	8%
Incompetence	8%
Unauthorized practice	5%
Disregarding a court rule or ruling	3%
Improper communication	3%
Other	13%

V. SUMMARY OF CASELOAD

A summary of the pending caseload in Disciplinary Counsel's Office at the end of 2007 follows:

New complaints pending	150
Pending LPRC investigations	4
Pending formal proceedings	70*
Probation/diversion matters	14
Contested admission/contested reinstatement matters	1
Total	239

* Reflects no. of lawyers; no. of complaints is greater.

In addition to disciplinary matters, Disciplinary Counsel's Office processed and investigated approximately 175 reinstatement applications in 2009; processed approximately 616 membership status changes (inactive, active emeritus, and active pro bono transfers and voluntary resignations); and responded to roughly 2,770 public record requests during the year.

VI. STAFFING/FUNDING

In 2009, Disciplinary Counsel's Office employed fifteen staff members (13.95 FTE), along with occasional temporary help. In addition to Disciplinary Counsel, there were seven staff lawyer positions. Support staff included one investigator, one office administrator, one regulatory services coordinator, three secretaries, and one public records coordinator. Current staff members include:

Disciplinary Counsel

Jeffrey D. Sapiro

Assistants Disciplinary Counsel

Amber Bevacqua-Lynott
 Mary A. Cooper
 Susan R. Cournoyer
 Linn D. Davis
 Stacy J. Hankin
 Martha M. Hicks
 Kellie F. Johnson

Support Staff

Lynn Bey-Roode
 Jennifer Brand
 Karen L. Duncan
 Anita B. Erickson
 Sandy L. Gerbish
 Vickie R. Hansen
 R. Lynn Haynes

Disciplinary Counsel's Office is funded out of the Bar's general fund. Revenue is limited (roughly \$81,400 for 2009) and comes from cost bill collections, reinstatement fees, a fee for good standing certificates and *pro hac vice* admissions, and photocopying charges for public records.

Expenses for 2009 were \$1,635,000 with an additional \$382,500 assessed as a support services (overhead) charge. Of the actual program expenses, 88.3%

consisted of salaries and benefits. An additional 7.6% of the expense budget went to out-of-pocket expenses for court reporters, witness fees, investigative expenses and related items. 4.1% of the expense budget was spent on general and administrative expenses such as copying charges, postage, telephone and staff travel expense.

VII. OTHER DEVELOPMENTS

A. TRUST ACCOUNT OVERDRAFT NOTIFICATION PROGRAM

The Oregon State Bar has a Trust Account Overdraft Notification Program, pursuant to ORS 9.132 and RPC 1.15-2. Under the program, lawyers are required to maintain their trust accounts in financial institutions that have agreed to notify the Bar of any overdraft on such accounts. Approximately 65 banks have entered into notification agreements with the Bar.

In 2009, the Bar received notice of 100 trust account overdrafts. For each overdraft, a written explanation and supporting documentation was requested of the lawyer, with follow-up inquiries made as necessary. Many overdrafts were the result of bank or isolated lawyer error and, once confirmed as such, were dismissed by staff. If circumstances causing an overdraft suggested an ethics violation, the matter was referred to the SPRB. A minor violation resulting in an overdraft typically results in a letter of admonition issued to the lawyer. More serious or on-going violations result in formal disciplinary action. A summary of the disposition of trust account overdrafts received in 2009 follows:

2009 Trust Account Overdrafts

Dismissed by staff	84
Dismissed by SPRB	0
Referred to LPRC for further investigation	2
Closed by admonition letter	12
Closed by diversion	0
Formal charges authorized	2
Closed by Form B resignation	0
Pending (as of 3/2009)	0
Total Received	100

B. IOLTA COMPLIANCE

Related to trust accounts is the obligation under RPC 1.15-2(m) for Oregon lawyers to certify annually that they are in compliance with the trust account disciplinary rules, identifying the financial institutions and account numbers in which Interest on Lawyer Trust Account (IOLTA) trust funds are held. The annual certification is distributed to each lawyer with the yearly invoice for membership dues.

By April 2009, approximately 1,519 lawyers still had not filed their IOLTA certifications, and their names were turned over to Disciplinary Counsel's Office. Further notices from DCO prompted substantial compliance such that only two (2) lawyers ultimately were charged with a violation of RPC 1.15-2(m) from 2009.

C. PUBLIC RECORDS

In Oregon, lawyer discipline files are public record with very limited exceptions. Disciplinary Counsel staff responds to an average of 230 public records requests each month. These requests come from members of the public who inquire into a lawyer's background or from other Bar members who have a need to examine these records.

Disciplinary history data is on computer such that many disciplinary record inquiries can be answered without a manual review of a lawyer's file. A significant number of requests, however, require the scheduling of appointments for file review.

During 2009, the Bar followed its established document management and retention policies. Ethics complaints dismissed for lack of probable cause more than ten (10) years ago were destroyed. Retained records were scanned and maintained in electronic format, thereby reducing the physical file storage needs of the Bar.

D. PRO HAC VICE ADMISSION.

Uniform Trial Court Rule 3.170 provides that all applications by out-of-state lawyers for admission in a single case in Oregon (*pro hac vice* admission) must first be filed with the Oregon State Bar, along with a fee of \$250. Disciplinary Counsel's Office is responsible for reviewing each application and supporting documents (good standing certificate, evidence of professional liability coverage, etc.) for compliance with the UTCR. The filing fees collected, after a nominal administrative fee is deducted, are used to help fund legal service programs in Oregon.

In 2009, the Bar received and processed 442 *pro hac vice* applications, collecting \$110,500 for legal services.

E. CUSTODIANSHIPS

ORS 9.705, *et. seq.*, provides a mechanism by which the Bar may petition the circuit court for the appointment of a custodian to take over the law practice of a lawyer who has abandoned the practice or otherwise is incapable of carrying on. In 2009, the Bar took preliminary steps to initiate a custodianship, but the filing was not necessary because the lawyer ultimately turned over her files voluntarily.

F. CONTINUING LEGAL EDUCATION PROGRAMS

Throughout 2009, Disciplinary Counsel staff participated in numerous CLE programs dealing with ethics and professional responsibility issues. Staff spoke to law school classes, local bar associations, Oregon State Bar section meetings, specialty bar organizations and general CLE audiences.

VIII. CONCLUSION

In 2009, the Oregon State Bar remained committed to maintaining a system of lawyer regulation that fairly but effectively enforces the disciplinary rules governing Oregon lawyers. Many dedicated individuals, both volunteers and staff, contributed significantly toward that goal throughout the year.

Respectfully submitted,

Jeffrey D. Sapiro

Disciplinary Counsel

APPENDIX A 2009

COMPLAINANT TYPE	NUMBER	PERCENTAGE
Accused (self-reported)	22	4.5%
Client	151	31.3%
Judge	8	1.6%
Opposing Counsel	27	5.6%
Opposing Party	28	5.8%
Third Party	52	10.8%
Unknown	0	-
OSB	98	20.3%
OSB (IOLTA Compliance)	97	20.1%
TOTAL	483	100%

COMPLAINT SUBJECT MATTER	NUMBER	PERCENTAGE
Adoption	5	1.0%
Advertisement	0	-
Arbitration	0	-
Bankruptcy	22	4.6%
Business	5	1.0%
Civil dispute (general)	20	4.2%
Conservatorship	2	.4%
Criminal	60	12.4%
Domestic Relations	44	9.1%
Estate Planning	4	.8%
Guardianship	1	.2%
Immigration	8	1.7%
Juvenile	1	.2%
Labor Law	3	.6%
Litigation (general)	31	6.4%
Land Use	0	-
Other	26	5.4%
Paternity	0	-
Personal injury	11	2.3%
Probate	8	1.7%
Real Estate	13	2.7%
Social Security	2	.4%
Tenant/landlord	2	.4%
Tax	0	-
Trust Account (IOLTA)	97	20.1%
Trust Account Overdraft	102	21.1%
Workers Comp.	12	2.5%
Unknown	4	.8%
TOTAL	483	100%

APPENDIX B 2008

COMPLAINANT TYPE	NUMBER	PERCENTAGE
Accused (self-reported)	13	2.8%
Client	135	28.9%
Judge	8	1.7%
Opposing Counsel	45	9.6%
Opposing Party	41	8.8%
Third Party	33	7.1%
Unknown	2	.4%
OSB	92	19.7%
OSB (IOLTA Compliance)	98	21%
TOTAL	467	100%

COMPLAINT SUBJECT MATTER	NUMBER	PERCENTAGE
Adoption	0	-
Advertisement	0	-
Arbitration	0	-
Bankruptcy	8	1.7%
Business	6	1.3%
Civil dispute (general)	28	6.0%
Conservatorship	2	.4%
Criminal	51	10.9%
Domestic Relations	61	13.1%
Estate Planning	4	.9%
Guardianship	4	.9%
Immigration	10	2.1%
Juvenile	4	.9%
Labor Law	2	.4%
Litigation (general)	26	5.6%
Land Use	1	.2%
Other	42	9.0%
Paternity	0	-
Personal injury	11	2.4%
Probate	13	2.8%
Real Estate	2	.4%
Social Security	8	1.7%
Tenant/landlord	2	.4%
Tax	1	.2%
Trust Account (IOLTA)	98	21.0%
Trust Account Overdraft	81	17.3%
Workers Comp.	2	.4%
Unknown	0	-
TOTAL	467	100%

OSB DISPOSITION LIST – 2009

Case No.	Case Name/Cite	Disposition	CC/ Stip	S Ct/ DB	Date of Action	Effective Date	DRs , RPCs, BRs, ORS	Bulletin Summary
1	08-12, 13, 14 Vincent J. Bernabei 23 DB Rptr ___	Reprimand	CC	DB	11/4/08	1/5/09	ORS 9.527(2) NG – 8.4(a)(2)	Feb/Mar 2009
2	06-52 M. Christian Bottoms 23 DB Rptr ___	Reprimand	Stip	DB	1/16/09	1/16/09	1.4(a), 1.4(b), 1.16(a)(2)	April 2009
3	08-28 Colette Boehmer 23 DB Rptr ___	60 day suspension	Stip	DB	1/28/09	3/1/09	1.15-1(a), 8.1(a)(1), 8.1(a)(2)	April 2009
4	08-104, 08-139, 08-140 Jacqueline L. Koch SC S056881	Form B resignation	--	S Ct	1/29/09	1/29/09	9-101A, 9-101C3, 1.3, 1.4(a), 1.5(a), 1.15-1(a), 1.15-1(c), 1.15-1(d), 1.15-1(e), 1.15-2(m), 1.16(c), 1.16(d), 8.1(a)(2), 8.4(a)(3)	April 2009
5	07-44, 07-45 John H. Oh 23 DB Rptr ___	Eight month suspension	CC	DB	12/4/08	2/3/09	9-101A, 1.3, 1.15-1(a), 1.15-1(c), 1.16(d), 8.1(a)(2)	April 2009
6	06-14, 06-127 G. Jefferson Campbell, Jr. 345 Or-670, 202 P3d 871	60 day suspension	CC	S Ct	2/5/09	4/6/09	2-106A, 5-105C NG – 5-101A1	June 2009
7	08-80 Bruce Matsuo Nishioka 23 DB Rptr ___	Reprimand	Stip	DB	2/23/09	2/23/09	1.5(a), 5.3(a), 5.5(a)	May 2009
8	08-103 Daniel N. Gordon 23 DB Rptr ___	Reprimand	Stip	DB	2/23/09	2/23/09	8.4(a)(4)	May 2009
9	08-159 John M. Petshow 23 DB Rptr ___	Reprimand	Stip	DB	2/23/09	2/23/09	1.3, 1.4(a), 1.7(a)	May 2009
10	08-62 Colette Cameron	Diversion	--	SPRB	3/14/09	3/14/09	1.3, 1.4(a), 1.4(b), 1.16(c), 1.16(d)	No
11	08-25 Arthur E. Coyne SC S056067	Form B resignation	--	S Ct	4/2/09	4/2/09	1.16(d), 8.1(a)(2)	June 2009
12	06-110 R. Kevin Hendrick 346 Or-98, 208 P3d 488	Remand for new trial	CC	S Ct	4/2/09	4/23/2009	BR 2.4(g)	No
13	07-01, 08-98 Brian J. Sunderland SC S057211	Three year suspension, consecutive to previous suspension	Stip	S Ct	4/8/09	7/8/09	1-102A4, 2-106A, 5-105E, 6-101A, 9-101C3, 1.1, 1.3, 1.4(a), 1.5(a), 1.7(a), 1.15-1(a), 1.15-1(d), 1.16(d), 8.4(a)(3), 8.4(a)(4)	Aug/Sept 2009
14	09-15 Larry Reeves SC S057230	Form B resignation	--	S Ct	4/17/09	4/17/09	8.4(a)(2)	June 2009
15	07-31 to 07-35, 07- 101 Thomas K. Okai SC S057271	Four year suspension	Stip	S Ct	4/22/09	4/22/09	1.2(c), 1.3, 1.4(b), 1.5(a), 1.7(a)(2), 1.15-1(c), 1.15-1(d), 1.16(d), 8.1(a)(2), 8.4(a)(2), 8.4(a)(4), ORS 9.527(2)	July 2009
16	08-75, 08-76 John P. Eckrem 23 DB Rptr ___	60 day suspension	Stip	DB	4/22/09	6/21/09	1.3, 1.4(a), 1.5(a), 1.15-1(c), 1.15-1(d), 1.16(d)	July 2009

OSB DISPOSITION LIST – 2009

	Case No.	Case Name/Cite	Disposition	CC/ Stip	S Ct/ DB	Date of Action	Effective Date	DRs , RPCs, BRs, ORS	Bulletin Summary
17	08-79	Britt Nelson	Diversio	--	SPRB	5/5/09	5/15/09	5.5(a), ORS 9.160	No
18	08-10	William S. Dames SC S057261	Form B resignation	--	S Ct	5/14/09	5/14/09	6-101B, 1.3, 8.4(a)(3), 8.4(a)(4)	July 2009
19	07-14	Charles N. Isaak 23 DB Rptr __	Six month suspension	CC	DB	3/26/09	6/2/09	2-106A, 1.5(a), 1.7(a)(2)	Aug/Sept 2009
20	08-39, 08- 67, 08-81	Westly Allen Warner SC S057368	Form B resignation	--	S Ct	6/4/09	6/4/09	1.3, 1.4(a), 1.4(b), 1.5(a), 1.7(a)(2), 1.16(d), 3.3(a)(1), 8.4(a)(2), 8.4(a)(3), ORS 9.527(2)	Aug/Sept 2009
21	08-18	Richard T. Perry 23 DB Rptr __	Six month suspension	Stip	DB	6/8/09	6/8/09	1.15-1(d), 1.16(d)	Aug/Sept 2009
22	SC S057392	Michael J. Bird SC S057392	Form B resignation	--	S Ct	6/17/09	6/17/09	1.7(a)(2), 1.8(a), 1.15-1(a), 1.15-1(c), 8.4(a)(3)	Aug/Sept 2009
23	08-153	Robert D. Dames 23 DB Rptr __	Reprimand	Stip	DB	6/29/09	6/29/09	1.2(a), 1.3, 1.4(a), 1.4(b)	Oct 2009
24	07-94, 95; 08-09	Michael R. Shinn SC S056614	BR 3.1 suspension	CC	S Ct	7/8/09	7/8/09	1.3, 1.4(a), 1.15-1(a), 1.15-1(d), 8.1(a)(2), 8.4(a)(3), 8.4(a)(4)	No
25	08-101	Sarah Brudi Creem 23 DB Rptr __	30 day suspension	Stip	DB	7/14/09	7/14/09	1.16(a)(1), 8.4(a)(3), 8.4(a)(4)	Oct 2009
26	08-86	Kurt Carstens 23 DB Rptr __	90 day suspension	Stip	DB	7/15/09	9/1/09	5-105E, 1.7(a)	Oct 2009
27	08-151	Scott A. Hodgess	Diversio	--	SPRB	7/18/09	9/1/09	5.5(a), 8.1(a)(2), ORS 9.160(1)	No
28	09-07	James A. Palmer	Diversio	--	SPRB	7/18/09	8/1/09	1.15-1(c)	No
29	09-62	Debbe J. Von Blumenstein, aka Debbe Stein	Diversio	--	SPRB	7/18/09	7/18/09	1.5(a), 1.15-1(a), 1.15-1(c), 3.4(c), 8.4(a)(2), 8.4(a)(4)	No
30	09-13	Matthew P. Zanotelli 23 DB Rptr __	Reprimand	Stip	DB	8/20/09	8/20/09	1.1, 1.7(a)	Nov 2009
31	08-144	Gregory W. Olson 23 DB Rptr __	180 day suspension	Stip	DB	8/24/09	8/24/09	4.1, 8.1(a)(1), 8.4(a)(3), 8.4(a)(4)	Nov 2009
32	08-33	L. Ross Brown 23 DB Rptr __	90 day suspension	CC	DB	6/25/09	9/1/09	1.15-1(c)	Nov 2009
33	05-187, 06-05, 07- 19 to 22	Lauren J. Paulson 346 Or 676, 216 P3d 859 <i>recon</i> 347 Or 529	Disbarment	CC	S Ct	9/3/09 1/22/10	11/02/09	1-102A4, 2-106A, 1.16(a)(1), 1.16(d), 3.3(a)(1), 5.5, 8.1(a)(2), 8.4(a)(3), 8.4(a)(4)	Nov 2009

OSB DISPOSITION LIST – 2009

	Case No.	Case Name/Cite	Disposition	CC/ Stip	S Ct/ DB	Date of Action	Effective Date	DRs , RPCs, BRs, ORS	Bulletin Summary
34	09-48	Amanda L. Stanley SC S058309	BR 3.4 suspension	Stip	S Ct	9/17/09	9/17/09	8.4(a)(2), ORS 9.527(2)	No
35	07-154	Randy Ray Richardson SC S057807	BR 3.4 suspension	CC	S Ct	9/23/09	9/23/09	8.4(a)(2), ORS 9.527(2)	No
36	08-112	Kevin J. Rank 23 DB Rptr __	Reprimand	Stip	DB	9/28/09	9/28/09	1.3	Dec 2009
37	09-20	Lawrence L. Taylor 23 DB Rptr __	Reprimand	Stip	DB	9/28/09	9/28/09	5.3(a), 5.3(b), 8.4(a)(4)	Nov 2009
38	08-15, 08-114	Jacob S. Johnston 23 DB Rptr __	90 day suspension	Stip	DB	9/29/09	9/29/09	1.1, 1.3, 1.4(a), 1.4(b), 1.5(a), 1.16(d)	January 2010
39	SC S057772	Larry K. Houchin SC S05772	Form B resignation	--	S Ct	10/7/09	10/7/09	8.4(a)(2)	Dec 2009
40	08-145	Timothy J. Vanagas 23 DB Rptr __	60 day suspension	Stip	DB	10/17/09	10/20/09	1.5(a), 1.15-1(a), 1.15-1(c), 1.15-1(d), 1.16(d)	Dec 2009
41	09-95, 09-96	William E. Carl SC S057861	BR 3.4 criminal conviction – No discipline imposed	--	S Ct	10/21/09	10/21/09	9.527(2)	No
42	09-98	Dale L. Smith 23 DB Rptr __	Reprimand	Stip	DB	11/3/09	11/3/09	1.3, 1.4(a), 1.15-1(a), 1.15-1(c)	January 2010
43	08-73	R. Sande Tomlinson 23 DB Rptr __	Reprimand	Stip	DB	11/19/09	11/19/09	5-101A	Feb/Mar 2010
44	07-132, 08-96 & 154; 09-38	T. Michael Ryan SC S057967	Form B resignation	--	S Ct	11/24/09	11/24/09	1.2(c), 1.3, 1.4(a), 1.15-1(a), 1.15-1(d), 1.16(d), 4.3, 8.1(a)(2), 8.4(a)(3), 8.4(a)(4)	January 2010
45	08-117, 09-01	Lawrence P. Cullen SC S057995, 23 DB Rptr __	Nine month suspension	Stip	S Ct	11/24/09	12/1/09	1.3, 1.4(a), 1.4(b), 1.15-1(d), 8.1(a)(2), 8.4(a)(3)	January 2010
46	09-32	Philip R. Bennett 23 DB Rptr __	120 day suspension, plus formal reinstatement	Stip	DB	12/14/09	12/14/09	8.1(a)(2), 8.1(c)	Feb/Mar 2010
47	09-103	Allen Barteld 23 DB Rptr __	Reprimand	Stip	DB	12/16/09	12/16/09	1.15-2(m), 8.1(a)(2)	Feb/Mar 2010
48	07-54	Jay R. Jackson 347 Or 426, 223 P3d 387	120 day suspension	CC	S Ct	12/24/09	2/22/10	1.3, 3.3(a)(1), 8.4(a)(3), 8.4(a)(4)	Feb/Mar 2010
49	08-133	Arthur P. Klosterman 23 DB Rptr __	Nine month suspension	CC	DB	10/28/09	12/28/09	1.15-2(m), 3.4(c), 8.1(a)(2), 8.4(a)(4),	Feb/Mar 2010

OREGON STATE BAR DISCIPLINARY PROCESS

