

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

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

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

**A. Report of the President**

As written.

**B. Report of the President-elect**

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

**C. Report of the Executive Director**

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

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

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

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

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

#### **D. Director of Diversity & Inclusion**

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

#### **E. MBA Liaison Reports**

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

### **2. Professional Liability Fund [Mr. Zarov]**

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

### **3. Rules and Ethics Opinions**

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

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

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

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

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

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

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

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

### **4. ABA House of Delegates**

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

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

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

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

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

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

## **5. OSB Committees, Sections, Councils and Divisions**

### **A. Minimum Continuing Legal Education Committee**

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

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

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

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

### **B. Oregon New Lawyers Division**

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

### **C. CSF Claims**

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

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

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

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

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

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

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

### **A. Board Development Committee**

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

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

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

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

### **B. Budget and Finance Committee**

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

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

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

### **C. Governance and Strategic Planning Committee**

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

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

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

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

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

**D.** Public Affairs Committee

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

**E.** Special Projects Committee

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

**F.** Centralized Legal Notice System Task Force

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

**G.** Knowledge Base Task Force

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

**7. Other Action Items**

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

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

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

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

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

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

**8. Consent Agenda**

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

**9. Closed Sessions – see CLOSED Minutes**

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

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

None.

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

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

A. Disciplinary Counsel's Report

As written.

**DRAFT**

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

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

A. Unlawful Practice of Law Litigation

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

B. Pending or Threatened Non-Disciplinary Litigation

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

C. Other Matters

Bulletin Advertising by Disbarred Attorneys

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

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

OLF Proposed Amendment to RPC 1.15-2

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

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



**Legal Ethics Committee Proposed Amendment to Oregon RPC 8.4**

**RULE 8.4 MISCONDUCT**

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

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

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

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

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

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

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

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

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

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

RULE 1.0 TERMINOLOGY

\* \* \*

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

RULE 1.6 CONFIDENTIALITY

\* \* \*

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

\* \* \*

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

\* \* \*

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

RULE 1.18 DUTIES TO PROSPECTIVE CLIENT

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

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

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

\* \* \*

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

RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER [ASSISTANTS] ASSISTANCE

RULE 7.3 [DIRECT CONTACT WITH PROSPECTIVE] SOLICITATION OF CLIENTS

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment [from a prospective client] when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

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

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

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

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

## Supplement to BOG Agenda Item 4.A.2

## RULE 1.6 CONFIDENTIALITY

\* \* \*

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

\* \* \*

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

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

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

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

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

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

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

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

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

RULE 2.4 LAWYER SERVING AS MEDIATOR

(a) A lawyer serving as a mediator:

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

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

(b) A lawyer serving as a mediator:

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

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

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

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

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

**Rule 1.8 Service Methods.**

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

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

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

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

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

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

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

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

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

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

DRAFT

## Rule 2.4 Disciplinary Board.

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

(b) Term.

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

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

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

(d) Disqualifications and Suspension of Service.

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

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

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

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

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



(e) Duties of State Chairperson.

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

(f) Duties of Regional Chairperson.

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

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

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

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

(i) Duties of Trial Panel.

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

(2)

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

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

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

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

(j) Publications.

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

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

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

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

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

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

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

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

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## Rule 2.6 Investigations

### (a) Review by Disciplinary Counsel.

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

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

\* \* \* \*

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

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

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

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

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

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

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

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

**(g) Reinstatement.** Subject to the provisions of BR 8.1(a)(viii) and BR 8.2(a)(v), any person who has been a member of the Bar but suspended under Rule 7.1 solely for failure to respond to requests for information or records or to comply with a subpoena shall be reinstated by the Executive Director to the membership status from which the person was suspended upon the filing of a Compliance Affidavit with Disciplinary Counsel as set forth in BR 12.10.

*-(Rule 7.1 amended by Order dated November 1, 1984, effective December 1, 1984. Amended by Order dated September 24, 1987, effective October 1, 1987. Rule 7.1 amended by Order dated October 1, 1990. Title 7 amended by Order dated July 22, 1991.)  
(Rule 7.1 deleted by Order dated October 19, 2009.)*

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**Rule 8.2 Reinstatement — Informal Application Required.**

(a) Applicants. Any person who has been a member of the Bar, but who has

(i) resigned under Form A of these rules for five years or less prior to the date of application for reinstatement, and who has not been a member of the Bar during such period; or

(ii) been enrolled voluntarily as an inactive member for five years or less prior to the date of application for reinstatement; or

(iii) been suspended for failure to pay the Professional Liability Fund assessment, Client Security Fund assessment, or membership fees or penalties and has remained in that status more than six months but not in excess of five years prior to the date of application for reinstatement; or

(iv) been suspended for failure to file with the Bar a certificate disclosing lawyer trust accounts and has remained in that status more than six months but not in excess of five years prior to the date of application for reinstatement; or

(v) been suspended under BR 7.1 and has remained in that status more than six months but not in excess of five years prior to the date of application for reinstatement.

may be reinstated by the Executive Director by filing an informal application for reinstatement with the Bar and compliance with the Rules of Procedure in effect at the time of such application. The informal application for reinstatement shall be on a form prepared by the Bar for such purpose. The applicant shall attest that the applicant did not engage in the practice of law except where authorized to do so during the period of the applicant's inactive status, suspension or resignation. Reinstatements to inactive status shall not be allowed under this rule except for those applicants who were inactive and are seeking reinstatement to inactive status after a financial suspension. No applicant shall resume the practice of law in this state or active or inactive membership status unless all the requirements of this rule are met.

\* \* \* \*

*(Rule 8.2(b) amended by Order dated May 31, 1984, effective July 1, 1984.)*

*(Rule 8.2 amended by Order dated March 13, 1989, effective April 1, 1989.)*

*(Rule 8.2 (a) and (b) amended by Order dated March 20, 1990, effective April 2, 1990.)*

*(Rule 8.2(a) amended by Order dated December 28, 1993.)*

*(Rule 8.2(a) amended by Order dated December 14, 1995.)*

*(Rule 8.2 amended by Order dated December 9, 2004, effective January 1, 2005.)*

*(Rule 8.2(d)(iii) amended by Order dated April 26, 2007.)*

*(Rule 8.2(c) and 8.2(d) amended by Order dated October 19, 2009.)*

*(Rule 8.2(a)(iv) added by Order dated June 6, 2012.)*

**Rule 12.10 Compliance Affidavit.**

A compliance affidavit filed under BR 7.1(g) shall be in substantially the following form:

**COMPLIANCE AFFIDAVIT**

In re: Reinstatement of

\_\_\_\_\_  
(Name of Attorney) (Bar Number)

For reinstatement as an active/inactive (circle one) member of the OSB.

1. Full name \_\_\_\_\_ Date of Birth \_\_\_\_\_

2. Residence address \_\_\_\_\_ Telephone \_\_\_\_\_

3. I hereby attest that during my period of suspension from the practice of law from \_\_\_\_\_ to \_\_\_\_\_, (insert dates),

I did not at any time engage in the practice of law except where authorized to do so.

or

I engaged in the practice of law under the circumstances described on the attached [attach an explanation of activities relating to the practice of law during suspension].

4. I hereby attest that I have responded to the requests for information or records by Disciplinary Counsel or the Local Professional Responsibility Committee and have complied with any subpoenas issued by Disciplinary Counsel or the Local Professional Responsibility Committee, or provided good cause for not complying to the request.

I, \_\_\_\_\_, the undersigned, being first duly sworn, depose and say that the above answers are true and correct as I verily believe.

(Name)

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Notary Public in and for  
the State of Oregon

My Commission Expires: \_\_\_\_\_



**AMERICAN BAR ASSOCIATION**

**COMMISSION ON HOMELESSNESS & POVERTY  
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES**

**CENTER FOR HUMAN RIGHTS**

**COMMISSION ON DISABILITY RIGHTS**

**COMMISSION ON SEXUAL ORIENTATION AND GENDER IDENTITY**

**COMMISSION ON YOUTH AT RISK**

**SOLO, SMALL FIRM AND GENERAL PRACTICE DIVISION**

**STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS**

**FORUM ON AFFORDABLE HOUSING & COMMUNITY DEVELOPMENT LAW**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

- 1 RESOLVED, That the American Bar Association urges governments to promote the human right
- 2 to adequate housing for all through increased funding, development and implementation of
- 3 affordable housing strategies and to prevent infringement of that right.

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## REPORT

One of the four goals listed alongside the ABA’s mission statement is to Advance the Rule of Law, which includes objectives to hold governments accountable and work for just laws and human rights.<sup>1</sup> The Universal Declaration of Human Rights lists the right to adequate housing as a necessary component of the right to a standard of living that supports one’s health and well-being.<sup>2</sup>

Coming out of the Depression, and heading into World War II, President Franklin Roosevelt set out four freedoms essential for world peace in his 1941 State of the Union address: freedom of speech, freedom of religion, freedom from want, and freedom from fear.<sup>3</sup> In his 1944 State of the Union address, President Roosevelt took another bold step, declaring that the United States had accepted a “second Bill of Rights,” including the right of every American to a decent home.<sup>4</sup> The U.S. then led the U.N. in drafting and adopting the Universal Declaration on Human Rights, placing civil, political, economic, social, and cultural rights, including the right to adequate housing, on equal footing.<sup>5</sup> The U.S. signed the International Covenant on Economic, Social & Cultural Rights in 1977, which codifies the right to housing. Indeed, the ABA endorsed its ratification in 1979, making the human right to housing part of ABA policy for the past 34 years.<sup>6</sup>

In responding to a U.N. report on the right to housing in the U.S., the State Department in 2010 emphasized that the U.S., has made a “political commitment to a human right related to housing in the Universal Declaration on Human Rights.”<sup>7</sup>

### **The Right to Housing Should be Progressively Realized**

Despite recognition of the human right to housing, implementation has not yet occurred. This resolution, as a whole, provides a framework for progressive realization of that right. As such, implementing the human right to housing would not require the government to immediately build a home for each person in America or to provide housing for all free of charge overnight. However, it does require more than some provision for emergency shelter, piecemeal implementation of housing affordability programs, and intermittent enforcement of non-discrimination laws, all of which exist in some form in all local U.S. communities and have failed as a whole to eliminate homelessness or poverty. It requires an affirmative commitment to progressively realize the right to fully adequate housing,

<sup>1</sup> American Bar Association, *ABA Mission and Goals* (last visited Nov. 1, 2012), [http://www.americanbar.org/utility/about\\_the\\_aba/aba-mission-goals.html](http://www.americanbar.org/utility/about_the_aba/aba-mission-goals.html).

<sup>2</sup> Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., pt. 1, art. 25(1), U.N. Doc. A/810 (1948).

<sup>3</sup> Franklin D. Roosevelt, State of the Union Message to Congress (January 6, 1941).

<sup>4</sup> Franklin D. Roosevelt, State of the Union Message to Congress (January 11, 1944).

<sup>5</sup> See National Law Center on Homelessness & Poverty, *Simply Unacceptable: Homelessness & the Human Right to Housing in the United States 2011*, 16 (2011) [hereinafter “*Simply Unacceptable*”].

<sup>6</sup> See International Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 16, 1966, art. 11(1), 993 U.N.T.S. 3, 5 (entered into force Jan. 3, 1976); ABA House Report 690 MY 1979.

<sup>7</sup> Interactive Dialogue following the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, A/HRC/13/20/Add 4 and A/HRC/13/20.

whether through public funding, market regulation, private enforcement, or a combination of all of the above.<sup>8</sup>

This resolution calls on the U.S. government at all levels to more fully implement the right to housing as a legal commitment. Asserting housing as a human right will create a common goal and a clear framework to:

- a. Help government agencies set priorities to implement the right to housing
- b. Provide support for advocacy groups
- c. Create pressure to end policies which fail to guarantee human rights
- d. Allow us to focus on *how* to solve the problem rather than worrying about whether the U.S. government has a *duty* to solve the problem

### **U.S. Policy Supports the Implementation of the Human Right to Housing Domestically**

Our nation was founded on the principles of the self-evident, unalienable rights to life, liberty and the pursuit of happiness.<sup>9</sup> Yet today, lack of shelter and affordable housing has forced members of our society to live their daily lives in ways that threaten their dignity and sense of worth as a human being as well as their health and safety, contrary those founding principles.

The U.S. commitment to the human right to housing was reaffirmed in its signature to the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1977. The ICESCR was submitted to the Senate for ratification in late 1978, with an ABA resolution endorsing ratification in early 1979.<sup>10</sup> The ICESCR codifies the right to housing in Article 11, which states, “[t]he States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing... The States Parties will take appropriate steps to ensure the realization of this right.”<sup>11</sup> Although the Senate has yet to ratify the treaty, law professor David Weissbrodt notes signing a covenant indicates that “the United States accepts the responsibility to refrain from acts calculated to frustrate the objects of the treaty.”<sup>12</sup> The U.S. has also already ratified the International Covenant on Civil and Political Rights and the International Covenant on the Elimination of All Forms of Racial Discrimination (both with endorsement from the ABA), both of which recognize the right to be free from discrimination, including in housing.<sup>13</sup>

<sup>8</sup> *Simply Unacceptable*, *supra* note 5, at 8.

<sup>9</sup> The Declaration of Independence, para. 1 (U.S. 1776).

<sup>10</sup> ABA House Report 690 MY 1979.

<sup>11</sup> *See* International Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 16, 1966, art. 11(1), 993 U.N.T.S. 3, 5 (entered into force Jan. 3, 1976).

<sup>12</sup> David Weissbrodt, "United States Ratification of the Human Rights Covenants," *Minn. L. Rev.* 63:35 at n. 63, 43, (November 1978), citing Vienna Convention on the Law of Treaties, art. 18, UN Doc. A/Conf. 39/27 (1969).

<sup>13</sup> U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992); International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 (Article 2(1)); U.S. reservations, declarations, and understandings, International Convention on the Elimination of All Forms of Racial Discrimination, 140 Cong. Rec. S7634-

On the 70<sup>th</sup> Anniversary of President Roosevelt’s “Four Freedoms” speech, in a presentation to the American Society of International Law, Assistant Secretary of State for Democracy, Human Rights, and Labor Michael Posner stated, “there are many ways to think about what should or should not count as a human right. Perhaps the simplest and most compelling is that human rights reflect what a person needs in order to live a meaningful and dignified existence.”<sup>14</sup>

Posner’s speech reflects the increasing importance the Obama Administration has placed on economic and social human rights such as the right to adequate housing. In March 2011, the U.S. acknowledged for the first time that rising homelessness implicates its human rights obligations, and made commitments to the United Nations (U.N.) Human Rights Council to “reduce homelessness,” “reinforce safeguards to protect the rights” of homeless people, and to continue efforts to ensure access to affordable housing for all.<sup>15</sup> In May 2012, the Department of Justice and U.S. Interagency Council on Homelessness issued a joint report recognizing that criminalization of homelessness may not only violate our Constitution, but also the U.S.’s treaty obligations under the International Covenant on Civil & Political Rights, and the Convention Against Torture.<sup>16</sup> The Administration has frequently welcomed both the international community’s input and its obligation to lead by example. The U.S. seems more willing than ever to hold itself to high international standards, and even acknowledge that it may sometimes fall short.

Moreover, the international community has increasingly taken note of America’s failure to uphold the right to housing. In 2006, the UN Human Rights Committee expressed concern about the disparate racial impact of homelessness in the U.S. and called for “adequate and adequately implemented policies, to ensure the cessation of this form of racial discrimination.”<sup>17</sup> In 2008, the UN Committee on the Elimination of Racial Discrimination again recognized racial disparities in housing and ongoing segregation in the U.S.<sup>18</sup> Since then, numerous U.N. experts, on official missions to the U.S., have addressed U.S. violations of the human right to housing and related rights.<sup>19</sup>

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02 (daily ed., June 24, 1994); International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, entered into force Jan. 4, 1969 (Article 5(e)(i)). *See also*, ABA House Report 700 MY 1979; ABA House Report 921 AM 1978.

<sup>14</sup> The Four Freedoms turn 70, Michael H. Posner, Assistant Secretary, Bureau of Democracy, Human Rights, and Labor, Address to the American Society of International Law, March 24, 2011.

<sup>15</sup> Report of the Working Group on the Universal Periodic Review, United States of America, *Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review*, A/HRC/16/11/Add.1, ¶ 19 (Mar. 8, 2011).

<sup>16</sup> Interagency Council on Homelessness, *Searching out Solutions: Constructive Alternatives to the Criminalization of Homelessness* 8 (2012) (USICH and the Access to Justice Initiative of the U.S. Dep’t of Justice, with support from the Department of Housing and Urban Development, convened a summit to gather information for this report).

<sup>17</sup> Concluding Observations of the Human Rights Committee on the Second and Third U.S. Reports to the Committee, CCPR/C/USA/CO/3 (2006), at para. 22.

<sup>18</sup> Committee on the Elimination of Racial Discrimination, Consideration of Reports Submitted by State Parties Under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America, CERD/C/USA/CO/6 (2008), at para. 9.

<sup>19</sup> *See Simply Unacceptable*, *supra* note 5, at 24-5.

## **The Legal Community has an Important Role to Play in Implementing the Human Right to Housing**

Despite the nation's commitment to human rights ideals, its practices have often fallen short. Families continue to face foreclosures, many as a result of predatory lending practices, but even as homes without families multiply, families without homes cannot access them. Many tenants pay more than 50% of their income toward rent, putting them one paycheck away from homelessness. Without a right to counsel in housing cases, renters must often choose between pushing for basic repairs or facing unjust eviction. When widespread poverty goes unattended, despite the sufficiency of a country's resources, "respect for legal institutions will ultimately be undermined."<sup>20</sup> The legal community has a duty to provide these families with justice, yet we can only do so much in the nation's current legal environment. In this instance, access to justice requires us to advocate for change. That advocacy comes in the form of this resolution, calling upon our government at all levels to implement the human right to housing as a necessary component of ensuring the basic human dignity of every individual.

### **Implementing the human right to adequate housing**

**In implementing the human right to adequate housing, the American Bar Association calls upon federal, state, local, tribal, and territorial governments to**

- (1) Implement policies promoting the human right to adequate housing for all including veterans, people with disabilities, older persons, families, single individuals, and unaccompanied youth, which, at minimum, includes:**
  - a. Affordability, habitability, and accessibility;**
  - b. Provision of security of tenure, access to services, materials, facilities, and infrastructure;**
  - c. Location proximate to employment, health care, schools, and other social facilities;**
  - d. Provision of housing in areas that do not threaten occupants' health; and**
  - e. Protection of cultural identity or diversity**

The Committee on Economic, Social and Cultural Rights (CESCR), which oversees implementation of the ICESCR, lists seven elements required for housing to be considered adequate including legal security of tenure; availability of services, materials, facilities, and infrastructure; affordability; habitability; accessibility; location near employment options, healthcare facilities, schools, child care centers, and other social facilities; and cultural adequacy in housing design.<sup>21</sup> This framework recognizes that each of these elements is interdependent with each other. Adequate housing requires more than four walls and a roof; it requires adequate community resources, supportive

<sup>20</sup> ABA Annual meeting, 1986 at 789.

<sup>21</sup> General Comment 4, The right to adequate housing (Sixth session, 1991), U.N. Doc. E/1992/23, annex III at 114 (1991), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 18 (2003).

legal and policy frameworks, effective access to justice, and a participatory and transparent democratic system to maintain all aspects of the right. It also recognizes that enjoyment of the right to housing is a standard relative to the availability of resources in a given country; here in the U.S., in what remains the wealthiest country in the world, we can and must do more.<sup>22</sup>

In 2010, there were over 10 million very low-income renters and only 4.5 million affordable rental units, 40% of which were occupied by higher-income renters.<sup>23</sup> This lack of availability forced approximately 22 percent of the 36.9 million rental household in the United States to spend more than half of their income on housing.<sup>24</sup> Not only is affordable housing in short supply, but affordable units are often inadequate in other ways based on the CESC definition. Underfunding for public housing leaves many affordable units in disrepair and lack of meaningful enforcement – including lack of access to legal counsel – has rendered housing codes ineffective, making these units uninhabitable.<sup>25</sup> In urban areas, poor, minority areas have poorer access to basic services, including hospitals.<sup>26</sup> In rural, impoverished areas, access to infrastructure allowing for basic water and sanitation is limited or unavailable.<sup>27</sup> In suburbs and ex-urban communities, zoning restrictions have prevented construction of (and in some cases, removed) affordable housing.<sup>28</sup> In all areas, the high cost of housing often forces individuals to endure these housing inadequacies, live in overcrowded spaces, and live in areas with failing schools, high crime rates, and increased exposure to environmental pollutants.<sup>29</sup>

Even where needy applicants are able to obtain housing assistance or access affordable housing, they face discrimination in the private housing market on the basis of race, disability, gender, sexual orientation, source of income, criminal background, or other status. Despite some strong de jure protections: over 27,000 complaints were registered in 2011 with housing protection agencies, and many more go unreported.<sup>30</sup> Although this number has decreased slightly since 2009, more work needs to be done to ensure equal access to housing resources. This includes ensuring availability of various types of home and community based support services that enable individuals and families to live independently as long as possible. Additionally, as was seen following Hurricanes Katrina and Sandy, many traditionally marginalized groups feel a disparate impact during

<sup>22</sup> See National Law Center on Homelessness & Poverty, *Human Right to Housing Report Card* (2012).

<sup>23</sup> John Griffith, Julia Gordon & David Sanchez, Center for American Progress, *It's Time to Talk About Housing 7* (August 15, 2012).

<sup>24</sup> *Id.*

<sup>25</sup> *Simply Unacceptable*, *supra* note 5, at 9, 74-79.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> See, e.g. Benjamin Harney, *The Economics of Exclusionary Zoning and Affordable Housing*, 38 *Stetson L.Rev.* 459 (2009); John Hasse, John Reiser & Alexander Pichacz, *Evidence of Persistent Exclusionary Effects of Land Use Policy within Historic and Projected Development Patterns in New Jersey: A Case Study of Monmouth and Somerset Counties*, Rowan University (2011).

<sup>29</sup> *Simply Unacceptable*, *supra* note 5, 51-61

<sup>30</sup> National Fair Housing Alliance, *Fair Housing in a Changing Nation – 2012 Fair Housing Trends Report* (April 30, 2012).

natural disasters, and the right to adequate housing must be ensured appropriately in the post-disaster context as well.<sup>31</sup>

The U.S. has a strong tradition of promoting affordable, accessible housing, but programs have been under-funded and under-implemented. Moreover, while the human rights framework demands progressive implementation of the right to housing, and prohibits retrogressive policies, over the past 30 years there has been a significant disinvestment in public and subsidized housing at the federal level.<sup>32</sup> Recent years have seen innovations such as the Rental Assistance Demonstration and Choice Neighborhoods Initiative, which attempt to “do more with less” while preserving important rights and protections for low-income residents, but these programs still fail to meet the need in communities.<sup>33</sup> Furthermore, many long-term contracts for affordable housing built under the Section 8 program during the 1960’s are now coming to term, threatening a further loss of affordable units.<sup>34</sup>

The contours of the human right to adequate housing continue to be developed at the international level by the CESCR and other U.N. experts, and at the regional level by regional human rights bodies, in response to ever-changing conditions. The U.S. should always seek to be a leader in applying these developing standards to its policies.

**(2) Take immediate steps to respect, protect, and fulfill the right to adequate housing and other human rights through measures guaranteeing the availability of affordable, accessible housing to all who require it;**

Progressively realizing the right to adequate housing requires resolutions, recognition, and legislation, but also requires action. In our federal system, states and local communities are often best situated to act quickly to remedy human rights violations in a way that is effective for their area. State and local governments should not wait for the United States to act on the right to adequate housing but should immediately take steps to create local solutions to housing rights violations. Recent positive steps include resolutions recognizing and pledging to implement the human right to housing in Madison and Dane County, WI, and the introduction of a homeless bill of rights referencing human rights standards in California.<sup>35</sup>

<sup>31</sup> See, e.g. Advisory Group on Forced Evictions, Mission Report to New Orleans, (2010).

<sup>32</sup> Western Regional Advocacy Project, *Without Housing 2010 update* (2010), [http://www.wraphome.org/pages/index.php?option=com\\_content&id=376](http://www.wraphome.org/pages/index.php?option=com_content&id=376); National Low Income Housing Coalition, *Changing Priorities: The Federal Budget and Housing Assistance 1976-2007* (2002), <http://nlihc.org/sites/default/files/changingpriorities.pdf>.

<sup>33</sup> See Peter W. Salsich, Jr., *Does America Need Public Housing?*, 19 Geo. Mason L. Rev. 689 (2012); Emily Turner, *A Suspect Shift: Public Housing’s Transition to Mixed-Income Housing, A National Analysis- Lessons from Denver* (2010).

<sup>34</sup> See, e.g. National Low Income Housing Coalition, *Project-Based Housing* (2013), <http://nlihc.org/issues/project-based>; Rachel Bratt, *A Withering Commitment*, National Housing Institute (1997), <http://www.nhi.org/online/issues/94/bratt.html>.

<sup>35</sup> City of Madison Res. 28925 (Dec. 2011), <http://madison.legistar.com/View.ashx?M=F&ID=1775433&GUID=B82C4409-BF96-4361-A1A1-587ED424E4D6>; Dane County Res. 292, 11-12 (July 2012); R.I. S. 2052 (2012); AB 5 2013-14 Reg. Sess. (Ca. 2012).



**(3) Recognize that homelessness is a prima facie violation of the right to housing, and to examine the fiscal benefits of implementation of the right to housing as compared to the costly perpetuation of homelessness;**

Homelessness is an ongoing and increasingly prevalent violation of the most basic essence of the human right to housing in the United States and requires an immediate remedy. In 2011, cities across the country noted an average 16% increase in the number of homeless families.<sup>36</sup> From the 2009-10 school year to the 2010-11 school year, the number of homeless school children increased by 13% to over one million children.<sup>37</sup> Among other factors contributing to this growth, recent studies have shown that: one out of four homeless women is homeless as a result of domestic violence;<sup>38</sup> 1 in 11 released prisoners end up homeless<sup>39</sup> - with a disparate impact on racial minorities and those who have been criminalized because of their homeless status;<sup>40</sup> and over 1.6 million unaccompanied homeless youth are forced out of home due to physical or sexual abuse, aging out of foster care, or as a result of disagreements with parents or caretakers over sexual orientation.<sup>41</sup> Temporary shelter should only be seen as an interim, emergency response to homelessness. The right to housing demands permanent housing arrangements, with whatever supports are needed to maintain stability, in as short a time as possible.

In a 2007 resolution, equally applicable today, the ABA opposed the enactment of laws criminalizing individuals for “carrying out otherwise non-criminal life-sustaining practices or acts in public spaces, such as eating, sitting, sleeping, or camping, when no alternative private spaces are available.”<sup>42</sup> Instead of providing adequate alternatives, more communities are increasingly turning to these criminalization policies.<sup>43</sup> Criminalization of homelessness, and homelessness itself, injures the dignity and self-worth of the individual, as well as potentially interfering with their health and safety, where individuals are forced into unsafe situations or must face the elements without shelter. Lack of proper identification or generation of a criminal record caused by homelessness may also prevent homeless persons from accessing government support or

<sup>36</sup> The United States Conference of Mayors, *Hunger and Homelessness Survey: A Status Report on Hunger and*

*Homelessness in America's Cities* 21 (2011).

<sup>37</sup> National Center for Homeless Education, *Education for Homeless Children and Youths Program 4* (2012).

<sup>38</sup> National Law Center on Homelessness and Poverty, *Lost Housing, Lost Safety: Survivors of Domestic Violence Experience Housing Denials and Evictions Across the Country*, 5 (Feb. 2007).

<sup>39</sup> Bureau of Justice Statistics, 2009. “Prisoners In 2008”, available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1763> (last visited Jan. 21, 2011).

<sup>40</sup> *Simply Unacceptable*, supra note 5, at 61-73.

<sup>41</sup> James Swift, National Network for Youth, *Experts Address the Legal Problems Surrounding Homeless Youth Services* (Sept. 10, 2012), available at <http://www.nn4youth.org/news/network-news/2012/09/10/experts-address-legal-problems-surrounding-homeless-youth-services>.

<sup>42</sup> ABA House Report 106 MY 2007.

<sup>43</sup> National Law Center on Homelessness and Poverty, *Criminalizing Crisis: The Criminalization of Homelessness*

*in U.S. Cities* 9-10 (2011) (among the 188 cities reviewed between 2009 and 2011, the report identifies a 7 percent increase in prohibitions on begging or panhandling; a 7 percent increase in prohibitions on camping in particular public places; and a 10 percent increase in prohibitions on loitering in particular public places).

finding a job.<sup>44</sup> Low-income youth facing inadequate housing conditions or lack of housing have poorer educational outcomes due to high mobility, hunger, and health problems, creating a cycle of poverty and homelessness.<sup>45</sup>

Housing is a critical component of overall health, and homeless persons have an average life span of 42-52 years, compared to 78 years for the general population.<sup>46</sup> Indeed, New York City has established a right to housing for those suffering from AIDS, recognizing their “acute needs for safe, clean housing to keep them healthy.”<sup>47</sup>

In 2010, 113 attacks, 24 of which led to the death of the victim, were deemed acts of “bias motivated violence” against homeless individuals.<sup>48</sup> The National Coalition for the Homeless documented hate crimes against homeless persons for twelve years (1999-2010) and noted that fatal attacks on homeless individuals were twice as high each year as fatal attacks on all currently protected classes combined.<sup>49</sup> Although low-income families in affordable housing do not face the “bias motivated violence” perpetrated against those living on the streets, low-income neighborhoods tend to have higher rates of violence than other areas. Students in poor neighborhoods reported fighting in school or the presence of weapons at school twice as often as their wealthier counterparts.<sup>50</sup>

In addition to viewing housing expenditures as obligatory, legislators must also consider the fiscal *benefits* of adequately meeting low-income housing needs. In a 2004 study by the Lewin Group on the costs of serving homeless individuals in nine cities across the U.S., several cities found supportive housing to be cheaper than housing homeless individuals in shelters.<sup>51</sup> That same year, the Congressional Budget Office estimated the cost of a Section 8 Housing Certificate to be \$7,028, approximately \$8,000 less than the cost of an emergency shelter bed funded by HUD’s Emergency Shelter Grants program.<sup>52</sup> A collaborative effort of service and medical providers in San Diego, Project 25, has documented a \$7 million dollar savings to tax payers through reduced emergency care and jail costs by providing permanent housing to 35 homeless individuals, a 70% reduction.<sup>53</sup>

<sup>44</sup> *Simply Unacceptable*, *supra* note 5, at 61-73.

<sup>45</sup> New Housing Normal; *Simply Unacceptable*, *supra* note 5, at 74-79.

<sup>46</sup> Nat’l Coalition for the Homeless, Health Care and Homelessness (July 2009), <http://www.nationalhomeless.org/factsheets/health.html>.

<sup>47</sup> New York City Local Law 50 of 2005, Council Int. No. 535-A, (2005).

<sup>48</sup> National Coalition for the Homeless, *Hate Crimes Against the Homeless, Violence Hidden in Plain View* 9 (January 2012), available at <http://www.nationalhomeless.org/publications/hatecrimes/hatecrimes2010.pdf>.

<sup>49</sup> National Coalition for the Homeless, *Hate Crimes Against the Homeless, Violence Hidden in Plain View* 12 (January 2012), available at <http://www.nationalhomeless.org/publications/hatecrimes/hatecrimes2010.pdf>.

<sup>50</sup> *Id.*

<sup>51</sup> National Law Center on Homelessness and Poverty, *Criminalizing Crisis: The Criminalization of Homelessness in U.S. Cities* 9-10 (2011).

<sup>52</sup> *Ibid.*

<sup>53</sup> Gary Warth, *San Diego: Homeless program reportedly saved taxpayers \$7M*, North County Times, Apr. 10, 2012, [http://www.nctimes.com/news/local/sdcounty/san-diego-homeless-program-reportedly-saved-taxpayers-m/article\\_85fded-46a4-5e6d-9d0d-83b068acdd1e.html](http://www.nctimes.com/news/local/sdcounty/san-diego-homeless-program-reportedly-saved-taxpayers-m/article_85fded-46a4-5e6d-9d0d-83b068acdd1e.html).

Scotland, France, and South Africa all show that the progressive implementation of the right to housing through legislation and case law is possible where the political will exists. Scotland's Homeless Act of 2003 progressively expanded the right to be immediately housed and the right to long-term, supportive housing for as long as it is needed, starting with target populations, but available to all in need as of 2012. The law also includes a private right of action and requires jurisdictions to plan for development of adequate affordable housing supplies.<sup>54</sup> France created similar legislation in 2007 in response to public pressure and a decision of the European Committee on Social Rights under the European Social Charter.<sup>55</sup> South Africa's constitutional right to housing protects even those squatting in informal settlements, requiring the provision of adequate alternative housing before families and individuals can be evicted.<sup>56</sup> This law has been enforced in local communities to even require rebuilding housing that has been torn down.<sup>57</sup> While not yet perfect, these countries are proving that progressively implementing the right to housing is both economically feasible and judicially manageable.

**Further, the American Bar Association urges the federal government to lead by example through increased efforts to support and develop the right to housing domestically and at the international level. These efforts include:**

- a. Prioritizing funding for housing when making federal budgetary decisions;**
- b. Assessing the impact new federal legislation and regulatory decisions will have on the right to housing;**
- c. Urging every state, locality, and territory to develop comprehensive affordable housing strategies;**
- d. Developing mandates or incentives for housing developers and financial institutions to ensure the right to housing as a priority;**
- e. Prohibiting state and local governments, territories, government-owned entities, and substantially government-related entities from violating the right to adequate housing;**
- f. Requiring governments and organizations to prevent or mitigate any infringement upon the right to adequate housing;**

<sup>54</sup> See, e.g. Eric S. Tars and Caitlin Egleson, *Great Scot! The Scottish Plan to End Homelessness and Lessons for the Housing Rights Movement in the U.S.*, 16 GEORGETOWN J. POV. LAW & POLICY 187 (2009).

<sup>55</sup> See, e.g. Eric S. Tars, Julia Lum & E. Kieran Paul, *The Champagne of Housing Rights: France's Enforceable Right to Housing and Lessons for U.S. Advocates*, 4 NE. U. L.J. 429 (2012).

<sup>56</sup> See, e.g. Kate Tissington, [A Review of Housing Policy and Development in South Africa since 1994](#), Social & Economic Rights Institute (2010).

<sup>57</sup> See *Tswelopele Non-Profit Organisation v. City of Tshwane metropolitan Municipality* [2007] SCA 70 (RSA), stating "to be hounded unheralded from the privacy and shelter of one's home, even in the most reduced circumstances, is a painful and humiliating indignity... Placing them on the list for emergency [housing] assistance will not attain the simultaneously constitutional and individual objectives that reconstruction of their shelters will achieve. The respondents should, jointly and severally, be ordered to reconstruct them. And, since the materials belonging to the occupiers have been destroyed, they should be replaced with materials that afford habitable shelters."

- g. **Leading a shift in discussion of housing services from providing charity to supporting victims of human rights violations;**
- h. **Reviewing policies that govern the cost of housing to ensure costs do not interfere with a person's ability to enjoy other human rights such as the right to adequate food or health; and**
- i. **Supporting the adoption of resolutions, treaties, and other international principles further establishing and promoting the right to housing at the international and regional level and committing to their implementation domestically.**

Federal housing assistance provides several million units of housing nationwide but continues to fall far short of adequately addressing the country's low-income housing needs.<sup>58</sup> Under current funding levels, federal assistance is only available for approximately one out of every four eligible low-income families.<sup>59</sup> Framing these expenditures as part of our government's basic obligations to its citizens, the same as its duty to ensure constitutional rights, allows us to establish a new baseline in budgetary debates and planning.<sup>60</sup>

To take some of the burden to support the homeless and low-income populations off the government, the government must include the right to adequate housing in its policy decisions. At the start of the economic downturn in 2007 and 2008, for example, the government provided bailout money to failing banks without requiring protections to help those facing foreclosure remain in their homes.<sup>61</sup> Had protections been included, the government and banks could have worked to keep homeowners in their homes to prevent a massive influx in the number of families requiring affordable housing or homelessness services.<sup>62</sup>

As a leader in the international community, the United States should be on the forefront of the realization of a right to adequate housing.<sup>63</sup> This requires acknowledging housing

<sup>58</sup> See *Simply Unacceptable*, *supra* note 5, at 51-61.

<sup>59</sup> *Id.*, at 26.

<sup>60</sup> *Id.*, at 11.

<sup>61</sup> See Emergency Economic Stabilization Act of 2008 (Division A of [Pub.L. 110-343](#), 122 *Stat.* 3765, enacted October 3, 2008). See also Paul Kiel, *Banks Getting TARP Money Lending Less Than Other Banks*, ProPublica, Feb. 3, 2009, <http://www.propublica.org/article/banks-getting-tarp-money-lending-less-than-other-banks-090203>; Mary Snow, *Where's the bailout money?*, CNN, Dec. 22, 2008, <http://www.cnn.com/2008/US/12/22/bailout.accountability/index.html>.

<sup>62</sup> Preventing foreclosure is far more cost-effective for all stakeholders- banks, individuals, and governments - than incurring losses and government having to provide additional services once a family becomes homeless. See, e.g. Diana Savino, *NYS Foreclosure Prevention Services Campaign*, Feb. 1, 2012, <http://www.nysenate.gov/press-release/nys-foreclosure-prevention-services-program-campaign-0> (estimating \$1 of investment in foreclosure prevention generates a \$68 return); see also, Roberto G. Quercia, Spencer M. Cowan & Ana Moreno, *The Cost-Effectiveness of Community-Based Foreclosure Prevention*, 2005; Ana Moreno, *Cost Effectiveness of Mortgage Foreclosure Prevention*, 1995.

<sup>63</sup> See Susan Randolph, Sakiko Fukada-Parr & Terra Lawson-Remer, Working Paper Version of Economic and Social Rights Fulfillment Index: Country Scores and Rankings 4, 18 (2010) (working paper) (on file with the Economic & Social Rights Empowerment Initiative), available at <http://www.serfindex.org/research/>, (The Economic and Social Rights Fulfillment Index, an assessment that

as a priority in terms of funding, regulation, and enforcement. This also requires a paradigm shift in our society. Provision of housing can no longer be seen as an optional government entitlement program but must be seen as an essential protection of human rights. Overall, we must realize as a country that protecting human rights is not optional and that the violation of one individual's human rights weakens an entire community.

## Conclusion

The U.S. is in the midst of the worst housing crisis since the Great Depression. We need a new framework in which to discuss issues of housing and homelessness; a framework that says everyone has a right to adequate housing. While adopting an explicit human rights framework in the U.S, would represent a shift, the U.S. has a proud history to which it can point, starting from the days of President Roosevelt that demonstrate the human right to housing is not a foreign, but a domestic value.<sup>64</sup> Our current struggle with budget deficits is not a reason to defer actions to improve Americans' access to adequate housing; rather, it is precisely in this time of economic crisis that the need to do so is most acute. Given that the U.S. is still the wealthiest nation in the world, with a well-developed democratic and judicial system, the ABA calls upon all levels of government to hold itself to a high standard, one that recognizes the full dignity of every human being cannot be guaranteed without enjoying, among all other rights, the human right to adequate housing.

Respectfully submitted,

Antonia Fasanelli, Chair  
Commission on Homelessness & Poverty

August 2013

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determines how well countries perform in meeting economic and social rights, such as the right to housing, in light of their available resources, places the U.S. 24th out of 24 high-income countries analyzed.); See The Constitution of the Republic of South Africa, Act 100 of 1996, §§ 26-28, (The Constitution of the Republic of South Africa includes the right of all to access of affordable housing.)

<sup>64</sup> See *Simply Unacceptable*, *supra* note 5, at 93.

GENERAL INFORMATION FORM

Submitting Entity: Commission on Homelessness & Poverty

Submitted By: Antonia Fasanelli, Chair, Commission on Homelessness & Poverty

1. Summary of Resolution(s).

This resolution calls upon local, state, tribal, and federal government to progressively implement policies promoting the human right to adequate housing for all including veterans, people with disabilities, older persons, families, single individuals, and unaccompanied youth, and urges the federal government to lead by example through increased efforts to support and develop the right to housing domestically and at the international level.

This resolution, as a whole, provides a framework for *progressive realization* of that right. As such, implementing the human right to housing would not require the government to immediately build a home for each person in America or to provide housing for all free of charge overnight. However, it does require more than some provision for emergency shelter, piecemeal implementation of housing affordability programs, and intermittent enforcement of non-discrimination laws, all of which exist in some form in all local U.S. communities and have failed as a whole to eliminate homelessness or poverty. It requires an affirmative commitment to progressively realize the right to fully adequate housing, whether through public funding, market regulation, private enforcement, or a combination of all of the above.

2. Approval by Submitting Entity.

The Commission approved this policy resolution on May 4, 2013.

3. Has this or a similar resolution been submitted to the House or Board previously?

No. Please see response to #4 below.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

In 1979, the ABA endorsed the U.S. ratification of the International Covenant on Economic, Social & Cultural Rights which codifies the right to housing. (See ABA House Report 690 MY 1979.) Adoption of this policy would build on the ABA's 34 year history of advocacy in the human rights arena.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

N/A

6. Status of Legislation. (If applicable)

None at this time.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The United States government has supported the human right to housing in a number of international treaties and other documents, and is increasingly discussing housing and homelessness in terms of human rights. Lawyers across the country are using human rights framing at the federal, state, and local levels as an additional tool in litigation and legislative advocacy to end homelessness and promote the right to adequate housing for all.

8. Cost to the Association. (Both direct and indirect costs)

None. Existing Commission and Governmental Affairs staff will undertake the Association's advocacy on behalf of these recommendations, as is the case with other Association policies.

9. Disclosure of Interest. (If applicable)

There are no known conflicts of interest with this resolution.

10. Referrals.

Administrative Law  
 Business Law  
 Criminal Law  
 Government and Public Sector Lawyers  
 Individual Rights and Responsibilities  
 International Law  
 Law Student Division  
 Litigation  
 Real Property  
 Senior Lawyers  
 Solo, Small Firm and General Practice  
 State and Local Government  
 Young Lawyers Division  
 Forum on Affordable Housing and Community Development  
 Delivery of Legal Services  
 Disaster Response and Preparedness  
 Legal Aid and Indigent Defendants  
 Pro Bono and Public Service  
 Center for Human Rights

# 117

Commission on Disability Rights  
Commission on Domestic Violence  
Commission on Immigration  
Commission on Law and Aging  
Commission on Sexual Orientation and Gender Identity  
Commission on Youth at Risk

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

Antonia Fasanelli, Chair  
Homeless Persons Representation Project  
201 N Charles St., Ste. 1104  
Baltimore, MD 21201  
(410) 685-6589 x17  
[AFasanelli@hprplaw.org](mailto:AFasanelli@hprplaw.org)

Amy Horton-Newell, Staff Director  
ABA Commission on Homelessness & Poverty  
(202) 662-1693  
[Amy.Hortonnewell@americanbar.org](mailto:Amy.Hortonnewell@americanbar.org)

12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

Antonia Fasanelli, Chair  
Homeless Persons Representation Project  
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Baltimore, MD 21201  
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[AFasanelli@hprplaw.org](mailto:AFasanelli@hprplaw.org)



## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

This resolution calls upon federal, state, local, territorial, and tribal governments to progressively implement policies promoting the human right to adequate housing for all including veterans, people with disabilities, older persons, families, single individuals, and unaccompanied youth, and urges the federal government to lead by example through increased efforts to support and develop the right to housing domestically and at the international level.

This resolution, as a whole, provides a framework for progressive realization of that right. As such, implementing the human right to housing would not require the government to immediately build a home for each person in America or to provide housing for all free of charge overnight. However, it does require more than some provision for emergency shelter, piecemeal implementation of housing affordability programs, and intermittent enforcement of non-discrimination laws, all of which exist in some form in all local U.S. communities and have failed as a whole to eliminate homelessness or poverty. It requires an affirmative commitment to progressively realize the right to fully adequate housing, whether through public funding, market regulation, private enforcement, or a combination of all of the above.

### 2. Summary of the Issue that the Resolution Addresses

Despite the nation's commitment to human rights ideals, its practices have often fallen short. The U.S. has a strong tradition of promoting affordable, accessible housing, but programs have been under-funded and under-implemented. Furthermore, over the past 30 years there has been a significant disinvestment in public and subsidized housing at the federal level. Families continue to face foreclosures, many as a result of predatory lending practices, but even as homes without families multiply, families without homes cannot access them. Many tenants pay more than 50% of their income toward rent, putting them one paycheck away from homelessness. Homelessness is an ongoing and increasingly prevalent violation of the most basic essence of the human right to housing in the United States and requires an immediate remedy. In 2011, cities across the country noted an average 16% increase in the number of homeless families. From the 2009-10 school year to the 2010-11 school year, the number of homeless school children increased by 13% to over one million children.

### 3. Please Explain How the Proposed Policy Position will address the issue

This resolution calls on the U.S. government at all levels to more fully implement the right to housing as a legal commitment. Asserting housing as a human right will create a common goal and a clear framework to:

- a. Help government agencies set priorities to implement the right to housing
  - b. Provide support for advocacy groups
  - c. Create pressure to end policies which fail to guarantee human rights
  - d. Allow us to focus on how to solve the problem rather than worrying about whether the U.S. government has a duty to solve the problem
4. Summary of Minority Views
- None to date.

DRAFT

**AMERICAN BAR ASSOCIATION**  
**CRIMINAL JUSTICE SECTION**  
**SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES**  
**COMMISSION ON SEXUAL ORIENTATION AND GENDER IDENTITY**  
**COMMISSION ON YOUTH AT RISK**  
**CENTER FOR HUMAN RIGHTS**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

- 1 RESOLVED, That the American Bar Association urges federal, state, local and territorial  
2 governments to take legislative action to curtail the availability and effectiveness of the  
3 “gay panic” and “trans panic” defenses, which seek to partially or completely excuse crimes such  
4 as murder and assault on the grounds that the victim’s sexual orientation or gender identity is to  
5 blame for the defendant’s violent reaction. Such legislative action should include:
- 6 (a) Requiring courts in any criminal trial or proceeding, upon the request of a party, to  
7 instruct the jury not to let bias, sympathy, prejudice, or public opinion influence its  
8 decision about the victims, witnesses, or defendants based upon sexual orientation or  
9 gender identity; and
  - 10 (b) Specifying that neither a non-violent sexual advance, nor the discovery of a person’s sex  
11 or gender identity, constitutes legally adequate provocation to mitigate the severity of any  
12 non-capital crime.

**DRAFT**

## REPORT

### **Executive Summary**

Jorge Steven Lopez-Mercado, age 19, was decapitated, dismembered and burned for being openly gay, but according to the police investigator on the case, “people who live this lifestyle need to be aware that this will happen.” When Matthew Shepard, age 21, made a pass at two men in a gay bar, he should have expected to be beaten, pistol-whipped, tied to a fence, and left to die. When Emile Bernard was stabbed, beaten and blinded after coming on to a hitchhiker, his assailant claimed he could not be guilty since the victim “was asking for trouble” by making sexual advances. If Angie Zapata, age 18, hadn’t initially “hidden” that she had male anatomy, her attacker would never have bludgeoned her to death with a fire extinguisher. And when a fellow student shot Larry King, age 15, execution-style in front of their teacher and classmates, his actions were understandable because Larry wore dresses and heels, and said “Love you, baby!” to him the day before. These are actual defenses, offered by real defendants, in United States courts of law that have succeeded in mitigating or excusing real crimes, even today.

The “gay panic” and “trans panic” legal defenses are surprisingly long-lived historical artifacts, remnants of a time when widespread public antipathy was the norm for lesbian, gay, bisexual, and transgender (‘LGBT’) individuals. These defenses ask the jury to find that the victim’s sexual orientation or gender identity is to blame for the defendant’s violent reaction. They characterize sexual orientation and gender identity as objectively reasonable excuses for loss of self-control, and thereby mitigate a perpetrator’s culpability for harm done to LGBT individuals. By fully or partially excusing the perpetrators of crimes against LGBT victims, these defenses enshrine in the law the notion that LGBT lives are worth less than others.

Historically, the gay and trans panic defenses have been used in three ways to mitigate a charge of murder to manslaughter or justified homicide. First, the defendant uses gay panic as a reason to claim insanity or diminished capacity. The defendant alleges that a sexual proposition by the victim triggered a nervous breakdown in the defendant, and then claims to have been afflicted with “homosexual panic disorder.” This insanity defense has been discredited since 1973, when the American Psychiatric Association removed the diagnosis of homosexual panic disorder from its *Diagnostic and Statistical Manual of Mental Disorders*. However, the legal field has yet to catch up with medical progress, and variations on the defense are still being raised in court.

Second, defendants make a gay panic argument to bolster a defense of provocation by arguing that the victim’s sexual advance, although entirely non-violent, was sufficiently provocative to induce the defendant to kill. Similarly, defendants make a trans panic argument for provocation by pointing to the discovery of the victim’s biological sex, usually after the defendant and victim have engaged in consensual sexual relations, as the sufficiently provocative act that drove the defendant to kill.

Third, defendants use gay/trans panic arguments to strengthen their case for self-defense. In these cases, defendants contend that they reasonably believed the victim was about to cause them serious bodily harm because of the victim’s sexual orientation or gender identity. Although the

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threat of danger would otherwise fall short of the standard for self-defense, the defendant asserts that the threat was heightened solely due to the victim's sexual orientation or gender identity.

Successful gay and trans panic defenses constitute a miscarriage of justice. One form of injustice is obvious: the perpetrator kills or injures the victim, and then blames the victim at trial based on sexual orientation or gender identity. In addition, the successful use of these defenses sends a message to the LGBT community that the suffering of a gay or trans person is not equal to the suffering of other victims, and will not be punished in the same manner. By the same token, in excusing violent behavior towards LGBT individuals, courts teach those who hold anti-LGBT bias that the law does not take bias attacks seriously. For those looking to hurt LGBT individuals, nothing can do more harm than the notion that violence, even homicide, is a reasonable response to a life lived openly.

Some courts and legislatures have begun to curtail the use of gay and trans panic defenses. But in other jurisdictions gay and trans panic defenses remain a valid defense option, and are successful in too many courts across the country. This report makes three recommendations to combat the discriminatory effects of gay and trans panic defenses. First, at the request of any party, courts should provide jury instructions advising juries to make their decisions without improper bias or prejudice. Second, legislatures should specify that neither non-violent sexual advances nor the discovery of a person's gender identity can be adequate provocation for murder. Third, state and local governments should proactively educate courts, prosecutors, defense counsel, and the public about gay and trans panic defenses and the concrete harms they perpetuate against the LGBT community.

Continued use of these anachronistic defenses marks an egregious lapse in our nation's march toward a more just criminal system. As long as the gay and trans panic strategies remain available and effective, it halts the forward momentum initiated by criminal law reforms such as rape shield rules and federal hate-crime laws. To reflect our modern understanding of LGBT individuals as equal citizens under law, gay and trans panic defenses must end.

## Introduction

Lawrence "Larry" King, 15, was open about being gay. He was teased and bullied incessantly from the age of ten, but he was proud of his identity and openly expressed it through make-up, accessories, and high heels.<sup>1</sup> He had the support of some of his school's administration, who stood up for him when students and teachers expressed concern about his appearance.<sup>2</sup> Despite this support, one day after saying "Love you, baby!" to another male student, Larry was shot to death in a classroom in front of his classmates.<sup>3</sup>

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<sup>1</sup> Ramin Setoodeh, *Young, Gay and Murdered*, Newsweek, Jul. 28, 2008, at 40.

<sup>2</sup> *Id.*

<sup>3</sup> Jens Erik Gould, *The Lawrence King Case: In Court, Has the Bullied Become the Bully?*, TIME, Aug. 25, 2011, <http://www.time.com/time/nation/article/0,8599,2090287,00.html>.

Larry did not touch Brandon McInerney, 14.<sup>4</sup> He never threatened Brandon, did not make any advances toward him, and did not put him in any kind of danger.<sup>5</sup> The day before he was murdered, Larry, wearing make-up and high heels, simply asked Brandon to be his valentine.<sup>6</sup>

Brandon's defense at trial was that Larry was sexually harassing Brandon and that Larry's words and wardrobe were responsible for his death.<sup>7</sup> His attorney argued that Brandon was just responding to Larry, whom he described as an aggressor and a bully who was known to make inappropriate remarks and sexual advances to males.<sup>8</sup> Brandon's attorney did not claim that Larry assaulted Brandon or threatened his safety; he didn't have to.<sup>9</sup> Following this strategy of shaming and demonizing the victim for his sexual orientation, the jury hung when trying to decide if Brandon was deliberate, and wholly blameworthy, in killing Larry.<sup>10</sup>

Sadly, Larry's story of murder and subsequent vilification is not unique. Intentional violence against LGBT people is an increasingly common hate crime in the United States.<sup>11</sup> Approximately three-quarters of LGBT persons have been targets of verbal abuse and one-third have been targets of physical violence.<sup>12</sup> Data collected under the Hate Crimes Statistics Act indicate that, "gay people report the greatest number of hate crimes at greater per capita rates than all other groups."<sup>13</sup> Unfortunately, attacks on LGBT persons motivated by their sexual orientation or gender identity have had fatal consequences.<sup>14</sup>

<sup>4</sup> Zeke Barlow, *Emotional Day as Students Testify in Brandon McInerney Murder Trial*, VENTURA COUNTY STAR, July 6, 2011, <http://www.vcstar.com/news/2011/jul/06/first-student-testifies-in-brandon-mcinerney/> [hereinafter *Emotional Day*]; Setoodeh, *supra* note 1.

<sup>5</sup> *Emotional Day*, *supra* note 5.

<sup>6</sup> Catherine Saillant, *Oxnard School's Handling of Gay Student's Behavior Comes Under Scrutiny*, LOS ANGELES TIMES, Aug. 11, 2011, at A1; Setoodeh, *supra* note 1.

<sup>7</sup> Zeke Barlow, *Attorneys Argue over Who Was the Aggressor in Brandon McInerney Trial*, VENTURA COUNTY STAR, July 5, 2011, <http://www.vcstar.com/news/2011/jul/05/lawyers-give-opening-statements-in-brandon-case/> [hereinafter *Attorneys Argue*].

<sup>8</sup> *Attorneys Argue*, *supra* note 8 ("[Brandon's attorney] said of his client, 'He [Brandon] was pushed there [to kill Larry] by a young man who repeatedly targeted him with unwanted sexual advances.'").

<sup>9</sup> *See Attorneys Argue*, *supra* note 8.

<sup>10</sup> *Mistrial Declared in CA Gay Student Killing Trial*, VENTURA COUNTY STAR, Sept. 1, 2011, <http://www.vcstar.com/news/2011/sep/01/jury-stuck-in-calif-gay-student-killing-trial/>.

<sup>11</sup> In 2010, 1,277 of the 6,628 hate crimes reported to the FBI were based on the victim's sexual orientation. Fed. Bureau of Investigation, U.S. Dep't of Justice, FBI — Table 1 (2011), <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2010/index> (follow "Incidents and Offenses" hyperlink; then follow "Table 1" hyperlink). Of all hate crimes, the percentage of crimes linked to sexual orientation has steadily increased over the last five years from 14.2% in 2005 to 19.3% in 2010. *Id.*; Fed. Bureau of Investigation, U.S. Dep't of Justice, Table 1 — Hate Crime Statistics 2005 (2006), <http://www2.fbi.gov/ucr/hc2005/table1.htm>.

<sup>12</sup> Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 474-75 (2008).

<sup>13</sup> William B. Rubenstein, *The Real Story of U.S. Hate Crimes Statistics: An Empirical Analysis*, 78 TUL. L. REV., 1213, 1215. (2004).

<sup>14</sup> In 2010, at least two people were killed, motivated by anti-gay bias. Fed. Bureau of Investigation, U.S. Dep't of Justice, FBI — Table 4 (2011), <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2010/index> (follow "Incidents and Offenses" hyperlink; then follow "Table 4" hyperlink).

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Many defendants charged with violence against LGBT people have claimed “gay panic,” a theory in which the defendant argues that the victim’s sexual orientation excuses, mitigates, or justifies violence.<sup>15</sup> For example, a heterosexual male defendant charged with murdering a gay male may claim that he panicked when the victim made a sexual advance. The defendant thus blames the victim, insisting that it was the victim’s identity and actions that resulted in “an understandable and excusable loss of self-control.”<sup>16</sup> Although gay panic is not a freestanding defense to criminal liability, gay panic arguments are used as grounds for traditional defenses of provocation, self-defense, insanity, or diminished capacity.<sup>17</sup>

“Trans panic” is a related defense wherein defendants argue that the victim’s gender identity excuses, mitigates, or justifies violence.<sup>18</sup> A defendant charged with murdering a male-to-female transgender victim, for example, may claim that he panicked when he learned after sexual relations that the victim was biologically male.<sup>19</sup> Like the gay panic defense, the defendant uses trans panic arguments to shift blame to the victim for “deceiving” the defendant.<sup>20</sup>

The use of gay or trans panic defenses subjects victims to secondary victimization<sup>21</sup> by asking the jury to find the victim’s sexual orientation or gender identity blameworthy for the defendant’s actions.<sup>22</sup> The use of a gay or trans panic defense deprives victims, their family, and their friends of dignity and justice.<sup>23</sup> More broadly, it is designed to stir up and reinforce the anti-gay or anti-transgender emotions and stereotypes that led to the assault in the first place.<sup>24</sup> It also suggests that violence against LGBT individuals is excusable.<sup>25</sup> Finally, gay and trans panic

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<sup>15</sup> Victoria L. Steinberg, *A Heat of Passion Offense: Emotions and Bias in “Trans Panic” Mitigation Claims*, 25 B.C. THIRD WORLD L.J. 1, 3 (2005). Gay panic, trans panic, and similar terms are sometimes used in a more general way to describe when a defendant seeks mitigation of a crime or sympathy from the jury by claiming that the defendant held some negative (but understandable) emotions toward the victim’s sexual orientation that motivated the defendant’s actions. This report focuses only on the use of gay panic and trans panic in defense of a murder charge.

<sup>16</sup> *Maier v. People*, 10 Mich. 212, 220 (1862).

<sup>17</sup> Lee, *supra* note 15, at 490.

<sup>18</sup> Victoria L. Steinberg, *A Heat of Passion Offense: Emotions and Bias in “Trans Panic” Mitigation Claims*, 25 B.C. THIRD WORLD L.J. 1, 3 (2005).

<sup>19</sup> See Steinberg, *supra* note 21, at 3.

<sup>20</sup> See Robert B. Mison, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133, 171 (1992); Lee, *supra* note 15, at 515 (noting that the defendant argued that it was the transgender victim’s “deception and betrayal” that caused the killing).

<sup>21</sup> Kevin T. Berrill & Gregory M. Herek, *Primary and Secondary Victimization in Anti-Gay Hate Crimes: Official Response and Public Policy*, J. INTERPERSONAL VIOLENCE, 401, 404 (1990).

<sup>22</sup> Lee, *supra* note 15, at 471 & 475.

<sup>23</sup> See Berrill & Herek, *supra* note 25, at 404-05.

<sup>24</sup> Robert G. Bagnall, Patrick C. Gallagher & Joni L. Goldstein, Comment: *Burdens on Gay Litigants and Bias in the Judicial System: Homosexual Panic, Child Custody, and Anonymous Parties*, 19 HARV. C.R.-C.L.L. REV. 497, 501 (1984).

<sup>25</sup> *Id.*



defenses are irreconcilable with state and federal laws that treat bias crimes against LGBT people as aggravated offenses.<sup>26</sup>

For almost three decades, the ABA has taken a leading role in urging the elimination of discrimination against the LGBT community, keeping pace with our evolving understanding that LGBT persons are healthy, functioning contributors to our society.<sup>27</sup> The proposed resolution is consistent with and builds upon the existing ABA policy of supporting equality under the law for LGBT persons.

## I. Gay Panic and Trans Panic Defenses

### A. Origins of “Gay Panic”

Edward J. Kempf, a clinical psychiatrist, first coined the term “homosexual panic” in the 1920s to describe a psychological disorder.<sup>28</sup> It referred to a panic that resulted from the internal struggle of a patient’s “societal fear of homosexuality and the delusional fantasy of homoeroticism.”<sup>29</sup> Kempf observed that when these patients found people of the same sex attractive, they felt helpless, passive, and anxious.<sup>30</sup> However, Kempf’s studies did not find that patients afflicted with such panic became violent towards others.<sup>31</sup> Instead, he observed that patients became suicidal or self-inflicted punishment.<sup>32</sup> Later studies confirmed that homosexual panic disorder rendered patients incapable of aggression.<sup>33</sup>

<sup>26</sup> See Berrill & Herek, *supra* note 28, at 401-04 (explaining that tactics like gay panic defenses undercut hate crime laws, because victims would rather choose not to claim the protections of the hate crime laws instead of enduring — or because victims anticipate — the anti-gay consequences, such as panic defenses, that come with accepting the laws’ protections).

<sup>27</sup> In 1986, the American Bar Association adopted Goal IX supporting “full and equal participation in the legal profession by minorities, women, persons with disabilities, and persons of different sexual orientations and gender identities.” Since then, the ABA has adopted a host of resolutions aimed at combatting discrimination against LGBT individuals, on issues including housing and employment (1989), child custody (1995), adoption (1999), domestic violence (2006), foster care (2007), immigration (2009), and same-sex marriage (2010). See generally ABA Policy Document Library, available at <http://www.americanbar.org/directories/policy.html>.

<sup>28</sup> Gary David Comstock, *Dismantling the Homosexual Panic Defense*, 2 LAW & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES 81, 82 (1992).

<sup>29</sup> Christina Pei-Lin Chen, Note: *Provocation’s Privileged Desire: The “Homosexual Panic,” and the Non-Violent Unwanted Sexual Advance Defense*, 10 CORNELL J.L. & PUB. POL’Y 195, 199 (2000).

<sup>30</sup> Lee, *supra* note 15, at 482; Comstock, *supra* note 33, at 87-88.

<sup>31</sup> Comstock, *supra* note 33, at 86.

<sup>32</sup> *Id.*

<sup>33</sup> Kara S. Suffrendini, *Pride and Prejudice: The Homosexual Panic Defense*, 21 B.C. THIRD WORLD L.J. 279, 289 (2001) (citing Burton S. Glick, *Homosexual Panic: Clinical and Theoretical Considerations*, 129 J. NERVOUS & MENTAL DISEASE 20, 21 (1959)); Comstock, *supra* note 33, at 85 (quoting Henry Harper Hart, *Fear of Homosexuality in College Students*, in PSYCHOSOCIAL PROBLEMS OF COLLEGE MEN BY THE STAFF OF THE DIVISION OF STUDENT MENTAL HYGIENE 200, 204 (Bryant M. Wedge ed., Department of University Health, Yale University 1973). Rather than become violent, however, the patients blamed themselves with contempt for their homosexual cravings. Suffrendini, *supra* note 38, at 289; Comstock, *supra* note 28, at 85.

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Homosexual panic disorder was briefly recognized in the American Psychiatric Association (“APA”) *Diagnostic and Statistical Manual of Mental Disorders* (“DSM”), appearing in the 1952 edition.<sup>34</sup> Homosexual panic depended on a condition of latent homosexuality or “repressed sexual perversion” as the underlying disorder.<sup>35</sup> After the APA formally removed homosexuality from the DSM in 1973, homosexual panic disorder was also stripped of recognition.<sup>36</sup>

## B. Gay and Trans Panic in the Courts

Gay panic and trans panic defenses are not officially recognized, freestanding defenses. Instead, these terms describe theories used to establish the elements of traditional criminal defenses including insanity and diminished capacity, provocation leading to heat of passion, and self-defense.

### 1. Insanity and Diminished Capacity

Gay panic was first raised as an insanity or diminished capacity defense.<sup>37</sup> To invoke an insanity defense, the defendant attempts to show that he suffered from a mental defect — in this case, homosexual panic disorder — at the time of his act.<sup>38</sup> The defendant then tries to prove that the victim’s sexual orientation and actions triggered in him a violent psychotic reaction, and because of the disorder he did not understand the nature and quality of his act or appreciate that that what he was doing was wrong.<sup>39</sup> A defendant arguing diminished capacity must show that the defendant’s homosexual panic disorder affected his capacity to premeditate and deliberate or to form the requisite intent to kill.<sup>40</sup>

The use of gay panic to make a case for either insanity or diminished capacity is inappropriate. The defense has no medical or psychological basis. Under the insanity or diminished capacity frameworks, the gay panic defense relies on the medical and psychological validity of homosexual panic disorder.<sup>41</sup> However, with the removal of homosexuality from the DSM, defendants can no longer claim to suffer from homosexual panic disorder.<sup>42</sup> Even if homosexual panic disorder were still medically recognized, the use of homosexual panic disorder in this manner would be inappropriate because according to the early research, those suffering from homosexual panic did not have the ability to react violently to another person.<sup>43</sup> Defendants who

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<sup>34</sup> Comstock, *supra* note 33, at 83.

<sup>35</sup> Chen, *supra* note 34, at 202.

<sup>36</sup> *Id.*

<sup>37</sup> Chen, *supra* note 34, at 201. The first reported use of the gay panic defense was in 1967 in *People v. Rodriguez*, 64 Cal. Rptr. 253 (Cal. Ct. App. 1967). According to the defendant, when the victim grabbed him from behind the defendant became temporarily insane due to an acute homosexual panic, which resulted in a violent, uncontrollable psychotic reaction. *Rodriguez*, 64 Cal. Rptr. at 255; Chen, *supra* note 34, at 201. The jury ultimately rejected the defendant’s homosexual panic defense and convicted him of murder. *Rodriguez*, 64 Cal. Rptr. at 254.

<sup>38</sup> Bagnall, Gallagher & Goldstein, *supra* note 28, at 499.

<sup>39</sup> *Id.*

<sup>40</sup> Lee, *supra* note 15, at 494.

<sup>41</sup> Chen, *supra* note 34, at 202.

<sup>42</sup> See *supra* text accompanying notes 39-41.

<sup>43</sup> Comstock, *supra* note 33, at 86.

have assaulted or killed another person thus exhibit violence inconsistent with the once-recognized psychiatric disorder.<sup>44</sup> Moreover, the gay panic defense relies on the notion that same-sex attraction is objectionable and that anti-gay violence is culturally understandable, or even permissible.<sup>45</sup>

As homosexual panic disorder has been delegitimized, defendants' arguments that a mental disease was to blame for their actions are increasingly less successful.<sup>46</sup> Unfortunately, the decline of the gay panic defense then gave way to the defense that a non-violent homosexual advance could constitute provocation to murder.

## 2. Provocation

The partial defense of provocation is one of the most common forms of gay and trans panic defenses. The provocation defense allows a defendant to mitigate the crime of murder to lesser crime of voluntary manslaughter.<sup>47</sup>

A defendant using a gay panic provocation defense points to the actions of the LGBT victim, usually a non-violent sexual advance toward the defendant, as provocation.<sup>48</sup> While the use of this provocation defense has become popularly known as "gay panic," it is sometimes described as the "non-violent homosexual advance" defense.<sup>49</sup>

A defendant employing a trans panic defense uses similar strategy.<sup>50</sup> In a typical trans panic case, a male defendant engages in consensual sexual activity with a victim who is biologically male but presents as female.<sup>51</sup> After the sexual act concludes, the defendant discovers the victim's biological sex, becomes violently angry, and kills the victim in the heat of passion.<sup>52</sup> At trial the defendant claims that the victim deceived the defendant, and that the discovery of her sex and gender identity should partially excuse the killing.<sup>53</sup>

<sup>44</sup> *Id.* at 88.

<sup>45</sup> Lee, *supra* note 15, at 496-7 (citing Karen Franklin & Gregory M Herek, *Homosexuals, Violence Toward*, in 2 ENCYCLOPEDIA OF VIOLENCE, PEACE, CONFLICT 139, 148 (Lester Kurtz & Jennifer Turpin eds. 1999)).

<sup>46</sup> Chen, *supra* note 34, at 199; Lee, *supra* note 15, at 497.

<sup>47</sup> WAYNE R. LAFAVE, CRIMINAL LAW FIFTH EDITION § 15.2 (West 2010).

<sup>48</sup> Lee, *supra* note 15, at 500. The non-violence of the sexual advance is essential. Any violence used in the solicitation allows the defendant to claim self-defense as justification for the killing. Chen, *supra* note 34, at 202.

<sup>49</sup> Chen, *supra* note 34, at 202. Many of the cases where gay panic is used to support a provocation defense involve a defendant that has been the subject of a homosexual advance. Scott D. McCoy, Note: *The Homosexual-Advance Defense and Hate Crimes Statutes: Their Interaction and Conflict*, 22 CARDOZO L. REV. 629, 641 (2001). However, there is at least one case where the defendant employed a provocation defense when he was not the subject of a solicitation. In *Commonwealth v. Carr*, a man shot two lesbian women, killing one of them, after he found them naked and in the act of lovemaking. 580 A.2d 1362, 1363 (Pa. 1990). The defendant argued that his rage against homosexuality provoked him to shoot. *Id.* This use of the provocation defense corresponds more to a homosexual panic defense rather than a homosexual advance defense. McCoy, *supra*, at 641 n. 73.

<sup>50</sup> See Steinberg, *supra* note 21, at 3.

<sup>51</sup> See *id.*

<sup>52</sup> Lee, *supra* note 15, at 513.

<sup>53</sup> *Id.* at 516.

Both of those defense strategies seek to exploit jurors' bias and prejudice. By arguing that the victim's sexual orientation or gender identity are partially to blame for the killing, the defendant appeals to deeply rooted negative feelings about homosexuality and transgender people.<sup>54</sup> The defense implicitly urges the jury to conclude that bias against gay or transgender individuals is reasonable, and that a violent reaction is therefore an understandable outcome of that bias.<sup>55</sup> Where the sole basis for the claim of provocation is a non-violent sexual advance or the discovery of the victim's sex or gender identity, the defense should not be available.

### 3. Self-Defense

Defendants also have enjoyed some success using gay and trans panic arguments when raising the defense of self-defense.<sup>56</sup> Self-defense is a complete defense to criminal liability that justifies a non-aggressor who uses reasonable force against another, provided that he reasonably believes that he is in immediate danger of serious bodily harm and reasonably believes that the use of force is necessary to avoid the danger.<sup>57</sup>

Under the self-defense framework, the defendant who pursues a gay panic strategy attempts to show that the victim made some advance or overture, and that the defendant reasonably believed defensive force was necessary to prevent imminent danger of serious bodily harm through sexual assault.<sup>58</sup> The defendant typically focuses on the victim's sexual orientation to convince the jury that his perception of danger was reasonable and that his violent response was necessary.<sup>59</sup> Self-defense used in this manner is inappropriate because the threat coming from the victim usually falls short of the serious bodily harm standard, and the force used to thwart any perceived attack far outweighs any threat supplied by the victim.<sup>60</sup>

To assert the defense, the defendant points to the victim's sexual orientation as a reason why the defendant reasonably perceived a threat of serious bodily harm, over and above the danger posed by the victim's actions alone.<sup>61</sup> This tactic attempts to call up negative stereotypes that cast LGBT individuals as sexual predators.<sup>62</sup> The defendant then suggests that because the victim was

<sup>54</sup> See Bagnall, Gallagher & Goldstein, *supra* note 28, at 501; Lee, *supra* note 15, at 504; Steinberg, *supra* note 21, at 4.

<sup>55</sup> See Steinberg, *supra* note 21, at 10; Lee, *supra* note 15, at 517.

<sup>56</sup> Bagnall, Gallagher & Goldstein, *supra* note 28, at 498 & n. 3; Lee, *supra* note 15, at 517.

<sup>57</sup> LAFAVE, *supra* note 58, § 10.4.

<sup>58</sup> Comstock, *supra* note 33, at 82.

<sup>59</sup> See *id.* at 89; Suffredini, *supra* note 38, at 300.

<sup>60</sup> Comstock, *supra* note 33, at 95-96.

<sup>61</sup> McCoy, *supra* note 60, at 640 n. 67 (providing two example cases, *People v. Rowland*, 69 Cal. Rptr. 269 (Cal. Ct. App. 1968), and *Walden v. State*, 307 S.E.2d 474 (Ga. 1983), where the defendant pointed to the victim's sexual orientation as evidence that a sexual advance was more menacing or violent in order to assert the defense of self-defense).

<sup>62</sup> Mison, *supra* note 24, at 157 (describing common negative stereotypes surrounding the term "homosexual," which include: "homosexuals are loathsome sex addicts who spread AIDS and other venereal diseases; homosexuals are unable to reproduce and therefore must recruit straight males to perpetuate their ranks;

homosexual, the victim's advance must have been more aggressive than his actions would have otherwise indicated.<sup>63</sup>

Equally troubling, defendants sometimes use gay panic arguments to explain their use of greater force than is reasonably necessary to avoid the danger.<sup>64</sup> Gary David Comstock has surveyed a number of cases where excessive force was used, including when defendants attacked the victim in groups;<sup>65</sup> used weapons against unarmed victims;<sup>66</sup> and acted in a manner that suggested premeditation rather than response to an unexpected sexual assault.<sup>67</sup> In these cases, the use of excessive force should disqualify the defendant from the defense of self-defense; however juries have permitted excessive force when the sexual orientation of the victim is at issue.<sup>68</sup>

The use of gay panic to bolster a claim of self-defense relies on and propagates negative stereotypes about gay people.<sup>69</sup> It attempts to appeal to jurors' biases and invites them to mischaracterize both the advance as seriously threatening and the defendant's violent reaction as reasonable, simply because of the victim's sexual orientation.

## II. Courts and Legislatures Have Begun to Curtail Gay Panic and Trans Panic Defenses

As gay and trans panic defenses have become less credible and more obviously driven by discriminatory intent, some courts have refused to recognize their validity and some legislatures have acted to limit their success.

### A. Categorical Limits on Gay Panic and Trans Panic Defenses

#### 1. Judicial Restraints on Gay Panic Defenses

Courts have increasingly been skeptical of gay panic arguments to support defense claims of insanity or provocation. Trial courts have refused to provide juries with applicable defense

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homosexuals are unproductive and untrustworthy members of society; homosexuals are insane and dangerous because homosexuality is a mental illness").

<sup>63</sup> Comstock, *supra* note 33, at 97. Another way for a defendant to improperly use a victim's sexual orientation is to claim that he suffered from homosexual panic disorder, which heightened his perception of danger. The defendant attempts to convince the jury to consider his weakened mental condition when deciding if his perception of danger was objectively reasonable. *See* Suffredini, *supra* note 38, at 299; Lee, *supra* note 15, at 518-19; Comstock, *supra* note 33, at 95 (citing Bagnall, Gallagher & Goldstein, *supra* note 28, at 508 (quoting Parisie v. Greer, 671 F.2d 1011, 1016 (7th Cir. 1982))). As explained above, the use of the no-longer-recognized homosexual panic disorder in this manner is inappropriate.

<sup>64</sup> Comstock, *supra* note 33, at 95.

<sup>65</sup> *Id.* at 96 & n. 105.

<sup>66</sup> *Id.* at 96 & nn. 106-12.

<sup>67</sup> *Id.* at 96-97 & nn. 113-18.

<sup>68</sup> Lee, *supra* note 15, at 518-20. For example, a jury found that when the defendant, a 30-year-old, muscular, stocky, construction worker, claimed that he was sexually assaulted by an overweight and weak 58-year-old, deadly force was appropriate despite the likelihood that the defendant probably could have avoided the assault without killing the victim. *Id.* at 520.

<sup>69</sup> Lee, *supra* note 15, at 518.

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instructions, while appellate courts have made strong statements about why gay panic arguments are inadequate. Unfortunately, in many jurisdictions gay panic arguments remain viable and continue to do harm.

## *a. Restrictions on the Defense of Insanity*

Several courts have explicitly rejected gay panic as a basis for the insanity defense. For example, the Massachusetts Supreme Judicial Court rejected a defendant's argument that he was entitled to invoke an insanity defense against a charge of murder because he suffered from gay panic.<sup>70</sup> The defendant, William Doucette Jr., drove to a motel with Ronald Landry.<sup>71</sup> Doucette and Landry engaged in sexual activity after which Doucette stabbed Landry in the heart, chest, neck, and back and then left Landry to die.<sup>72</sup> Doucette later claimed that he killed Landry due to an attempted homosexual attack.<sup>73</sup> The jury convicted Doucette of first-degree murder, but Doucette appealed on the ground that his attorney should have raised an insanity defense based on "homosexual panic."<sup>74</sup> The court disagreed, holding that homosexual panic was merely the defendant's characterization of the events, and not a mental disorder which would compel the interposition of an insanity defense.<sup>75</sup>

## *b. Restrictions on the Defense of Provocation*

Similarly, several courts have curtailed the use of gay panic arguments as a basis for provocation. In one high-profile Pennsylvania case, Claudia Brenner and Rebecca Wight were hiking along the Appalachian Trail.<sup>76</sup> Having stopped to rest for the night, the two were engaged in lovemaking when suddenly Brenner was shot five times in her right arm, face, and neck. Wight ran for cover but was also shot in the head and back. Brenner attempted to assist Wight, but when she was unable to revive her, left for help. By the time help arrived, Wight had died. Stephen Roy Carr was arrested for the shooting and found guilty of first-degree murder by a bench trial. Carr attempted to argue that he shot Brenner and Wight in a heat of passion caused by the provocation of observing their homosexual lovemaking. To support his argument, Carr offered to show a history of constant rejection by women, including his mother, who may have been a lesbian.<sup>77</sup> The trial court refused to consider Carr's evidence of his psychosexual history, finding it irrelevant.

On appeal, the Superior Court of Pennsylvania agreed with the trial court that Carr's evidence of his psychosexual history was irrelevant to prove the defense of provocation.

The sight of naked women engaged in lesbian lovemaking is not adequate provocation to reduce an unlawful killing from murder to voluntary manslaughter. It is not an event which is sufficient to cause a reasonable person to become so

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<sup>70</sup> See *Commonwealth v. Doucette*, 462 N.E.2d 1084, 1097 (Mass. 1984).

<sup>71</sup> *Id.* at 1089.

<sup>72</sup> *Id.* at 1089-90.

<sup>73</sup> *Id.* at 1089.

<sup>74</sup> *Id.* at 1097.

<sup>75</sup> *Id.*

<sup>76</sup> *Commonwealth v. Carr*, 580 A.2d 1362, 1363 (Pa. Super. Ct. 1990).

<sup>77</sup> *Id.* at 1363-64.

impassioned as to be incapable of cool reflection. . . . [T]he law does not condone or excuse the killing of homosexuals any more than it condones the killing of heterosexuals. Similarly, it does not recognize homosexual activity between two persons as legal provocation sufficient to reduce an unlawful killing of one or both of the actors by a third person from murder to voluntary manslaughter.<sup>78</sup>

The court thus limited the gay panic defense by categorically eliminating the sight of same-sex sexual activity from what may constitute legally adequate provocation.<sup>79</sup>

Similarly, in a pair of cases, the Massachusetts Supreme Judicial Court rejected the argument that verbal solicitations coupled with a touch on the leg or genitals could constitute provocation. On September 29, 1988, Joshua Halbert and Kevin Pierce telephoned David McLane to “go party” at McLane’s apartment.<sup>80</sup> McLane treated Halbert and Pierce to beer, whiskey, and rum, and they watched pornographic films.<sup>81</sup> When Halbert left the apartment to purchase cigarettes, McLane grabbed Pierce’s genitals and said, “You know you want it.”<sup>82</sup> Pierce rejected McLane, pushing him away.<sup>83</sup> Once Halbert returned, Pierce said that McLane and Halbert were gay.<sup>84</sup> McLane responded by placing his hand on Halbert’s knee and asking, “What do you want to do?”<sup>85</sup> Pierce and Halbert then attacked McLane. Pierce came from behind and locked his arm around McLane’s neck, choking him.<sup>86</sup> Halbert kicked and punched McLane in the groin, slashed McLane’s neck with a razor blade, and smashed a whiskey bottle over McLane’s head.<sup>87</sup> Finally, Pierce released his hold over McLane, and stabbed McLane twice through his temple with steak knives.<sup>88</sup>

At Halbert’s trial, the judge refused to instruct the jury on voluntary manslaughter due to provocation, and the jury found Halbert guilty of first-degree murder.<sup>89</sup> Halbert argued on appeal that the trial court erred when it did not provide the manslaughter instruction.<sup>90</sup> He argued that McLane provoked him when McLane put his hand on Halbert’s knee and asked, “What do you want to do?”<sup>91</sup> The court rejected Halbert’s assertion that McLane’s question to Halbert, along with the touch of the knee, was sufficient provocation, reasoning that neither was enough to produce a heat of passion in an ordinary person.<sup>92</sup>

<sup>78</sup> *Id.* at 1364-65.

<sup>79</sup> *Id.* at 1364.

<sup>80</sup> Commonwealth v. Pierce, 642 N.E.2d 579, 581 (Mass. 1994); Commonwealth v. Halbert, 573 N.E.2d 975, 977 (Mass. 1991).

<sup>81</sup> *Pierce*, 642 N.E.2d at 581.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Halbert*, 573 N.E.2d at 977.

<sup>85</sup> *Id.* at 979.

<sup>86</sup> *Pierce*, 642 N.E.2d at 581; *Halbert*, 573 N.E.2d at 977.

<sup>87</sup> *Pierce*, 642 N.E.2d at 581; *Halbert*, 573 N.E.2d at 977.

<sup>88</sup> *Halbert*, 573 N.E.2d at 977.

<sup>89</sup> *Id.* at 976.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 979.

<sup>92</sup> *Id.*

Having been convicted of first-degree murder, Pierce also argued on appeal that the trial judge erred by not providing the manslaughter instruction.<sup>93</sup> He asserted that McLane's statement, "You know you want it," and McLane's grabbing of Pierce's genitals were provocative enough to incite a heat of passion.<sup>94</sup> As in *Halbert*, the court disagreed, holding that a sexual invitation and the grabbing of genitals were insufficient to provoke a reasonable person into a homicidal response.<sup>95</sup>

Other state courts have similarly limited the use of gay panic to support a provocation defense.<sup>96</sup> Internationally, in several jurisdictions the legislature has responded to the gay panic defense by amending the criminal code to exclude non-violent sexual advances as a legally adequate basis for provocation.<sup>97</sup>

## B. Jury Instructions to Eliminate Bias

State legislatures are also becoming concerned about the use of gay or trans panic strategies, and have implemented or considered a number of laws aimed at reducing their impact in the courtroom.

For example, in the wake of the murder of Gwen Araujo and the uncertainty that her killers would be held accountable,<sup>98</sup> in 2006 the California legislature passed, and Governor Arnold Schwarzenegger signed into law, the Gwen Araujo Justice for Victims Act aimed at limiting the success of gay panic defenses.<sup>99</sup>

The Act made legislative findings and declarations that the use of panic strategies that appeal to societal bias against a person's sexual orientation or gender identity conflicted with California's

<sup>93</sup> *Pierce*, 642 N.E.2d at 581.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *E.g.*, *People v. Page*, 737 N.E.2d 264, 273-74 (Ill. 2000) (attempting to "make out" with the defendant is not a category of provocation); *Commonwealth v. Troila*, 571 N.E.2d 391, 394-95 (Mass. 1991) ("making a pass" at the defendant is not evidence that provocation existed); *State v. Volk*, 421 N.W.2d 360, 365 (Minn. Ct. App. 1988) (revulsion by the defendant to a homosexual advance is not a provocation sufficient to elicit a heat of passion response); *State v. Latiolais*, 453 So. 2d 1266 (La. App. 3d Cir. 1984) (touching defendant's leg in a manner which was not rough but just "meaningful," indicating that the victim was determined to have sexual relations with the defendant, was not provocation sufficient to justify vicious attacks).

<sup>97</sup> Crimes Act 1900, AUSTL. CAP. TERR. LAWS § 13(3) (2012) ("[C]onduct of the deceased consisting of a non-violent sexual advance (or advances) towards the accused — (a) is taken not to be sufficient, by itself, to be conduct to which [the defense of provocation] applies; . . .") (Central Territory of Australia); Criminal Code Act, N. TERR. AUSTL. LAWS § 158(5) (2012) ("[C]onduct of the deceased consisting of a non-violent sexual advance or advances towards the defendant: (a) is not, by itself, a sufficient basis for a defence of provocation; . . .") (Northern Territory of Australia).

<sup>98</sup> *Prosecutors Examine Ways to Counter 'Gay Panic' Defense*, USA TODAY, July 21, 2006, [http://www.usatoday.com/news/nation/2006-07-21-gaypanic-trials\\_x.htm](http://www.usatoday.com/news/nation/2006-07-21-gaypanic-trials_x.htm); see *supra* text accompanying notes 98-110.

<sup>99</sup> 2006 Cal. Legis. Serv. ch 550 (West); see also *News in Brief*, S. VOICE (Atlanta), October 6, 2006, at 16.



public policy.<sup>100</sup> The Act further provided that in a criminal trial, either party may request that the jury be instructed not to let bias, prejudice, or public opinion influence its decision about the defendant's culpability.<sup>101</sup>

### III. Proposed Responses to Gay Panic and Trans Panic Defenses

To combat the discriminatory effects of gay and trans panic defenses, lawmakers or courts should take the following actions: (1) ensure that any party during a criminal trial may ask that the court instruct the jury to make its decision free from bias or prejudice and to disregard any appeals to societal bias or prejudice; (2) eliminate non-violent sexual advances or the discovery of a person's gender identity as sufficient for adequate provocation; and (3) provide for the training of judges, prosecutors, and defense attorneys regarding gay and trans panic defenses and best practices for dealing with them.

#### A. Anti-bias Jury Instructions

To reduce the risk of improper bias, legislatures should provide jury instructions that advise jurors of their duty to apply the law without improper bias or prejudice.

#### Model Language

In any criminal trial or proceeding, upon the request of a party, the court shall instruct the jury substantially as follows: "Do not let bias, sympathy, prejudice, or public opinion influence your decision. Bias includes bias against the victim or victims, witnesses, or defendant based upon his or her disability, gender, nationality, race or ethnicity, religion, gender identity, or sexual orientation."<sup>102</sup>

#### B. Eliminate Gay Panic and Trans Panic as Adequate Provocation

In addition, legislatures should specify that neither a non-violent sexual advance, nor the discovery of a person's sex or gender identity, constitutes legally adequate provocation to mitigate the severity of any non-capital crime.<sup>103</sup> Such an exception would be consistent with the holdings of state supreme courts that have expressly rejected non-sexual advances as a basis for provocation,<sup>104</sup> and with similar categorical exceptions adopted by other state legislatures.<sup>105</sup>

<sup>100</sup> 2006 Cal. Legis. Serv. ch 550 § 2(d) (West).

<sup>101</sup> *Id.* § 3.

<sup>102</sup> Modeled from section 1127h of the California Penal Code. CAL. PENAL CODE § 1127h (West 2009).

<sup>103</sup> Although the Constitution guarantees a criminal defendant the right to present a full defense, *Rock v. Arkansas*, 483 U.S. 44, 52 (1987), courts and legislatures are free to eliminate or narrow criminal defenses. 6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE §24.4(a) (3d ed. 2007).

<sup>104</sup> *See supra* Part II.A.1.b.

<sup>105</sup> *See, e.g.,* LAFAVE, *supra* note 58, § 15.2(b)(6) (noting that in many states, as a matter of common law, "mere words" are never adequate provocation); MD. CODE ANN., CRIM. LAW § 2-207(b) (LexisNexis 2002) ("[t]he discovery of one's spouse engaged in sexual intercourse with another does not constitute legally adequate provocation for the purpose of mitigating a killing from the crime of murder to voluntary manslaughter even though

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## Model Language

### *Version 1*

(1) A non-violent sexual advance does not constitute legally adequate provocation for the purpose of mitigating a killing from the crime of murder to the crime of manslaughter even though the killing was provoked by that advance.

(2) The discovery of a person's sex or gender identity does not constitute legally adequate provocation for the purposes of mitigating a killing from the crime of murder to the crime of manslaughter even though the killing was provoked by that discovery.<sup>106</sup>

### *Version 2*

(1) Sufficient provocation to support "sudden quarrel" or "heat of passion" does not exist if the defendant's actions are related to discovery of, knowledge about, or the potential disclosure of one or more of the following characteristics or perceived characteristics: disability, gender nationality, race or ethnicity, religion, or sexual orientation, regardless of whether the characteristic belongs to the victim or the defendant. This limitation applies even if the defendant dated, romantically pursued, or participated in sexual relations with the victim.

(2) Sufficient provocation to support "sudden quarrel" or "heat of passion" does not exist if the defendant's actions are related to discovery of, knowledge about, or the potential disclosure of the victim's association with a person or group with one or more of the characteristics, or perceived characteristics, in paragraph (1).

(3) For the purposes of this section, "gender" means sex, and includes a person's gender identity and gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.<sup>107</sup>

## IV. Conclusion

An individual's sexual orientation or gender identity does not trigger in another person a medical or psychological panic, does not constitute legally adequate provocation, and does not make a person more threatening. LGBT people should be able to live without fear that being honest about their sexual orientation or gender identity would provide a socially sanctioned excuse or justification for violence.

Accordingly, courts and legislatures should affirmatively act (1) to ensure that juries are aware of the possibility that subconscious or overt bias or prejudice may cloud their judgment and (2) to limit the use of gay or trans panic arguments as a basis for provocation in non-capital cases.

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the killing was provoked by that discovery"); MINN. STAT. ANN. § 609.20(1) (West 2011) ("[T]he crying of a child does not constitute provocation.").

<sup>106</sup> Modeled from section 2-207 of the Criminal Law Code of Maryland. MD. CODE ANN., CRIM. LAW § 2-207 (LexisNexis 2002).

<sup>107</sup> Modeled from the California Assembly Bill 1160, as introduced. Assem. 1160, 2006 Reg. Sess. (Cal. 2005).

Respectfully submitted,

**William Shepherd, Chair**  
Criminal Justice Section  
August 2013

DRAFT

## GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section

Submitted By: William Shepherd, Chair

1. Summary of Resolution(s).

This resolution urges legislative action to curtail the availability and effectiveness of the “gay panic” and “trans panic” defenses – including requiring courts instruct the jury not to let the sexual orientation or gender identity of the victims, witnesses, or defendants, bias the jury’s decision, specifying that neither a non-violent sexual advance, nor the discovery of a person’s sex or gender identity, constitutes legally adequate provocation to mitigate the severity of any non-capital case.

2. Approval by Submitting Entity.

The proposed resolution was approved by the Criminal Justice Section Council at its Spring Meeting on May 12, 2013.

3. Has this or a similar resolution been submitted to the House or Board previously?

The ABA has passed numerous resolutions on LGBT issues, this resolution is most similar to and builds upon resolution 10A passed at the Annual Meeting in 1996 (urging bar associations to research bias against LGBT within the legal community).

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

This resolution is unique in addressing the “gay panic” and “trans panic” defenses.

5. What urgency exists which requires action at this meeting of the House?

The use of gay or trans panic defenses subjects victims to secondary victimization by asking the jury to find the victim’s sexual orientation or gender identity blameworthy for the defendant’s actions. The use of a gay or trans panic defense deprives victims, their family, and their friends of dignity and justice. More broadly, it is designed to stir up and reinforce the anti-gay or anti-transgender emotions and stereotypes that led to the assault in the first place. It also suggests that violence against LGBT individuals is excusable. Finally, gay and trans panic defenses are irreconcilable with state and federal laws that treat bias crimes against LGBT people as aggravated offenses.

6. Status of Legislation. (If applicable)

Not Applicable

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The policy will be distributed to various criminal justice stakeholders in order to encourage the necessary legislative action to curtail the availability and effectiveness of the “gay panic” and “trans panic” defenses. The policy will also be featured on the Criminal Justice Section website and in Section publications.

8. Cost to the Association. (Both direct and indirect costs)

No cost to the Association is anticipated.

9. Disclosure of Interest. (If applicable)

None

10. Referrals.

At the same time this policy resolution is submitted to the ABA Policy Office for inclusion in the 2013 Annual Agenda Book for the House of Delegates, it is being circulated to the chairs and staff directors of the following ABA entities:

Standing Committees

Governmental Affairs

Gun Violence

Pro Bono and Public Service

Legal Aid and Indigent Defendants

Professionalism

Ethics and Professional Responsibility

Special Committees and Commissions

Commission on Civic Education in the Nation’s Schools

Center on Children and the Law

Commission on Disability Rights

Commission on Sexual and Domestic Violence

Commission on Homelessness and Poverty

Center for Human Rights

Center for Racial and Ethnic Diversity

Council for Racial and Ethnic Diversity in the Educational Pipeline

Commission on Racial and Ethnic Diversity in the Profession

Commission on Racial and Ethnic Justice

Commission on Sexual Orientation and Gender Identity

Commission on Women in the Profession

Commission on Youth at Risk

Sections, Divisions

Business Law

Family Law

Government and Public Sector Division

Health Law

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Individual Rights and Responsibilities

Judicial Division

National Conference of Federal Trial Judges

National Conference of Specialized Court Judges

National Conference of State Trial Judges

Litigation

Judicial Division

Senior Lawyers Division

State and Local Government Law

Tort Trial & Insurance Practice

Young Lawyers Division

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

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## EXECUTIVE SUMMARY

1. Summary of the Resolution  
This resolution urges legislative action to curtail the availability and effectiveness of the “gay panic” and “trans panic” defenses – including requiring courts instruct the jury not to let the sexual orientation or gender identity of the victims, witnesses, or defendants, bias the jury’s decision, specifying that neither a non-violent sexual advance, nor the discovery of a person’s sex or gender identity, constitutes legally adequate provocation to mitigate the severity of a non-capital case.
2. Summary of the Issue that the Resolution Addresses  
The use of a gay or trans panic defense deprives victims, their family, and their friends of dignity and justice. More broadly, it is designed to stir up and reinforce the anti-gay or anti-transgender emotions and stereotypes that led to the assault in the first place. It also suggests that violence against LGBT individuals is excusable. Finally, gay and trans panic defenses are irreconcilable with state and federal laws that treat bias crimes against LGBT people as aggravated offenses.
3. Please Explain How the Proposed Policy Position will address the issue  
This resolution will help to ensure that juries are aware of the possibility that subconscious or overt bias or prejudice may cloud their judgment; limit the use of gay or trans panic arguments as a basis for provocation in non-capital murder cases.
4. Summary of Minority Views  
None are known.

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**AMERICAN BAR ASSOCIATION**

**KING COUNTY BAR ASSOCIATION**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

- 1 RESOLVED, That the American Bar Association urges lawyer disciplinary authorities not to
- 2 take disciplinary action against lawyers who counsel and assist clients about compliance with
- 3 state and territorial laws legalizing the possession and use of marijuana.

**DRAFT**

## REPORT

### 1. Background

Eighteen states and the District of Columbia<sup>1</sup> currently have some form of legalized marijuana for medical purposes. At the November 2012 general election, voters in Washington State and Colorado approved initiatives providing for state regulation of the production, processing, distribution, and sale of marijuana for recreation purposes and the taxation of marijuana sold for such purposes. Recent polling by the Pew Research Center indicates a majority of Americans now favor some form of legalization and/or decriminalization of marijuana. It is possible that other jurisdictions may join Washington and Colorado in ending marijuana prohibition and replacing it with comprehensive schemes to regulate and tax this product now legal under state law.

Creating regulations for legal marijuana is a challenging task. Regulations have to deal with what is and is not permissible under new laws, preventing the product from being diverted and used in ways that are not permissible, insuring that marijuana that enters the market is not contaminated and a threat to health, where legal cannabis business may be located, tax reporting and compliance, and a host of other issues. Governments embarking on this process need the assistance of counsel in fashioning the regulatory regime.

Because of the changing legal landscape, investors and those interested in owning or operating need the assistance of lawyers to understand the legal landscape and how to make their businesses compliant with laws and regulations for a cannabis industry legal under state or territorial law.

### 2. The Problem

Lawyers who are called upon to assist clients, including governments implementing a legal marijuana regime, face an ethical dilemma in responding to their clients' needs. The reason is federal law still criminalizes the possession and use of marijuana. 21 U.S.C. Section 812(c), Schedule 1 (c)(10), lists marijuana as a Schedule 1 drug, making it unlawful to possess, sell or distribute it. *See* 21 U.S.C. § 841(a). Consideration must also be given to whether any facilitation of those who do possess, sell or distribute marijuana would run afoul of criminal conspiracy laws such as 18 U.S.C. Section 371 and 21 U.S.C. Section 846.

Model Rule 1.2(d) provides:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

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<sup>1</sup> Alaska, Arizona, California, Colorado, Connecticut, District of Columbia, Delaware, Hawaii, Maine, Massachusetts, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington.

# 10A

Model Rule 8.4 “Misconduct” also has provisions that could implicate a lawyer counseling and assisting a client on legalized marijuana because of marijuana’s continued illegal status under federal law. The Rule defines misconduct in the following ways potentially applicable in dealing with state legal marijuana:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;
- (d) engage in conduct that is prejudicial to the administration of justice.

While these Rules directly address lawyer conduct, any supervisory lawyer approving the work of a subordinate who assists clients in regard to state legal marijuana laws also has a potential exposure under Model Rule 5.3.

### 3. Discussion

As the Scope section to the Model Rules recognizes: “The Rules of Professional Conduct are rules of reason.” However, the Scope section also makes clear that “Failure to comply with an obligation or prohibition imposed by a Rule is a basis for discipline.” Obviously, whether a violation should result in a disciplinary proceeding, and what sanction should be imposed, depends on the circumstances and the appropriate discretion of disciplinary officials.

The proponents of this resolution respect those who work in the disciplinary process. However, disciplinary discretion is not always appropriately used. What is known is that with Washington and Colorado now legalizing marijuana and replacing prohibition with a proposed comprehensive scheme of regulation and taxation, a significant shift in the approach toward marijuana has occurred. To date, it is not clear exactly what, if anything, the federal government is going to do now that these states have acted. While medical marijuana has not been a “priority” of this administration, raids on medical marijuana dispensaries have recently occurred.

We are in uncharted waters because of the conflict between state and territorial laws and those of the U.S. government. One thing is certain, in trying to navigate those waters, clients need the assistance of lawyers.

Accordingly, because of the unique circumstances present in this limited area, the ABA is called upon to give policy guidance to appropriate lawyer disciplinary authorities not to institute disciplinary action against lawyers who counsel and assist clients about compliance with state and territorial laws legalizing the possession and use of marijuana. As the progenitor of the Model Rules, ABA guidance would be particularly beneficial in this area. Passing this resolution would not place the ABA in the position of advocating one way or another in regard to legalization of marijuana. It merely provides guidance and assistance to disciplinary authorities and lawyers who are called upon to counsel and assist clients in states and territories that have decided that a new approach should be taken on marijuana, including its legalization.

Respectfully submitted,

Richard Mitchell, President  
King County Bar Association

DRAFT

# 10A

## GENERAL INFORMATION FORM

Submitting Entity: King County Bar Association, State of Washington

Submitted by: Richard Mitchell, President

1. Summary of Resolution

The resolution urges lawyer disciplinary authorities not to take disciplinary action against lawyers who counsel and assist clients about compliance with state and territorial laws legalizing the possession and use of marijuana.

2. Approval by Submitting Entity

On April 17, 2013, the Board of Trustees of the King County Bar Association during a regularly scheduled meeting, for which the time and agenda had been previously distributed, approved the Recommendation.

3. Has this or a similar recommendation been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption.

None known at the time this report was drafted.

5. If a late report, what urgency exists which requires action at this meeting of the House?

This is not a late report. However, there is some urgency to this matter. The voters of Washington State and Colorado in the general election of November 2012 approved initiatives providing for the taxation and regulation of the production and sale of marijuana for recreational purposes. Both states are now in the process of adopting regulations to implement the voter approved laws permitting the taxation of and production and sale of marijuana for recreational purposes. Eighteen states and the District of Columbia have some form of medical marijuana. Possession and sale of marijuana remains illegal under federal law. The United States has the option to take legal action now to preclude state efforts to take an alternate approach to marijuana by legalizing, regulating, and taxing it. The United States has recently raided legal medical marijuana dispensaries in various jurisdictions. The Justice Department has not yet said what it will do in regard to the legalization, regulation, and tax approach now taken by Colorado and Washington. Clients wanting to enter into a legal marijuana business, and governments that must write and implement appropriate regulations for legal marijuana, need counsel now. Because of the continued illegal status of marijuana under federal law, lawyers who counsel or assist such clients could be subject to lawyer discipline for counseling or assisting clients to engage in illegal activity. These lawyers need the issue of disciplinary jeopardy for doing their job addressed now by the ABA.

6. Status of Legislation (if applicable)

No legislation on these issues is known to the submitting entity. There is pending in Congress a recently introduced bill which would prohibit the federal government from interfering with state laws that legalize marijuana.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

Most disciplinary authorities will learn of the House action in the ordinary course of information being disseminated about House action. In addition, the Policy Implementation Committee of the Center of Professional Responsibility will inform most groups interested in discipline in the ordinary course of its work.

8. Cost to the Association. Both direct and indirect costs.

Adoption of the recommendation will not result in expenditures.

9. Disclosure of Interest (if applicable)

No known conflict of interest exists.

10 Referrals

This Recommendation is being co-sponsored by

Co-sponsorships are currently being sought.

This Recommendation was circulated to the following Association entities and affiliated organizations:

All ABA Sections and Divisions

Ethics and Professional Responsibility  
 Professional Discipline  
 Center for Professional Responsibility  
 National Organization of Bar Counsel  
 Association of Professional Responsibility Lawyers

Bar Associations:

Alaska State Bar Association  
 State Bar of Arizona  
 Maricopa County Bar Association  
 State Bar of California  
 Alameda County Bar Association  
 San Fernando Valley Bar Association

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Beverly Hills Bar Association  
Los Angeles County Bar Association  
Orange County Bar Association  
San Diego County Bar Association  
Bar Association of San Francisco  
Santa Clara County Bar Association  
Colorado Bar Association  
Denver Bar Association  
Connecticut Bar Association  
The District of Columbia Bar  
Hawaii State Bar Association  
Maine State Bar Association  
Massachusetts Bar Association  
Boston Bar Association  
State Bar of Michigan  
Oakland County Bar Association  
State Bar of Montana  
State Bar of Nevada  
Clark County Bar Association  
New Jersey State Bar Association  
Bergen County Bar Association  
Camden County Bar Association  
Essex County Bar Association  
State Bar of New Mexico  
Oregon State Bar  
Multnomah Bar Association  
Rhode Island Bar Association  
Vermont Bar Association  
Washington State Bar Association  
King County Bar Association

11. Contact Person. (Prior to the meeting)

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12. Contact Person. (Who will present the report to the House)

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DRAFT



# 10A

## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

The Resolution urges lawyer disciplinary authorities not to take disciplinary action against lawyers who counsel or assist clients about compliance with state and territorial laws legalizing the possession and use of marijuana.

### 2. Summary of the Issue that the Resolution Addresses

The legal use of marijuana under state law continues to grow. Eighteen states and the District of Columbia have some form of medical marijuana. Voters in Washington State and Colorado recently approved the legalization of marijuana for recreational purposes under comprehensive schemes to regulate the production, sale, distribution, and taxation of marijuana. In order to comply with these laws, clients need the assistance of legal counsel. This includes assistance of lawyers to help state and local authorities implement schemes for legal marijuana enterprises. Marijuana remains illegal under federal law. Because the Model Rules of Professional Conduct prohibit a lawyer from assisting a client to commit an illegal act, counseling and assisting a client about compliance with state or territorial legal marijuana could be deemed a disciplinary offense because marijuana possession or sale remains illegal under federal law.

### 3. Please Explain How the Proposed Policy Position Will Address the Issue

This Resolution urges appropriate disciplinary authorities not to take disciplinary actions against lawyers who counsel and assist clients about compliance with state and territorial laws legalizing marijuana.

### 4. Summary of Minority Views

Unknown at the time this Summary was prepared.

# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** July 13, 2013  
**Memo Date:** June 10, 2013  
**From:** MCLE Committee  
**Re:** Proposed Rule and Regulation Amendments re Filing Deadlines and Notices to Members

---

### Action Recommended

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

### Background

During the 2013 Legislative session, ORS 9.200 and ORS 9.675 were amended in order to align the delinquency dates for payment of fees and IOLTA compliance, and allow the bar to send notices of delinquency/noncompliance by e-mail rather than by certified mail. The proposed amendments to the MCLE Rules and Regulations below will align all three deadlines (MCLE compliance, member fees and IOLTA compliance). Our goal is to eliminate confusion among bar members.

#### MCLE Rule 7.4 Noncompliance.

(a) Grounds. The following are considered grounds for a finding of non-compliance with these Rules:

- (1) Failure to complete the MCLE requirement for the applicable reporting period.
- (2) Failure to file a completed compliance report on time.
- (3) Failure to provide sufficient records of participation in CLE activities to substantiate credits reported, after request by the MCLE Administrator.

(b) Notice. In the event of a finding of noncompliance, the MCLE Administrator shall send ~~certified mail~~ a written notice of noncompliance ~~on~~ to the affected active member. The notice shall ~~be sent via email 30 days after the filing deadline and shall state the nature of the noncompliance and shall~~ summarize the applicable rules regarding noncompliance and its consequences.

#### MCLE Rule 7.5 Cure.

(a) Noncompliance for failure to file a completed compliance report by the due date can be cured by filing the completed report demonstrating completion of the MCLE requirement during the applicable reporting period, together with the late fee specified in MCLE Regulation 7.200, no

more than within 63-60 days after the email following mailing of the notice of noncompliance was sent.

(b) Noncompliance for failure to complete the MCLE requirement during the applicable reporting period can be cured by doing the following within 63 no more than 60 days after the email following mailing of the notice of noncompliance was sent:

- (1) Completing the credit hours necessary to satisfy the MCLE requirement for the applicable reporting period;
- (2) Filing the completed compliance report; and
- (3) Paying the late filing fee specified in MCLE Regulation 7.200.

(c) Noncompliance for failure to provide the MCLE Administrator with sufficient records of participation in CLE activities to substantiate credits reported can be cured by providing the MCLE Administrator with sufficient records, together with the late fee specified in MCLE Regulation 7.200, no more than 60 days after the email notice of noncompliance was sent within the time established by the MCLE Administrator and paying the late fee specified in MCLE Regulation 7.200.

(d) Credit hours applied to a previous reporting period for the purpose of curing noncompliance as provided in Rule 7.5(b) may only be used for that purpose and may not be used to satisfy the MCLE requirement for any other reporting period.

(e) When it is determined that the noncompliance has been cured, the MCLE Administrator shall notify the affected active member that he or she has complied with the MCLE requirement for the applicable reporting period.

#### **MCLE Regulation 1.115 Service By Mail Method.**

(a) MCLE Compliance Reports and Notices of Noncompliance ~~Anything transmitted by mail to a member shall be sent to the member's email address on file with the bar on the date of the notice, except that notice shall be sent by first-class mail (to the last designated business or residence address on file with the Oregon State Bar) to any member who is exempt from having an email address on file with the bar. by first class mail, or certified mail if required by these rules, addressed to the member at the member's last designated business or residence address on file with the Oregon State Bar. Certified mail will not be sent "Return Receipt Requested". Members who are sent certified mail will also be notified about the certified mailing via e-mail or regular mail (for those members who do not have e-mail).~~

~~(b) Service by mail shall be complete on deposit in the mail.~~

#### **MCLE Regulation 7.200 Late Fees.**

(a) The late fee for curing a failure to timely file a completed compliance report is \$50 if the report is filed and the late fee is paid within 30 days of the filing deadline and \$100 if the report is filed and the late fee is paid more than 30 days after the filing deadline but within the ~~63- 60~~ day cure period; if additional time for filing is granted by the MCLE Administrator, the fee shall increase by \$50 for every additional 30 days or part thereof.

(b) The late fee for not completing the MCLE requirement during the applicable reporting period is \$200 if the requirement is completed after the end of the reporting period but before the end of the ~~with the 63~~ 60 day cure period; if additional time for meeting the requirement is granted by the MCLE Administrator, the fee shall increase by \$50 for every additional 30 days or part thereof.

Rule 8.1 (c) Suspension Recommendation of the MCLE Administrator. A recommendation for suspension pursuant to Rule 7.6 shall be subject to the following procedures:

1) A copy of the MCLE Administrator's recommendation to the Supreme Court that a member be suspended from membership in the bar shall be sent by email ~~certified mail~~ to the member. ~~Within 14 days of the date of the mailing, the member recommended for suspension may file with the State Court Administrator and the MCLE Administrator a petition for review of the recommended suspension. The petition shall set forth a concise statement of each reason asserted for review of the MCLE Administrator's recommendation and may be accompanied by one or more supporting affidavits.~~

~~(2) Within 14 days after a petition for review is filed by a member recommended for suspension, the MCLE Administrator shall file with the State Court Administrator a response and may submit one or more supporting affidavits. Further submissions by the parties shall not be allowed unless the court so requests.~~

~~(2) (3) The court may review the MCLE Administrator's recommendation, petition for review and response without further briefing or oral argument. The court may, however, request either further briefing or oral argument, or both. Thereafter, the court shall enter its order. If the court approves the recommendation of the MCLE Administrator is approved, the court shall enter its order and an effective date for the member's suspension shall be stated therein.~~

# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** July 13, 2013  
**Memo Date:** June 10, 2013  
**From:** MCLE Committee  
**Re:** Proposed Amendment to Rule 7.5

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### Action Recommended

Amend Rule 7.5 to clarify that compliance reports may be audited after noncompliance has been cured.

### Background

A member whose reporting period ended 12/31/2011 was sent a Notice of Noncompliance in February 2012. He cured his noncompliance in April 2012 and his report was processed. Due to questions regarding the accuracy of the report, the MCLE Program Manager forwarded his report and her concerns to Disciplinary Counsel's office in accordance with MCLE Rule 7.3(d).

The disciplinary matter is currently pending. However, in communications with Disciplinary Counsel's office, the member asked why he was being investigated when he was deemed to be in compliance with the MCLE Rules pursuant to the notice he received from the MCLE Department after his compliance report had been processed.

In order to clarify that reports may be referred to Disciplinary Counsel's office even though the member has cured the noncompliance issue, the MCLE Committee recommends amending Rule 7.5 (e) as suggested below:

#### 7.5 Cure.

(a) Noncompliance for failure to file a completed compliance report by the due date can be cured by filing the completed report demonstrating completion of the MCLE requirement during the applicable reporting period, together with the late fee specified MCLE Regulation 7.200, within 63 days following mailing of the notice of noncompliance.

(b) Noncompliance for failure to complete the MCLE requirement during the applicable reporting period can be cured by doing the following within 63 days following mailing of the notice of noncompliance:

(1) Completing the credit hours necessary to satisfy the MCLE requirement for the applicable reporting period;

(2) Filing the completed compliance report; and

(3) Paying the late filing fee specified in MCLE Regulation 7.200.

(c) Noncompliance for failure to provide the MCLE Administrator with sufficient records of participation in CLE activities to substantiate credits reported can be cured by providing the MCLE Administrator with sufficient records within the time established by the MCLE Administrator and paying the late fee specified in MCLE Regulation 7.200.

(d) Credit hours applied to a previous reporting period for the purpose of curing noncompliance as provided in Rule 7.5(b) may only be used for that purpose and may not be used to satisfy the MCLE requirement for any other reporting period.

(e) When it is determined that the noncompliance has been cured, the MCLE Administrator shall notify the affected active member that he or she has complied with the MCLE requirement for the applicable reporting period. Curing noncompliance does not prevent subsequent audit and action specified in Rule 7.3.

MCLE Rule 7.3:

**7.3 Audits.**

(a) The MCLE Administrator may audit compliance reports selected because of facial defects or by random selection or other appropriate method.

(b) For the purpose of conducting audits, the MCLE Administrator may request and review records of participation in CLE activities reported by active members.

(c) Failure to substantiate participation in CLE activities in accordance with applicable rules and regulations after request by the MCLE Administrator shall result in disallowance of credits for the reported activity and assessment of the late filing fee specified in 7.5(f).

(d) The MCLE Administrator shall refer active members to the Oregon State Bar Disciplinary Counsel for further action where questions of dishonesty in reporting occur.

# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** July 13, 2013  
**From:** Sylvia E. Stevens, Executive Director  
**Re:** Client Security Fund Award Recommendations

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### Action Recommended

Consider the recommendation of the Client Security Fund Committee that awards be made in the following claims:

GRUETTER (McClain)	\$23,767.96
GRUETTER (Mosley)	\$16,675.00
McBRIDE (Luna Lopez)	\$9,500.00
HORTON (Calton)	\$5,739.07 <sup>1</sup>
<b>TOTAL</b>	<b>\$55,682.03</b>

### Background

#### GRUETTER (McClain) - \$23,767.96

Kathryn McClain hired Bryan Gruetter in early 2008 to pursue a claim for serious injuries sustained in an automobile accident. Because her damages exceeded the limits of the at-fault driver's policy, McClain wanted to also assert an underinsured motorist claim and PIP waiver from her own insurer.

In August 2010, McClain settled with the at-fault driver's insurer for the policy limits of \$100,000. After paying himself for fees and costs and distributing nearly \$32,000 to McClain, Gruetter should have held the balance of \$23,767.96 in trust pursuant to McClain's arrangement with her own insurer that the funds would be so held their negotiations on the PIP lien.

Over the next year McClain made many unsuccessful efforts to get information from Gruetter about his progress resolving the PIP lien waiver issue. In late December 2011, she hired another lawyer to help her complete the matter, but his demands to Gruetter also went unanswered.

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<sup>1</sup> This matter was reviewed by the BOG in May 2013 on the claimant's request for review of the CSF Committee's denial of the claim. The BOG referred the claim back to the CSF Committee for further consideration. At its May 11 meeting, the CSF concluded that the claim was eligible for an award from the Fund.

McClain's funds were not in his trust account at the time his office was closed in early 2012. Her uninsured motorist and PIP lien waiver claims are pending in Multnomah County Circuit Court. The CSF Committee recommends that McClain be awarded \$23,767.96. She has agreed that the funds should be delivered to her new counsel to hold pending the outcome of the pending litigation.

**GRUETTER (Mosley) - \$16,675**

Amanda Mosley hired Bryan Gruetter to handle her personal injury claim after a December 2009 accident. Because her medical expenses alone exceeded the at-fault driver's policy limits, Mosely planned to make a claim on her own uninsured motorist policy and seek a waiver of the PIP reimbursement.

Gruetter settled Mosley's claim with the driver's carrier in January 2011 for the policy limits of \$25,000. Mosley's insurer consented to the settlement on condition that the funds be held in trust pending resolution of the underinsured/PIP waiver dispute. After receiving the settlement, Gruetter did nothing concerning Mosley's UIM/PIP claims and denied her requests for any portion of the settlement funds.

Mosley's funds were not in Gruetter's trust account when his office was closed in early 2012. Mosley retained Joe Walsh<sup>2</sup> to pursue her UIM/PIP claims, which he ultimately resolved in her favor so that no reimbursement to her own insurer is required. Mosley requested an award of the entire \$25,000 settlement in part because her claim was settled quickly for the policy limits and also because she contends the entire amount was subject to the UIM/PIP lien. The committee disagreed, concluding that Gruetter would have been entitled to his fee and Mosley's insurer would have been entitled only to the remaining funds, \$16,675.

The committee recommends an award of \$16,675 and a waiver of the requirement that Mosley have a civil judgment against Gruetter.

**McBRIDE (Luna Lopez) - \$9,500**

In 2003 the Department of Homeland Security began deportation proceedings against Alberto Lopez and his daughter Carmen Lopez, who had entered the US illegally in 1989 when Carmen was a young girl. Alberto and Carmen conceded removability and were ordered to leave the country within 60 days, but they did not. Alberto appealed his case to the Board of Immigration Appeals and then the Ninth Circuit but was unsuccessful and in April 2008 was again ordered to leave the country. Alberto and Carmen remained in the US in violation of their agreements and the court orders.

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<sup>2</sup> Walsh was a contract attorney who worked on many of Gruetter's cases. He had no involvement with the handling of client funds and there is no evidence to suggest he participated in, knew about or benefitted from Gruetter's misconduct.



In January 2010, Alberto and Carmen were arrested in an ICE raid of their employer's workplace. They were taken to Tacoma for detention pending deportation. On January 20, 2010 Jennifer Luna Lopez (Alberto's younger daughter who was born in the US) met with Jason McBride, seeking help for her father and sister, disclosing their history and deportation orders. McBride agreed to take on both cases for \$8000. He assured Jennifer that he could obtain lawful residency for her father and sister despite the prior deportation orders. On January 22, McBride submitted preliminary papers to stop the deportation; however, the filings were rejected because they were received after Alberto and Carmen had been deported back to Mexico.

It is not clear when McBride learned that his filing has been rejected. However, on several occasions over the next two years he assured Jennifer that he was waiting for notice of a hearing that would be scheduled in Tijuana. His files don't reflect any activity after the January 22 filings. He made no refund to Jennifer for the unearned portion of his fees.

In March 2012, Jennifer and her husband Gabino retained McBride to help Gabino obtain lawful residency (he had entered the US illegally at age 15 in 2002). McBride agreed to handle the matter for a flat fee of \$3000 and told Jennifer and Gabino it would take about 18 months. McBride did not disclose to Jennifer and Gabino that he was being prosecuted by the bar and that the bar had petitioned for an interim suspension order.

Within a few days, Jennifer and Gabino delivered documents and other background information requested by McBride. They also paid \$1500 toward McBride's fee (the balance was to be paid in monthly installments). Despite several calls to inquire about the status of the matter, Jennifer and Gabino never heard anything more from McBride and no further payments were made. McBride's file contains nothing other than routine intake forms and the documents Jennifer and Gabino delivered, and there is no evidence that he did anything on their behalf.

McBride stipulated to the interim suspension effective June 14, 2012; the PLF assisted with the closure of his office sometime in July and he submitted a Form B resignation in August 2012.

From consultations with other immigration attorneys, Jennifer learned that nothing could have been done to prevent Alberto from being deported and that they would not have accepted his case. (It appears that Carmen might have been eligible for some relief as a victim of domestic violence, but McBride took no action in that regard after his initial notice of appearance was rejected.)

While McBride might (and has in similar situations) ascribed his conduct to malpractice, the Committee concluded that McBride (who held himself out as an experienced immigration attorney) was dishonest in agreeing to and accepting an \$8000 fee when he knew or should have known that he could not help Alberto or Carmen. Even if he hadn't known when he took on the case, he should have refunded the unearned fees once he understood the situation. As for taking Gabino's case, the Committee also found fraud in the inducement by McBride's

taking a matter he knew (or should have known) he wouldn't be able to complete. In both cases, McBride performed virtually no service in exchange for the fees paid.

### **HORTON (Calton) - \$5,739.07**

Christopher Calton hired William Horton in January 2007 to pursue a third party claim for injuries sustained at work for which Calton had been receiving benefits from SAIF. Horton negotiated a settlement with Farmers Insurance for \$31,447.07, which included nearly \$14,000 owed to SAIF. Calton's share after deduction of Horton's fees and costs was \$5,989.07.

Horton received the settlement check (net of the SAIF lien amount) on or about October 25, 2007. There is no deposit to his trust account that matches the sum received from Farmers, but a close amount was deposited on October 26. By the end of October, the balance of Horton's trust account was \$1.00.

On November 26, 2007, Horton deposited \$1250<sup>3</sup> into Calton's account at US Bank. In February 2008, Calton acknowledged that \$5,739 of his funds remained.

In late February 2008, Horton received a demand from Calton's ex-wife for the 80% of his injury settlement that had been awarded to her in a default divorce judgment (Calton had been convicted and jailed shortly after retaining Horton). Calton objected and Horton advised the parties that he would hold the funds pending their resolution of the issue or he would interplead them into court.

In November 2008, attorney Morrell contacted Horton on behalf of Calton's ex-wife. In response to Morrell's demand, Horton claimed there was only a small portion of Calton's money left, explaining that he had applied more than \$3800 of it fees for his services relating to Calton's criminal case and divorce. The letter purported to include a check to the ex-wife representing 80% of the trust balance, but Morrell confirms he never received it and heard nothing further from Horton.<sup>4</sup>

There is no evidence whatsoever that Horton provided any services to Calton in connection with either Calton's criminal or domestic relations cases. To the contrary, in a letter to Calton in October 2007, Horton says he is unsure as to the confidentiality of written communications while Calton is in jail, suggesting an unfamiliarity with criminal defense. Similarly, Horton told Calton's ex-wife that he didn't do divorce work and was therefore unsure how to handle her demand.

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<sup>3</sup> There is a corresponding withdrawal from Horton's business account on that date. Recall that Horton's trust account was depleted within days of receiving Calton's settlement funds.

<sup>4</sup> Horton took his own life on January 29, 2009 following his admission in a fee arbitration proceeding to have misappropriated another client's settlement funds. In 2009 and 2010, the CSF paid a total of \$86,718 to four of Horton's former clients.

There is little doubt that Horton misappropriated all of Calton's settlement proceeds within a few days of receiving the money and told a continuing series of lies to cover up what he had done. Although he distributed \$1250 of the proceeds, \$5,739.07 remains unaccounted for.

Calton claims to have inquired of Horton about his funds on the day in mid-2008 that he was released from jail. On that and subsequent occasions, Horton informed Calton that he couldn't release the funds in the face of the ex-wife's claim. Calton was reluctant to get into a fight with Horton, fearing it would jeopardize his parole, so by the end of 2008 he dropped the issue and had no further contact with Horton. He denies having learned of Horton's death in early 2009 when the PLF assisted with the closure of the office following Horton's death. Calton claims that all his mail went to his ex-wife's address and she didn't give it to him. Toward the end of 2012, Calton was going through old documents that reminded him of the money that he believed Horton was holding. Unable to contact Horton at his old address, Calton did an internet search and learned both of Horton's death and that the CSF had reimbursed other clients.

The CSF Committee concluded that the claim is eligible for reimbursement in the amount of \$5,739.07 and that no judgment should be required because Horton died insolvent more than four years ago. The Committee also found that Calton's claim was filed within the Fund's six-year "statute of ultimate repose."<sup>5</sup>

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<sup>5</sup> CSF Rule 2.8 provides that claims must be filed "within two years after the latest of the following: (a) the date of the lawyer's conviction; or (b) in the case of a claim of loss of \$5,000.00 or less, the date of the lawyer's disbarment, suspension, reprimand or resignation from the Bar; or (c) the date a judgment is obtained against the lawyer, or (d) *the date the claimant knew or should have known, in the exercise of reasonable diligence, of the loss.* In no event shall any claim against the Fund be considered for reimbursement if it is submitted more than six (6) years after the date of the loss.

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# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** July 12, 2013  
**Memo Date:** July 27, 2013  
**From:** Tom Kranovich, Board Development Committee Chair  
**Re:** Appointment Recommendations for the BPSST and COCP

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### Action Recommended

Approve the following appointment recommendation from the Board Development Committee.

### Background

As provided in ORS 181.637, the BOG makes a recommendation to the Board on Public Safety Standards and Training (BPSST) for the appointment of one licensed private security representative to serve on the Private Security/Investigators Policy Committee for a two year term.

After reviewing information from the current OSB representative regarding the specific needs of the BPSST policy committee, the Board Development Committee recommends **Ronald J. Miller** for appointment consideration.

Pursuant to ORS 1.730, the BOG is responsible for appointing 12 lawyer members to the Council on Court Procedures. This year 7 positions are up for appointment. The Board Development Committee reviewed the recommendations from the plaintiff and defense sides along with the list of volunteers. The following members are recommended for appointment with terms expiring August, 2017:

- John Bachofner** (reappointment)
- Michael Brian** (reappointment)
- Jennifer Gates** (reappointment)
- Maureen Leonard** (reappointment)
- Deanna Wray** (new appointment)
- Shenoa Payne** (new appointment)
- Travis Eiva** (new appointment)

# 2014 EXECUTIVE SUMMARY BUDGET



June 27, 2013

Report to the Budget & Finance Committee

## PURPOSE OF THIS REPORT

This 2014 Executive Summary Budget Report and the related forecasts are developed on anticipated trends, percentage increases, and various assumptions with the 2013 budget as the base. This report gives only a “first look” toward developing the final 2014 budget.

**The 2014 BUDGET column on Exhibit A forecasts a Net Revenue of \$17,900 for 2014.**

This is before any bar staff manager or department has prepared his/her line item budget, but that net revenue number becomes a target for the final 2014 budget.

All forecasts incorporated herein include no changes to program service and activity from the current budget.

## CONTENTS

1. Assumptions - Revenue
2. Assumptions - Expenditures
3. Diversity & Inclusion
4. Client Security Fund Assessment
5. Fanno Creek Place
6. The Five Years After 2014
7. Budget Development Calendar
8. Recommendations of the Budget & Finance Committee to the Board of Governors

Exhibit A - 2014 Budget and Five-Year Forecast

Exhibit B - Memo from John Gleason

Exhibit C1 – Chart: Mandatory Services Fee

Exhibit C2 – Chart: Voluntary Services Fee

Exhibit C3 - Summary of Fee

Exhibit D - Email Comments from Committee Member

The positive “bottom line” for 2014 is the result of a change in many factors from the \$400,000 deficit mentioned at the previous Committee meetings. The reasons for the positive swing to a \$17,900 Net Revenue are numerous (and explained in more detail later):

- **Membership growth** is the lowest in many years, but slightly higher than anticipated
- Sales of **print Legal Publications** are historically exceeding projections
- **Admissions** revenue shows an increase over 2012, rather than a decline
- Revenue from the **new Lawyer Referral funding model** is far exceeding expectations
- The employer’s **rates for PERS** declined by 4.4% of eligible payroll due to legislative action
- **Non-personnel costs** continue to decline

The Net Expense in 2012 was \$2,641 and the Net Revenue projected for 2013 is \$6,331. The forecast for 2014 without any detailed analysis is a similarly small \$17,900 leaving little margin for error, variances, or changes.

**This forecast projects:**

- **no member fee increase in 2014**
- **not transferring any reserves to revenue for general operations.**

**Assumptions**

Here are the assumptions factored into this 2014 budget summary

**1. Revenue . . . .**

■ **Membership Fees**

This forecast includes no increase in the active membership fee for 2014. This would be the ninth consecutive year of no active member fee increase.

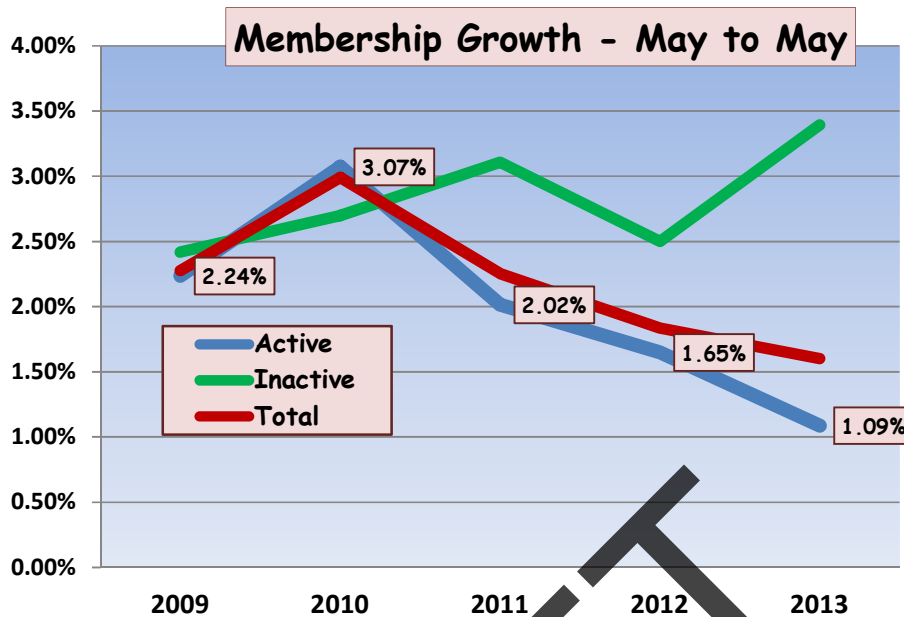
The forecast includes a 1% growth in membership fees, and is a reasonable increase based on the growth of membership from May 2012 to May 2013 (see chart on next page). Also Admissions anticipates slightly more bar exam applications this year than last, which should trend to anticipating at least the 1% growth.

■ **Admissions**

Admissions revenue is exceeding the budget by 26% after five months this year. That is due to slightly more bar exam applications, but primarily due to raising the investigation fee by \$175.00 to \$425.00. In spite of those increases, the 2014 forecast includes a 5% revenue decline.

**Member Fee Revenue History**

Year	Actual	\$ Chg YOY	% YOY
<b>2014 P</b>	<b>\$7,081,110</b>	<b>\$70,110</b>	<b>1.00%</b>
<b>2013 B</b>	<b>\$7,011,000</b>	<b>\$51,300</b>	<b>0.74%</b>
2012	\$6,959,700	\$145,657	2.14%
2011	\$6,814,043	\$183,588	2.77%
2010	\$6,630,455	\$153,872	2.38%
2009	\$6,476,583	\$159,808	2.53%
2008	\$6,316,775	\$127,911	2.07%
2007	\$6,188,864	\$156,947	2.60%
2006	\$6,031,917		
<b>Average 2007 to 2012</b>			<b>2.41%</b>



#### ■ CLE Seminars

CLE Seminars has consistently declined the past few years and the 2014 forecast includes a 5% decline from the 2013 budget.

#### ■ Legal Publications

Sales of Legal Publications books have exceeded expectations significantly. Sales in 2012 were \$216,238, which was more than twice the revenue budgeted. After five months in 2013, sales are already \$171,955 and the Publications manager projects 2013 sales to reach \$262,000. The manager projects 2014 sales to be \$235,000 based on the books anticipated to come to market in 2014.

#### ■ Lawyer Referral

The bar was not expecting revenue from the new Lawyer Referral funding model until this year. Then the budget was only \$55,000. The bar received three months of revenue in 2012 and for the first five months of 2013 already has received \$123,521. Admittedly the five month history does not necessarily mean that trend will continue through the rest of 2013, but if it did, revenue for 2013 would be \$296,000.

For the purpose of the 2014 forecast, the 2013 projection is lowered to \$266,000. Assuming a 10% growth in 2014, revenue projects to \$293,000 - a significant change from the forecast a year ago, but not an unattainable number.

*In summary, the 2014 forecast for all revenue is \$135,000 more than the 2013 budget – not an impractical increase based on current activity. A 1% reduction in all forecast revenue would still allow a break-even budget assuming expenses would not change.*

## 2. Expenditures . . .

### Salaries, Taxes & Benefits

A significant change from the forecast made a year ago is in Personnel costs. The 2014 forecast is \$222,000 less than the forecast a year ago – even though a 2% salary pool is included in the 2014 forecast.

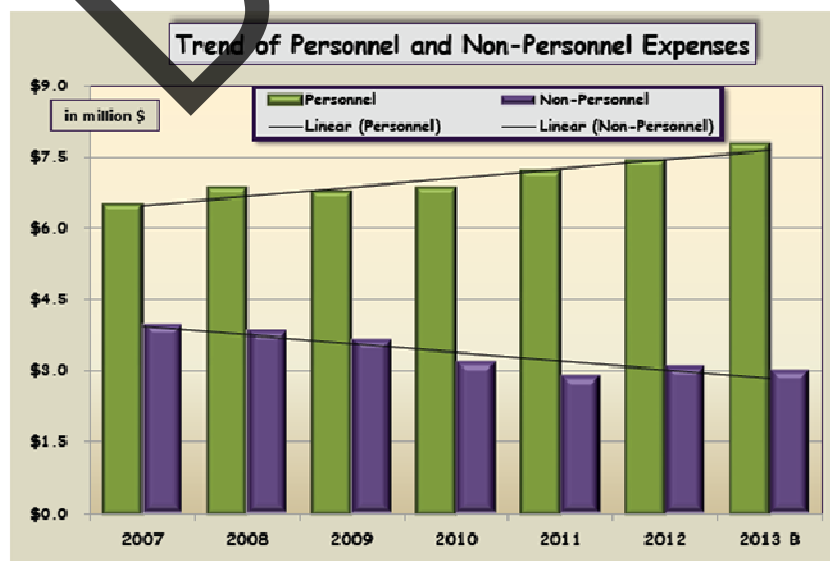
- Previous salary pool increases have been: 2013 – 2%; 2012 – 2%; 2011 – 3%.
- The employer’s rate for PERS changed July 1, 2013. The bar had expected an 8-10% cost increase in benefits due entirely to the cost of PERS. In June, all PERS employers were informed that SB 822 decreased the employer rate and the bar will pay 4.4% less than what was forecast. As a result, the total 2014 cost of Taxes & Benefits is projected to be slightly less than the 2013 budget.
- With the rate change the bar’s 2013 cost for PERS is projected to be \$90,000 to \$95,000 below the amount budgeted.

The chart indicates the impact of including a salary increase in the 2014 budget. The highlighted row contains the amounts included in this forecast.

Estimated Impact of Salary Pool on 2014 Forecast		
Per Cent Change	Dollar Amount	Revised Net Revenue (Expense)
No change	\$ 0	\$ 147,200
1%	\$ 64,300	\$ 82,200
<b>2%</b>	<b>\$ 129,300</b>	<b>\$ 17,900</b>
3%	\$ 194,500	\$ (47,300)

### Changing Trends

The chart below shows the total cost of Personnel and Non-Personnel since 2007. The trends move in two different directions and the summaries on the next page indicate their impact.





### From 2007 to 2013 . . .

- **Non-Personnel** costs have decreased \$964,000. This is a 24.2% decrease, i.e. reducing operational and administrative expenses by a fourth. Some of the drop is due to the on line availability of the Legal Publications library causing the printing of far fewer pages. However, the 24.2% decline is impressive regardless of the reasons.
- **Personnel** costs (salary increases, taxes, and benefits) have gone up \$1.28 million over the six years - an average increase of only 3.3% a year.
- **All costs** are only \$317,000 more than 2007, or an average increase of ½ of 1% a year.

### ■ Direct Program & Administrative Expenses

Direct Program and Administrative costs are expected to be the same as the 2014 budget. Any change may be caused by a change in revenue – for example, CLE Seminars generating more or less registration revenue or Legal Publications printing and selling more or less books than projected.

Any indirect cost increase probably will be offset by the decrease in the cost of the new lease for copiers and facilities management in mid 2013.

Potential changes in operational costs for Admissions and Disciplinary Counsel are addressed in a memo from John Gleason in **Exhibit B**. If the circumstances in the memo occur, revenue for Admissions and membership fees also will be impacted.

## 3. Diversity & Inclusion

The Diversity & Inclusion assessment has been \$30.00 since 1990. This program is a standalone budget that maintains its own fund balance.

2013 Diversity & Inclusion Budget			
	Total	Diversity & Inclusion	OLIO
<b>Revenue</b>	\$ 478,200	\$ 428,200	\$ 50,000
<b>Expenses</b>			
Personnel Costs	295,300	295,300	
Program & Administration	164,850	114,950	49,900
Indirect Costs	78,441	78,441	
<b>Total Expenses</b>	538,591	488,691	49,900
<b>Net Expense</b>	<b>\$ (60,391)</b>	<b>\$ (60,491)</b>	<b>\$ 100</b>

Revenue comes from the assessment, interest on the fund balance, and registration or contributions for special events like BOWLIO. The amount of revenue from the \$30.00 assessment in the 2013 budget is \$419,700.

The fund balance at the beginning of 2013 was \$62,672. By the end of this year after the current year net expense, there will be approximately \$2,200 in the fund balance.

Thus, to continue with the programming at the 2013 level in 2014 without dipping into general member fees, there must be significant amounts of additional revenue or significant expense reductions.

#### **4. Client Security Fund**

For 2013 the Client Security Fund assessment was raised from \$15.00 to \$45.00 to offset the large volume and size of claims. The increase was warranted as from July 1, 2012 to June 30, 2013 the bar paid \$1,125,404 in 88 claims.

At the end of June, the fund balance is approximately \$300,000. If all claims currently being processed are paid, the fund balance would be wiped out, pushing payments into 2014.

The \$45.00 assessment generates \$675,000 in revenue, so the chance of reaching the current reserve goal of \$500,000 by the end of 2014 is unlikely.

#### **5. Fanno Creek Place**

Little change is expected in the Fanno Creek Place budget from 2013 to 2014. The projected net expense is \$683,000 and the cash flow is a negative \$395,000 – both of which are in line with expectations (see page 2 of **Exhibit A**).

Currently, only 2,091 s.f. is vacant at the bar center and the forecast assumes a tenant in place midyear. A current lease expires in April 2014, but that tenant is expected to renew. Operating costs are expected to be in line with current operations.

#### **6. The Five Years After 2014**

There are numerous “IF’s” factored into the forecast for the five years beginning 2015. Here are IF’s that could delay the member fee increase even beyond 2015.

- ... **IF** member fee growth increases by at least 1%;
- ... **IF** Admissions revenue can return to the 2012 budgeted revenue;
- ... **IF** CLE Seminars revenue stops declining;
- ... **IF** CLE Publication sales continue comparable to current levels;
- ... **IF** the percentage funding from Lawyer Referral continues to grow substantially to breaking even by 2016;
- ... **IF** the investment portfolio avoids a major decline;
- ... **IF** salary increases don’t exceed 2%;
- ... **IF** PERS rates don’t exceed the increase already factored into the forecasts;
- ... **IF** non-personnel costs remain at no change;
- ... **IF** the net revenue for 2013 is attained or exceeded and 2014 attains the \$17,900 projected net revenue.

Those are a lot of **IF’s**.

If some or all of those don’t materialize:

- a \$50 member fee increase raises enough revenue to keep the fee constant for at least 3 years;

- a \$70 member fee increase raises enough revenue to keep the fee constant for at least 5 years.

Note that the forecast includes the \$200,000 grant from the PLF from 2014 to 2016. This is due to the action of the PLF board committing the grant only for those three years.

#### ■ Exhibits C1, C2, and C3

These exhibits were shared with the Committee at the June meeting. They allocate the current active membership fee of \$522.00 to the mandatory and the voluntary services provided by the bar and the anticipated cost of each activity as a portion of the member fee. These charts are helpful if the Committee and BOG were to evaluate eliminating certain services as limited value to the membership for the purpose of balancing or reducing the budget.

#### ■ Exhibit D

These are the comments from the Committee members in response to Chair Knight's request "to gather preferences from the committee regarding potential programming cuts." They are included as reference to the review of this phase of the 2014 budget development process.

### 7. 2014 BUDGET DEVELOPMENT CALENDAR

Date	Process
July 12	<b>Budget &amp; Finance Committee</b> reviews the 2014 Executive Summary Budget; shares review with the <b>Board of Governors</b>
August 23	The <b>Budget &amp; Finance Committee</b> will not meet unless additional budget review is needed.
September 27	<b>Budget &amp; Finance Committee</b> recommends member fee for 2014; the <b>Board of Governors</b> acts on fee recommendation
Early to mid October	Bar <b>staff</b> prepare 2014 line by line program/department budgets
October 25	<b>Budget &amp; Finance Committee</b> reviews the 2014 Budget Report.
Early to mid November	Bar <b>staff</b> refine 2014 budget
November 1	<b>House of Delegates</b> meeting. Action on Fee resolution (if increase approved by the BOG).
November 22	<b>Budget &amp; Finance Committee</b> review revised 2014 Budget Report
November 22-23	<b>Board of Governors</b> reviews and approves 2014 Budget

## **8. RECOMMENDATIONS OF THE BUDGET & FINANCE COMMITTEE TO THE BOARD OF GOVERNORS**

Although no specific recommendations are necessary with this report (the committee will meet twice before a recommendation on the 2014 fee is needed and three times before the final budget approval), the Committee can provide direction on the following:

- the general membership fee currently at \$447.00
- the Diversity & Inclusion assessment currently at \$30.00;
- the Client Security Fund assessment currently at \$45.00;
- changes on the revenue projections
- changes to program or policy considerations
- the 2014 salary pool
- guidance/direction to bar staff budget preparers of the 2014 line item budget
- other \_\_\_\_\_

**DRAFT**

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# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** July 12, 2013  
**Memo Date:** July 8, 2013  
**From:** Rod Wegener, CFO  
**Re:** Revision of the Bar's Investment Policy

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### Action Recommended

Approve the revision (listed below) to the investment policy in bylaw 7.402

### Background

This topic has been on the Budget & Finance Committee's agenda for the past several meetings as the Committee works with Washington Trust Bank to revise the bar's investment policy specifically the list of approved investments in bylaw 7.402. The board approved a revision to the policy at its May 3, 2013 meeting, but after further discussions with the bank, the Committee is recommending the policy be revised slightly

On July 1, Budget & Finance Committee members Knight, Wade, and Wilhoite and the bar's CFO met via conference call with Rick Cloutier and Sarah Crothers of Washington Trust Bank to clarify a number of items on the bar's investment policy and the Investment Policy Statement as directed at the June 14 Committee meeting.

After relevant discussion and the bank explaining its position, the Committee members agreed to these revisions in the policy, which will be acted upon at its meeting prior to the board meeting:

Mutual funds investing in infrastructure, commodities, and instruments such as high yield bonds, adjustable rate bonds, derivatives, futures, currencies, **mortgage backed securities**, and ETFs, but not swaps or speculative instruments, and only for the purpose of both managing risk and diversifying the portfolio and not at all for the purpose of leveraging, with all such investments in total not to exceed ~~10%~~ **35%** of the total invested assets.

The Committee also will address a slight change to the Investment Policy Statement (ISP) to conform with the list of approved investments that has been made to the investment policy.

## Section 2.4 Meetings

### **Subsection 2.400 Robert's Rules of Order**

~~Subject to ORS Chapter 9 and these Policies, the conduct and voting at Board meetings are governed by ORS Chapter 9, these bylaws, and~~ the most recent edition of Robert's Rules of Order.

### **Subsection 2.401 Regular Meetings**

Meetings of the Board ~~must be~~ held at such times and places as the Board determines, ~~and the~~ Executive Director ~~must will~~ provide notice of the time and place ~~of all meetings in accordance with ORS 192.610 to 192.690. Newly elected governors and officers of the Bar take office on January 1 of the year following their election.~~<sup>1</sup>

### **Subsection 2.402 Special Meetings**

A special meeting of the Board may be called by the President or by three Governors filing a written request with the Executive Director. If, within five days after a written request by three Governors ~~is filed with the Executive Director~~, the President fails or refuses for any reason to set a time for and give notice of a special meeting, the Executive Director ~~or some other person designated by the three Governors joining in the request, may set a time for and give notice of the meeting. The date fixed for the meeting may be no less than five nor more than ten days from the date of the notice. The Executive Director shall~~ ~~must~~ call the meeting and provide at least 24 hours' notice ~~of the time and place of the special meeting in accordance with ORS 192.610 to 192.690. or the person designated by the three Governors in their request must sign the notice of a special meeting. The notice must set forth the day, hour, place and purpose of the meeting. The notice must be in writing and be communicated to each Governor at his or her principal office address. Notice must be given to each Governor, unless waived. A written waiver by or actual attendance of a Governor is the equivalent of notice to that Governor. Special meetings may consider only the matters set forth in the notice of the meeting.~~

### **Subsection 2.403 Emergency Meetings**

When the President determines that a matter requires immediate attention of the Board, an emergency meeting ~~or conference call~~ may be called ~~with on less than 24-~~ hours' notice ~~to members of the Board. Notice shall~~ ~~must~~ be given to members of the ~~board, the media and other interested persons as may be appropriate under the circumstances. The notice shall~~ ~~must~~ indicate the subject matter to be considered. ~~Conference calls and emergency meetings can consider only~~ Only the matters for which

<sup>1</sup> This sentence should be moved to Bylaw 2.101(a):

#### **Subsection 2.101 Election**

- (a) The election of lawyer-members of the Board will be conducted according to Article 9 of the Bar's Bylaws. Newly elected governors and officers of the Bar take office on January 1 of the year following their election.
- (b) Candidate statements for the office of Governor from a region must be in writing. The Executive Director will prepare the forms for the candidate statements and supply the forms to the applicants. Applicants must complete and file the form with the Executive Director by the date set by the Board. The Executive Director must conduct elections in accordance with the Bar Bylaws and the Bar Act.

~~notice is given the emergency meeting is called may be considered at the meeting. If all members of the Board are present at the meeting or participating in the conference call, any actions taken are final. If any member does not participate or receive notice, the matters decided must be ratified at the next Board meeting.~~

***Subsection 2.404 Minutes***

~~The Executive Director or his or her designee must keep accurate minutes of all board meetings must be preserved in writing or in a sound, video or digital recording. The minutes shall must reflect at least the following information: members present, motions or proposals and their disposition, the substance of any discussion on any matter, and a reference to any document discussed at the meeting. The minutes must reflect the vote of each member of the Board by name, on any matter considered by it, must be recorded in the minutes if the vote is not unanimous. Draft minutes, identified as such, will be available to the public within a reasonable time after the meeting. Final minutes will be available to the public within a reasonable time after approval by the Board. The minutes of executive sessions will be available to the public except where disclosure would be inconsistent with the purpose of the executive session.~~

***Subsection 2.405 Oregon New Lawyers Division Liaison***

The Oregon New Lawyers Division ("ONLD") has a non-voting liaison to the Board, who must be a member of the ONLD Executive Committee. The ONLD liaison is appointed by the chair of the ONLD Executive Committee to serve for a one-year term. No person may serve more than three terms as ONLD liaison. If the ONLD liaison is unable to attend a meeting of the Board, the ONLD chair may appoint another member of the ONLD Executive Committee to attend the meeting.

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<sup>2</sup> This provision was apparently added here because it didn't fit neatly into other parts of the bylaws.

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# OREGON STATE BAR

## Governance and Strategic Planning Committee Agenda

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**Meeting Date:** July 13, 2013  
**Memo Date:** June 27, 2013  
**From:** Helen M. Hirschbiel, General Counsel  
**Re:** Proposed Amendment to Oregon RPC 4.4(b)

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### Action Recommended

Consider the recommendation of the Legal Ethics Committee that the attached proposed amendment to Oregon RPC 4.4(b) be submitted to the House of Delegates for approval instead of the amendment proposed by the Board of Governors at its November 2012 meeting.

### Background

At its meeting in November 2012, the Board of Governors decided to send the following amendment to RPC 4.4(b) to the House of Delegates for approval:

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

Representatives from the Legal Ethics Committee attended the Governance and Strategic Planning Committee meeting on June 14, 2013 to request that the Board reconsider its proposed amendment to RPC 4.4(b). The LEC representatives explained the LEC's reasoning for following the majority (and ABA) approach, but acknowledged that some jurisdictions have added language that requires maintaining the status quo while the sending and receiving lawyers sort out the proper handling of misdirected documents. The GSP Committee invited the LEC to submit an alternative amendment to RPC 4.4(b) that would better balance the responsibilities of the sender and the receiver.

The LEC met on June 15 and discussed the rule at length. Many committee members felt strongly that the current RPC 4.4(b) should not be amended at all for the reasons set forth in the letter from LEC member David Elkanich to the Board at its November 2012 meeting. Even so, the LEC was sensitive to the GSP Committee concerns. In the end, the LEC voted to submit the following proposed alternate amendment to RPC 4.4(b), which is substantially similar to the Arizona rule on the topic:

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender, and preserve the status quo for a reasonable period of time in order to permit the sender to take protective measures.



# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** July 12, 2013  
**Memo Date:** July 27, 2013  
**From:** Danielle Edwards, Director of Member Services  
**Re:** Volunteer Appointments

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### Action Recommended

Review and approve the following appointment recommendations.

### Background

#### Advisory Committee on Diversity and Inclusion

Due to a resignation, the committee needs one member appointed to fill a partial term. The committee and staff liaison recommend **Jacqueline Lizeth Alarcon** (116073). Ms. Alarcon is a 2010 Willamette University graduate practicing in Portland with Yates, Matthews & Eaton.

**Recommendation:** Jacqueline Lizeth Alarcon, member, term expires 12/31/2015

#### Legal Services Program Committee

A member of the committee was removed due to a lack of participation. As such, the committee staff liaison recommends the appointment of Judge Timothy C. Gerking (792345) to fill the vacant seat. In addition to his ongoing access to justice support, Judge Gerking offers a rural area perspective.

**Recommendation:** Judge Timothy C. Gerking, member, term expires 12/31/2014

#### Pro Bono Committee

The chair of the committee moved out of state and resigned from the committee. Current committee member, **Beverly A. West** (085076) agreed to serve as chair the remainder of the year.

**Recommendation:** Beverly A. West, chair, term expires 12/31/2013

#### Unlawful Practice of Law Committee

Staff and the UPL Committee officers recommend the appointment of **Karen M. Oakes** (984631). Ms. Oakes served a two-year term on the committee but is willing to be reappointed. She is a solo practitioner located in Klamath Falls.

**Recommendation:** Karen M. Oakes, member, term expires 12/31/2016

### **House of Delegates**

The following regions have vacant seats due to resignations or region changes. In most cases, the candidate recommended below is the 2013 HOD Election runner-up.

**Region 1:** M. Kathryn Olney, term expires 4/19/2016

**Region 3:** J. Ryan Kirchoff, term expires 4/19/2016

**Region 4:** Manvir Sekhon, term expires 4/19/2016

**Region 5:** Courtney C. Dippel, term expires 4/19/2016

**Region 5:** Jaimie A. Fender, term expires 4/20/2015

**Region 6:** Ryan Hunt, term expires 4/20/2015

**Out of State Region:** Jennifer M. Geiger, term expires 4/20/2015

**Out of State Region:** Nathan Voegeli, term expires 4/20/2015

### **Disciplinary Board**

Two public member seats are vacant in region 5 of the Disciplinary Board. The staff liaison recommends **Virginia Symonds** and **Michael Wallis** for appointment and both have agreed to serve. Ms. Symonds has experience serving as a fee arbitrator and mediator with the bar and has proven to be dependable, intelligent, and even keeled. Mr. Wallis is new to bar volunteering but has exhibited enthusiasm at the opportunity to participate on the Disciplinary Board.

**Nomination:** Virginia Symonds, public member, term expires 12/31/2015

**Nomination:** Michael Wallis, public member, term expires 12/31/2015

### **Oregon Elder Abuse Work Group**

During the 2013 legislative cycle, HB 2205 created the Oregon Elder Abuse Work Group, consisting of 22 members. The group is to study and make recommendations on defining "abuse of vulnerable persons". The definition will be relevant to lawyers, who will become mandatory elder abuse reporters effective January 1, 2015. The work group is to recommend legislation to the 2014 legislature. The Board of Governors has two appointments to the work group: a lawyer whose practice is concentrated on elder law and a criminal defense lawyer.

**Lara C. Johnson** (933230), of Corson & Johnson in Eugene, is recommended for the elder law practitioner position. OCDLA will provide a recommendation for the criminal defense lawyer position during the July 13 meeting.

**Recommendation:** Lara C. Johnson, Elder Law Practitioner

**Recommendation:**

**RULE 1.15-2 IOLTA ACCOUNTS AND TRUST ACCOUNT OVERDRAFT NOTIFICATION**

- (a) A lawyer trust account for client funds that cannot earn interest in excess of the costs of generating such interest (“net interest”) shall be referred to as an IOLTA (Interest on Lawyer Trust Accounts) account. IOLTA accounts shall be operated in accordance with this rule and with operating regulations and procedures as may be established by the Oregon State Bar with the approval of the Oregon Supreme Court.
- (b) All client funds shall be deposited in the lawyer’s or law firm’s IOLTA account unless a particular client’s funds can earn net interest. All interest earned by funds held in the IOLTA account shall be paid to the Oregon Law Foundation as provided in this rule.
- (c) Client funds that can earn net interest shall be deposited in an interest bearing trust account for the client’s benefit and the net interest earned by funds in such an account shall be held in trust as property of the client in the same manner as is provided in paragraphs (a) through (d) of Rule 1.15-1 for the principal funds of the client. The interest bearing account shall be either:
- (1) a separate account for each particular client or client matter; or
  - (2) a pooled lawyer trust account with subaccounting which will provide for computation of interest earned by each client's funds and the payment thereof, net of any bank service charges, to each client.
- (d) In determining whether client funds can or cannot earn net interest, the lawyer or law firm shall consider the following factors:
- (1) the amount of the funds to be deposited;
  - (2) the expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;
  - (3) the rates of interest at financial institutions where the funds are to be deposited;
  - (4) the cost of establishing and administering a separate interest bearing lawyer trust account for the client’s benefit, including service charges imposed by financial institutions, the cost of the lawyer or law firm's services, and the cost of preparing any tax-related documents to report or account for income accruing to the client’s benefit;
  - (5) the capability of financial institutions, the lawyer or the law firm to calculate and pay income to individual clients; and
  - (6) any other circumstances that affect the ability of the client’s funds to earn a net return for the client.
- (e) The lawyer or law firm shall review the IOLTA account at reasonable intervals to determine whether circumstances have changed that require further action with respect to the funds of a particular client.
- (f) If a lawyer or law firm determines that a particular client’s funds in an IOLTA account either did or can earn net interest, the lawyer shall transfer the funds into an account specified in paragraph (c) of this rule and request a refund for any interest earned by the client’s funds that may have been remitted to the Oregon Law Foundation.
- (1) The request shall be made in writing to the Oregon Law Foundation within a reasonable period of time after the interest was remitted to the Foundation and shall be accompanied by written verification from the financial institution of the interest amount.
  - (2) The Oregon Law Foundation will not refund more than the amount of interest it received from the client’s funds in question. The refund shall be remitted to the financial institution for transmittal to the lawyer or law firm, after appropriate accounting and reporting.
- (g) No earnings from a lawyer trust account shall be made available to a lawyer or the lawyer’s firm.

- (h) A lawyer or law firm may maintain a lawyer trust account only at a financial institution that:**
- (1) is authorized by state or federal banking laws to transact banking business in the state where the account is maintained;**
  - (2) is insured by the Federal Deposit Insurance Corporation or an analogous federal government agency;**
  - (3) has entered into an agreement with the Oregon Law Foundation:**
    - (i) to remit to the Oregon Law Foundation, at least quarterly, interest earned by the IOLTA account, computed in accordance with the institution's standard accounting practices, less reasonable service charges, if any; and**
    - (ii) to deliver to the Oregon Law Foundation a report with each remittance showing the name of the lawyer or law firm for whom the remittance is sent, the number of the IOLTA account as assigned by the financial institution, the average daily collected account balance or the balance on which the interest remitted was otherwise computed for each month for which the remittance is made, the rate of interest applied, the period for which the remittance is made, and the amount and description of any service charges deducted during the remittance period; and**
  - (4) has entered into an overdraft notification agreement with the Oregon State Bar requiring the financial institution to report to the Oregon State Bar Disciplinary Counsel when any properly payable instrument is presented against such account containing insufficient funds, whether or not the instrument is honored.**
- (i) Overdraft notification agreements with financial institutions shall require that the following information be provided in writing to Disciplinary Counsel within ten banking days of the date the item was returned unpaid:**
- (1) the identity of the financial institution;**
  - (2) the identity of the lawyer or law firm;**
  - (3) the account number; and**
  - (4) either (i) the amount of the overdraft and the date it was created; or (ii) the amount of the returned instrument and the date it was returned.**
- (j) Agreements between financial institutions and the Oregon State Bar or the Oregon Law Foundation shall apply to all branches of the financial institution. Such agreements shall not be canceled except upon a thirty-day notice in writing to OSB Disciplinary Counsel in the case of a trust account overdraft notification agreement or to the Oregon Law Foundation in the case of an IOLTA agreement.**
- (k) Nothing in this rule shall preclude financial institutions which participate in any trust account overdraft notification program from charging lawyers or law firms for the reasonable costs incurred by the financial institutions in participating in such program.**
- (l) Every lawyer who receives notification from a financial institution that any instrument presented against his or her lawyer trust account was presented against insufficient funds, whether or not the instrument was honored, shall promptly notify Disciplinary Counsel in writing of the same information required by paragraph (i). The lawyer shall include a full explanation of the cause of the overdraft.**
- (m) For the purposes of paragraph (h)(3), "service charges" are limited to the institution's following customary check and deposit processing charges: monthly maintenance fees, per item check charges, items deposited charges and per deposit charges. Any other fees or transactions costs are not "service charges" for purposes of paragraph (h)(3) and must be paid by the lawyer or law firm.**