

Oregon State Bar
Meeting of the Board of Governors

January 28, 2005

Open Session Minutes

For ease of future research efforts for the minutes, the minutes are written to reflect information as it appears on the agenda. Items in the minutes were not necessarily considered by the board in the order in which they appear below.

The meeting of the Oregon State Bar Board of Governors was called to order Friday, January 28, 2005, at 12:10 p.m., by President Nena Cook and adjourned at 5:31 p.m. Current board members present were Mark Comstock, Bette Worcester, Albert Menashe, Rick Yugler, Dennis Rawlinson, John Enbom, Frank Hilton, Nena Cook, Jon Hill, Tim Gerking, Phyllis Edmundson, Marva Fabien (out 12:20 p.m. – 2:00 p.m.), Gerry Gaydos, Carol Skerjanec, and Linda Eyerman. Staff present was Karen Garst, George Riemer, Stella Manabe (12:10 p.m. – 12:20 p.m.), Rod Wegener, Susan Grabe, Jeff Sapiro (4:00 p.m. – 5:31 p.m.) and Teresa Wenzel. Individuals present from the PLF were Ira Zarov (12:10 p.m. – 3:00 p.m.) and Robert Cannon (12:10 p.m. – 3:00 p.m.). Also present were The Honorable Richard Baldwin and David Bartz appearing by phone (12:45 p.m. – 1:15 p.m.); ABA Delegates Adrienne Nelson, William Barton, and Marilyn Harbur (1:50 p.m. – 2:50 p.m.); ONLD representative Christine Meadows (2:05 p.m. – 3:00 p.m.); Michael Gleeson appearing by phone (2:00 p.m. – 2:30 p.m.); and Steve Houze (3:25 p.m. – 4:20 p.m.) Mr. Paulson did not attend the board meeting.

1. Work Session

Stella Manabe, Manager of the OSB Affirmative Action Program, gave an overview of the services the bar provides to minority and non-minority law students. After an extensive “predicate study” in 1997, the services were divided into “allocative” (financial and available to anyone who advanced the mission of the program) and “non-allocative” (non-financial and targeted at minority students). The primary program, which is non-allocative, is OLIO (Opportunities for Law in Oregon) and brings minority students from across the state together in a series of educational and networking activities. The OSB AAP has been referred to by the ABA as a “model for the nation.” Not complete and will be completed at a later date.

2. Report of Officers

A. Report of the President

Meeting with Chief Justice Carson on January 4, 2005

Ms. Cook reviewed the recent meeting with the Chief Justice highlighting cuts made to the Oregon Judicial Department budget. She is in the process of working with the Chief Justice on appointments to the newly formed Disability Task Force.

1. Focus of Priorities for 2005

Nena Cook explained the format for board meetings that she plans to follow in 2005: Committee meetings will take place in the morning for review of the day's board items, the work session will take place in conjunction with lunch, and the closed and executive sessions will take place at the end of the agenda. She further stated the committee chairs would present most of the items on the agenda. Special appearances should be decided at the committee meetings. Staff is present to answer questions and she expected a respectful but spirited discussion at each meeting. She reiterated the board has one employee, the executive director, and compliments should be made directly to bar staff, but problems should be discussed with the executive director or in the case of the executive director with the president.

2. Miscellaneous

Several bar bills, including revisions to the Bar Act, will be heard early in February. PLF liaisons are requested to discuss with the PLF Board of Directors the possibility of them sharing in the cost of providing Online CLE Publications. Ms. Cook spoke at a recent Oregon Minority Lawyers Association meeting and thanked board members and staff for their participation in the January Conference of Bar Leaders. There will be a roundtable discussion of representatives from women and minority lawyer associations on February 8, 2005. Dennis Rawlinson and Ms. Cook will be attending the ABA Mid-year meeting in Salt Lake City in early February.

- B. Report of the President-elect

1. Update on Current Activities

Mr. Rawlinson mentioned his recent appearance at the preliminary injunction hearing in *Paulson v. Oregon State Bar*. He stated Mark Comstock and George Riemer met with the Supreme Court on January 19, 2005 to discuss a proposed bar rule requiring the suspension of Disciplinary Board members who are being prosecuted by the bar. The court approved the proposed rule of procedure. In addition to the ABA meeting, he and Karen Garst will attend the Bar Leadership Conference in March in Chicago.

- C. Report of the Executive Director

1. Columbia Gorge Hotel Reception for Bar Members

Ms. Garst received a thank you note from Ron Somers regarding the recent Regional Bar Social held in conjunction with the board meeting in Hood River.

2. Client Success Stories from the Client Assistance Office

Ms. Garst related two client success stories from the Client Assistance Office where clients were able to have their problems solved with a few phone calls by the CAO.

3. Professional Liability Fund

A. General Update

1. Evaluations of Claims Attorneys and Defense Counsel

Ira Zarov, CEO of the PLF, introduced the very favorable results of evaluations by bar members of PLF services in the above categories. The overall ratings were 86% very satisfied and 14% satisfied with less than 1% not satisfied. Approximately 50% of those surveyed responded.

B. Goals and Projects of 2005

Mr. Zarov stated the PLF Board of Directors would review alternatives to increasing the assessment in the event claim results in 2005 suggest an assessment increase should be considered for 2006. Measures that might be considered include administrative savings and deductibles, as well as other prudent approaches. Mr. Zarov made clear the review was exploratory and did not indicate an increase in the assessment was being considered at this time. Mr. Zarov also stated the PLF would examine whether there was an effective way to determine if less than full-time lawyers could be allowed to pay a percentage of the assessment. They will also explore a proposal similar to Bar Bylaw 18.6 regarding the suspension of board members who are being prosecuted by the bar. Finally, the PLF with the OSB will study closing a loophole in the coverage requirements for Oregon lawyers. Under current rules Oregon lawyers who are admitted through the Oregon Bar Exam but whose principal office is outside Oregon are not eligible for PLF coverage nor do they have to carry substantially equivalent malpractice coverage, even if their practices are largely or exclusively within Oregon. As a result, such lawyers may be practicing in Oregon without coverage of any kind.

C. Financial Update

Mr. Zarov indicated there would probably be a small overage or a break-even budget when the books are closed on 2004. He is cautiously optimistic for 2005. The PLF hired a new claims attorney - Maureen DeFrank from Eugene. Two new board members are Jim Rice, a solo criminal defense attorney, and Bill Crow, past president of the bar and a lawyer at Schwabe Williamson.

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

A. Federal Practice and Procedure Committee

1. Recommendation of 2004 Federal Practice and Procedure Committee that the Board Oppose the Split of the U.S. Court of Appeals for the Ninth Circuit

Mr. Riemer introduced the committee's recommendation that the bar go on record as opposed to the split of the Ninth Circuit. He mentioned the agenda material which explained the bar's prior opposition to the split.

Action: Mr. Rawlinson moved, Mr. Menashe seconded, and the board passed a motion to table the decision. Staff was asked to request the committee continue to monitor federal legislation on the topic and report back to the board, as it deems appropriate.

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

A. **Joint OSB/PLF Committee on Defense of Volunteers and Staff**

1. **Adopt New Bar Bylaw 2.107**

Mr. Hilton introduced the committee’s recommendation to adopt a new Bar Bylaw 2.107, which would establish a framework for the board’s consideration of requests of volunteers and staff for defense of complaints of professional misconduct arising out of an act or omission occurring in the performance of their official duties on behalf of the bar. He further stated the bar needed to control the requests, select the attorney, and examine the fees to be paid. Mr. Yugler expressed concern about reimbursing volunteers if the bar is pursuing an ethical complaint against them. Mr. Riemer stated in the ethics area, the request still has to fall within the “scope of official duties” language. If a request was denied and the person was later vindicated and showed their conduct fit with the scope of the proposed new bylaw, they could be reimbursed later. Mr. Hilton said volunteers should not have to pay for unfounded complaints and they should not have to represent themselves. Mr. Zarov indicated the PLF had provided a defense to several employees in the past and it was unfair not to provide a defense to staff acting entirely within the scope of their official duties. Ms. Garst also indicated staff should have legal representation in depositions.

Action: Mr. Rawlinson moved, Mr. Enbom seconded, and the board approved a motion to waive the required one meeting notice (yes, 13, no, 1 [Yugler], absent, 2 [Fabien, Paulson])

Action: The committee motion passed with Ms. Eyerman and Mr. Yugler opposing and Ms. Fabien absent. Mr. Yugler further stated paying for the initial response in defense of a complaint was different from once the SPRB decided to prosecute and he felt the new bylaw was too broad.

6. **Budget and Finance Committee**

1. **Future Bar Center**

Mr. Hilton summarized a three-hour session on the previous day with representatives from a Portland architectural firm regarding the bar’s future facility needs. The conclusions were to make a firm determination on the life of the current building. It did not appear that remodeling it was worth the investment. Other choices to explore are building a new building, which would be expensive, or buying an existing building. He said the board needs to define what the bar is looking for and how much can be afforded without raising dues. The location would probably need to be near I-5 or downtown. He will write an article for the *Bulletin* about the issue.

2. Opposition to Proposed Revisions to Bar Act

Mr. Hilton indicated there was some opposition to the proposed revisions to the Bar Act regarding establishing an alternative to PERS.

B. Committee on the Judiciary

1. Court of Appeals Vacancy

Mr. Hill spoke about the daylong interview session with candidates for the Court of Appeals vacancy. The Committee on the Judiciary conducted interviews and checked references. Representatives from the bar's Judicial Administration Committee and the Governor's Office attended the interviews as well. The chair and vice-chair of the Committee on the Judiciary of the committee will meet with the Governor's Office on February 7, 2005. All eighteen people interviewed met the minimum standards.

Action: The committee motion to approve the list of qualified candidates passed with Ms. Fabien absent.

2. Revision to Bar Bylaw 2.703 – Statewide Judicial Appointments

Mr. Hill introduced the final draft of Bar Bylaw 2.703 that would codify the changes sought in the process by the Governor.

Ms. Eyerman stated she was concerned the committee had not done the extensive examination that was required in the bylaw's list of criteria under the definition of "suitable" for consideration by the Governor. Mr. Enbom indicated there was substantive variation within the list of eighteen. He further indicated that the problem is not with the wording, but whether the board can exclude people from the list it gives to the Governor.

Action: Mr. Rawlinson moved, Mr. Comstock seconded, and the board failed to pass a motion to waive the one meeting notice requirement (yes, 10; no, 4 [Edmundson, Eyerman, Worcester, Yugler]; absent, 2 [Paulson, Fabien]). The issue will be brought back to the board at its next meeting. Chair Hill was asked to discuss the proposed bylaw with the Governor's Office.

C. Member Services Committee

1. Participation in the Bar

Ms. Cook indicated there would be a roundtable of representatives of women and minorities on February 8, 2005, to discuss increasing the diversity of participation in bar activities such as CLEs. Board members are welcome and encouraged to attend.

2. Recruitment

The committee discussed recruitment and felt it was the responsibility of each board member to recruit bar members for both the House of Delegates and the board. There are two board vacancies in Region 5 and one in Region 2.

Board members updated the board on their recruitment efforts. Albert Menashe had organized a meeting of Region 5 board members.

3. Events from the Annual Meeting

Events from the annual meeting have been distributed throughout the year: The 50-year member luncheon will take place on May 6, 2005, at the Tualatin Country Club; the Legislative Review CLE and House of Delegates meeting will take place at the new Salem convention center September 30 and October 1, 2005, respectively; and the Tent Show and Dinner will take place November 4, 2005, at the Portland Convention Center following the PLF's Learning the Ropes course. The location and date of the Awards Luncheon and the Conference for Bar Leaders will be determined later.

7. Special Appearances

A. MCLE Committee

1. BOG Review of MCLE Committee Denial of Credit

J. Michael Gleeson

Michael Gleeson participated by phone in this portion of the meeting. His application for MCLE credit for assisting in developing new legislative language regarding trusts had previously been denied. He stated volunteers need to be supported. He had put in a great deal of time and his request should be approved according to the purpose of the MCLE rules. Mr. Comstock explained the MCLE Administrator had denied the request pursuant to Rule 5.2 (c) because it requires material to be published for the benefit of lawyers. Mr. Gleeson's work was done for a subcommittee of the Taxation Section. The MCLE Committee upheld the Administrator's decision. Mr. Comstock asked whether the work was done individually by Mr. Gleeson and whether he had prepared legislative testimony. Mr. Gleeson indicated the work was done by committee and he had not prepared legislative testimony.

Action: Ms. Skerjanec moved, Mr. Enbom seconded, and the board unanimously approved a motion to uphold denial of Mr. Gleeson's request.

B. Oregon New Lawyers Division

Christine Meadows indicated Mr. Yugler had joined the ONLD's recent retreat on January 21, 2005. Projects for the year include the ABA Young Lawyers Division Annual Conference in Portland; outreach to new lawyers; branding of their division; and the Pro Bono Challenge (see www.osbar.org). She said there are more categories of pro bono service this year including community service. Another project included their leadership development efforts with a legislative focus. She asked for anyone interested in mentoring a new lawyer to contact the division.

C. ABA Update

1. ABA Update

ABA House of Delegates representatives Marilyn Harbur, Adrienne Nelson, and Bill Barton appeared before the board. Ms. Harbur outlined action taken at the August, 2004, ABA HOD meeting: Repeal or modification of the alternative minimum tax; clients not having to pay taxes on the money they pay to their lawyers in contingent fee cases [a case out of Oregon]; judicial independence; and the minimum amount of time of incarceration. The ABA HOD's next meet is on February 16, 2005. Issues on the agenda include asbestos litigation, compensation for wrongful incarceration, uniform state law changes, and juror trials. Mr. Robert Gray, ABA President, visited Portland for a town hall meeting on the American Jury Project in the fall of 2004.

8. BOG Committees, Special Committees, Task Forces and Study Groups (continued)

A. Policy and Governance Committee

1. MCLE Self Study

Mr. Comstock introduced the committee's recommendation on clarifying self-study does not qualify for MCLE credit.

Action: The committee motion not to allow MCLE credit for self-study was passed by the board.

2. MCLE Elimination of Bias

Mr. Comstock introduced the committee's recommendation to adopt MCLE Regulation 5.600 which states: "A program shall not be ineligible for accreditation as an elimination of bias activity solely because it is limited to a discussion of substantive law, provided the substantive law relates to issues involving race, gender, economic status, creed, color, religion, national origin, disability, age, or sexual orientation." The board had approved courses that had initially been denied by the MCLE Administrator and MCLE Committee. The Policy and Governance Committee made the recommendation to clarify the bar's position regarding CLEs focused on substantive law. The areas outlined above would qualify for MCLE credit. In particular, Mr. Comstock pointed to the successful CLE at the Annual Meeting focusing on *Brown v. Board of Education*. The bar received a letter from former OSB President Angel Lopez urging it not to adopt the new proposal.

The Honorable Richard Baldwin, former OSB Board of Governors member, and David Bartz, former chair of the OSB Affirmative Action Committee, appeared at the board meeting by phone. Judge Baldwin stated substantive law CLEs are most often neutral and the original Elimination of Bias MCLE requirement was intended to encourage lawyers to take personal responsibility for changing the racial bias in the judicial system as documented by the Racial and Ethnic Bias Task Force in 1994. He indicated the change sends the wrong

message and undermines the activity and meetings with the Supreme Court to get the rule passed. Mr. Bartz said the rule works and it should not be tinkered with, racism is still an issue, and we need to continue to gain ground. Further, he stated substantive law is about minimums and the rule is not. There are laws on the books about racial discrimination, but they have not dramatically changed the world.

Mr. Comstock said the new rule would allow access to substantive law courses on the topic. Further, he stated substantive law would not subsume experiential courses. Rick Yugler stated he was voting for the new rule because he felt substantive law helped eliminate bias. Linda Eyerman stated there is a perception of unfairness among members whose practice area is in employment law, etc., because their consideration of bias issues in the course of their practice area CLEs are not presently given credit. Tim Gerking agreed with Judge Baldwin that substantive law alone was not the target objective of the elimination of bias rule. Frank Hilton emphasized that as lawyers we need the tools to help the public. He felt giving credit to substantive law programs was appropriate because substantive law training helped lawyers help their clients in deal with these issues. Carol Skerjanec stated the course still has to pass accreditation.

Action: The committee motion to adopt new MCLE Regulation 5.600 passed with Mr. Gerking and Mr. Gaydos opposing and Ms. Fabien absent. Ms. Cook was asked to write a letter to the Chief Justice explaining the change in the regulation.

3. Remaining Issues from Special Committee on Board Relations; Revision to Bar Bylaw 18.6

Mr. Comstock introduced the committee's proposal to conduct an election in the region affected to replace any board member who was suspended through Bar Bylaw 18.6. LPRC and SPRB vacancies would be filled by appointment. He indicated the committee had heard from representatives of Region 4. By a slight plurality, they preferred an election. The committee thought an election was the easiest way to ensure representation for and from the region.

Action: Mr. Comstock moved, Ms. Worcester seconded, and the board unanimously approved a motion to waive the one meeting notice requirement.

Action: Mr. Comstock moved on behalf of the committee to adopt the changes outlined in Bar Bylaw 18.600; 18.601; and 18.602.

Ms. Eyerman said she felt sending out the notice to all Region 4 members would only repeat the adverse publicity of the board member suspended, yet not formally disciplined by the bar. It would be better to appoint someone who is a HOD member. Mr. Gerking agreed with Ms. Eyerman and said it would unnecessarily stigmatize the individual before a decision is made on the ethics charges he or she faces. Mr. Rawlinson and Mr. Yugler also expressed support for an appointment. Ms. Cook said she was concerned because an appointment would look like the board was handpicking a replacement and

the region should make the decision. Mr. Comstock stated the current recall provision requires a high number of signatures and this election could be accomplished in thirty days and would give the board its full contingent of members.

Action: The motion was defeated (yes, 5; no, 10 [Enbom, Eyerman, Fabien, Gerking, Hill, Hilton, Rawlinson, Skerjanec, Worcester, Yugler]; absent, 1 [Paulson]).

Alternatives to the proposal were discussed. Mr. Hill indicated Region 4 covers four counties that do not have a well-established community of interest and they do not know each other.

Action: Mr. Comstock moved and Mr. Gerking seconded to waive the one meeting notice requirement to consider the language previously proposed by Ron Bryant last year to appoint a member of the region's elected HOD members.

Ms. Cook stated another alternative should not be considered until Region 4 was informed the board did not approve the election proposal. Mr. Hill reiterated this was not just a Region 4 issue and it would be logical to draw from the HOD members in a region. Mr. Rawlinson stated that board members who are defendants in *Paulson v. Carter* should probably abstain from the vote. Mr. Yugler offered suggested changes to the appointment proposal which had been distributed and those changes were briefly discussed. In addition, interest from outside the HOD in a region should be considered.

Action: Ms. Edmundson called the question, seconded by Mr. Gerking The motion to waive the one meeting notice requirement failed (yes, 4; no, 10 [Cook, Edmundson, Enbom, Fabien, Gaydos, Gerking, Hill, Hilton, Menashe, Worcester]; absent, 2 [Skerjanec, Paulson]).

Action: The board agreed by consensus to ask for a special meeting at noon on March 4, 2005, to consider a recommendation by the Policy and Governance Committee of an appointment process or other alternatives. The committee's recommendation should be sent to the board prior to March 4, 2005. Mr. Comstock said he would draft something and share it with the committee prior to that date.

B. Public Affairs Committee

1. Request that Bar Appear as *Amicus Curiae* in *State v. Holbrook*

Mr. Gaydos stated the committee had voted to decline the request of Stephen Houze to file an *amicus curiae* brief in the case of *State v. Holbrook*. Mr. Houze appeared before the board. He stated he understood the narrow use of *amicus curiae* appearances by the bar, but that the bar's submission in this case was very important because it concerned the ethics of lawyers in litigation and the rules of evidence. In the instant case, the prosecutor had interviewed jurors after the first trial resulted in a hung jury. He used rumors to question witnesses in the second trial, which resulted in the conviction of the defendant, Mr. Houze's client. A Disciplinary Board Trial Panel found the

prosecutor had violated the ethics rules in his questioning of the witnesses because he had not investigated whether the rumors were true.

Mr. Hilton questioned whether the disciplinary decision could be brought up by Mr. Houze in Mr. Holbrook's case. Mr. Houze stated it was unclear and the deadline was February 2, 2005. Ms. Skerjanec stated if the prosecutor appealed, it might be a conflict for the bar to file an *amicus curiae* brief in the matter. Ms. Eyerman stated one could not add facts to the record through an *amicus* brief. Mr. Yugler stated the ethics complaint does not mean there is reversible error concerning Mr. Holbrook's conviction. Mr. Hilton felt the prosecutor's mistake was egregious and might warrant the bar's filing in this case. Mr. Riemer said the criminal evidence question involved is separate from the disciplinary process and the bar does not have special expertise on that question. In any event, the Supreme Court would not likely rule on Mr. Holbrook's petition for review before the prosecutor's appeal of the adverse discipline decision was before the court and Mr. Houze could bring that appeal to the attention of the court in connection with Mr. Holbrook's case. The court could consider consolidating the cases. Mr. Sapiro indicated the prosecutor had filed an appeal.

Action: The committee motion to deny Mr. Houze's *amicus curiae* request was passed with Mr. Hilton and Mr. Menashe opposing.

2. *ABA v. FTC/NYSBA v. FTC* (re: Gramm-Leach-Bliley Act)

Gerry Gaydos introduced the request for the OSB to file an *amicus curiae* brief in the case of *ABA v. FTC/NYSBA v. FTC*. The case challenges the federal government's authority to subject attorneys to the requirements of the Gramm-Leach-Bliley Act.

Action: The committee motion to approve the request passed unanimously.

3. General Political Update

Legislative Reception/Political Update

Mr. Gaydos thanked those who attended the bar's reception for legislators held the previous day. He also indicated those board members who are willing to make contributions could do so in their name and Susan Grabe would attend the event or deliver the contribution. The bar's bill to make revisions to the Bar Act, which also contains the PERS issue mentioned earlier, will be up early in February. Other bills are being tracked. Representative Dan Doyle resigned his position as co-chair of the Joint Ways and Means Committee due to irregularities in his campaign finance reports.

4. Additional Changes to ORS Chapter 9

Mr. Gaydos introduced the committee's motion to amend this bill to stipulate the lawyer's office does not need to be in Oregon for the client to make a claim with the Client Security Fund. Another change would allow the State

Lawyers Assistance Committee to participate in monitoring diversion under the new disciplinary procedure on that topic. Its participation would not be confidential.

Action: The committee motion to amend the bill passed unanimously.

5. Judicial Election Initiatives

Mr. Gaydos indicated the committee discussed two proposed initiatives regarding judicial elections. One would not allow the word “incumbent” in the listing of a judicial candidate. The other would create judicial districts in the state for election of Supreme Court and Court of Appeals judges. Because the deadline for challenging constitutional aspects of the measures was January 27, 2005, and comments on the ballot title were due January 28, 2005, Mr. Gaydos filed objections drafted by Sylvia Stevens, Mr. Yugler, and Ms. Eyeran in his own name.

Action: The committee motion to ratify the committee’s action passed unanimously.

9. Consent Agenda

Mr. Hilton added to the agenda a handout listing the Appointment Committee’s recommendations for vacancies to the UPL Committee, CPA Joint Committee, Procedure and Practice Committee, Uniform Criminal Jury Instructions Committee, Public Service Advisory Committee, State Lawyers Assistance Committee, CLE Committee, Affirmative Action Committee, Washington Yamhill LPRC, and Pro Bono Committee. The committee also recommended Chief Justice Wallace Carson for the University of Oregon Distinguished Service Award. Other items on the consent agenda included the Minutes of the November 19, 2004, board meeting; revisions to the Standard Section Bylaws; and the final CLE Committee Charge.

Action: Mr. Hilton moved, Mr. Hill seconded, and the board unanimously approved the Consent Agenda with Mr. Hilton’s additions. Ms. Cook will draft a letter of recommendation for Chief Justice Carson’s nomination.