

Oregon State Bar
2006 House of Delegates Meeting

The Hilton Conference Center

66 East Sixth Ave.

Eugene, OR 97401

Saturday, September 16, 2006, 9:00 a.m.



Dear Oregon State Bar Member:

Enclosed is your agenda for the 2006 Oregon State Bar House of Delegates Meeting, which will begin at 9:00 a.m. on Saturday, September 16, 2006, at The Hilton Conference Center, 66 East Sixth Ave., Eugene, OR 97401. Please note that the meeting starts one hour earlier than in past years.

Although only delegates may vote on resolutions, all members are welcome and are encouraged to participate in the discussion and debate of the agenda items. If you are unable to attend, please contact one or more of your delegates to express your views on the items to be considered. Delegates are listed on the bar's webpage at www.osbar.org.

Matters that will be considered by the House of Delegates include:

- Continuation of the Affirmative Action Program.
- Amendments to the Oregon Rules of Professional Conduct.
- Delegate resolutions regarding post-trial contact with jurors, form pleadings, "true copy" certification, armed forces advertising, termination of the Leadership College, the fee structure for online CLE publications subscription service, HOD approval of special assessments, renumbering the ORCPs, amendment of the House of Delegates Rules of Procedure and the Oregon State Bar Bylaws, adoption of a recent ABA opinion as the position of OSB, indigent defense funding, legal services funding, and opposition to two ballot measures.

The full text and explanatory statements for all resolutions are enclosed.

I also encourage you to attend other great events to be held in conjunction with this year's House of Delegates meeting, including:

- The President's Reception at the Valley River Inn at 6:00 p.m. Friday, September 15, 2006.
- The Affirmative Action Program's September 15, 2006, CLEs and evening event at the Valley River Inn (see the OSB website at www.osbar.org for additional details).
- The Affirmative Action Program presentation prior to the House of Delegates meeting - 8:00 a.m. Saturday, September 16, 2006 at The Hilton Conference Center

If you have questions concerning the House of Delegates meeting, please contact Teresa Wenzel, Executive Assistant, at 503-431-6386, by e-mail at twenzel@osbar.org, or toll-free inside Oregon at 800-452-8260, extension 386; or Alecia Cox, Administrative Assistant, at 503-431-6309, by e-mail at acox@osbar.org, or toll-free inside Oregon at 800-452-8260, extension 309 (in Oregon only).

I look forward to seeing you in Eugene!

A handwritten signature in black ink, appearing to read "Dennis P. Rawlinson". The signature is stylized with a large, sweeping initial "D" and "R".

Dennis P. Rawlinson
OSB President

OREGON STATE BAR
2006 House of Delegates Meeting
The Hilton Conference Center
66 East Sixth Ave.
Eugene, OR
9:00 a.m., Saturday, September 16, 2006
Presiding Officer: Dennis P. Rawlinson, OSB President

Agenda

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| <p>1. Call to Order
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<i>The Honorable David Gernant, Parliamentarian</i></p> <p>3. Report of the President
<i>Dennis P. Rawlinson, OSB President</i></p> <p>4. Adoption of Final Meeting Agenda
<i>Dennis P. Rawlinson, OSB President</i></p> <p>5. Comments from the Chief Justice of the Oregon Supreme Court
<i>Paul J. DeMuniz, Chief Justice, Oregon Supreme Court</i></p> <p>6. Report of the Board of Governors Budget and Finance Committee
<i>Albert A. Menashe OSB President-elect and Chair, Board of Governors' Budget and Finance Committee</i></p> <hr/> <p style="text-align:center">Notice of 2007 Membership Fees</p> <hr/> <p>7. Notice of 2007 Membership Fees Page 4
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<i>Presenter: Albert A. Menashe, OSB President-elect and Chair, Board of Governors' Budget and Finance Committee</i></p> <p>16. Opposes Judicial Districting Ballot Initiative (Board of Governors Resolution No. 5) Page 13-14
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Notice of 2007 Membership Fees

7. 2007 Membership fees and Assessments

Pursuant to ORS 9.191(1), notice is given that the 2007 membership fees and assessments shall be as follows (subject to the outcome of Board of Governors Resolutions No. 2):

1. Active Members.

A. For members admitted in any jurisdiction before January 1, 2007: \$447.00 for the basic membership fee; \$30.00 for the Affirmative Action Program fee; and \$5.00 for the Client Security Fund assessment; for a total of \$482.00.

B. For members admitted in any jurisdiction before January 1, 2007, who fail to pay their active fees and assessments of \$482.00 by the due date: \$532.00.

C. For members admitted in any jurisdiction on or after January 1, 2005: \$383.00 for the basic membership fee; \$15.00 for the Affirmative Action Program fee; and \$5.00 for the Client Security Fund assessment; for a total of \$403.00.

D. For members admitted in any jurisdiction on or after January 1, 2005, who fail to pay their active fees and assessments of \$403.00 by the due date: \$445.00.

E. For those members admitted in Oregon in 2007, the fees shall be apportioned. The Client Security Fund assessment of \$5.00 shall be paid in full by each new admittee.

F. For those members who pass away in 2007, the fees shall be apportioned upon request of appropriate representatives. The Client Security Fund assessment of \$5.00 and the increase of fees due to payment made after the due date shall not be included in the apportioned refund.

2. Active Pro Bono and Active Emeritus Members.

A. For members who qualify under Bar Bylaw 6.101 for Active Pro Bono or Active Emeritus membership: \$110.00 for the basic membership fee and \$5.00 for the Client Security Fund assessment, for a total of \$115.00.

B. For Active Pro Bono or Active Emeritus members who fail to pay their fees and assessments of \$115.00 by the due date: \$140.00.

3. Inactive Members.

A. The 2007 membership fee for inactive members shall be \$110.00.

B. For those inactive members who fail to pay their fees of \$110.00 by the due date: \$135.00.

4. Exemptions:

(1) Members who were admitted to practice law in Oregon prior to January 1, 1957, are exempt from the payment of all membership fees and assessments.

(2) Members who are on active military duty in compliance with the terms of ORS 408.450 are exempt from the payment of active membership fees and assessments. Members who are in voluntary programs serving the national interest or the legal profession within the meaning of Bar Bylaw 6.6 are exempt from the payment of active membership fees and assessments. The payment of membership fees may also be waived in cases of hardship as defined by Bar Bylaw 6.5.

5. Payment Date: All fees and assessments shall be paid simultaneously, in one remittance, not later than the due date, or within 60 days of date of admission to the Oregon State Bar, whichever occurs last. The due date for 2007 membership fees is Wednesday, January 31, 2007.

6. Definitions: Apportioned fees pertain only to those members admitted in Oregon or who passed away during calendar year 2007. If the member is admitted or passes away in January, the apportioned fee or refund, as the case may be, shall be 12/12; February shall be 11/12; ...; December shall be 1/12. The calculation shall be rounded up to the nearest dollar for each fee allocation.

*Presenter: Albert Menashe
OSB President-elect and
Chair of the Board of Governors'
Budget and Finance Committee*

Items with Financial Impact

8. Continue the Affirmative Action Program (Board of Governors Resolution No. 1)

Whereas, the mission of the OSB includes access to justice as part of our common purpose as lawyers; and

Whereas, access to justice includes the availability of legal counsel that reflects the diverse population of Oregon; and

Whereas, increasing access to justice also increases public confidence and trust in the legal profession; and

Whereas, the OSB can increase opportunities for law students who experience or have experienced barriers to access to justice based on economic disadvantage, disability, ethnicity, gender, race, sexual orientation, etc.;

Whereas, the OSB has developed a nationally recognized Affirmative Action Program, adopted in 1974 and reauthorized in 1991, which provides diverse law students and new graduates with the necessary tools to become successful members of the bar; and

Whereas, the Affirmative Action Program has specifically achieved the following since its inception and is helping to make our profession more accessible to all Oregonians:

- Minority lawyers in Oregon increased from 27 in 1974 (.5% of the membership) to 701 in 2005 (5.49% of the membership);
- 94 legal employers have participated in the Public Honors Fellowship Program and first year internship programs;
- As many as 100 employers have annually sought to hire clerks in the Clerkship Stipend Program;
- AAP programs substantially benefit Oregon law schools and the bar by helping to recruit out-of-state prospective students who become Oregon lawyers;
- OLIO (Opportunities for Law in Oregon), an ethnic minority law student recruitment/retention strategy, has been lauded as a national role model and also includes non-ethnic minority students committed to supporting diversity in the classrooms and in the bar;

Whereas, the racial and ethnic diversity of the bar still lags significantly behind Oregon's 10% minority population; and

Whereas, the Affirmative Action Program has been funded by Oregon State Bar members through a \$30 per year per member assessment; and

Whereas, the members of the OSB support continuation of the Affirmative Action Program's progress; now therefore be it

Resolved, That, the Affirmative Action Program assessment of \$30.00 per member per year be continued for the period January 1, 2007 through December 31, 2021.

Presenter: Chief Justice Paul J. De Muniz
Oregon Supreme Court

Proponent's Statement

The Board of Governors recommends passage of the resolution reauthorizing the Affirmative Action Program (AAP) for a period of 15 years. The requested assessment maintains the current amount of \$30.00 for members with active membership for two or more years and \$15 for members with active membership for less than two years (new lawyers fees are reduced for two years).

The program has successfully achieved an increase in lawyers of diverse backgrounds that is 18 times greater than the increase in the membership of the bar as a whole over the past 30 years. The board believes that the diversity of the legal profession is a value. Until a diverse set of lawyers is present at every level of the profession – partners in firms, judges both state and federal, etc., there is still work to be done. In addition, clients are increasingly demanding to work with lawyers who reflect an increasingly diverse population.

While the initial program was directed solely at members of four ethnic groups, in 1998 eligibility for AAP programs was split—anyone (regardless of ethnicity) who could help advance the program's mission was eligible to apply for programming that contained a financial component (stipend, wage, grant, fellowship). Opportunities for Law in Oregon (OLIO) was created at the same time as an ethnic minority law student recruitment/retention strategy. Direct program expenses for OLIO were paid for through non-member resources (grants, etc.) Beginning in 2005, the eligibility requirement for OLIO was opened to non-ethnic minority law students who supported OLIO's mission.

Today, the AAP's program components are open to anyone who supports the program's mission and has experienced barriers to access to justice based on economic disadvantage, disability, ethnicity, gender, race, sexual orientation, etc.

9. Mileage Reimbursement for Attending Annual House of Delegates Meeting (House of Delegates Resolution No. 1)

Whereas, Under Bar Bylaws Section 7.5, most expenses of certain Bar members are reimbursed when that member is conducting certain Bar business;

Whereas, The Oregon State Bar and its membership would benefit from active involvement on the House of Delegates by more attorneys;

Whereas, The majority of the Oregon State Bar's 12,500+ members have not been involved in the governance process of the Oregon State Bar;

Whereas, Elections for the House of Delegates are sometimes uncontested;

Whereas, Many House of Delegates members do not attend every annual House of Delegates meeting during their terms in office;

Whereas, The time and cost of traveling to and from the annual House of Delegates meeting discourages many attorneys from running for election to HOD and/or attending HOD meetings;

Whereas, Oregon stretches over 300 miles from the Columbia River to the California border, and 375 miles from Brookings to Baker City;

Whereas, Bylaws Subsection 7.501(b) allows travel reimbursement at the allowable IRS rate for certain members attending certain functions;

Whereas, Providing a travel reimbursement to members of the House of Delegates who attend the annual House of Delegates meeting would not only defray some of the attendance cost thereof, but would also send a message to the entire membership that their involvement is needed and wanted; now therefore be it

Resolved, That, the House of Delegates of the Oregon State Bar does hereby direct the Board of Governors to amend Bylaws Section 7.5 by deleting those provisions in ~~strikeout~~ and adding those provisions in **underlined bold**, to read as follows and to make said amendment effective immediately so as to include the 2006 House of Delegates meeting:

Subsection 7.500 General Policy

(a) Bar employees and members of the Board of Governors, State Professional Responsibility Board, Disciplinary Board, New Lawyers Division Board or any other special task force or commission named by the Board of Governors will be reimbursed for their expenses in accordance with this policy when acting in their official capacities. Expenses of spouses or guests will not be reimbursed except as specifically approved by the Board of Governors. The bar must receive requests for expense reimbursement no later than 30 days after the expense has been incurred. If an expense reimbursement form is not submitted within 30 days after the meeting, it must be submitted not later than 45 days after year-end and include justification as to why it was not timely submitted. If these two requirements are not met, reimbursement will not be paid. Supporting documentation in the form of original receipts or copies of original receipts must be submitted with all requests for reimbursement of expenses while acting on official bar business.

(b) All members of the House of Delegates who attend the annual House of Delegates meeting will be eligible for mileage reimbursement, regardless [of] the means of transportation utilized. The rate applied will be the allowable IRS rate for use of a personal automobile. The mileage will be calculated for the round trip from the HOD member's office address to the address where the annual HOD meeting is held. All mileage over 100 miles and under 1001 miles will be reimbursed if the HOD member submits a claim therefore no later than 30 days after the annual House of Delegates meeting. Any individual who qualifies to be reimbursed for the same House of Delegates meeting pursuant to Subsection 7.500(a) above will not be eligible to receive reimbursement under this subsection.

Subsection 7.501 Eligible Expenses

Eligible reimbursable expenses while on official business **pursuant to Subsection 7.500(a)** above include the following:

(a) **Out-of-State Travel:** Out-of-state travel for board members will be reimbursed for those persons and meetings set forth in the bar's annual budget or as otherwise approved by the Board of Governors. Employees must obtain prior approval of the Executive Director prior to traveling out-of-state.

(b) **Transportation:** Use of a personal automobile is reimbursed at the allowable IRS rate. Airfare is reimbursed at the actual cost of coach fare unless the flight is at least three hours and an upgrade to business class can be obtained for \$100 or less. Actual cost of taxi, bus or other public transportation is reimbursable. Actual cost of car rental at economy car rate when other transportation is not readily available.

(c) **Lodging:** Actual cost for a moderately priced, double-occupancy room, except when the location of the meeting or conference requires other arrangements. Receipts for lodging must be attached to the reimbursement form.

(d) **Meals:** Reimbursement for meals will be made at actual cost of the meal provided that it meets the standard of reasonableness. A request for reimbursement for meals without receipts will be reimbursed according to the rates published under the Federal Travel Regulations as put out by the U.S. General Service Administration for federal government travel. Meals purchased for members of the bar or other persons in the course of official bar business will be reimbursed at actual cost with submission of receipts and an explanation provided it meets the standard of reasonableness. Official dinners, meetings or banquets of the bar which eligible persons and their spouses or guests are expected to attend will be paid for by the bar and, if not, will be eligible for reimbursement.

(e) **Miscellaneous Costs:** Telephone, postage, office expense, registration fees and other legitimate business expenses will be reimbursed at actual cost with submission of receipts or an explanation of the business purpose of the expense. Bar funds must not be used to pay the cost of alcoholic beverages.

*Presented by: Diane L. Gruber,
House of Delegates, Region 6*

Financial Impact

Proponent:

The cost will be between \$3,500 and \$5,000 per annual HOD meeting.

Board of Governors:

The bar's estimate of the cost is considerably higher. Assuming a meeting in Portland, where only delegates from outside the metropolitan area would be reimbursed, it is estimated that 76 delegates would travel more than 100 miles (with a cap of 1,000 miles) round-trip, for a total of 34,854 miles. At the current IRS rate of \$0.445/mile, the cost would be \$15,510. For meetings held outside the Portland metropolitan area, the cost of reimbursement could be higher because more delegates would be entitled to reimbursement.

10. Termination of OSB Leadership College (House of Delegates Resolution No. 6)

Whereas, The OSB Leadership College's mission statement states "The mission of the Leadership College is to recruit, train and retain emerging leaders for the legal community and the Oregon State Bar;"

Whereas, The membership has felt increasingly alienated from the leadership of the Oregon State Bar in recent years;

Whereas, The Leadership College creates an even wider gap between the membership and those who make decisions directly impacting the practice of law for all members;

Whereas, The Leadership College was established in 2005 without the input or vote of the membership or of the House of Delegates;

Whereas, In 2005 the House of Delegates voted to accept the Board of Governors' resolution to raise annual membership dues by \$50, without knowledge that some of the increased dues would be used to fund the Leadership College;

Whereas, The annual budget for the Leadership College is \$28,000 to \$30,000;

Whereas, Future leaders arise naturally through their interest in Bar governance, and via the election process wherein their peers choose them, and should not be imposed upon the membership;

Whereas, The OSB Leadership College has a 13-member Advisory Board who were not elected by the membership, who in turn chose the 22 fellows for the 2006 OSB Leadership College;

Whereas, The 22 chosen fellows receive Continuing Legal Education credits at no cost to them;

Whereas, The membership as a whole should not be required to fund educational benefits not offered to all members;

Whereas, Leaders elected by the entire membership, or a subset thereof, should be the only members singled out for educational benefits not offered to all members; therefore, be it

Resolved, That the Leadership College shall be terminated not later than December 31, 2006.

*Presenter: Diane L. Gruber
House of Delegates, Region 6*

Financial Impact

Proponent:

Saves the entire cost of the Leadership College, making the funds available of other uses.

Board of Governors Statement

The mission of the Oregon State Bar Leadership College is to recruit, train and retain emerging leaders for the legal community and the Oregon State Bar. The Leadership College Advisory Board (LCAB) is responsible for the overall mission and goals of the College by developing program curriculum, participating in the College sessions, overseeing Fellows recruitment and evaluating results. The LCAB recruits the College participants or Fellows, ensuring that the College reflects the diversity of the membership of the bar as to geographic location, gender, ethnicity, area of practice, and leadership experience. Fellows commit to a one-year program consisting of five three-hour sessions. Curriculum focuses on general leadership development, diversity, communication skills and professionalism. The Leadership College is available at no cost to the Fellows. The 21 Fellows participating in the 2006 College were selected from 49 applicants and range in age from 30-66 years. The 2006 Leadership College has a budget of \$28,000.

Items with Legislative Impact

11. Direct the Board of Governors to Establish a Requirement for Special Assessments above Normal Bar Dues (House of Delegates Resolution No. 9)

Whereas, a special assessment in addition to normal bar dues is an extraordinary benefit to a particular program and an extraordinary burden on members of the bar;

Whereas, A special assessment should be considered by the membership and debate the pros and cons of the issue;

Whereas, A debate of the full membership is most likely to bring all points of view in order for the members to make an informed and wise vote;

Whereas, a vote of the entire membership is the only just and democratic way for a voluntary professional association to make major decisions bearing a direct cost to each member for a specific purpose; and

Whereas, ORS 9.139(1) (b) provides that the House of Delegates may “direct the board of governors as to future action,” and ORS 9.139(2) provides that “the board of governors is bound by a decision of the house of delegates made in the manner prescribed by subsection (1) of this section;” now, therefore, be it

Resolved, That no special assessment above normal bar dues be created without an affirmative vote of a majority of the voting membership of the Oregon State Bar setting the amount and duration of such assessment.

*Presenter: Peter J. Mozena
House of Delegates, Region 5*

Proponent’s Statement

Certain assessments have been imposed on top of the membership dues for specific purposes.

Board of Governors’ Statement

Implementation of this resolution would require legislative changes to several statutes. ORS 9.191 provides that “the annual membership fees to be paid by member of the Oregon State Bar shall be established by the Board of Governors” and that “any increase in annual membership fees over the amount established for the preceding year must be approved by a majority of delegates of the house of delegates voting thereon.”

The Client Security Fund assessment is established pursuant to ORS 9.645, which provides that “to establish and maintain a client security fund, the board of governors may require an annual payment by each active member of the state bar.”

The PLF “premium” is a statutory assessment established by the Board of Governors pursuant to ORS 9.080(2)(a): “...The board shall have the authority to assess each active member of the state bar engaged in the private practice of law...for contributions to such fund...”

The only other assessment is the Affirmative Action Program assessment, which was established by the membership in 1977 and 1992.

12. Adopt Fairness in Compensation for Those Practicing Public Defense Law (House of Delegates Resolution No. 15)

Whereas, the United States and Oregon Constitutions and fundamental fairness require that all people charged with a criminal offense have a right to assistance by ethical and competent counsel;

Whereas, the United States and Oregon Constitutions require that all people charged with a criminal offense who are determined eligible for public defense counsel receive ethical and competent counsel compensated by the State;

Whereas, the United States and Oregon Constitutions, Oregon laws and fundamental fairness require that all people facing state court proceedings that may result in the deprivation of an individual’s constitutionally or statutorily protected right (such as parental rights) have a right to assistance by ethical and competent counsel paid by the state, if a court determines the person is eligible;

Whereas, ORS 151.216(1)(f)(C) requires Oregon’s Public Defense Services Commission to create a system for “[t]he fair compensation of counsel appointed to represent a person financially eligible for appointed counsel at state expense;”

Whereas, the compensation currently paid to those who provide court appointed representation to individuals entitled to public defense counsel is grossly unfair and below the lowest of market rates;

Whereas, the hourly rate for private bar, court-appointed attorneys was set in 1991 at \$40.00 and has not been raised since;

Whereas, rates paid to public defense contractors similarly have failed to even keep up with inflation and are far below a fair rate, with starting lawyer salaries as low as \$30,000 per year;

Whereas, the student loan debt and lack of loan forgiveness or assistance programs for public defense attorneys exacerbates the unfair compensation levels;

Whereas, for more than a decade, public defense contractors have been required to take ever increasing caseloads in order to receive additional compensation for their work;

Whereas, the low compensation and increases in workload have caused some attorneys to accept more public defense cases than they ethically should;

Whereas, this system of unfair compensation and increased workloads is creating a growing risk that those entitled to counsel appointed by and paid by the state will not receive constitutionally adequate representation; now therefore be it

Resolved, That, the Oregon State Bar take all appropriate actions to ensure that the State of Oregon, through its Legislature and the Public Defense Services Commission, fulfills its constitutional and statutory duties to provide for adequately funded public defense services;

2. That the Oregon State Bar, through its Board of Governors and staff, actively participate with the Public Defense Services Commission’s Office of Public Defense Services (OPDS) and the Oregon Criminal Defense Lawyers Association (OCDLA) in the establishment of a plan for achieving fair compensation for public defense providers.

3. That the Oregon State Bar, in concert with the OPDS and OCDLA, issue a progress report to the House of Delegates by November 10th, 2006.

*Presenter: Stephen D. Finlayson
President, Harney County Bar Association*

Proponent’s Statement

The funding for defense of indigent persons accused of crimes, alleged to be mentally ill, parents charged with child neglect facing the termination of their parental rights in family court, and children accused of delinquency or in need of court wardship has been chronically underfunded in Oregon. Payment for services, which was minimal when first set by the State, has remained relatively static, failing to provide for reasonable compensation for professional services, comparability with other government-paid attorneys, or cost of living increases.

Because of the low compensation for public defense providers and the lack of comparability of pay with other government-funded lawyers, present defense practitioners are leaving the field, and new practitioners who are otherwise interested and willing to work as court appointed counsel are financially unable to take on the burden of public defense practice.

The hourly rate for private bar, court-appointed attorneys in cases other than aggravated murder has remained at \$40 for over 15 years. The hourly rate for representation in death penalty cases has remained at \$55 for over 15 years. These rates were inadequate in 1991. \$40 per hour is the equivalent of \$25 per hour in 2005 dollars.

Rates paid to public defense contractors and public defender offices are increasingly inadequate to retain experienced attorneys and to attract new attorneys to this government service. Salaries for public defense attorneys are significantly less than those paid their counterparts in prosecutors’ offices and the Department of Justice.

Comparison of Compensation of Public Defense, Prosecutor and Government Lawyers (Excerpted from the Oregon State Bar Economic Survey, 2002)

Attorney Type	Average Salary	Median Salary	25 th Percentile	75 th Percentile	95 th Percentile
Public Defense	\$50,930	\$45,000	\$38,000	\$57,500	\$79,000
Public Prosecutor	\$66,499	\$63,504	\$50,000	\$84,000	\$118,800
Government Lawyer	\$68,512	\$65,000	\$49,925	\$85,000	\$118,000

Based upon the data above, a public defense lawyer with a median annual salary of \$45,000 per year would realize a percentage increase in salary of 41% if she were to receive the median salary of \$63,504 for prosecutors. A public defense lawyer with an average annual salary of \$50,930 would realize a percentage increase in salary of 30% if she were to receive the average salary of \$66,499 for prosecutors. Not only are there significant disparities in compensation on an annual basis. The cumulative effect of such disparities over years of public service is substantial.

Historically, minimal inflationary increases have been included in Legislative appropriations for public defense. This fact, coupled with increasing public defense caseloads, has resulted in the negotiation of public defense contracts that has relied primarily on increases in funding to local contractors being tied to contractors agreeing to accept appointment to represent more and more public defense clients.

The Oregon State Bar’s first indigent defense task force in the early 1990s was warned and noted that this contract negotiation strategy could not be maintained over time. More than ten years later, the impact of continuing to rely significantly on workload increases to generate additional income for contractors has been devastating – devastating in terms of attorney and other staff compensation levels, capital needs, caseloads per attorney and the adequacy of representation that realistically can be provided to those who are entitled to the same.

Other Resolutions

13. In Memoriam (Board of Governors Resolution No. 2)

Resolved, That the Oregon State Bar House of Delegates and members assembled stand for a moment of silence in honor of the members of the Oregon State Bar whose deaths have been reported since the 2005 House of Delegates Meeting (through August 4, 2006).

*Presenter: Linda K. Eyerman
Board of Governors, Region 5*

- Robert B. Abrams*
- Linda M. Algar*
- Helen F. Althaus*
- Debra L. Anderson*
- Henry J. Bailey, III*
- Peter R. Blyth*
- John A. Bryan*
- Derik Burkland*
- John Daniel Callaghan*
- Mitch Crew*
- The Honorable Ralph Currin*
- Mercedes F. Deiz*
- Mary Irene Duhaime*
- George J. Eivers*
- Philip Alan Erickson*
- John F. Fagan, Sr*
- Joseph F. Fliegel, Jr*
- Patricia D. Gaw*
- Elizabeth D. Geary*
- Armonica Marie Gilford*
- Orval O. Hager*
- Edward C. Harms, Jr*
- Judith Ann Hartmann*
- Allen M. Hein*
- The Honorable Stephen B Herrell*
- John L. Hiltz*
- Thomas C. Howser*
- George E. Juba*
- Donald S. Kelley*
- Robert B. Kerr*
- William A. Lang*
- Jill C. Lematta*
- Judith Lerner*
- Sidney I. Lezak*
- Ron P. MacDonald*
- Michael L. McDonough*
- R. Scott McGrew*
- Gregory E. Milnes*
- Frank E. Nash*
- Captain Barry G. O’Connell*
- Georgia D. Ouzts*
- Dale W. Pierson*
- Keith R. Pinkstaff*

*Charles O. Porter
Sumner C. Rodriguez
The Honorable Phillip J. Roth
Timothy Leo Ryan
Jay H. Safley
Benhardt E. Schmidt
Eugene G. Schuster
Herbert M. Schwab
Joel P. Scotti
William N. Stiles
Don G. Swink
Thomas K. Thorpe
Wayne A. Williamson
William B. Wyllie
William W. Wyse
Theodore D. Zacher*

14. Proposed Amendments to Oregon Rules of Professional Conduct (Board of Governors Resolution No. 3)

Whereas, The Board of Governors has formulated the following amendments to the Oregon Rules of Professional Conduct pursuant to ORS 9.490(1); and

Whereas, The Oregon State Bar House of Delegates must approve any changes in the rules of professional conduct before they may be presented to the Oregon Supreme Court for adoption pursuant to ORS 9.490(1); now, therefore, be it

Resolved, That, Oregon Rules of Professional Conduct be amended as set forth below and submitted to the Oregon Supreme Court for adoption.

RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

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

* * *

(6) to provide the following information in discussions preliminary to the sale of a law practice under Rule 1.17 with respect to each 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. A potential purchasing lawyer shall have the same responsibilities as the selling lawyer to preserve ~~confidences and secrets~~ 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.

* * *

RULE 1.9 DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless each affected client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9© that is material to the matter, unless each affected client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

(d) For purposes of this rule, matters are "substantially related" if (1) the lawyer's representation of the current client will injure or damage the former client in connection with the same transaction or legal dispute in which the lawyer previously represented the former client; or (2) there is a substantial risk that confidential factual information as would normally have been obtained in the prior representation of the former client would materially advance the current client's position in the subsequent matter.

* * *

RULE 1.10 IMPUTATION OF CONFLICTS OF INTEREST; SCREENING

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer or on Rule 1.7(a)(3) and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

* * *

RULE 1.13 ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows ~~facts from which a reasonable lawyer, under the circumstances, would conclude~~ that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, referral to the highest authority

that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) ~~if~~ despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

RULE 3.1 MERITORIOUS CLAIMS AND CONTENTIONS

In representing a client or the lawyer's own interests, ~~A~~ a lawyer shall not knowingly bring or defend a proceeding, assert a position therein, delay a trial or take other action on behalf of a client, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law, except that a lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration may, nevertheless so defend the proceeding as to require that every element of the case be established.

RULE 3.5 IMPARTIALITY AND DECOUM OF THE TRIBUNAL

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte on the merits of a cause with such a person during the proceeding unless authorized to do so by law or court order;

RULE 4.4 RESPECT FOR THE RIGHTS OF THIRD PERSONS; INADVERTENTLY SENT DOCUMENTS

(a) In representing a client or the lawyer's own interests, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, harass or burden a third person, or knowingly use methods of obtaining evidence that violate the legal rights of such a person.

RULE 7.1 COMMUNICATION CONCERNING A LAWYER'S SERVICES

(a) A lawyer shall not make or cause to be made any communication about the lawyer or the lawyer's firm, whether in person, in writing, electronically, by telephone or otherwise, if the communication:

(1) contains a material misrepresentation of fact or law, or omits a statement of fact or law necessary to make the

communication considered as a whole not materially misleading;

(2) is intended or is reasonably likely to create a false or misleading expectation about results the lawyer or the lawyer's firm can achieve;

(3) except upon request of a client or potential client, compares the quality of the lawyer's or the lawyer's firm's services with the quality of the services of other lawyers or law firms;

(4) states or implies that the lawyer or the lawyer's firm specializes in, concentrates a practice in, limits a practice to, is experienced in, is presently handling or is qualified to handle matters or areas of law if the statement or implication is false or misleading;

(5) states or implies ~~an ability that the lawyer or the lawyer's firm is in a position to influence improperly influence a government agency or official or to achieve results by means that violate these Rules or other law~~ an ability that the lawyer or the lawyer's firm is in a position to influence improperly influence a government agency or official or to achieve results by means that violate these Rules or other law any court or other public body or office;

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; ~~or~~

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

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

*Presenter: Sylvia Stevens
Oregon State Bar General Counsel*

Proponent's Statement

Rule 1.6

This is a housekeeping correction necessitated by inadvertently retaining the words "confidences and secrets" when importing paragraph (b)(6) of this rule from former DR 4-101 in to Oregon RPC 1.6, which speaks of a lawyer's duty to preserve the confidentiality of "information relating to the representation of a client." This amendment makes no substantive change in the rule; rather it merely corrects a potentially confusing variation in language.

Rule 1.9

Oregon RPC 1.9 follows the analogous ABA Model Rule and prohibits representation adverse to a former client if the matters are “substantially related.” Former DR 5-105(c) referred to matters that were “significantly related.” The drafters and others who have studied the new rule, including the Legal Ethics Committee, do not believe there is a meaningful distinction between the two phrases. However, unlike its predecessor, Oregon RPC 1.9 does not contain a definition of “substantially related.” For that, one must look at the Comment to Model Rule 1.9, case law or other authorities.

Comment [3] to ABA Model Rule 1.9 reflects the rule’s principal focus on the use of information learned in the prior representation: “Matters are ‘substantially related’ for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client’s position in the subsequent matter.” However, because Oregon has not adopted any comment to its rules, the Legal Ethics Committee and the BOG believe the understanding of Oregon RPC 1.9 would be enhanced by adding a definition of “substantially related” to Rule 1.0 (the definitions rule).

The first part of the proposed new language comes largely from former DR 5-105(c)(1) to retain the prohibition against undercutting the work done for the former client regardless of whether it involves the use of confidential information. The second part of the new definition comes from the comment to ABA Model Rule 1.9 and makes it clear that only confidential factual information gives rise to a conflict, rather than all information learned in the prior representation.

Rule 1.10

Paragraph (a) of this rule is identical to ABA Model Rule 1.10(a). It exempts from the general rule of imputation a conflict that is based on a “personal interest of the prohibited lawyer,” provided the personal interest of the prohibited lawyer “does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.”

The “personal interest” prohibition applies clearly to conflicts existing under Oregon RPC 1.7(a)(2), pursuant to which a lawyer has a conflict when there is a “significant risk” that the lawyer’s representation of a current client will be “materially limited” by a “personal interest of the lawyer.” It has been suggested, however, that Oregon RPC 1.10(a)’s exemption for a “personal interest conflict” does not clearly encompass the spousal or family conflict expressed in 1.7(a)(3).

Spousal and family conflicts were covered in former DR 5-101(A)(2), and were specifically exempted from the vicarious disqualification provisions of former DR 5-105(G). Former DR 5-101(A)(2) was derived from the language of ABA Model Rule 1.8(i) in 1997. The ABA repealed its spouse-conflict rule in 2002, and instead amplified the comments to MR 1.7 to make it clear that spouse and family conflicts were a type of “personal interest” under the rule.

By retaining the specific spousal conflict rule, the drafters of the Oregon RPC were following their mandate of not making substantive changes to the rules governing lawyer conduct in Oregon. Moreover, because the Oregon RPCs don’t include official comments, there was concern that the spouse and family conflict prohibition would not be clear unless it was stated expressly in the new rule. This amendment will make it clear

that spousal and family conflicts are exempt from the imputation otherwise required under Rule 1.10.

Rule 1.13

It was recently brought to staff’s attention that the version of Oregon RPC 1.13 approved by the HOD and adopted by the Supreme Court in 2004 is different than the version approved by the HOD in 2003. Because the discrepancy was not noted in 2004, it was not brought to anyone’s attention that the HOD was voting on a different version than it had previously approved.

The amendment would require a lawyer to take action mentioned in paragraph (b) only when the lawyer “knows” that the specific circumstances exist. The current language standard is based on the conclusions of “a reasonable lawyer, under the circumstances.” The change will assist lawyers in knowing when the duty to act arises under the rule. The other changes in paragraph (b) and in paragraph (c) are to correct clerical errors.

This change will conform the rule to the most current version of the ABA Model Rule, as the HOD originally intended, with the exception of paragraph (g), which deviates slightly to clarify a point of possible confusion identified by the Supreme Court.

Rule 3.1

Oregon RPC 3.1 deviates somewhat from the analogous ABA Model Rule, principally by the addition of the phrase “on behalf of a client.” Nevertheless, the Model Rule is generally interpreted to apply only to representational conduct and Comment [2] to Model Rule 3.1 refers to “action taken for a client.”

The additional phrase was included in Oregon RPC 3.1 in part so that the rule would more closely track former DR 7-102(A)(1) (prohibiting a lawyer from filing suit, asserting a defense or taking other action on behalf of the lawyers’ client that would serve merely to harass or maliciously injure another). At the same time, the introductory phrase of former DR 7-102(A) indicated that all of the provisions of the rule applied not only when a lawyer was representing a client, but also when “representing the lawyer’s own interests.” The internal inconsistency in former DR 7-102(A) was the result of a 1991 amendment intended to alert practitioners to the court’s interpretation of the rule in *In re Glass*, 308 Or 297, 779 P2d 612 (1989) (lawyer violated rule by filing application for an assumed business name for the sole purpose of defeating a creditor’s capacity to sue him) in which the court said: “[t]he reference in the rule to ‘representation of a client’ is not intended to grant a license to lawyers to abuse procedures for their own personal advantage.”

While there is not reason to believe the Supreme Court would reach a different conclusion under Oregon RPC 3.1, the proposed amendment will provide notice to practitioners of the reach of the rule.

Rule 3.5

Unlike its predecessor, *former* DR 7-110(B), the prohibition on ex parte contact in Rule 3.5(b) is not limited to contact relating to the “merits of the cause.” This change created considerable confusion, as it suggested that the rule could be violated by even innocent contact with a judge that had nothing to do with the merits of a matter. Various alternatives were considered, but ultimately the consensus was that the best approach would be to restore the “on the merits of a cause” language from *former* DR 7-110(B). The meaning of the phrase is not necessarily clear and can be a trap for the unwary. As the

court held in *In re Schenck*, 320 Or 94, 879 P2d 863(1994), interpreting former DR 7-110(B), a communication on a purportedly procedural matter may still relate to the merits of a case.

Rule 4.4

Like Oregon RPC 3.1, Oregon RPC 4.4(a) by its terms also appears to apply only to conduct that occurs in the course of representing a client. This rule had no direct counterpart in the Oregon Code, although it resembles former DR 7-102(A)(1), which prohibited action taken merely to harass if it was done “in the lawyer’s representation of a client or in representing the lawyer’s own interests.”

As discussed above, former DR 7-102(A) originally applied only to conduct in the representation of a client, but was amended to apply the prohibition to lawyers acting in their own interests. Oregon was apparently unique in adding that clarifying language to DR 7-102(A). Similarly, it does not appear that any of the jurisdictions that have adopted Model Rule 4.4(a) have included the “in the lawyer’s own interests” language. Nevertheless, as did the Oregon Supreme Court in *In re Glass*, there are at least two other jurisdictions (Indiana and South Dakota) where Rule 4.4(a) has been applied to lawyers who abused the legal process to advance their own personal interests. In both cases, the lawyer was also charged with violating the prohibition in Rule 8.4 against conduct prejudicial to the administration of justice.

If Oregon RPC 3.1 is amended to more precisely continue the scope of former DR 7-102(A), the same change should be made here for consistency.

Rule 7.1 and Rule 8.4

The proposed amendments to these two rules must be considered together.

At the time it was supplanted by the Oregon RPCs, the Oregon Code of Professional Responsibility contained two prohibitions against stating or implying the ability to exert improper influence on government. Former DR 1-102(A)(5) made it misconduct for a lawyer to “state or imply an ability to influence improperly a government agency or official.” That rule was made part of the Oregon Code in 1986 and was drawn from the then-version of ABA Model Rule 8.4(e). (In 2002, the Model Rule was amended to add “or to achieve results by means that violates the Rules of Professional Conduct or other law.”)

When former DR 1-102(A)(5) was added to the Code, a similar prohibition already existed in former DR 2-101(A) relating to advertisements. It prohibited a statement that was “intended or is reasonably likely to convey the impression that the lawyer is in a position to improperly influence any court or other public body or office.” In 1992, DR 2-101(A) was amended slightly to prohibit a communication that “states or implies that the lawyer or the lawyer’s firm is in a position to improperly influence any court or other public body or office.”

It was not clear to the drafters of the Oregon RPCs whether the duplication of the prohibition was inadvertent or purposeful. They questioned the need for the same rule in two places and recommended retaining it as an advertising prohibition in Oregon RPC 7.1(a) while deleting it from the general misconduct provisions of Oregon RPC 8.4. The drafters recommended using the broader language of ABA Model Rule 8.4(e) in Oregon RPC 7.1(a)(5). The BOG, the HOD and the Supreme Court agreed, adopting Oregon RPC 7.1(a)(5) as proposed.

The unforeseen consequence of this drafting choice is that the Oregon RPCs do not prohibit a lawyer from stating or implying the ability to improperly influence government except in the context of advertising. By way of example, the Oregon RPCs would not appear to prohibit a lawyer from threatening to use the lawyer’s influence with the district attorney, the mayor and myriad other local officials in a demand for payment of a client’s debt, since the statement is not a communication about the lawyer or the lawyer’s services within the meaning of Oregon RPC 7.1.

To remedy this gap, both RPC 7.1(a)(5) and Oregon RPC 8.4(a) must be amended. The proposal is to move the language that is now RPC 7.1(a)(5) to RPC 8.4(a)(5) and amend RPC 7.1(a)(5) to the language of former DR 2-101(A)(5). It is worth noting that, in relaying its willingness to adopt the proposed Oregon RPCs, the Supreme Court suggested that Oregon’s advertising rules (retained in Oregon RPC 7.1 through 7.5) may be unconstitutional. The LEC has discussed the possibility of drafting amendments to those rules but has not as yet undertaken to do so.

15. Proposed Revised Statement of Professionalism (Board of Governors Resolution No. 4)

Whereas, as members of the Oregon State Bar we belong to a profession devoted to serving both the interests of our clients and the public good, and

Whereas, in our roles as officers of the court, as counselors, and as advocates, we aspire to a high professional standard of conduct, and

Whereas, in 1990 the Oregon State Bar membership approved a Statement of Professionalism that was adopted by the Supreme Court of Oregon in 1991, and

Whereas, the Oregon Bench/Bar Commission on Professionalism has determined that a simpler and more inspirational Statement of Professionalism will be more effective in promoting the values of professionalism, and

Whereas, the Oregon Bench/Bar Commission on Professionalism has prepared a new Statement of Professionalism for the benefit of the bar and bench in Oregon; now therefore be it

Resolved, that the current Statement of Professionalism be replaced with the new Statement of Professionalism as set forth hereinafter, and submitted to the Supreme Court for adoption.

OREGON STATE BAR STATEMENT OF PROFESSIONALISM

As lawyers, we belong to a profession that serves our clients and the public good. As officers of the court, we aspire to a professional standard of conduct that goes beyond merely complying with the ethical rules. Professionalism is the courage to care about and act for the benefit of our clients, our peers, our careers, and the public good. Because we are committed to professionalism, we will conduct ourselves in a way consistent with the following principles in dealing with our clients, opposing parties, opposing counsel, the courts, and the public.

- I will promote the integrity of the profession and the legal system.
- I will work to ensure access to justice for all segments of society.
- I will avoid all forms of discrimination.

- I will protect and improve the image of the legal profession in the eyes of the public.
- I will promote respect for the courts.
- I will support the education of the public about the legal system.
- I will work to achieve my client’s goals, while at the same time maintain my professional ability to give independent legal advice to my client.
- I will always advise my clients of the costs and potential benefits or risks of any considered legal position or course of action.
- I will communicate fully and openly with my client, and use written fee agreements with my clients.
- I will not employ tactics that are intended to delay, harass, or drain the financial resources of any party.
- I will always be prepared for any proceeding in which I am representing my client.
- I will be courteous and respectful to my clients, to adverse litigants and adverse counsel, and to the court.
- I will only pursue positions and litigation that have merit.
- I will explore all legitimate methods and opportunities to resolve disputes at every stage in my representation of my client.
- I will support pro bono activities.

*Presenter: Albert A. Menashe
OSB President-elect and*

Chair, Board of Governors’ Budget and Finance Committee

**16. Opposes Judicial Districting Ballot Initiative
(Board of Governors Resolution No. 5)**

Whereas, Oregon Revised Statutes 9.080(1) charges the Board of Governors to “direct its power to the advancement of the science of jurisprudence and the improvement of the administration of justice”; and

Whereas, the Oregon State Bar’s purposes include promoting the application of the knowledge and experience of the profession to the public good; and

Whereas, currently all Oregon Supreme Court justices and Court of Appeals judges are elected by statewide vote, and the only residency requirement for Oregon Supreme Court judges is that they “shall have resided in this state at least three years next preceding their election or appointment”, and for Court of Appeals judges is that they “shall be an elector of the county of the residence of the judge”; and

Whereas, Ballot Measure 40, if approved by the voters, would amend the Oregon Constitution to require the creation of judicial districts established by the Oregon Legislative Assembly in 2007; and

Whereas, this measure would require that an appellate court candidate must have been a resident of the appropriate court district for a period of at least one year before election or appointment and must remain a resident throughout the term of office; and

Whereas, this measure would require that the state be divided into seven districts for the purpose of electing judges of

the Oregon Supreme Court with one judge elected by the electors of each district; and

Whereas this measure would require that the state be divided into five districts for the election of judges of any other appellate court, other than the tax court, with two judges elected by the electors of each of the districts; and

Whereas, this measure would potentially require judges to maintain dual residences, incurring additional housing and travel expenses; and

Whereas, this measure also would require reapportionment of judicial districts when legislative districts are reapportioned; and

Whereas, notwithstanding section 18, Article II of the Oregon Constitution, this initiative would provide that a judge who has been assigned to a district is subject to recall by the electors of the district to which the judge is assigned and not by the electors of the district existing before the latest reapportionment; and

Whereas, individuals from all part of the state now serve on the Oregon Supreme Court and Court of Appeals, and governors appoint successor judges to vacancies from all over the state, and this measure would arbitrarily prevent the most highly qualified candidates from being elected or appointed if their district slots are already filled; and

Whereas, this measure would have a disproportionate impact on the more populated regions of the state because fewer highly qualified candidates would be eligible to run for Oregon Supreme Court or Court of Appeals positions; and

Whereas, it is in the best interests of the public and advances the efficient administration of justice to assure that judicial vacancies on the Oregon Supreme Court and the Court of Appeals are filled by the most highly qualified members of the legal profession regardless of their place of residence in the state; now, therefore be it

Resolved, That:

1. The Oregon State Bar opposes enactment of Ballot Measure 40; and
2. All members of the Oregon State Bar are urged to communicate to their clients, family, staff members, and others the harmful effect that this measure would have on the efficient functioning of the Oregon Supreme Court and Court of Appeals.

*Presenter: Gerry Gaydos
Board of Governors, Region 2*

Proponent’s Statement

The Board of Governors believes Ballot Measure 40 would impact the efficient functioning of the Oregon Supreme Court and the Court of Appeals if approved by the electorate in November 2006. The measure would amend the Oregon Constitution to require the creation of judicial districts based on population. The measure divides the state into seven districts, based on population, for the purpose of electing Supreme Court judges; electors within each district elect only one Supreme Court judge. The measure also divides the state into five districts for election of judges of other appellate courts created by law (except the Tax Court), with two judges elected from each district. The measure also requires all Oregon Supreme Court judges and Court of Appeals judges elected or appointed to office to reside within their districts.

The requirement that Oregon Supreme Court and Court of Appeals judges reside within their districts would result in judges incurring significant expenses related to travel to and from their respective districts to the Capitol. For some judges, the time involved in their “commute” may be so significant that they are forced to either maintain dual residences or spend significant amounts of time away from their home and families. There would also likely be significant costs associated with this commute, although no estimate of the costs is presently available. Also, the collegiality, discussion and debate facilitated by judges sharing adjacent office space would be severely curtailed.

In addition, the measure requires reapportionment of judicial districts when legislative districts are reapportioned. The reapportionment becomes operative on the next date on which a judge will commence a term of office, and any judge whose term continues through the next date on which a judge will commence a term of office shall be specifically assigned to a district.

However, notwithstanding section 18, Article II of the Oregon Constitution (which provides that public officers in Oregon are subject to recall by the electors of the state or of the electoral district from which the public officer is elected), any judges assigned to a district would be subject to recall by the electors of the district to which the judge is assigned and not by the electors of the district existing before the latest reapportionment.

This measure would potentially foreclose opportunities for highly qualified candidates to run for Oregon Supreme Court and Court of Appeals positions. It could also subject a standing judge who is assigned to a district to recall by a subset of the electorate, only those voters in the specific district.

This measure could politicize the judicial selection process by encouraging the belief that a judge would perhaps apply the law differently based on the region of the state in which the judge resides. However, judges swear an oath of office to support the Constitution of the United States and the Constitution of the State of Oregon, and affirm that they will faithfully discharge the duties of their office of the to the best of their ability and will not apply the laws or constitutions differently based on the judicial district from which the judge is elected.

Approval of the proposed resolution would put the Oregon State Bar on record as opposed to this measure based on its adverse effects on Oregon’s justice and court systems if enacted into law.

17. Elimination of Rule Prohibiting Post-trial Contact with Jurors (House of Delegates Resolution No. 2)

Whereas, most other jurisdictions allow contact by Trial Counsel with Jurors Post-Trial;

Whereas, such feedback is of considerable educational value to Counsel;

Whereas, the benefits of such free speech permissive contact outweighs the present blanket prohibition; now therefore be it;

Resolved, That, the House of Delegates recommend and encourage the Board of Governors to seek modification of UTCR 3.120 [Communication with Jurors] so as to permit conditionally, rather than prohibit, Post-Trial contact by Counsel on condition that such contact does not badger, coerce, or harass Jurors. In other words, the House of Delegates recommends that

voluntary Post-Trial communication between Counsel and Jurors shall no longer be prohibited and that the requirements set forth in UTCR 3.120(2), 3.120(2)(a) be relaxed accordingly.

*Presenter: Dan McKinney,
Douglas County Bar President*

18. Encourage and Recommend Availability of Optional Form Pleadings (House of Delegates Resolution No. 3)

Whereas, the optional use of form pleadings has been favorably utilized in other states and in some Oregon actions [FED & Domestic Abuse Restraining Order Petitions];

Whereas, the optional use of form pleadings provides accommodation to persons representing themselves and to Oregon State Bar Members in routine actions;

Whereas, basic pleading forms reduce the cost of litigation;

Whereas, the optional available use of form pleadings will promote greater access to justice; now therefore be it

Resolved, That, the House of Delegates recommends and encourage the appropriate committees [Council on Court Procedures and UTCR Committee] to generate form pleadings sufficient to set forth the basic allegations of ultimate fact to state a claim for relief or defense.

*Presenter: Dan McKinney,
Douglas County Bar President*

19. Amend ORCP 7A to Eliminate “True Copy” Certification (House of Delegates Resolution No. 4)

Whereas, ORCP 7A requires a “true copy” of a summons and complaint be served;

Whereas, ORCP 7A further requires the copy to be served also contain a certificate by the Attorney of record of a party that the copy served is “exact and complete;”

Whereas, the current requirement for certification of true copies is obsolete given the use of modern printers, copiers, fax machines, and e-mail such that the archaic requirement of certifying same as a “true copy” should be discontinued; now therefore be it

Resolved, That, the House of Delegates recommends and encourages the Board of Governors in coordination with the Council on Court Procedures and/or the UTCR Committee eliminate the existing requirement of the certificate of true copy upon pleadings, discovery, and court filed documents.

*Presenter: Dan McKinney,
Douglas County Bar President*

20. Direct the Board of Governors to Restore Armed Forces Advertising to the Oregon State Bar Bulletin (House of Delegates Resolution No. 5)

Whereas, The Oregon State Bar Board of Governors has determined that advertising by the United States Armed Forces in the Oregon State Bar *Bulletin* is in violation of Article 10 of the Oregon State Bar Bylaws;

Whereas, The policies of the United States Armed Forces are established by the Congress of the United States of America and the President of the United States of America;

Whereas, The Constitution of the United States of America and the laws of the United States made in pursuance thereof are the Supreme Law of the Land;

Whereas, The four functions of the Bar are to serve as a professional organization, a provider of assistance to the public, a partner with the judicial system, and a regulatory agency proving protection to the public;

Whereas, Except as otherwise and absolutely necessary to carry out the four functions of the Bar, the Bar should not take positions nor make policies for predominately political purposes; and

Whereas, ORS 9.139(1)(b) provides that the House of Delegates may “direct the Board of Governors as to future action,” and ORS 9.139(2) provides that “the Board of Governors is bound by a decision of the House of Delegates made in the manner proscribed by subsection (1) of this section; now therefore be it

Resolved, That, the House of Delegates of the Oregon State Bar, under the provisions of ORS 9.139(1)(b), does hereby direct the Board of Governors to take all steps necessary to immediately restore full advertising rights and privileges to the Armed Forces of the United States of America in the Oregon State Bar *Bulletin*.

*Presenter: Eugene Karandy II
House of Delegates, Region 3*

Proponent’s Statement

Advertising by the United States Armed Forces in the *OSB Bar Bulletin* is currently banned by the Board of Governors under their interpretation of Article 10 of the Bylaws.

21. Adopt ABA Formal Opinion 06-441 as Position of Oregon State Bar (House of Delegates Resolution No. 7)

Whereas the United States and Oregon Constitution and fundamental fairness require that all people charged with a criminal offense have a right to assistance by ethical and competent counsel;¹

Whereas, an attorney serving low income clients by court appointment is bound by the Oregon Rules of Professional Conduct that require competence, diligence, and freedom from conflicts of interest with other clients;

Whereas, if an attorney serving low income clients by court appointment is burdened with an excessive caseload, that attorney’s clients are not receiving the competence, diligence, and freedom from conflict of interest required by the Rules of Professional Conduct;²

Whereas, during the last decade, public defense service providers in Oregon usually have been required to take ever increasing caseloads to receive any additional compensation for their work;

Whereas, it is reliably estimated that attorneys under contract with the Office of Public Defense Services (OPDS) to provide public defense services have average caseloads and

¹ See *Gideon v. Wainwright*, 372 U.S. 335, 342-45(1963); see also *Gideon’s Broken Promise: American’s Continuing Quest For Equal Justice*, 2004 A.B.A. STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, available at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf> [hereinafter *Gideon’s Broken Promise*].

² See *Gideon’s Broke Promise*, *supra* note 1, at 17-18.

workload statewide that are 30 percent higher than nationally accepted standards and those standards set and adopted by the Oregon State Bar;

Whereas, the American Bar Association, in the recently published Formal Opinion 06-441, the text of which appears below [at the end of this document], interpreting the Model Rules of Professional Conduct, which have been adopted by the Oregon State Bar and 45 other states, delineates the ethical responsibilities of an attorney representing indigents pursuant to court appointment charged with a criminal offense where that attorney is carrying an excessive caseload.³ This opinion correctly interprets any attorney’s ethical responsibilities and obligations; and an orderly professional procedure to be followed to assure ethical compliance; now therefore, be it

Resolved, That American Bar Association Formal Opinion 06-441 be and hereby is adopted as the position of the Oregon State Bar. The Oregon State Bar is directed to lobby and explain this decision to the Courts and Legislature of the State of Oregon.

*Presenter: Ross M. Shepard
House of Delegates, Region 2*

22. Direct the Board of Governors to Establish an Equal Fee Structure for Voluntary Online Continuing Legal Education Publication Subscription Service (House of Delegates Resolution No. 8)

Whereas, The Online Publications Task Force has recommended to the Board of Governors of the Oregon State Bar that a voluntary online subscription program for access to all Oregon State Bar Continuing Legal Education publications be made available, with a yearly access fee to be charged each attorney subscribing inversely related to the size of the practice to which the attorney belongs;

Whereas, Each member of the Oregon State Bar who chooses to subscribe to online access for Oregon State Bar Continuing Legal Education publications and materials should pay the same yearly fee regardless of whether the member is in a solo practice or belongs to a small, medium, or large firm;

Whereas, It is in the best interest of the membership of the Bar, the Professional Liability Fund, and the public to help ensure the professional competency of the membership of the Bar by providing access on equal terms to members of the Bar to Continuing Legal Education publications;

Whereas, Any purported economy of scale is out weighed by the goal of creating competency of all members of the Oregon Bar regardless of firm size, and

Whereas, ORS 9.139(1)(b) provides that the House of Delegates may “direct the board of governors as to future action,” and ORS 9.139(2) provides that “the board of governors is bound by a decision of the house of delegates made in the manner prescribed by subsection (1) of this section;” now, therefore, be it

Resolved, That the House of Delegates of the Oregon state Bar does hereby direct the Board of Governors in implementing any voluntary online subscription program for Oregon State Bar Continuing Legal Education publications to create a fee structure that charges an equal fee per year for access for each attorney who subscribes, regardless of the size of the firm,

³ See ABA Standing Comm. on Ethics and Prof’l Responsibility, Formal Op. 06-441 (2006).

partnership, professional corporation, or other practice entity to which the attorney belongs.

*Presenter: Peter J. Mozena
House of Delegates, Region 5*

Proponent’s Statement

The Online Publication Task Force reported to the Board of Governors on the question of the creation of a voluntary online Continuing Legal Education publication subscription service. The Task Force recommended that each attorney who subscribes pay \$395 per year for access, with the per attorney access fee to decrease in relation to the increasing size of the law firm to which the attorney belongs.

Board of Governors’ Statement

The pricing structure recommended by the Online Publications Task Force is the result of a careful and thoughtful analysis conducted by a Task Force comprised of HOD members representing a cross section of the bar. The Task Force goal was to ensure that pricing covered the cost of making the publications available online while addressing the concerns of members ranging from sole practitioners to large firms. The Board of Governors adopted the fee structure as recommended by the Task Force:

Number of Oregon Attorneys in Firm	Annual Subscription Fee
1	\$395
2	\$595
3-5	\$795
6-9	\$995
10-19	\$1,395
20-29	\$1,695
30-49	\$2,495
50-99	\$3,995
100-150	\$4,995
Each Additional 10 attorneys	\$295

23. Direct the Board of Governors to Establish a Policy Regarding Renumbering the Oregon Rules of Civil Procedure to Conform to the Federal Rules of Civil Procedure (House of Delegates Resolution No. 10)

Whereas, Many States have brought the civil rules into general conformity with the numbering of the Federal Rules of Civil Procedure;

Whereas, Any simplification of the law or Court Rules without a change in substance is to be encouraged and alternative numbering of the Oregon Rules of Civil Procedure with the numbering of the Federal Rules of Civil Procedure as a transition should be encouraged;

Whereas, the State of Washington and other states have for many years used the Federal Rules of Civil Procedure numbering; and

Whereas, ORS 9.139(1)(b) provides that the House of Delegates may “direct the board of governors as to future action,” and ORS 9.139(2) provides that “the board of governors is bound by a decision of the house of delegates made in the manner prescribed by subsection (1) of this section;” now, therefore, be it

Resolved, That the House of Delegates of the Oregon State Bar does recommend to the Board of Governors [and] to the Oregon Supreme Court and its appropriate Commission that the Oregon Rules of Civil Procedure should adopt a dual numbering to encourage a transition to numbering that parallels the Federal Rules of Civil Procedure. Any Rules not addressed in Oregon as Interrogatories would be left as reserved in the numbering. Any Rules not found in the Federal Rules would be placed appropriately by a task force appointed by the Oregon Supreme Court or the Oregon State Bar if directed by the Court.

*Presenter: Peter J. Mozena
House of Delegates, Region 5*

Proponent’s Statement

Oregon Rules of Civil Procedure numbering is not commensurate with the Federal Rules of Civil Procedure numbering even though the same procedural issues are addressed.

24. Amend Rule 2 of the House of Delegates Rules of Procedures (House of Delegates Resolution No. 11)

Whereas, The Oregon State Bar House of Delegates adopted and last revised in 1999 Rules of Procedure for Meetings of the House of Delegates;

Whereas, The Rules of Procedure adopt “Robert’s Rules of Order Newly Revised (1990 Edition),” which is the Ninth Edition, as the parliamentary authority for the House of Delegates;

Whereas, The Tenth Edition of Robert’s Rules of Order Newly Revised was issued in the year 2000;

Whereas, The Tenth Edition of Robert’s Rules of Order Newly Revised provides “this Tenth (10th) Edition supersedes all previous editions and is intended automatically to become the parliamentary authority in organizations whose [rules] prescribe Robert’s Rules of Order, Robert’s Rules of Order Revised, Robert’s Rules of Order Newly Revised, or ‘the current edition of any of these titles, or the like, without specifying a particular edition. If the [rules] specifically identify one of the nine previous editions of the work as parliamentary authority, the [rules] should be amended to prescribe ‘the current edition of Robert’s Rules of Order Newly Revised;” and

Whereas, Rule 10.1 of the Oregon State Bar House of Delegates Rules of Procedure provides that “These rules may be amended by a vote of a majority of the delegates present and voting. Only delegates may propose amendments to these rules;” now, therefore, be it

Resolved, That the House of Delegates of the Oregon State Bar does hereby amend Rule 2 of the Oregon State Bar House of Delegates Rules of Procedure, by deleting those provisions in ~~strikeout~~ and adding those provisions in **underlined bold**, to read:

Rule 1 – Presiding Officer

2.1. The President of the Oregon State Bar shall preside over meetings of the House of Delegates. In the President’s absence or inability to act, the President shall designate another officer to preside. See ORS 9.070(1).

2.2 The presiding officer shall preserve order, require observance of the rules of procedure and decide all questions of order and procedure.

2.3. Proceedings of the House of Delegates shall be governed by the Bar Act, the bylaws and policies of the State Bar, these rules and the current edition of Robert's Rules of Order Newly Revised (1990 Edition).

*Presenter: Eugene J. Karandy II
House of Delegates, Region 3*

Proponent's Statement

Currently Oregon State Bar House of Delegates Rules of Procedure adopt the Ninth Edition of Robert's Rules of Order Newly Revised as the parliamentary authority for the House of Delegates. After the Rules of Procedure were adopted by the House of Delegates, the Tenth Edition of Robert's Rules of Order Newly Revised was published, superseding all previous editions and intended to become the parliamentary authority in organizations using Robert's Rules.

25. Direct the Board of Governors to Amend Article 26 of the Bar Bylaws

Whereas, the Oregon State Bar House of Delegates, as the representative body for the Oregon State Bar membership and of sections and local bars, has the power and duty to debate and decide matters of policy relating to the membership of the Bar;

Whereas, the content of much of the Bar's Bylaws has important bearing on the rights and duties of members of the Bar and on the degree to which the membership of the Bar is to retain control of the Bar's business;

Whereas, ORS 9.080 provides that the Board of Governors "shall have authority to adopt, alter, amend and repeal bylaws and to adopt new bylaws containing provisions for the regulation and management of the affairs of the state bar not inconsistent with law;"

Whereas, ORS 9.139(1)(b) provides that the House of Delegates may "direct the board of governors as to future action," and ORS 9.139(2) provides that "the board of governors is bound by a decision of the house of delegates made in the manner prescribed by subsection (1) of this section;" now, therefore, be it

Resolved, That the House of Delegates of the Oregon State Bar, under the provisions of ORS 9.139(1)(b), does hereby direct the Board of Governors to amend Article 26 of the Oregon State Bar Bylaws, by deleting those provision in ~~strikeout~~ and adding those provisions in underlined bold, to read:

Article 26 Amendment of Bylaws

~~Any amendment of the Bar's Bylaws requires notice at a prior Board meeting unless two-thirds of the entire Board waives the notice requirement.~~ The Bar's Bylaws may be amended either by the affirmative vote of a majority of the entire Board, at any regular meeting or at any special meeting of the Board called for that purpose, or the affirmative vote of a majority of the House of Delegates present at any meeting of the House of Delegates. Any amendment of the Bar's Bylaws by the Board requires notice at a prior Board meeting unless two-thirds of the entire Board waives the notice requirement. Any amendment of the Bar's Bylaws by the House of Delegates requires notice as provided by Article 3 of these Bylaws for resolutions before the House of Delegates.

*Presenter: Eugene J. Karandy II
House of Delegates, Region 5*

Proponent's Statement

Current Bylaws limit the ability to amend the Bar's Bylaws only to the Board of Governors; much of the content of the Bar's Bylaws has important bearing on the rights and duties of members of the Bar and on the degree to which the membership of the Bar is able to retain control of the Bar's business.

26. Direct the Board of Governors to Amend Article 10 of the Bar Bylaws (House of Delegates Resolution No. 13)

Whereas, The Oregon State Bar Board of Governors has determined that advertising by the United States Armed Forces in the Oregon State Bar *Bulletin* is in violation of Article 10 of the Oregon State Bar Bylaws;

Whereas, The policies of the United States Armed Forces are established by the Congress of the United States of American and the President of the United States of American pursuant to the authority granted to them in the Constitution of the United States of America;

Whereas, the Constitution of the United States of American and the laws of the United States made in pursuance thereof are the Supreme Law of the Land;

Whereas, The four functions of the Bar are to serve as a professional organization, a provider of assistance to the public, a partner with the judicial system, and a regulatory agency providing protection to the public;

Whereas, Except as otherwise and absolutely necessary to carry out the four functions of the Bar, the Bar should not take positions or make policies for predominately political purposes; and

Whereas, ORS 9.139(1)(b) provides that the House of Delegates may "direct the board of governors as to future action," and ORS 9.139(2) provides that "the board of governors is bound by a decision of the house of delegates made in the manner prescribed by subsection (1) of this section;" now, therefore, be it

Resolved, That the House of Delegates of the Oregon State Bar, under the provisions of ORS 9.139(1)(b), does hereby direct the Board of Governors to amend Article 10 of the Oregon State Bar Bylaws, by deleting those provisions in ~~strikeout~~, to read:

Article 10 Diversity

The Bar respects the diversity of its membership and its employees. Bar entities, including, but not limited to standing committees, section executive committees and Continuing Legal Education programs and publications, should reflect this diversity. "Reflect," as used in this article, does not require the application of strict quotas, but requires a good faith attempt to achieve representative participation. Reports of such efforts may be required of bar entities. In addition, no bar entity may discriminate on the basis of race, religion, color, gender, sexual orientation, geographic location, age, handicap or disability, marital, parental or military status or other classification protected by law. No professional, business or social functions of the Bar, or any of its sections, committees, affiliates or other authorized entities may be held at any private or public facility, which discriminates, based upon the terms listed above. ~~Furthermore, advertisements or solicitations for employment must offer equal employment opportunities. Advertising in bar communications for employment opportunities may not discriminate against candidates based on the terms listed above.~~

Proponent's Statement

Advertising by the United States Armed Forces in the OSB Bar *Bulletin* is currently banned by the Board of Governors under their interpretation of Article 10 of the Bylaws. This resolution removes the barriers in the Bylaws to the United States Armed Forces advertising in the *Bulletin*.

27. Support of Adequate Funding for Legal Services for Low-income Oregonians (House of Delegates Resolution No. 14)

Whereas, providing equal access to justice and high quality legal representation to all Oregonians is central to the mission of the Oregon State Bar;

Whereas, equal access to justice plays an important role in the perception of fairness of the justice system;

Whereas, programs providing civil legal services to low income Oregonians are a fundamental component of the Bar's effort to provide such access;

Whereas, legal aid programs in Oregon are currently able to meet less than 20% of the legal needs of Oregon's poor;

Whereas, federal funding for Oregon's civil legal services programs is substantially less than it was in 1980 and there have been severe restrictions imposed on the work that programs, receiving LSC funding, may undertake on behalf of their clients;

Whereas, assistance from the Oregon State Bar and the legal community is critical to maintaining and developing resources that will provide low-income Oregonians meaningful access to the justice system; now, therefore, be it

Resolved, That the Oregon State Bar;

(1) Strengthen its commitment and ongoing efforts to improve the availability of a full range of legal services to all citizens of our state, through the development and maintenance of adequate support and funding for civil legal services programs for low-income Oregonians.

(2) Request that Congress and the President of the United States make a genuine commitment to equal justice by adequately funding the Legal Services Corporation.

(3) Actively participate in the efforts of the Campaign for Equal Justice to increase contributions by establishing goals of a 100% participation rate by members of the House of Delegates and of a 50% contribution rate by all lawyers.

(4) Support the Oregon Law Foundation and its efforts to increase resources through the interest on Lawyers Trust Accounts (IOLTA) program.

(5) Encourage Oregon lawyers to support civil legal services programs through enhanced pro bono work.

Presenter: Charles R. Williamson
House of Delegates, Region 5
William G. Carter
House of Delegates, Region 3
Dennis C. Karnopp
House of Delegates, Region 1

Proponent's Statement

"The mission of the Oregon State Bar is to serve justice by promoting respect for the rule of law, by improving the quality

of legal services and by increasing access to justice." Section 1.2 of the Oregon State Bar Bylaws. One of the four main functions of the Bar is to be, "A provider of assistance to the public. As such, the bar seeks to ensure the fair administration of justice for all..." (Ibid.)

The Board of Governors and the House of Delegates have adopted a series of resolutions supporting adequate funding for civil legal services in Oregon (Delegate Resolution No. 7 in 2005, BOG Resolution No. 7 in 2002, BOG Resolution No. 6 in 1999, BOG Resolution No. 3 in 1997, and Delegate Resolution No. 11 in 1996). These resolutions are almost identical to the one being proposed here.

The legal services organizations in Oregon were established by the State and local bar associations to increase access for low-income clients. The majority of the boards of the legal aid programs are appointed by State and local bar associations. The Oregon State Bar operates the Legal Services Program pursuant to ORS 9.572 to distribute filing fees for civil legal services and provide methods for evaluating the legal services programs. Finally, the Bar, the Oregon Law Foundation, and the Campaign for Equal Justice, have jointly operated the Access to Justice Endowment Fund.

In a comprehensive assessment of legal needs study, which was commissioned by the Oregon State Bar, the Office of the Governor, and the Oregon Judicial Department found that equal access to justice plays an important role in the perception of fairness of the justice system. The State of Access to Justice in Oregon (2000). Providing access to justice and high quality legal representation to all Oregonians is a central and important mission of the Oregon State Bar. The study also concluded that individuals who have access to a legal aid lawyer have a much-improved view of the legal system compared with those who do not have such access. A fall 2005 study by the national Legal Services Corporation confirms that in Oregon we are continuing to meet less than 20% of the legal needs of low-income Oregonians. Legal Services Corporation, "Documenting the Justice Gap in America: The unmet Civil Legal Needs of the Low-Income Americans" (Fall 2005). Although we have made great strides in increasing lawyer contributions to legal aid, there remains a significant deficit in providing access to justice to low-income Oregonians.

Currently, only about 20% of lawyers contribute to the Campaign for Equal Justice. Last year, about 50% of HOD members contributed, and 100% of the Board of Governors. The Campaign supports 5 statewide legal aid programs in Oregon which have offices in 16 different Oregon communities. The offices focus on the most critical areas of need for low-income clients.

28. Oppose Taxpayer Bill of Rights Ballot Initiative (House of Delegates Resolution No. 16)

Whereas, a TABOR (Taxpayer Bill of Rights) initiative is on the 2006 Oregon ballot (Ballot Measure 48) that would amend the Oregon Constitution to arbitrarily limit biennial increases in all State appropriations for public services to increase with the rate of inflation plus population;

Whereas, the Oregon judicial system is already chronically underfunded;

Whereas, the State Legislative Fiscal Office has concluded that if an "inflation plus population" measure had been in effect just since 1999, approximately \$1.8 billion would have had to be cut from the Governor's proposed budget of approximately \$30

billion (in categories affected by the limit) for the 2006-2007 biennium;

Whereas, an “inflation plus population” measure is an inappropriate limit on spending for public services, and is likely to undermine the effective administration of justice in Oregon, for at least the following reasons:

- (1) The cost of certain State services, such as health care, grows much faster than the basic rate of inflation; since the judicial system, in effect, competes with health care services for State resources, this will likely result in reduced funding for the judicial system;
- (2) The State serves certain populations, such as senior citizens, that are growing at a faster rate than the general population; since the judicial system, in effect, competes with senior care services for State resources, this will likely result in reduced funding for the judicial system;
- (3) Prison construction and staffing has outpaced inflation dramatically in part because of Ballot Measure 11. This budget sector would likely crowd out needed spending on virtually any other public safety category in the future
- (4) Over time – historically and, it is to be hoped, in the future – society becomes wealthier, and the economy as a whole grows faster than inflation plus population, and private sector employee compensation grows faster than inflation; but, if public sector spending increases are limited to the rate of inflation plus population, the real salaries of public servants such as judges, district attorneys, public defenders, and other court employees will be frozen at current levels, which will make it increasingly difficult to attract qualified persons to those positions; it would freeze forever the grossly inadequate compensation of public defenders and the less than adequate compensation of judges and deputy DAs;
- (5) In the State of Colorado, which adopted an ‘inflation plus population’ spending limit measure in 1992, Supreme Court Chief Justice Mary Mullarkey stated in January 2005: “To compensate for the lost staff, most courts have reduced their public hours ... Telephone calls may go unanswered and the lines of people waiting for services are longer. Many district courts no longer have live court reporters ...” The voters in Colorado have suspended their TABOR law for 5 years because of its adverse effects; now therefore be it

Resolved, That,

1. The Oregon State Bar is opposed to the adoption of Ballot Measure 48 a limit on State spending on public services by an “inflation plus population” formula.
2. Members of the Oregon State Bar are urged to contact their fellow citizens and to urge them to oppose Ballot Measure 48.

*Presenter: Charles R. Williamson
House of Delegates, Region 5*

Proponent’s Statement

According to the Oregonian (Editorial 9/21/05):

Oregon already has below-average spending on schools and . . . its combined State and local tax burden is among the ten lowest in the nation. Oregon now has only half the State Police troopers it had 25 years ago.”

“In Colorado, [which passed a TABOR law several years ago] the graduation rate is declining and more school buildings were falling into disrepair. Higher education funding has slipped to 47th in the nation. This state ranks 48th in access to prenatal care, and the percentage of low-birth weight babies is rising. The ratio of prison inmates to guards has skyrocketed; so has the number of assaults on prison staff.”

Passage of an arbitrary limit on state spending such as Colorado’s will harm our courts and our justice system severely over time. We saw what happened with the revolving door for arrested criminals and courthouses closed on Fridays just a few years ago when we had a budget crunch. Those days will be back soon if this TABOR initiative passes in Oregon.

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 06-441

May 13, 2006

Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation

All lawyers, including public defenders and other lawyers who, under court appointment or government contract, represent indigent persons charged with criminal offenses, must provide competent and diligent representation. If workload prevents a lawyer from providing competent and diligent representation to existing clients, she must not accept new clients. If clients are being assigned through a court appointment system, the lawyer should request that the court not make any new appointments. Once the lawyer is representing a client, the lawyer must move to withdraw from representation if she cannot provide competent and diligent representation. If the court denies the lawyer's motion to withdraw, and any available means of appealing such ruling is unsuccessful, the lawyer must continue with the representation while taking whatever steps are feasible to ensure that she will be able to competently and diligently represent the defendant.

Lawyer supervisors, including heads of public defenders' offices and those within such offices having intermediate managerial responsibilities, must make reasonable efforts to ensure that the other lawyers in the office conform to the Rules of Professional Conduct. To that end, lawyer supervisors must, working closely with the lawyers they supervise, monitor the workload of the supervised lawyers to ensure that the workloads do not exceed a level that may be competently handled by the individual lawyers.

In this opinion,¹ we consider the ethical responsibilities of lawyers, whether employed in the capacity of public defenders or otherwise, who represent indigent persons charged with criminal offenses, when the lawyers' workloads prevent them from providing competent and diligent representa-

1. This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2003. The laws, court rules, regulations, rules of professional conduct and opinions promulgated in the individual jurisdictions are controlling.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, 321 N. Clark Street, Chicago, Illinois 60610-4714. Telephone (312)988-5300. CHAIR: William B. Dunn, Detroit, MI. Elizabeth Alton, Mandeville, LA. D.T. Maxwell Bahner, Chattanooga, TN. D. Amie L. Clifford, Columbia, SC. D. Timothy J. Dacey, III, Boston, MA. D. James A. Kawachika, Honolulu, HI. D. Steven C. Krane, New York, NY. D. John P. Farnsworth, Chicago, IL. D. Irma Russell, Memphis, TN. D. Thomas Spann, McLean, VA. D. CENTER FOR PROFESSIONAL RESPONSIBILITY: George A. Kuhlman, Ethics Counsel; Eileen B. Libby, Associate Ethics Counsel.

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06-441 Formal Opinion

2

tion to all their clients. Excessive workloads present issues for both those who represent indigent defendants and the lawyers who supervise them.⁷ **Ethical responsibilities of a public defender' in regard to individual workload**

Persons charged with crimes have a constitutional right to the effective assistance of counsel.⁸ Generally, if a person charged with a crime is unable to afford a lawyer, he is constitutionally entitled to have a lawyer appointed to represent him.⁹ The states have attempted to satisfy this constitutional mandate through various methods, such as establishment of public defender, court appointment, and contract systems.¹⁰ Because these systems have been created to provide representation for a virtually unlimited number of indigent criminal defendants, the lawyers employed to provide representation generally are limited in their ability to control the number of clients they are assigned. Measures have been adopted in some jurisdictions in attempts to control workloads,¹¹ including the establishment of procedures for assigning cases to lawyers outside public defenders' offices when the cases could not properly be directed to a public defender, either because of a conflict of interest or for other reasons.

2. For additional discussion of the problems presented by excessive caseloads for public defenders, see "Gideon's Broken Promise: American's Continuing Quest For Equal Justice," prepared by the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants 29 (ABA 2004), available at <http://www.abanet.org/legal-services/sclaid/defender/brokenpromise/fullreport.pdf> (last visited June 21, 2006).

3. The term "public defender" as used here means both a lawyer employed in a public defender's office and any other lawyer who represents, pursuant to court appointment or government contract, indigent persons charged with criminal offenses.

4. U.S. CONST. amends. VI & XIV.

5. The United States Supreme Court has interpreted the Sixth Amendment to require the appointment of counsel in any state and federal criminal prosecution that, regardless of whether for a misdemeanor or felony, leads or may lead to imprisonment for any period of time. See generally, *Alabama v. Shelton*, 535 U.S. 654, 662 (2002); *Strickland v. Washington*, 466 U.S. 668, 684-86 (1984); *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979); *Argersinger v. Hamlin*, 407 U.S. 25, 30-31 (1972); *Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963); *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938).

6. Most states deliver indigent defense services using a public defender's office (eighteen states) or a combination of public defender, assigned counsel, and contract defender (another twenty-nine states), according to the Spangenberg Group, which developed a report on behalf of the ABA Standing Committee on Legal Aid and Indigent Defendants. See The Spangenberg Group, "Statewide Indigent Defense Systems: 2005," available at <http://www.abanet.org/legal-services/downloads/sclaid/indigentdefense/statewideinddef-systems2005.pdf> (last visited June 21, 2006).

7. See generally, National Symposium on Indigent Defense 2000, *Re-defining Leadership for Equal Justice, A Conference Report* (U.S. Dep't of Justice, Bureau of Justice Assistance, Wash., D.C.) 3 (June 29-30, 2000), available at <http://www.ojp.usdoj.gov/indigentdefense/symposium.pdf> (last visited June 21, 2006) (common problem in indigent defense delivery systems is that "lawyers often have unmanageable caseloads (700 or more in a year)").

3 Committee on Ethics and Professional Responsibility 06-441

Model Rules of Professional Conduct 1.1, 1.2(a), 1.3, and 1.4 require lawyers to provide competent representation, abide by certain client decisions, exercise diligence, and communicate with the client concerning the subject of representation.⁸ These obligations include, but are not limited to, the responsibilities to keep abreast of changes in the law, adequately investigate, analyze, and prepare cases; act promptly on behalf of clients; communicate effectively on behalf of and with clients; control workload so each matter can be handled competently; and, if a lawyer is not experienced with or knowledgeable about a specific area of the law, either associate with counsel who is knowledgeable in the area or educate herself about the area. The Rules provide no exception for lawyers who represent indigent persons charged with crimes.⁹

8. Rule 1.1(a) provides that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Rule 1.2(a) states:

[A] lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

Rule 1.3 states that "[a] lawyer shall act with reasonable diligence and promptness in representing a client."

Rule 1.4(a) and (b) states:

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

9. See ABA Formal Opinion Op. 347 (Dec. 1, 1981) (Ethical Obligations of Lawyers to Clients of Legal Services Offices When Those Offices Lose Funding), in FORMAL AND INFORMAL ETHICS OPINIONS, FORMAL OPINIONS 316-348, INFORMAL OPINIONS 1285-1495 at 139 (ABA 1985) (duties owed to existing clients include duty of adequate preparation and a duty of competent representation); ABA Informal Op. 1359 (June 4, 1976) (Use of Waiting Lists or Priorities by Legal Service Offices), *id.* at 237 (same); ABA Informal Op. 1428 (Sept. 12, 1979) (Lawyer-Client Relationship Between the Individual and Legal Services Office: Duty of Office Toward Client When Attorney Representing Him (Her) Leaves the Office and Withdraws from the Case), *id.* at 326 (all lawyers, including legal services lawyers, are subject to mandatory duties owed by lawyers to existing clients, including duty of adequate preparation

Comment 2 to Rule 1.3 states that a lawyer's workload "must be controlled so that each matter may be handled competently."¹⁰ The Rules do not prescribe a formula to be used in determining whether a particular workload is excessive. National standards as to numerical caseload limits have been cited by the American Bar Association.¹¹ Although such standards may be considered, they are not the sole factor in determining if a workload is excessive. Such a determination depends not only on the number of cases, but also on such factors as case complexity, the availability of support services, the lawyer's experience and ability, and the lawyer's nonrepresentational duties.¹² If a lawyer believes that her workload is such that she is unable to meet the basic ethical obligations required of her in the representation of a client, she must not continue the representation of that client or, if representation has not yet begun, she must decline the representation.¹³

A lawyer's primary ethical duty is owed to existing clients.¹⁴ Therefore, a and competent representation). See also South Carolina Bar Ethics Adv. Op. 04-12 (Nov. 12, 2004) (all lawyers, including public defenders, have ethical obligation not to undertake caseload that leads to violation of professional conduct rules).

The applicability of Rules 1.1, 1.3, and 1.4 to public defenders and/or prosecutors has been recognized by ethics advisory committees in at least one other state. See Va. Legal Eth. Op. 1798 (Aug. 3, 2004) (duties of competence and diligence contained within rules of professional conduct apply equally to all lawyers, including prosecutors).

10. Principle 5 of *The Ten Principles of a Public Defense Delivery System* specifically addresses the workload of criminal defense lawyers:

Defense counsel's workload is controlled to permit the rendering of quality representation. Counsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels. National caseload standards should in no event be exceeded, but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate measurement.

Report to the ABA House of Delegates No. 107 (adopted Feb. 5, 2002), available at <http://www.abanet.org/legalservices/downloads/sclaid/10principles.pdf> (last visited June 21, 2006) (emphasis in original).

11. *Id.*

12. *Id.* See also Attorney Grievance Comm'n of Maryland v. Ficker, 706 A.2d 1045, 1051-52 (1998) (supervising lawyer violated Rule 5.1 by assigning too many cases to supervised lawyer, assigning cases day before trial, and assigning cases too complex for supervised lawyer's level of experience and ability).

13. Rule 1.16(a) states that "a lawyer shall not represent a client or, where representation has begun, shall withdraw from the representation of a client if the representation will result in violation of the Model Rules of Professional Conduct or other law."

14. See ABA Formal Opinion Op. 96-399 (Jan. 18, 1996) (Ethical Obligations of Lawyers Whose Employers Receive Funds from the Legal Services Corporation to their Existing and Future Clients When Such Funding is Reduced and When Remaining Funding is Subject to Restrictive Conditions), in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 at 369 (ABA 2000); ABA Formal Opinion Op. 347, *supra* note 9.

lawyer must decline to accept new cases, rather than withdraw from existing cases, if the acceptance of a new case will result in her workload becoming excessive. When an existing workload does become excessive, the lawyer must reduce it to the extent that what remains to be done can be handled in full compliance with the Rules.

When a lawyer receives appointments directly from the court rather than as a member of a public defender's office or law firm that receives the appointment, she should take appropriate action if she believes that her workload will become, or already is, excessive. Such action may include the following:

- requesting that the court refrain from assigning the lawyer any new cases until such time as the lawyer's existing caseload has been reduced to a level that she is able to accept new cases and provide competent legal representation; and
- if the excessive workload cannot be resolved simply through the court's not assigning new cases, the lawyer should file a motion with the trial court requesting permission to withdraw from a sufficient number of cases to allow the provision of competent and diligent representation to the remaining clients.¹⁵ If the lawyer has sought court permission to withdraw from the representation and that permission has been denied, the lawyer must take all feasible steps to assure that the client receives competent representation.

When a lawyer receives appointments as a member of a public defender's office or law firm, the appropriate action to be taken by the lawyer to reduce an excessive workload might include, with approval of the lawyer's supervisor:

- transferring non-representational responsibilities within the office, including managerial responsibilities, to others;
- refusing new cases;¹⁶ and
- transferring current case(s) to another lawyer whose workload will allow for the transfer of the case(s).¹⁷

15. Whenever a lawyer seeks to withdraw from a representation the client should be notified, even if court rules do not require such notification. *See* Rule 1.4.

16. It should be noted that a public defender's attempt to avoid appointment or to withdraw from a case must be based on valid legal grounds. Rule 6.2(e) provides, in pertinent part, that "[a] lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as representing the client is likely to result in violation of the Rules of Professional Conduct or other law." (Emphasis added). Therefore, a public defender should not claim an excessive workload in an attempt to avoid new cases or to withdraw from current cases unless good cause objectively exists.

17. It is important to note that, for purposes of the Model Rules, a public defender's office, much like a legal services office, is considered to be the equivalent of a law firm. *See* Rule 1.0(c). Unless a court specifically names an individual lawyer within a public defender's office to represent an indigent defendant, the public defender's office should be considered as a firm assigned to represent the client; responsibility for handling the case falls upon the office as a whole. *See* ABA Informal Op. 1428, *supra* note 9 (legal services agency should be considered firm retained by client; responsibility for handling caseload of departing legal services lawyer falls upon office as whole rather than upon lawyer who is departing). Therefore, cases may ethically be reassigned within a public defender's office.

If the supervisor fails to provide appropriate assistance or relief, the lawyer should continue to advance up the chain of command within the office until either relief is obtained or the lawyer has reached and requested assistance or relief from the head of the public defender's office.

In presenting these options, the Committee recognizes that whether a public defender's workload is excessive often is a difficult judgment requiring evaluation of factors such as the complexity of the lawyer's cases and other factors.¹⁸ When a public defender consults her supervisor and the supervisor makes a conscientious effort to deal with workload issues, the supervisor's resolution ordinarily will constitute a "reasonable resolution of an arguable question of professional duty," as discussed in Rule 5.2(b).¹⁹ In those cases where the supervisor's resolution is not reasonable, however, the public defender must take further action.²⁰

Such further action might include:

- if relief is not obtained from the head of the public defender's office, appealing to the governing board, if any, of the public defender's office;²¹ and
- if the lawyer is still not able to obtain relief,²² filing a motion with the trial court requesting permission to withdraw from a sufficient number of cases to allow the provision of competent and diligent representation to the remaining clients.²³

If the public defender is not allowed to withdraw from representation, she must obey the court's order while taking all steps reasonably feasible to insure that her client receives competent and diligent representation.²⁴

18. *See* note 12, *supra*, and accompanying text.

19. *See* Comment [2].

20. *See, e.g.,* Atty. Grievance Comm'n of Maryland v. Kahn, 431 A.2d 1336, 1352 (1981) ("Obviously, the high ethical standards and professional obligations of an attorney may never be breached because an attorney's employer may direct such a course of action on pain of dismissal. . . .")

21. *See* Michigan Bar Committee on Prof. & Jud. Eth. Op. RI-252 (Mar. 1, 1996) (in context of civil legal services agency, if subordinate lawyer receives no relief from excessive workload from lawyer supervisor, she should, under Rule 1.13(b) and (c), take the matter to legal services board for resolution).

22. Rule 5.2 makes clear that subordinate lawyers are not insulated from violating the Rules of Professional Conduct and suffering the consequences merely because they acted in accordance with a supervisory lawyer's advice or direction unless it was in regard to "an arguable question of professional duty."

23. A public defender filing a motion to withdraw under these circumstances should provide the court with information necessary to justify the withdrawal, while being mindful of the obligations not to disclose confidential information or information as to strategy or other matters that may prejudice the client. *See* Rule 1.16 cmt. 3.

24. Notwithstanding the lawyer's duty in this circumstance to continue in the representation and to make every attempt to render the client competent representation, the lawyer nevertheless may pursue any available means of review of the court's order. *See* Iowa Supreme Court Bd. of Prof. Ethics & Conduct v. Hughes, 557 N.W.2d 890, 894

Ethical responsibility of a lawyer who supervises a public defender

Rule 5.1 provides that lawyers who have managerial authority, including work with intermediate managerial responsibilities, over the professional work of a firm or public sector legal agency or department shall make reasonable efforts to ensure that the other lawyers in the agency or department conform to the Rules of Professional Conduct. Rule 5.1 requires that lawyers having direct supervisory authority take reasonable steps to ensure that lawyers in the office they supervise are acting diligently in regard to all legal matters entrusted to them, communicating appropriately with the clients on whose cases they are working, and providing competent representation to their clients. As an essential first step, the supervisor must monitor the workload of subordinate lawyers to ensure that the workload of each lawyer is appropriate. This involves consideration of the type and complexity of cases being handled by each lawyer; the experience and ability of each lawyer; the resources available to support her, and any non-representational responsibilities assigned to the subordinate lawyers.

If any subordinate lawyer's workload is found to be excessive, the supervisor should take whatever additional steps are necessary to ensure that the subordinate lawyer is able to meet her ethical obligations in regard to the representation of her clients. These might include the following:

- transferring the lawyer's non-representational responsibilities, including managerial responsibilities, to others in the office;
- transferring case(s) to another lawyer or other lawyers whose workload will allow them to provide competent representation;²⁵
- if there are no other lawyers within the office who can take over the cases from which the individual lawyer needs to withdraw, supporting the lawyer's efforts to withdraw from the representation of the client;²⁶ and finally,
- if the court will not allow the lawyer to withdraw from representation, providing the lawyer with whatever additional resources can be made available to assist her in continuing to represent the client(s) in a manner consistent with the Rules of Professional Conduct.

(Iowa 1996) ("ignoring a court order is simply not an appropriate step to test the validity of the order under our Code of Professional Responsibility"); Utah Bar Eth. Adv. Op. 107 (Feb. 15, 1992) (if grounds exist to decline court appointment, lawyer should not disobey order but should seek review by appeal or other available procedure).

25. See note 17, *supra*.

26. See In re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender, 561 So.2d 1130, 1138-39 (Fla. 1990) (in context of inadequate funding, court stated that if "the backlog of cases in the public defender's office is so excessive that there is no possible way he can timely handle those cases, it is his responsibility to move the court to withdraw"); see also In re Order on Motions to Withdraw Filed by Tenth Circuit Public Defender, 612 So.2d 597 (Fla. App. 1992) (en banc) (public defender's office entitled to withdraw due to excessive caseload from representing defendants in one hundred forty-three cases).

When a supervised lawyer's workload is excessive and, notwithstanding any other efforts made by her supervisor to address the problem, it is obviously incumbent upon the supervisor to assign no additional cases to the lawyer, and, if the lawyer's cases come by assignment from the court, to support the lawyer's efforts to have no new cases assigned to her by the court until such time as she can adequately fulfill her ethical responsibilities to her existing clients.

In dealing with workload issues, supervisors frequently must balance competing demands for scarce resources. As Comment [2] to Rule 5.2 observes, if the question of whether a lawyer's workload is too great is "reasonably arguable," the supervisor of the lawyer has the authority to decide the question. In the final analysis, however, each client is entitled to competent and diligent representation. If a supervisor knows that a subordinate's workload renders the lawyer unable to provide competent and diligent representation and the supervisor fails to take reasonable remedial action, under Rule 5.1(c),²⁷ the supervisor himself is responsible for the subordinate's violation of the Rules of Professional Conduct.²⁸

27. Rule 5.1(c) states:

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if: (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

See also Rules 1.16 (a) and 8.4 (a).

28. See, e.g., Attorney Grievance Comm'n of Maryland v. Ficker, 706 A.2d at 1052, *supra* note 12; Va. Legal Ethics Op. 1798 *supra* note 9 (lawyer supervisor who assigns caseload that is so large as to prevent lawyer from ethically representing clients would violate Rule 5.1); American Council of Chief Defenders, Nat'l Legal Aid and Defender Ass'n Eth. Op. 03-01 (April 2003), available at <http://www.nalada.org/DMS/Documents/1082573112.32/ACCD%20Ethics%20Opinion%20on%20Workloads.pdf> (last visited June 21, 2006) ("chief executive of an agency providing public defense services is ethically prohibited from accepting a number of cases which exceeds the capacity of the agency's attorneys to provide competent, quality representation in every case... When confronted with a prospective overloading of cases or reductions in funding or staffing which will cause the agency's attorneys to exceed such capacity, the chief executive of a public defense agency is ethically required to refuse appointment to any and all such excess cases."); Wisconsin State Bar Prof. Ethics Comm. Op. E-91-3 (1991) (assigning caseload that exceeds recognized maximum caseload standards, and that would not allow subordinate public defender to conform to rules of professional conduct, "could result in a violation of disciplinary standards"); Ariz. Op. No. 90-10 (Sept. 17, 1990) ("when a Public Defender has knowledge that subordinate lawyers, because of their caseloads, cannot comply with their duties of diligence and competence, the Public Defender must take action."); Wisconsin State Bar Prof. Ethics Comm. Op. E-84-11 (1984) (supervisors in public defender's office may not ethically increase workloads of subordinate lawyers to point where subordinate lawyer cannot, even at personal sacrifice, handle each of her clients' matters competently and in non-neglectful manner).

Conclusion

The obligations of competence, diligence, and communication under the Rules apply equally to every lawyer. All lawyers, including public defenders, have an ethical obligation to control their workloads so that every matter they undertake will be handled competently and diligently. If a lawyer's workload is such that the lawyer is unable to provide competent and diligent representation to existing or potential clients, the lawyer should not accept new clients. If the problem of an excessive workload cannot be resolved through the non-acceptance of new clients or by other available measures, the lawyer should move to withdraw as counsel in existing cases to the extent necessary to bring the workload down to a manageable level, while at all times attempting to limit the prejudice to any client from whose case the lawyer has withdrawn. If permission of a court is required to withdraw from representation and permission is refused, the lawyer's obligations under the Rules remain: the lawyer must continue with the representation while taking whatever steps are feasible to ensure that she will be able to provide competent and diligent representation to the defendant.

Supervisors, including the head of a public defender's office and those within such an office having intermediate managerial responsibilities, must make reasonable efforts to ensure that the other lawyers in the office conform to the Rules of Professional Conduct. To that end, supervisors must, working with the lawyers they supervise, monitor the workload of the subordinate lawyers to ensure that the workloads are not allowed to exceed that which may be handled by the individual lawyers. If a supervisor knows that a subordinate's workload renders the lawyer unable to provide competent and diligent representation and the supervisor fails to take reasonable remedial action, the supervisor is responsible for the subordinate's violation of the Rules of Professional Conduct.